

Conflict between contact order and bail undertakings

Wednesday, 17 May, 2006

P v DUNNE (P38/2005)

Full Court of the Supreme Court of Western Australia decision: 27 October 2004

The applicant was convicted in May 2002 of four charges, three of breaching a misconduct restraining order and one of breaching a bail condition. The respondent, David Morgan Dunne, is the police officer who laid the complaints.

The convictions arose in the context of orders made in the course of a family law and child custody dispute between the applicant and his former wife, G. Orders had been made on 4 September 2000 by the Court of Petty Sessions exercising federal jurisdiction under the *Family Law Act 1975* (Cth), the substance of which were that the applicant could have telephone contact with his children of the marriage, and that such contact was to be initiated by G telephoning him at times specified in the orders ("the contact orders").

On 19 February 2001, the Court of Petty Sessions made a misconduct restraining order under the *Restraining Orders Act 1997* (WA) against the applicant, which included that he not communicate with G. The applicant twice telephoned G in breach of this order, which resulted in him entering into a bail undertaking pursuant to the *Bail Act 1982* (WA), that undertaking including that he would not contact G. The applicant then telephoned G three times and was charged and convicted as described above.

The applicant was successful in his appeal against conviction to the Supreme Court when on 29 August 2003 Heenan J quashed the convictions, concluding that the applicant's telephone calls were authorised under the contact orders and, because those orders were made under Commonwealth legislation, the bail condition imposed under the State legislation was invalid as inconsistent with the contact orders, by reason of s 109 of the Constitution [see *Paynter v Dunne* (2003) FLC ¶93-153].

On appeal, the Full Court of the Supreme Court (Malcolm CJ, McLure and Le Miere JJ) set aside the orders of Heenan J and reinstated the convictions [*Dunne, DM v P* (No 2) (2004) FLC ¶93-205].

In separate judgments, Malcolm CJ (with whom Le Miere J agreed) and McLure J held that the subject matter and purpose of the Commonwealth and the State legislation did not overlap or conflict, that the Family Law Act concerns, inter alia, the rights and welfare of children, and the Bail Act (WA) concerns the administration of criminal justice.

The Court concluded that there was no necessary inconsistency between the Commonwealth legislative provisions under which the contact orders were made and the State legislative provisions under which the bail condition had been imposed, and that therefore constitutional invalidity did not arise.

Malcolm CJ held that there is nothing in the Family Law Act which indicates that the power to make orders such as the contact orders can be exercised other than in conformity with the general law of the State, including the Bail Act.

The Court also concluded that there was nothing in the contact order which expressly or impliedly authorised the applicant to telephone G, even where G was in breach of her obligation under the contact orders to initiate that contact, and that therefore there was no conflict between the contact order and the bail undertaking.

The questions of law said to justify a grant of special leave to appeal include