

***Police v Kritcos* [2016] SASC 28 (10 March 2016) – Supreme Court of South Australia**

‘Confirmation of intervention order’ – ‘Emotional abuse’ – ‘Evidence’ – ‘Following, harassing, monitoring’ – ‘Interim intervention order’

Appeal Type: Appeal against a Magistrate’s decision to revoke an interim intervention order.

Facts: An interim intervention order was made against the respondent (the appellant’s former husband). A Magistrate dismissed an application to confirm the order and revoked the order. The alleged abuse consisted of three letters that the respondent sent to the appellant. One of the letters concerned renewal of their deceased pet dog’s council registration and the attached dog tag. She believed that the respondent was making a point of using her address when he knew she did not want it disclosed and that the letter was a ‘gratuitous and hurtful’ reminder of the dog’s death. During their marriage, they had intimidated the respondent’s former wife by driving past her house. She was worried she would suffer similar harassment. The respondent denied all knowledge of the other letters. The appellant gave evidence which alleged prior acts of abuse by the respondent, including threats to kill and physical abuse. The Magistrate largely rejected this evidence as not proven, taking into account the fact that the appellant admitted lying in an affidavit previously filed in the Family Court. The Magistrate also rejected the respondent’s explanation about sending the dog tag and found it was sent out of spite to upset the appellant.

Notwithstanding, while this conduct was spiteful, the Magistrate was not satisfied it resulted in emotional and psychological harm within the meaning of the *Intervention Orders (Prevention of Abuse) Act 2009* (the Act). The Magistrate concluded that it was reasonable to suspect that the conduct would cause ‘upset, annoyance and anger’ but not harm. While the Magistrate found it was reasonable to suspect that the conduct would continue without intervention because the respondent’s evidence ‘did not provide any direct reassurance that the conduct will not continue’ (See at [19]), he found that it would not be appropriate in the circumstances to confirm the order. He gave the respondent an opportunity to show he would not persist with the conduct. If the conduct persisted, the appellant could make an application for a further interim order. The Magistrate also noted the appellant was a personal trainer, coaches kick boxing and holds a black belt in martial arts.

Issue/s:

1. Whether the Magistrate erred in concluding that the letters did not amount to an act of abuse under the Act.
2. Whether the Magistrate erred in concluding that it was not appropriate to make an order in the circumstances.

Decision and Reasoning: The appeal was dismissed.

1. The appellant submitted that the Magistrate erred by not having regard to the definition of emotional and psychological harm in the Act which includes ‘distress, anxiety or fear that is more than trivial’. Doyle J held that while the Magistrate should have expressly referred to this definition, the Magistrate’s finding was that, ‘the correspondence was reasonably expected to cause “upset, annoyance and anger” in contradistinction to non-trivial “distress, anxiety or fear”’ (see at [36]). The appellant also submitted that the Magistrate erred in ‘approaching the issue of harm on the basis that he needed to be satisfied that the defendant’s conduct was “intended to, and caused” harm. Doyle J concluded that the Magistrate had to consider three issues – ‘First, whether the letters might reasonably be expected to cause harm (s 8(4)(j)) and then whether they were intended to, and did in fact, result in harm (s 8(2))’ (see at [39]). His Honour concluded that the effect of the Magistrate’s finding was that, ‘the letters were neither intended to, nor did in fact, result in harm’ and ‘(the Magistrate) appropriately addressed both the respondent’s state of mind in engaging in the relevant conduct and the (subjective) impact of this conduct on the protected person’ (see at [39]). In relation to the exclusion of other evidence relating to the history of the relationship, Doyle J held that the appellant was given several opportunities to detail the effect of the letters upon her.
2. The appellant submitted that the Magistrate failed to have regard to the principles set out in s 10 of the Act which are relevant to determining whether it is appropriate to make an order. In particular, the section makes clear that abuse can consist of isolated incidents. Doyle J stated at [44] – ‘his Honour did not suggest that isolated instances could not constitute abuse. His reasoning was merely that on the facts of this case the letters (neither individually nor cumulatively) were not sufficient to constitute abuse.’ In relation to the Magistrate’s references to the appellant being a personal trainer and having martial arts qualifications, his Honour stated that this was a ‘somewhat obscure’ reference, but it was, ‘probably best understood as being a reference to matters which might have given the protected person some level of personal confidence and physical prowess. While I consider these matters to have been of only marginal relevance, I do not think they are entirely irrelevant or that it was erroneous to take them into account’ (see at [45]). The Magistrate’s conclusion to give the respondent an opportunity to not persist with the relevant conduct is not a factor referred to in s 10(1) of the Act, but was nevertheless not irrelevant. It is a relevant consideration that the respondent is someone who might respond to an opportunity to change their behaviour. See finally at [48] –

‘Here there was no proven act of past abuse. While the Magistrate accepted there was a reasonable suspicion abuse would occur in the future without intervention, it might be inferred that the Magistrate did not consider there to be a high likelihood of this occurring. Indeed, the Magistrate’s judgment appears (from his reference to the contingency that his judgment might prove to be misplaced) to have been that the suspicion will probably not come to fruition. It is also relevant that while there was a suspicion of abuse in the broad sense contemplated by the Act (i.e. extending to emotional and psychological harm), the Magistrate made a positive finding that it was not reasonable to suspect that the defendant would cause physical harm to the protected person.