In The Supreme Court of Bermuda

APELLATE JURISDICTION

2019: No. 23

BETWEEN:

J.C.

Appellant

- and -

(1) K.R.
(2) E.H.
(3) G.C. (A MINOR)
(4) L.C. (A MINOR)

Respondents

Date of Hearing: **8 June 2022**
Date of Judgment: **12 September 2022**

Appellant: Christophers – E. Christopher
Respondents: Cox Hallett Wilkinson – C. Rothwell

JUDGMENT

The Stalking Act 1997, lack of reasons for findings, jurisdiction to make stalking protection orders, conduct amounting to stalking.

Kiernan Bell, AJ

Introduction

1. This is an appeal from a protection order (the **"Final SPO**") of Magistrate Chin granted on 20 June 2019 under the Stalking Act 1997 ("**the Act**").

2. The Final SPO, which was supported by the written judgment of the Magistrate, followed proceedings which, due to adjournments, extended over many months.

3. A temporary protection order prohibiting the Appellant from engaging in certain conduct towards the Respondents had been granted by Acting Magistrate Mills on 14 August 2018 (the "**Temporary SPO**").

4. The hearing for the Final SPO was adjourned part heard over many months, with the result that by the time the Magistrate delivered his ruling and granted the Final SPO, the Temporary SPO, initially granted for 28 days, had been extended multiple times for a total extension of 10 months. The learned Magistrate, notwithstanding the request for a final protection order to last 4 months, in granting the Final SPO, ordered it for the statutory maximum period of 12 months. Accordingly, the First through Fourth Respondents were protected by a protection order for approximately 22 months.

5. The Appellant appealed the decision to grant the Final SPO on 6 September 2019 and nearly a year later filed an Amended Notice of Appeal on 12 August 2020, two months after the Final SPO was discharged by effluxion of time and accordingly ceased to have effect.

6. The appeal was heard on 8 June 2022, by then close to two years after the discharge of the Final SPO. There were some 17 grounds of appeal.

7. In the meantime, the Appellant has not been convicted of the offence of stalking and counsel for the Appellant indicated that a prosecution is pending under the Act. Counsel for the

Appellant indicated that the prosecution's decision whether or not to continue with the prosecution is awaiting the outcome of this appeal, although she indicated that she did not have any additional information on the pending prosecution. The Respondents' submissions on their appeal state their understanding that the Crown has pursued criminal proceedings against the Appellant for breach of the Temporary Order and has not prosecuted the Appellant for the offence of stalking under the Act. Indeed, given that any appeal against the Final SPO is now moot as it no longer has any effect, counsel for the Appellant indicated to the Court that the pending prosecution is the primary reason for bringing the appeal, together with the costs of the Magistrate's Court hearing.

8. This is the decision on the appeal against the granting of the Final SPO.

Background

9. The Appellant is the former brother-in-law of the First Respondent. The First Respondent is the ex-wife of the Appellant's brother, and the divorce and ancillary relief proceedings (2011:No.206) appear from the evidence in the record of appeal to have been bitter and contentious. Indeed, the Appellant (who is obviously not a party to the divorce proceedings) produced in evidence an affidavit of the First Respondent sworn in 2017 in connection to continuing ancillary relief and access matters.

10. The Appellant is the uncle of the Third and Fourth Respondents, who at the time of the application were 11 and 8 years old respectively. The Second Respondent is the partner of the First Respondent and father of a child born in 2018 who was the Fifth Complainant in the application for the SPO but is not a Respondent to these appeal proceedings.

11. It was not disputed that the children no longer have any meaningful relationship with their father or their father's family, which includes the Appellant.

12. It is apparent from the record of appeal and not disputed by the parties, that the relationship between the Appellant and the First Respondent is strained and hostile. The Appellant was

not a neutral party in the bitterly contested matrimonial proceedings. The First Respondent and the Appellant both gave evidence of matters which they allege took place during the breakdown of the marriage and its aftermath, some of which are not disputed. For example, the Appellant readily acknowledges that he emailed the Department of Child and Family Services (the "**DCFS**") to lodge a complaint about the care of the Third and Fourth Respondents, who were then in the custody of the First Respondent.

13. The Appellant's brother left Bermuda in 2014 when the Third Respondent was approximately 7 years old and the Fourth Respondent was 4 years old. So far as the alleged conduct which particularly affected the Third and Fourth Respondents, namely the 2017 incident on Par-la-Ville Road (the "**Par-La-Ville Incident**"), the 2017 interaction in Treats (the "**Treats Incident**"), and the August 2018 episode in Gatwick Airport (the **"Gatwick Incident"**), there is no dispute that these interactions took place and that the children would not have seen their uncle or father for a number of years prior to these incidents.

14. The catalyst for the application for the Temporary and the Final SPO was the Gatwick Incident which took place at the British Airways ("**BA**") departures terminal at Gatwick Airport on 5 August 2018. Some of the interaction of the Appellant with the Respondents during that incident was filmed by the sister of the Appellant and formed part of the record of appeal.

15. The undisputed facts are that on 5 August 2018 the Respondents, as a family unit, were at the airport to check in for their return flight to Bermuda. By coincidence or happenstance, the Appellant and his family were also at Gatwick returning to Bermuda after a family holiday. The Appellant's mother, sister, brother (the estranged former husband of the First Respondent and the father of the Third and Fourth Respondents) and other members of the extended family all came *en masse* to the airport to see the Appellant and his family off.

16. It is not disputed by the parties that what followed was distressing to all parties, but particularly distressing for the minor children, the Third and Fourth Respondents. I address the Gatwick Incident in more detail subsequently.

17. On their return to Bermuda, in the aftermath of the Gatwick Incident, the Respondents attended the Bermuda Police Station, and lodged a complaint against the Appellant for stalking, and by 14 August had obtained the Temporary SPO from Acting Magistrate Mills against the Appellant under the Act.

18. In support of their application for a final stalking protection order the First and Second Respondents gave evidence of other historical interactions and alleged conduct of the Appellant, which course of conduct they said reached the threshold of stalking.

The Stalking Act

19. The Act makes provision for complainants to seek stalking protection orders (**SPO**s) and creates statutory offences punishable on summary conviction for (a) the offence of stalking and/or (b) breach of temporary or final SPOs.

20. The Act defines stalking as follows:

3 (1) For the purposes of this Act, a person stalks another person (the "victim") if—

(a) without lawful authority the first-mentioned person engages in conduct described in subsection (2)—

(i) with the intention—

(aa) of causing physical or mental harm to the victim; or

(bb) of inducing in the victim apprehension or fear for the victim's safety or for the safety of a connected person; or

(ii) when he knows that that conduct is likely to cause such harm to the victim or to induce in the victim such apprehension or fear; and

(b) that conduct actually has that result.

(2) The conduct referred to in subsection (1) is conduct consisting of acts, done over a period of time, which include any one or more of the following—

*(a) following the victim or a connected person**;***

(b)telephoning or sending electronic messages to, or otherwise contacting, the victim or a connected person;

(c) interfering with property in the possession of the victim or a connected person;

(d) entering the place of residence or employment of the victim or a connected person, or any other place frequented by the victim or a connected person, and loitering there;

(e) loitering outside the place of residence or employment of the victim or a connected person, or outside any other place frequented by the victim or a connected person;

(f) keeping the victim or a connected person under surveillance.

21. Section 2 defines a "*connected person*" as a person who has a family or domestic connection with a victim of stalking or with a complainant. A "complainant" is defined as a person who applies for a protection order.

22. Section 4 of the Act creates the statutory offence of stalking – such that a person who stalks another is liable on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding $2,500 or to both. (Section 4(1)).

23. Section 4(2) grants the Magistrate additional sentencing powers if the stalking offence is proven and there are aggravating factors – such as possession of an offensive weapon or

where the act forming part of the conduct was a breach of a protection order under the Act. So far as the latter is concerned, see section 4(2)(b)(i).

24. Section 5 sets out the procedure for the application for a SPO, which, in relation to complainants who are minors, should be read in conjunction with the Magistrates' Court (Stalking Protection Orders Proceedings Prescribed Forms) Rules 1997. In circumstances where the complainant is a minor, the application must be made by a representative in accordance with section 7 of the Domestic Violence (Protection Orders) Act 1997. The Act further specifically provides that complainants can seek the protection of a SPO *before* a respondent is convicted of stalking or a prosecution for the offence of stalking is instituted. What the Act requires is that in those circumstances the Court is satisfied that such proceedings are '*imminent*'; see Section 5(2)(c).

25. Section 6 sets out the power and jurisdiction of the Magistrate to make a SPO. Where someone has been convicted of the section 4 offence of stalking, or criminal proceedings have been instituted but not concluded, the Court may make a final SPO**.** However, where the criminal proceedings are only imminent, the Court's power is limited to only making a temporary SPO. See section 6(3).

26. Section 8 makes provision for the content of a SPO, "*a protection order may prohibit the respondent from*" and recites the same conduct as in section 3(2) with the addition of (g) "*inciting or assisting another person to stalk the complainant*." The section states "may" not "*may only*" and therefore, I do not interpret this section restrictively to mean that conduct not specified in section 8 (2) cannot be provided for in any protection order. However, as a practical matter most conduct, even if more particularly described in a SPO, is likely to fall within one of the categories of behaviour enumerated in section 8(2).

27. Section 15 enables a party to make application for the order to be varied or revoked (while a protection order is in force).

28. Section 16 provides for the standard of proof in relation to a protection order – providing that any question of fact to be decided by the court in, or in connection with, the making, variation or revocation of a protection order is to be decided by the court on the balance of probabilities.

29. Section 17 provides for the offence of breaching a protection order, such that a respondent who has been served with a copy of a protection order and who contravenes the order is liable on summary conviction.

30. Section 18 permits a complainant who has applied for a protection order to institute a prosecution under section 17 (i.e. when there has been a breach of a temporary protection order) in order to enforce the order.

31. Section 22 makes provision for the rights of appeal by a person aggrieved by a decision in proceedings under the Act, not being proceedings under section 4 or 17 (being prosecutions for the offence of stalking or the offence of breaching a protection order respectively). That is, the Act contemplates a right of appeal in relation to decisions to grant or vary or revoke a final stalking protection order. Furthermore, section 22(3) provides that there is no appeal from the making, variation or revocation of a temporary protection order or refusal to grant a temporary protection order. In short, there are limited rights of appeal to the Supreme Court under the Act, and the parties can only appeal decisions in connection to the granting, revocation, variation or refusal to grant, a final stalking protection order.

Discussion

32. The Act requires that the Court, to be satisfied on the evidence on the balance of probabilities, that it can make the following determinations, before it can grant a final SPO.

    (a) The conduct complained of was intended to cause physical or mental harm to the victim or fear for the safety of a connected person, or he knew it was likely to cause such harm or induce such apprehension or fear; (section 3(1)(a))

(b) The conduct actually does cause physical or mental harm to a victim or apprehension or fear for a connected person; (Section 3(1)(b))

(c) There was a course of conduct consisting of any of the acts specified in section 3(2);

(d) That a section 4 offence for stalking has either been instituted or prosecuted to conviction (section 6).

33. Where only (a) – (c) are satisfied, the Court must be satisfied that criminal proceedings are imminent before granting a temporary SPO (section 6).

34. The categories of persons who can stalk or be stalked is sensibly not defined in the Act. There are well known examples of celebrities being stalked by strangers but more often the alleged stalker and victim may know each other, be family members, former romantic partners, work colleagues, neighbours, or passing acquaintances. Sometimes the offender will be a complete stranger and the victim may never know why they become an object of the offender's attention. While the motive behind the stalking behaviour will depend on the circumstances and may even be impossible to discern, the Act requires only that the statutory criteria set out above be satisfied before the court can step in to protect victims of stalking. Behaviour that appears benign to an onlooker may create fear or mental harm in the victim for themselves or a connected person because of surrounding circumstances, history and context.

The Appeal

35. The Amended Notice of Appeal is brought on the basis that the Appellant "*being dissatisfied with the decision of the court of summary jurisdiction dated the 20th June 2019 doth hereby appeal to the Supreme Court*".

36. The Appellant complains of the "*entire ruling, the granting of a stalking order and costs*". There are 17, often lengthy, grounds of appeal most of which are concerned with the section 3(2) findings of fact by the Learned Magistrate. I observe here that the Civil Appeals Act 1971 section 6(2) requires that "*a notice of appeal shall state specifically and concisely the*

ground of appeal" and that many of the grounds of appeal in this case were neither specific nor concise, often containing legal argument.

37. The first ground of appeal incorporates by reference paragraphs 1 and 2 of the Appellant's skeleton argument. The Appellant contends *"that the Learned Magistrate erred in not finding that the Respondents could not make application for a stalking protection order when no criminal proceedings had been instituted or were imminent. Under those circumstances the Respondents had no locus. (see paras 1 & 2 of the Appellants written submissions below)*". The Appellant's written submissions (paragraphs 1- 2) relate to the granting of the Temporary SPO. As this ground as well as ground 14 relates to the Temporary SPO I shall address these grounds of appeal separately.

38. Save for Grounds 1 and 14 which seem primarily directed at the Temporary SPO, the grounds of appeal can be summarised as follows:

    i. That the Court erred in failing to give reasons for his findings and his judgment; (Grounds 12 and 13)

    ii. That the Court erred as the conduct complained of does not, even if true, amount to stalking under the Act; (Grounds 2, 3, 7, 8, 9, 10)

    iii. That the Court erred by making findings of fact where the burden of proof could not have been met; (Ground 12)

    iv. That the Court erred in granting the SPO as there was no evidence of intention or knowledge that the conduct was likely to cause harm or induce fear. (Ground 2)

    v. That the court erred in finding it had jurisdiction to make the SPO under the Act; (Grounds 1, 5, 6)

39. In relation to the Gatwick Incident, the Appellant contends in Ground 11 that the learned Magistrate erred by finding:

    b. That the incident constituted stalking;

    c. That any fear on the part of the Respondents was caused by the Appellant (as opposed to the Appellant's brother);

    d. By failing to find that the Appellant's approach was conciliatory; and

    e. By failing to make appropriate rulings "*whether the physical contact was deliberate, in self defence, intending to cause apprehension of fear, or harm etc*".

40. The Appellant contends that the learned Magistrate erred in "*taking into account in his ruling an incident that happened subsequent to the granting of the Temporary Order*" because even if true this conduct does not amount to stalking. (Ground 14) As this is a matter which pertains to the pending prosecution of the Appellant I shall address this separately.

41. The Appellant avers that the Learned Magistrate erred in the period of the Final SPO and the terms of the Final SPO (Grounds 15 and 16).

20 June 2019 Judgment

42. The learned Magistrate having heard four witnesses delivered a written judgment in which he summarised the evidence of the parties and gave limited observations of his assessments of the evidence. He makes 22 formal findings of fact, some of which were uncontroversial and some of which were contested, and where the Appellant complains it was not open to him to make findings given the lack of any corroborating evidence. The majority of the findings of fact are in relation to section 3(2) of the Act -i.e. determinations around acts which can constitute a course of conduct amounting to stalking.

43. The learned Magistrate repeatedly, when their evidence conflicts, accepted the evidence of the First and Second Respondent over that of the Appellant, though no reasons are provided as to why he preferred one version over the other. The learned Magistrate when he did not believe the Appellant adopted a formula – repeatedly stating "*The Court does not support the Respondent's assertion…*" The learned Magistrate held: "*after considering all of the evidence which it had heard is satisfied on the balance of probabilities that the Respondent has stalked the 1st, 2nd, 3rd, and 4th Applicants. The Court is not satisfied that the Respondent has stalked the 5th Applicant. The Court orders that the Respondent must not stalk the 1st, 2nd, 3rd, and 4th Applicants for a period of 12 months and that a power of arrest is to be attached."*

44. There is no indication in the Judgment that the Learned Magistrate made any determination as to whether section 3(1)(a) of the Act was satisfied – as there are no findings as to whether or not the Appellant intended to cause harm or knew the conduct was likely to cause physical or mental harm, and if so, to whom, and nor are there any findings as to whether the conduct could cause apprehension or fear for a connected person.

45. Similarly, there was no finding that such conduct as he did find occurred caused actual harm as is required by section 3(1)(b) of the Act.

46. Finally, there is no indication from the judgment whether the Learned Magistrate considered the question of his jurisdiction to make a final SPO, which required him to be satisfied that a section 4 offence for stalking had at least been instituted against the Appellant.

47. There is no explanation in the Judgment as to why the learned Magistrate granted the Final SPO for twelve months as opposed to the total 12-month period running from the date of the Temporary SPO, as requested by the Complainants/Respondents.

48. There was no explanation as to why the learned Magistrate included a power of arrest in the SPO.

49. As Ms Christopher for the Appellant submitted, Magistrates have a duty to give reasons for their judgments, referring the Court to the case of *Fernandez v. Burgess* [2018] SC (Bd) 73 App. Subair Williams, J in *Fernandez* refers to and relies upon the decision of Kawaley, CJ, as he then was, when he held in *Leader v. Stewart et al* (paragraph 13):

> *"It is an important duty of a judge to give at least one adequate reason for his material conclusions, that is, a reason which is sufficient to explain to the reader, and the appeal court, why one party has lost and the other party has succeeded… It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon (English. v. Emery Reimbold & Strick, para 19 per Lord Phillips MR, giving the judgment of the court)*
>
> *If an appellate court cannot deduce the judge's reasons for his conclusion in a case, it will set aside the conclusion and either direct a retrial or make findings of fact itself. See English v. Emery Reimbold at para 26."*

50. Subair Williams J held in *Fernandez* that "*the requirement for Magistrate's Court judgments to be accompanied by written reasons is a principle of great vintage and importance*." (paragraph 16). I completely agree with both Justices.

51. In this instance I am unable to discern from the learned Magistrate's judgment whether he considered or made any determinations on all the necessary points for determination before he reached his conclusion that stalking had occurred under the Act and that he had the jurisdiction to grant a final SPO.

52. Accordingly, as requested by counsel for the Appellant, and pursuant to the Civil Appeals Act 1971 section 14(3) the Court will treat this as a re-hearing of the appeal on the record and will make such inferences of fact as may be drawn from the record.

Findings on Stalking

Third and Fourth Respondents

53. For the reasons set out below, I find that a course of conduct amounting to stalking did occur so far as the Third and Fourth Respondents, based on the following incidents: the Par-La-Ville incident in 2017, the Treats incident in 2017 and the Gatwick Incident in August 2018. There is no dispute (as there is with some of the other more historic incidents) that these three incidents occurred.

Par-la-Ville Incident

54. The Third and Fourth Respondents were approximately 10 and 7 years old at the time of the Par-La-Ville Incident. At this time they had not seen the Appellant (their uncle) in a number of years (Appellant's evidence, page 164 MN).

55. The Appellant's evidence was that in 2017 that the Appellant did, while riding his bike with a friend, see the First Respondent and his niece and nephew in a parked car on Par La Ville Road. He drove past and at the roundabout turned back to speak to them. He states he was hesitant but was persuaded by his friend that he should go and say hello.

56. He communicated with the children by pulling up next to the First Respondent in the front seat of the parked car and proceeded to talk to the Third and Fourth Respondents who were in the back seat. He does not remember the First Respondent breast feeding the infant child of the First and Second Respondent, which the First and Second Respondent have said is the reason they were pulled over and parked. The Second Respondent's recollection is that the

First Respondent may have stopped feeding the infant when she saw the Appellant approaching.

57. I find that by passing the parked car and then deliberately turning around and going back to the car that this constitutes an act of following the Third and Fourth Respondents within the meaning of section 3(2)(a) and an act of otherwise contacting the Third and Fourth Respondents within the meaning of section 3(2)(b) of the Act.

58. I find that given it is not in dispute that there is estrangement and mutual hostility between the Appellant and the First Respondent and given he had not seen the Third and Fourth Respondents since they were approximately 7 and 4 years old respectively, and given his own hesitation, he knew that this interaction would not be welcomed.

59. Again, conduct falling within section 3(2) of the Act can appear benign to a casual onlooker – it is the context of the interaction that matters. I find that the Appellant knew that this interaction would not be welcomed by the adults in the car and that his interaction would likely be stressful for the occupants in the car. The younger child, the Fourth Respondent, would be unlikely to have much if any recollection of the Appellant, and the Appellant's feelings of love and affection for them were not likely to be reciprocated by the children for whom he is now a relative stranger.

60. I accept the evidence especially of the Second Respondent who was cross examined at length that the children were in fact made uncomfortable and distressed by the encounter.

61. The evidence of the Second Respondent was: "*My recollection is that the children were uncomfortable being approached directly by the [Appellant] in a situation where they were not expecting to see him. Their reaction to me displayed nervousness and uncertainty on their part*". (P. 87 MN). His recollection is that while the Appellant was still there the children asked "*can we go home now*". (P. 87 MN)

62. This one event, however, does not constitute stalking of the Third and Fourth Respondents which requires a course of conduct over a period of time.

The Treats Incident

63. In the same year, it is not disputed that the Appellant again saw the children (who had not seen him) and followed them while in the company of the Second Respondent into Treats candy store at which point the Appellant also immediately put the children on a FaceTime call with their father. The Appellant states he only went into Treats because he saw that the Third and Fourth Respondent were there. He put the children on a FaceTime call with the father knowing they had not seen him in a few years. (page 139 Magistrate's Notes ("**MN**"))

64. The Appellant did not ask the Second Respondent, who had care of the children at this time, whether he could FaceTime the father and put them on with the children. His evidence was *"No. He might want to pretend that he is the biological father and no matter how much [the First Respondent] wants to pretend that the biological father does not exist he still does. Further I am their blood uncle and I have a very close relationship with them and I would treat them like my other niece and nephews and I don't need my brother's and sister's permission to go speak to my niece and nephew*". (pp 165-166 MN]

65. I find that the Appellant knew that his conduct would likely cause mental harm and be distressing to the Third and Fourth Respondents, satisfying section 3(1)(a) of the Act. As a matter of common sense the Appellant would have known that following the Second, Third and Fourth Respondents into Treats (and interjecting himself in what was clearly a lighthearted and fun moment for the children), and arranging a FaceTime call in this way with their estranged father without any warning would be distressing to the Third and Fourth Respondents. There is no question but that he was aware it could be distressing to his adult brother. The Appellant gave evidence that immediately after this incident he messaged his brother's girlfriend "*I asked her if she was with my brother and if he was okay as he had just seen the kids. They were excited to see and speak to him* " (pp. 138-139 MN)

66. Children, like adults, are, psychological beings. I find that an interaction like this in the known circumstances, without warning and out of context, would be likely to cause emotional distress and psychological harm. Indeed, the Appellant was aware that the event was likely emotional for his brother, an adult, and of whom he gave evidence that "*he got emotional at the time as he hadn't seen them for a very long time*" (p. 138). I find that in those circumstances he would be aware that this whole interaction would likely be distressing to the children. I accept the evidence of the Second Respondent that the children were "*visibly upset by the incident and remained so several hours following the event*" (p. 57 MN) I find that section 3(1)(a) and (b) was of the Act was satisfied.

67. I further find that the conduct of following them into the store and communicating with them in this way constitutes both (a) "*following the victim or a connected person*" and (b) "… *otherwise contacting, the victim or a connected person*" satisfying section 3(2) of the Act.

68. At this point, I find that stalking has occurred, there being more than one act constituting a course of conduct.

The Gatwick Incident

The Gatwick Incident Video Evidence

69. The following is determinable from the video recording of the Gatwick Incident taken (and edited) by the Appellant's sister in the BA departure terminal at Gatwick. I accept the evidence of the Appellant that this was not his video and he did not circulate it. However, it is notable that not once in the 6 minutes of footage can he be seen or heard asking the videographer to stop filming. Given her repeated statements that she was filming the events he must have been aware she was doing so. The matters described in Part I below unfold quickly and represent about 23 seconds of elapsed time. The entire video lasts approximately 6 minutes.

Part I – the check-in queue

a. Is an edited video, and the video does not start at the beginning of the interaction.

b. The Respondents and the Appellant and the Appellant's brother are in notably close proximity in the check-in line. The Appellant and the Appellant's brother are standing in the check in line, inside the tape barrier, next to and amongst the Respondents.

c. The First Respondent has a stroller with the First and Second Respondents daughter, and the Fourth Defendant child is by her side. Her daughter, the Third Respondent, is behind her pushing her bag, next to her is her estranged father bending down trying to engage with her. The Appellant is standing immediately next to the baggage cart pushed by the Second Respondent.

d. The father is bending down attempting to talk to the Third Respondent. You hear a child crying.

e. The Appellant is not, given where he is standing, simply standing in line to check in for his own flight. He is not standing with his partner or child. He is standing notably close to the Respondents, as he puts it "*to support his brother*". (page 181 MN)

f. At the outset of the video recording you can hear a child sobbing and a child who appears to be the Third Respondent saying loudly "*leave me alone*" to her father and crying. You hear an adult woman, the First Respondent, saying "*leave her alone*". This appears to be directed to the Appellant's brother.

g. The First Respondent, pushing a stroller, with the Fourth Respondent child appearing to stand right next to her, then move forward in the queue. The Appellant's brother (the estranged father) then moves to stand between the Third Respondent child and First Respondent mother (whose back is now turned and facing the other direction). This has the effect of preventing the Third Respondent

child from moving forward in the queue with her mother. You can see the Third Respondent attempt to dart towards her mother and being prevented by her father. At this point her agitation and distress increase and she now screams "*leave me alone*". Her distress and fear is both visible and audible despite the edited version of this video pixelating the faces of the children.

h. The First Respondent, on hearing what can only be described as a scream of distress, turns around and her ex-husband (with his back to her) is standing in between her and the Third Respondent daughter.

i. She appears to try to push by him to get to the First Respondent and states "*get out of the way*". Her tone is best described as exasperated or frustrated. She does not appear aggressive. Her arms are never outstretched as if to shove him, though it is clear she was trying to get past him in very close quarters. The Second Respondent, for his part, and to the extent he is visible in the video remains still throughout.

j. The ex-husband appears to lose balance, whether for effect or in response to the First Respondent trying to get by him is difficult to tell. At this juncture the Appellant quickly moves from where he is – which is very close - to physically intercept the First Respondent.

k. The Appellant is a physically imposing man. I note this, because this factor is important to how this whole interaction might look to the children. He quickly gets between the First Respondent and his brother and physically restrains and moves the First Respondent, who is much smaller than him. While his back is blocking the camera angle, he appears to be gripping the First Respondent and shoving her away. At this juncture the Third Respondent screams in what sounds like terror "*stop"* and is increasingly agitated and panicked.

l. The First Respondent appears to jerk her arm out of his grip and away from him, immediately takes the stroller and the second minor child (the Fourth Respondent)

away from the conflict and goes to a member of BA staff who are now rapidly moving in to address the matter.

m. A BA staff member tells the Appellant and his brother to leave the queue – which they do.

Findings on the Check-In Queue

70. In evidence the Appellant describes the First Respondent as the only aggressive person in the video (page 176 MN). In his evidence in chief, he states that the First Respondent "*came up from behind and pushed him. Knowing how violent she was in the past and how many time she has attacked him and how that has affected him I stepped in so that it would not escalate any further. When I stepped in [the First Respondent] took a swing at me and that is when BA staff stepped in*". (p. 141 MN)

71. I reject this version of events entirely. On my review of the video the First Respondent is trying to get to her extremely distressed daughter and finds herself being blocked by her ex-husband who appears to have deliberately put himself between her and her daughter. I accept the First Respondent's evidence of this interaction "*I only moved towards her when it was apparent that she was extremely upset and terrified and that's when I moved towards [the Third Respondent]*." (p. 50 MN) which is entirely consistent with the video evidence.

72. I also reject, as the Appellant implies, that BA staff stepped in because of the First Respondent's interaction with the Appellant. The BA staff stepped in because of the anguished screams of the Third Respondent which escalate dramatically when the Appellant physically intercepts the First Respondent.

73. I find that the Appellant's conduct, following and standing in unnecessarily close proximity to the Respondents, to physically intercepting the First Respondent, and continuing with to engage with the Respondents despite the evident fear and distress of the minor children constitutes conduct that satisfies section 3 (1) and (2)(a) of the Act.

Part 2 – the Check-in Desk

a. There is an interlude where the videographer's attention shifts to the BA staff's interaction with the Appellant and his brother and her own interaction with BA staff. The Respondents have, in the meantime, been moved to a check in desk to check in for the flight.

b. The videographer then moves to film the Respondents at the check in desk. The Appellant and the Appellant's brother have followed them there.

c. It is notable that at this point there is no reason for anyone other than the Respondents to be at the check-in desk and at this stage the brother, the Appellant, a lady who appears to be the Appellant's partner, and the sister videographer are all now interacting in what has all the hallmarks of a domestic dispute with the Respondents at the check in desk. Members of BA staff are also present.

d. The First Respondent and the Appellants' brother exchange words. Both the brother and the Appellant verbally insult the Second Respondent. The Appellant, at page 142, of his behaviour says that "*during the exchange I was annoyed and I said to the [Second Respondent] that he was half a man*". (p. 142 MN)

e. During this time the Third and Fourth Respondents are hiding behind the First and Second Respondents.

Findings on Check-In Desk

74. Based on the review of the video evidence and having considered the evidence of the First and Second Respondents and the Appellant, I find that the Appellant did follow the Respondents to the check-in desk.

75. I find that the Appellant's conduct, continuing to engage with the Respondents, despite the continuing and evident fear and distress of the minor children, constitutes conduct that satisfies section 3 (1) and (2)(a) of the Act.

Gatwick Incident Overall Findings

76. So far as the entirety of the Gatwick Incident I find the Appellant knew that his conduct would likely cause mental harm in particular to the Third and Fourth Respondents. While I accept the Appellant's evidence that his role was primarily to be there to support his brother, he was an active and continuing participant in the whole event.

77. Instead of withdrawing, given the obvious distress of the children (or perhaps suggesting to his brother that this was not the time and place), he escalated it and made the incident demonstrably worse when he physically intercepted the First Respondent and prevented her from getting to the Third Respondent. It is apparent this made the Third Respondent terrified, no doubt in fear that the First Respondent was going to be harmed. In following the Respondents to the check in desk, where he admitted he verbally insulted the Second Respondent, in circumstances where the Third and Fourth Respondents were hiding, he again followed the Third and Fourth Respondents.

78. While, as I stated above, it is on occasion difficult to know the motive of an offender who is engaged in stalking behaviour, in this case, there is no real doubt. The Appellant, as the uncle of the Third and Fourth Respondents, believed he was being deprived of a relationship with his niece and nephew by the First Respondent.

79. Accordingly, I further find that the Appellant's focus in all three of these incidents was the Third and Fourth Respondent minor children. This is not capable of serious dispute as the Appellant repeatedly said both on direct and cross examination that the reason for his decision to interact with the Respondents on Par-La-Ville Road, in Treats, and at Gatwick was his niece and nephew:

"*I am only interested in speaking and having a relationship with my niece and nephew*" (p. 133 MN)

"*At the end of the day is [sic] about me having a relationship with my niece and nephew, again, my blood*" (p. 154 MN)

"*I keep telling Mr Rothwell that it is not about [the First Respondent] but my niece and nephew*" (p. 155 MN)

"*I don't think Mr Rothwell understands, for me this is about my niece and nephew…*" (p. 155 MN)

80. In connection with Par-la-Ville "*I said it before. Mr Rothwell doesn't understand it is about my niece and nephew. I did not pull over to speak to … I stopped to speak to my niece and nephew*". (pp 159-160 MN)

81. In connection with the Treats Incident "*He might want to pretend that he is the biological father and no matter how much [the First Respondent] wants to pretend that the biological father does not exist he still does. Further I am their blood uncle and I had a very close relationship with them and I would treat them like any other of my nieces and nephews. And I don't need my brothers and sisters to go speak to my niece and nephew*" (pp. 165-166 MN)

"*What is sensible is that [the First Respondent] allows blood family to see them and to reconnect with them*". (p.166 MN)

82. Counsel for the Appellant further contended that as these incidents were 'chance encounters' they could not amount to stalking under the Act. I reject this argument. On each occasion it is not disputed the Appellant happened to see the Third and Fourth Respondents and then

consciously decided to follow them and/or interact with them. This clearly falls within the type of conduct provided for by section 3(2) under the Act.

The Appellant's Conduct in Relation to the First and Second Respondents

83. Based on the above, I find that the First and Second Respondents did have cause to fear that mental harm and distress was being caused to the Third and Fourth Respondents who are "connected persons" to them under the Act and that the Appellant would have known that his conduct was likely to induce in them such apprehension and fear. There were then two incidents so far as the First Respondent is concerned (the Par-la-Ville Incident and the Gatwick Incident) and three for the Second Respondent (the Par-la-Ville Incident, the Treats Incident and the Gatwick Incident) Furthermore, I have found actual mental harm to the Third and Fourth Respondents resulted from these encounters. I find that section 3(1) is satisfied so far as the First and Second Respondents are concerned.

84. For the reasons set out above with respect to the Third and Fourth Respondents I further find that incidents satisfy section 3(2) of the Act.

85. Accordingly, I find that on the balance of probabilities stalking is proven as against the Appellant so far as the First and Second Respondents are concerned.

86. So far as the disputed historic incidents connected to the First Respondent, it is difficult to make any determination on these matters from the record of appeal and the absence of corroborating evidence. Given that the Final SPO has now been discharged due to effluxion of time, it is not in the interests of justice nor is anything useful to be served by seeking additional evidence on these points. I therefore make no findings on any of the historic matters of alleged stalking (the notes on the car, the alleged presence at the court building during the divorce hearing, the alleged interactions with the Appellant pre-2014).

Lack of Standing to Apply for the Temporary SPO and the alleged breach of the Temporary SPO – Grounds 1 and Ground 14

Notice of Appeal Ground 1*:*

> *"The learned magistrate erred in not finding that the Respondents could* ***not*** *[Counsel for the Appellant amended by the Notice of the Appeal during the hearing by adding 'not'] make an application for a stalking protection order when no criminal proceedings had been instituted or were imminent. Under those circumstances the Respondents had no locus. (see paras 1 & 2 of the Appellants written submissions below)"*

Notice of Appeal Ground 14*:*

> *"The Learned Magistrate erred in taking into account in his ruling an incident that happened subsequent to the granting of an unlawful Temporary Stalking Order that was made on 14 August 2018 by Acting Magistrate Mill. The allegation is that the appellant stopped on his bike and greeted [the Third Respondent]. It was wholly wrong throughout these proceedings to have permitted the unlawful order he is alleged to have breached to persist. The Applicants themselves asserted that it was not of importance as an act of stalking because, even if the facts relied on were true, the behaviour was not in breach of the act and not behaviour that the court is entitled to injunct against. The order concerned was made without jurisdiction. Furthermore, there was no first-hand evidence that such an act occurred – it was classic hearsay and inadmissible. The Appellant was not even cross examined with respect to this incident. Yet the Learned Trial Judge refers to it as a clear breach of the order at page 12 of the ruling and he, the Magistrate, did not support the Appellant's assertion that he did not follow or make contact with [the Third Respondent]."*

87. The Appellant's submissions on Ground 1 substantially relate to the grant of the Temporary SPO and the standing of the complainants (the First and Second Respondents) to apply for a protection order under section 5. The Appellant made this argument at first instance

following the grant of the Temporary SPO on 1 November 2018 which resulted in an interlocutory Ruling of Magistrate Chin. While the Magistrate's notes do not specifically record it as such, I understand the jurisdictional application made by Ms Christopher on 1 November to be the *inter partes* hearing on whether the Temporary SPO should be continued as provided for under section 9(2) of the Act. For reasons which were not clear from the record of appeal, that *inter partes* application was made following the First Respondent's evidence in chief on 1 November 2018.

88. Then, as now, Ms Christopher for the Appellant argued that the First and Second Respondents did not have standing to apply for the Temporary SPO of 14 August, and, she contended, this meant that there was no jurisdiction to make the protection order.

89. In the written submissions, on this appeal, counsel for the Appellant contends that "*at the outset, the Respondents' application for a protection order under the Act was made entirely without jurisdiction. This was raised at the court below* (ruling at pp. 41 and 42 of the Record of Appeal.)

90. At paragraph 2 of the Appellant's submissions Ms Christopher, correctly, argues: "*According to section 5 of that Act, an application can only be made for a protection order where proceedings for the criminal offence of stalking have been instituted or such proceedings are imminent.*

91. *She states: "No evidence of either was either led or proferred".*

92. And at paragraph 4: "*Under the circumstances the Respondents had no locus to apply for the order. The Order of the court dated the 14 August 2018 (pp 30 and 31 of the record) suggested that proceedings for an offence of stalking under section 4 of the Act have been instituted against the Appellant but that have not been concluded. There is no evidence before this court that any proceedings under the Act for an offence have ever been started based on the matters referred to in the application of August 2018."*

93. At first instance, the learned Magistrate ruled "*the court having heard from Ms Christopher and Mr Rothwell does not support Ms Christopher's application as the Court has heard sufficient evidence from this witness [the First Respondent] to support an application under the Stalking Act 1997*." (p. 42) The Temporary SPO was ultimately extended multiple times until the final determination of the application for a final order in June 2019.

94. As stated above, the Act provides limited rights of appeal, and there is no right of appeal from the grant of a temporary SPO (see section 22 of the Act.) Accordingly, on this basis alone ground 1 fails.

95. However, if I am wrong on the right of appeal against a temporary order, the ground fails because the gravamen of Ms Christopher's argument is not that the complainants did not have standing, but that they brought their application under the wrong head of section 5(2). I find that she is correct, the complainants should have framed their application under section 5(2)(c) and the court should therefore have been satisfied, before granting the temporary SPO, that criminal proceedings for stalking were imminent.

96. There is nothing to suggest to the Court that there was any deliberate intent to mislead the Court in the application for a Temporary SPO, the First Respondent's affidavit set outs the facts as she knew them, and there would be no reason for her to mislead given that criminal proceedings being "imminent" would have sufficed. Neither does the Act define the difference between "instituted" and "imminent", although, to my mind, the former is likely to mean that the alleged offender has been charged with a section 4 stalking offence. In the ordinary course one would expect such a mistake to be flushed out on the *inter partes* hearing on the temporary order and the order would be varied accordingly to reflect that proceedings were 'imminent' not 'instituted'. In either case the complainants would have standing, and the court would have jurisdiction of the Court to grant a temporary SPO.

97. Accordingly, I find that the Acting Magistrate did have the jurisdiction to make a temporary order under the Act, albeit it the power was derived from section 5(2)(c) and not (b). It follows

that I also find that the First Respondent and Second Respondent had standing to make the application on their own behalf and as the representatives of the minor children (per the provisions of section 5(3) as read with section 7 of the Domestic Violence (Protection Orders) Act 1997), in circumstances where a formal complaint had been made to the police about conduct amounting to an offence under section 4 of the Act.

98. By the time of the *inter partes* hearing on the Temporary SPO before Magistrate Chin on 1 November he had the benefit of the First Respondent's evidence in chief and read her affidavit in support of the Temporary SPO when she said of her report to the Police "*we gave an account of the incident at London Gatwick Airport and of the previous incidents of intimidation, harassment and stalking which we decided to pursue a stalking order after speaking at length with PC Bishop*." (p. 9)

99. Magistrate Chin, having heard the argument on the jurisdiction of the learned Magistrate to grant the Temporary SPO, decided not to vary or revoke the terms of the Temporary SPO, but instead to continue to extend it. He found that the First Respondent's evidence was sufficient to establish an application for a protection order under the Act. It would have been helpful if the Magistrate had varied the Order to reflect the appropriate subsection of Section 5(2)(b) which was being relied on, but as he was not being asked to vary the Order, only to revoke it, perhaps he did not see this as necessary particularly when by then it appears criminal proceedings had been instituted following the alleged breach of the Temporary SPO.

The Pending Prosecution – and breach of the Temporary SPO

100. It is alleged that after the issuance and service on the Appellant of the Temporary SPO that the Appellant saw the Fourth Respondent on the way to school and shouted a greeting. It is alleged that this scared the Third Respondent who ran to school in a highly distressed state and this in turn resulted in a complaint to the police of breach of the Temporary SPO.

101. The First Respondent gave evidence on the event, which allegedly occurred the day before the hearing of the Final SPO commenced. The Appellant gave no evidence in chief to

contradict this evidence and was not cross examined on it. The learned Magistrate made a finding that the incident had occurred in his judgment.

102. Counsel for the Appellant, at the outset of the appeal, indicated that it is the pending prosecution which is the reason for the appeal notwithstanding the protection order has long since expired. In fact, it is quite transparent that this appeal is really a backdoor appeal against the Temporary SPO, as no doubt the hope is that if this Order is set aside the pending prosecution for its breach will fall away.

103. The learned Magistrate in his judgment, said of the event of 17 September, "*this is a clear breach of the temporary Stalking Order dated 14 August 2018 by Acting Magistrate Mills*". He continues to make an express finding of fact, finding number 14, "*he did see and then stop to shout at [the Third Respondent] as she walked to school on 17 September 2018*". The learned Magistrate also finds, in finding number 22, "*the Court does not support the Respondent's assertion that he did not follow or make contact with [the Third Respondent] as she walked to school on 17 September*". The learned Magistrate was simply not in a position to make the latter finding as the Appellant never gave any evidence nor made any assertions regarding this incident. Further, there were no findings by the learned Magistrate in relation to section 3(1)(a) intention or knowledge or (b) harm. For these reasons, and given the concerns expressed by counsel for the Appellant surrounding the pending prosecution, I set all these findings aside. As it is not necessary for me to make any findings of fact with regard to the incident given the findings I have already made, and there is no useful purpose in doing so, I decline to make any findings of fact on this incident.

104. I observe that the burden of proof is different for protection orders and the statutory offences – a civil burden of proof for protection orders and a criminal burden of proof for stalking offence. In light of this, it is not clear why the decision to prosecute for the alleged breach of the Temporary SPO is being delayed pending the outcome of this appeal. In fact, in the ordinary course prosecution for a section 4 offence should be pursued expeditiously, and the Act contemplates that the two proceedings can run in parallel. In the event of a breach

of a temporary SPO (a section 17 offence) it is hard to see how this would not form an additional section 4 offence as well as being a stand-alone offence. If the criminal prosecution of the section 4 offence results in an acquittal then the application for a Final SPO will fall away as the applicants will then no longer have any standing to seek a Final SPO, nor the Court any jurisdiction to grant a Final SPO. The converse is not true, and the criminal court is not bound to follow any findings of the Magistrate on the determination of whether to grant a protection order.

105. If the pending prosecution is in regard to only the alleged breach of the Temporary SPO (as was suggested in the Respondents' submissions in the appeal) it is even less explicable that this appeal could have any bearing on the Crown's decision whether or not to prosecute given such orders are not appealable under section 22 and this court has no jurisdiction to determine such appeals.

106. That said, while it is not a matter for this court to interfere with prosecutorial discretion and direct whether or not to prosecute the Appellant, counsel for the Respondents indicated that for their part they are content for matters to rest. The Respondents have had the benefit of the Final SPO and there is no suggestion that the Appellant has either breached the Final SPO or, since its discharge, been engaged in any conduct amounting to stalking.

107. The prosecuting authorities, may, in such circumstances take the view in the exercise of their prosecutorial discretion that there is nothing to be served by pursuing any prosecution at this date whether for a section 4 stalking offence or section 17 offence for breach of the Temporary SPO, as the case may be.

Jurisdiction

108. There remains one last area for the Court to be satisfied, namely that there was section 6 jurisdiction and power to grant the Final SPO as a prosecution had been instituted under section 4 of the Act.

109. This issue does not appear to have been addressed in anything other than passing by the Appellant at first instance. In fact, counsel for the Appellant, at the end of the Respondents' case made a submission that there was no case to answer (pp.112-124 of the MNs, with the Ruling at pp. 125-127 of the MNs) and this was argued on the basis of section 3 not section 6. No mention is made of the threshold issue of a section 4 prosecution having been instituted. Whether the Magistrate, who knew from the November 1 2018 hearing that there was a pending prosecution, assumed that the prosecution was for section 4 and section 17 offences is impossible to tell from the record.

110. The focus of the jurisdiction argument, as is clear from the written submissions at first instance and on appeal, was primarily in connection to the jurisdiction to grant the Temporary SPO, which I have addressed above. The result is that the Magistrate does not appear to have been directed nor himself to have ever considered the different and higher threshold under the Act before granting a final SPO. One is left to conclude that counsel for the Appellant focused her argument at first instance and on appeal on the Temporary SPO thinking that doing so might obviate any prosecution for breach of that order. We know that the pending prosecution is the primary reason that this appeal has been pursued.

111. However, by the time that the appeal came to be argued, counsel for the Respondent expressly set out in their submissions their understanding that criminal proceedings for the section 4 offence of stalking were not instituted with the Crown pursuing proceedings only for breach of the Temporary Order. Counsel for the Respondent have said that as a matter of policy that "*it would be disadvantageous to any accused stalker that in order for a Protection Order to remain in place there was no option but for the Crown to pursue the criminal case to a conviction*". (paragraph 7 submissions).

112. While I have some sympathy for the position as articulated by counsel for the Respondents– this is not a matter for the court's discretion. The Magistrate either has jurisdiction and power to make a final SPO or not. The breathing period contemplated by the Act is the temporary SPO, and if an offender cannot abide by that order they could find themselves facing prosecution both for the section 4 offence of stalking and the section 17

offence of breaching a temporary SPO, as well as exposing themselves to the Magistrate's additional sentencing powers under section 4.

113. As there is no evidence in the record of appeal that a section 4 offence for stalking was instituted at the time that the Learned Magistrate gave his final order and given that Respondent's counsel have said in their appeal submissions that their understanding is that the pending prosecution is a related section 17 offence and not a section 4 offence, as a matter of fact and law there was no jurisdiction to grant a Final SPO.

114. As the learned Magistrate should have made a clear determination that he was satisfied a section 4 prosecution had been instituted and the basis for this determination and he did not do so the Appeal is granted.

Conclusion

115. It is clear that guidance should be issued by the Court on stalking protection orders and the parallel criminal proceedings for stalking under the Stalking Act. This would be helpful to complainants seeking the Court's protection and also helpful to prosecutors in considering whether to institute prosecutions either under section 4 (stalking) or section 17 (breach of a temporary protection order). It may also be helpful for the DPP to give guidance on how stalking prosecutions can proceed and how complainants can provide confirmation to the Court that a prosecution has been instituted or is imminent against an alleged offender. Such guidance would assist complainants understand how they can satisfy the court, as they must, that section 4 criminal proceedings have been instituted or are imminent as the case may be. It should not be necessary for victims of stalking to have to seek expert legal advice on these issues before seeking to avail themselves of the Court's protective jurisdiction. Finally, such guidance would be helpful to the Court both in issuing temporary and final SPOs.

116. This is particularly important given that there is no right of appeal from temporary SPOs.

117. For the reasons set out above, the appeal succeeds, on the basis that the learned Magistrate failed to determine that he had jurisdiction to make the Final SPO under section 6(2) of the Act and in fact did not have jurisdiction. However, as this ground of appeal was not pleaded, save in passing in reference to the ground focused on the Temporary SPO, and much of the argument and grounds of appeal were concerned with the issue of whether or not section 3 conduct amounting to stalking occurred, and given the issue of the jurisdiction to grant the Temporary SPO which issue has been found in favour of the Respondents, I direct that in the circumstances, each of the parties should bear their own costs of this appeal and the proceedings below. There is no order to discharge as the Final SPO has been discharged by effluxion of time and no longer has any effect.

Dated 12 September 2022

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KIERNAN J. BELL

ASSISTANT JUSTICE