COURT: SUPREME COURT OF TASMANIA (FULL COURT)

CITATION: *Lacroix v Lacroix* [2018] TASFC 8

PARTIES: ADRIAN LACROIX
v
CHANTELLE LACROIX

FILE NO: 1720/2015

JUDGMENT APPEALED FROM: *Lacroix v Lacroix* [2015] TASSC 42

DELIVERED ON: 24 October 2018

DELIVERED AT: Hobart

HEARING DATE: 31 August 2018

JUDGMENT OF: Wood J, Estcourt J, Pearce J

CATCHWORDS:

Magistrates – Appeal and review – Tasmania – Motion to review – Other matters – Whether "substantial miscarriage of justice" – On review of magistrate's decision granting family violence order "proviso" applied – Order made when application not served and respondent not present – Necessary statutory requirements for making order not complied with – Appeal allowed.

Justices Act 1959 (Tas), s 110(2)(ab)
Family Violence Act 2004 (Tas), s 31(7)
Wilde v The Queen (1998) 164 CLR 365; *Weiss v The Queen* [2005] HCA 81, 244 CLR 300; *Baiada Poultry Pty Ltd v The Queen* [2012] HCA 14, 246 CLR 9, applied.
Aust Dig Magistrates [1349]

REPRESENTATION:

***Counsel*:**
Appellant: F Cangelosi
Respondent: J Bourke
Solicitors:
Respondent: Blissenden Lawyers

Judgment Number: [2018] TASFC 8
Number of paragraphs: 18

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File No 1720/2015

ADRIAN LACROIX v CHANTELLE LACROIX

REASONS FOR JUDGMENT

FULL COURT
WOOD J
ESTCOURT J
PEARCE J
24 October 2018

Orders of the Court:

1 Appeal allowed.

2 The order of Blow CJ dated 3 September 2015 is set aside.

3 The motion to review is upheld.

4 The Family Violence Order made by Magistrate Mollard on 5 March 2015 is quashed.

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REASONS FOR JUDGMENT

FULL COURT
WOOD J
24 October 2018

1 I agree with Estcourt J and with the additional reasons of Pearce J.

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REASONS FOR JUDGMENT

FULL COURT
ESTCOURT J
24 October 2018

2 The appellant, Adrian Lacroix, appeals against a decision of Blow CJ made on 3 September 2015 by which his Honour dismissed the appellant's motion to review an order of a magistrate making a final family violence order against him on 5 March 2015. *Lacroix v Lacroix* [2015] TASSC 42.

3 The background to that order was somewhat unusual but is well explained by the learned primary judge in his reasons for judgment at [2]–[10] as follows:

> "2 The order in question was made on 5 March 2015. On 7 March 2014 an earlier family violence order was made against Mr Lacroix, for the protection of Ms Lacroix, by a magistrate. That order was made by consent. Mr Lacroix made no admissions on that occasion as to the conduct that Ms Lacroix complained of. The magistrate ordered that that first order was to remain in force for a period of 12 months.
>
> 3 On 23 February 2015 Ms Lacroix made an application for an extension of the first family violence order. By virtue of s 20(3) of the *Family Violence Act* 2004, a court may not entertain an application for the extension of a family violence order 'unless satisfied that there has been a substantial change in the relevant circumstances since the order was made or last varied'. The written material submitted with the extension application did not suggest that there had been any such substantial change.
>
> 4 The extension application came before the learned magistrate on 5 March 2015. Both parties were represented by counsel. Counsel for Mr Lacroix, Mr Chopping, told the learned magistrate that any extension would be opposed, and that it was contended that there was no proper basis for an extension. The magistrate invited Ms Lacroix's counsel to reconsider her application and file a different one. He suggested that she lodge an application for a new family violence order, and then make an oral application to revoke the existing one, so that he could consider the issues in the light of any information disclosed in an application for a fresh order. Counsel for Ms Lacroix indicated that she would do that. The magistrate then said, 'Mr Lacroix heard me say that, so he's effectively on notice that that may well occur in the course of the morning and taking care of the service requirements [sic]'.
>
> 5 After that Ms Bourke left the courtroom, went downstairs, completed a fresh application for a family violence order, and filed it.
>
> 6 Meanwhile Mr Lacroix left the courtroom and sent Mr Chopping a text message thanking him for his work that morning, and telling him that he was not authorised to accept service of any documents on his behalf. Mr Lacroix showed that message to Ms Bourke after it had been sent. It appears that, having been thanked for his services, Mr Chopping left the courthouse. It appears that Mr Lacroix was trying to outwit Ms Bourke, and possibly also the learned magistrate, with a view to creating a situation whereby an application against him could not be dealt with on its merits that day.
>
> 7 Ms Bourke returned to the courtroom. Mr Lacroix had gone. Ms Bourke told the magistrate that she had filed an application for a fresh family violence order; that Mr Lacroix had instructed Mr Chopping that he was not to accept service; and that Mr Chopping had left. She continued:

'So my application [would] be for the matter to adjourn so I can organise personal service of Mr Lacroix, and/or interim …'.

8 At that point the learned magistrate interrupted her and said:

'Well I'm not sure that you need to trouble to do that. Why don't you let me have the morning break which I'll take before very long to read the material and in the circumstances I might very well think that it's appropriate to make a final order if I make an order. Mr Lacroix was very clearly on notice that this matter was going to be lodged in the course of the morning.'

9 Subsequently the learned magistrate dealt with the new application in the absence of Mr Lacroix and Mr Chopping. Ms Bourke sought a final order, as distinct from an interim order, and proposed that it be an order of 12 months' duration. The learned magistrate commented that the matters Ms Bourke was relying upon "might suggest that the problem relied upon here, is likely to be of longer duration". Ms Bourke reconsidered her position and asked for an order that would operate for two years. The learned magistrate proceeded to revoke the order of 7 March 2014 and to make a fresh final order, to remain in force until midnight on 5 March 2017, in the same terms as the order that it replaced.

10 Mr Lacroix, as I have said, contends that he was denied procedural fairness. In particular, he contends that the learned magistrate should not have considered making a fresh family violence order because he had not been served with a sealed copy of the new application filed by Ms Bourke. His contentions are based on common law authorities concerning natural justice and procedural fairness, and on certain legislative provisions. I will consider the common law duties of the magistrate first."

4 The appellant has appealed to this Court on six grounds. However to my mind, the often pragmatically mandated detailed consideration of them all is not required as ground 5 raises an issue which I regard as unarguably dispositive of the appeal in favour of the appellant. That is the question of whether the learned primary judge erred in dismissing the appellant's motion to review by the application of s 110(2)(ab) of the *Justices Act* 1959.

5 After considering the appellant's submissions the learned primary judge concluded as follows:

"**Conclusion**

29 The learned magistrate made only one error that is relevant to the applicant's grounds of review. He erred by proceeding to make a final family violence order when, because a sealed copy of the application had not been served on Mr Lacroix and no attempt had been made to serve one on him, s 31(7) did not authorise him to proceed that far. However, in my view, no substantial miscarriage of justice resulted because Mr Lacroix had notice of the application, when and where it would be made, and the evidence to be relied upon, and had come to court with a lawyer for the purpose of defending a substantially similar application. There was no procedural unfairness.

30 I have already referred once to s 110(2)(ab) of the *Justices Act*. It provides that, on the hearing of a motion to review, this Court may do the following:

'(ab) in a case where the court considers that no substantial miscarriage of justice has occurred even though the cause or matter raised by the motion might be decided in favour of the applicant, dismiss the motion'.

31 Because there was no denial of procedural fairness to the slightest degree, and no substantial miscarriage of justice has resulted, I consider that this is an appropriate

case in which to do what s 110(2)(ab) authorises. I have therefore decided to dismiss the motion to review."

6 In my view the appellant's appeal must succeed because it could never be appropriate to apply the proviso contained in s 110(2)(ab) where the order sought to be reviewed by the motion was an order made without lawful authority.

7 In *Wilde v The Queen* [1988]; 164 CLR 365 at 373 [10], Brennan, Dawson and Toohey JJ, said, in the context of the application of the proviso to s 6(1) of the *Criminal Appeal Act* 1912 (NSW):

> "… the proviso was not intended to provide, in effect, a retrial before the Court of Criminal Appeal when the proceedings before the primary court have so far miscarried as hardly to be a trial at all. It is one thing to apply the proviso to prevent the administration of the criminal law from being 'plunged into outworn technicality' (the phrase of Barwick CJ in *Driscoll v The Queen*, at p 527); it is another to uphold a conviction after a proceeding which is fundamentally flawed, merely because the appeal court is of the opinion that on a proper trial the appellant would inevitably have been convicted. The proviso has no application where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings."

8 In *Pattison v Tasmania* [2017] TASCCA 13 Wood J, with whom Pearce and Brett JJ agreed, said at [125]:

> "The proviso may be denied because of the nature of the irregularity, even if the appellate court is satisfied to the requisite standard of the appellant's guilt. Examples have been where the errors or miscarriages of justice occurring in the course of a criminal trial may amount to a significant denial of procedural fairness (*Weis*s at [45]; *Libke v The Queen* [2007] HCA 30, 230 CLR 559 at [43]) or errors that are 'so fundamental or involve such a departure from the essential requirements of a fair trial that they exclude the operation of the proviso' (*AK* per Gleeson CJ and Kiefel J at [23]; *Nudd* [2006] HCA 9, 225 ALR 161, per Gleeson CJ at [6]-[7]). It has been emphasised that the operation of the proviso will fall for consideration in a wide variety of circumstances, and the courts have declined to define the circumstances in which the application of the proviso is denied: *AK* per Gummow and Hayne JJ at [54]."

9 Section 31(7) of the *Family Violence Act* 2004 provides as follows:

> "(7) If the court hearing an application under Part 3 or 4 is satisfied that —
>
> (a) a sealed copy of the application has been served on the respondent to the application; or
>
> (b) reasonable attempts have been made to serve a sealed copy of the application on the respondent —
>
> the court may proceed in the absence of the respondent and may —
>
> (c) make the FVO sought in the application or such other order as the court considers necessary; or
>
> (d) ...".

10 No sealed copy of the application for the order made by the magistrate had been served on the appellant, and no attempt to serve a sealed copy of that application had been made. The final order was not therefor authorised by s 31 to be made as it was, in the absence of the appellant, and it was not therefore lawfully made. Section 31(7) is not merely a procedural provision as, for example is the

Resource Management and Planning Appeal Tribunal Act 1993, s 17(2) (see *R v Resource Management and Planning Appeal Tribunal; ex parte Gary James Wilson* [2000] TASSC 101).

11 In my view, the magistrate's lack of authority to adopt the language used in *Wilde* (above), meant that the order made in the proceeding was fundamentally flawed, and the proviso has no application where such an irregularity has occurred. This was such a departure from the essential requirements of the law that it goes to the root of the proceedings.

12 It may well have been the case that on a hearing of the application after valid service of a sealed copy of it, or after reasonable attempts at such service, the appellant would inevitably have been made subject to the same order, but, as is clear from *Wilde*, such a consideration does not justify the application of the proviso.

13 I would allow the appeal.

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REASONS FOR JUDGMENT **FULL COURT**
PEARCE J
2018

14 I agree with Estcourt J that the motion should be allowed. I agree with his Honour's reasons, but would add some comments of my own.

15 Before the primary judge the appellant's principal contention was that he had been denied natural justice by the magistrate. Blow CJ rejected that contention. The Chief Justice found that the magistrate made an error as to the requirements for service in the *Family Violence Act* 2004, s 31(7), but dismissed the appeal pursuant to the *Justices Act* 1959, s 110(2)(ab). That provision is the *Justices Act* version of the proviso to the common form criminal appeal provision. Estcourt J refers to the decision of Brennan, Dawson and Toohey JJ in *Wilde v The Queen* (1988) 164 CLR 365 as to its application. Since *Wilde* was decided, the proviso has been considered by the High Court in many cases, including *Weiss v The Queen* [2005] HCA 81, 224 CLR 300. In *Baiada Poultry Pty Ltd v The Queen* [2012] HCA 14, 246 CLR 9, the majority stated at 103 [23] that, following from the Court's decision in *Weiss*, no single universally applicable criterion can be stated to identify either when the proviso does apply or when it does not apply, that it is "neither possible nor useful to attempt to argue about the application of the proviso by reference to some supposed category of 'fundamental defects' in a trial", and that the focus must be on the statutory question of whether there has been a "substantial miscarriage of justice". If a Court of Appeal considers that no substantial miscarriage of justice has actually occurred, the appeal *must* be dismissed in exercise of the power the proviso confers: *Baiada Poultry* at 103 [25]. In was not necessary in *Weiss* or in *Baiada Poultry* to decide whether there may be cases where it would be proper to allow the appeal and order a new trial even though the appellate court was persuaded to the requisite degree of the appellant's guilt: *Weiss* at 317 [45]-[46] and *Baiada Poultry* at [21]. A significant denial of procedural fairness was suggested as such a case, as were the circumstances dealt with in *AK v Western Australia* [2008] HCA 8, 232 CLR 438.

16 *Wilde,* and each of the other authorities to which I have referred, is a criminal appeal involving proof of offences beyond reasonable doubt. The appeal from the decision of the magistrate in this case is not a criminal appeal in the usual sense. The decision concerned the determination of an application under the *Family Violence Act* for a family violence order. Applications for an order are made to a court of summary jurisdiction, and are determined in the same manner, as nearly as practicable, as a complaint for a simple offence: ss 5(1) and 31(1)(a)(ii). However, a court may make a family violence order if satisfied, on the balance of probabilities, that a person has committed a family violence offence, and may do so again: s 16(1). Proof beyond reasonable doubt is not required, and an order does not result in a criminal finding of guilt. The proviso has statutory application because the provisions in the *Justices Act* for review of a decision of the magistrate apply, but is to be considered in that context: cf *Windoval Pty Ltd v Donnelly* [2014] FCAFC 127, 226 FCR 89.

17 The powers of the magistrate derive from, and are limited by, statute, in this case the *Family Violence Act*. The magistrate did not expressly consider s 31(7). He decided that the presence of the appellant in court when the filing of the new application was discussed had "taken care of any service requirements". Proof of service of an application for a family violence order, or of reasonable attempts to serve it, are a necessary pre-condition of the exercise of the power to make a final order. The terms of s 31(7) permit a final order to be made in the absence of the respondent, but not without service or reasonable attempts at service. As the learned Chief Justice found in the primary appeal, there was no basis on which the magistrate could have been satisfied of either of those things. The Chief Justice

correctly pointed out that the magistrate could have made an interim order under s 23, but went further and made a final order. It follows that although the subject-matter of the application lay within the jurisdiction of the magistrate, the application was not determined by the magistrate in accordance with the statutory requirements for the exercise of the power to make an order in the absence of the appellant. I agree with Estcourt J that an error of that nature is not such as to attract the application of the proviso. It cannot be said that there has not been a substantial miscarriage of justice.

18 For those reasons I would allow the appeal. The appropriate disposition is to order that the order made by the magistrate on 5 March 2015 is quashed. That disposition is not to be taken as determinative of any other proceeding arising from the making of that family violence order.