

***MJS v The State of Western Australia* [2011] WASCA 112 (9 May 2011) – Supreme Court of Western Australia (Court of Appeal)**

‘Directions and warnings for/to jury’ – ‘Evidence’ – ‘Evidence of character’ – ‘Indecent assault in family or domestic relationship’ – ‘Indecent dealing with lineal relative under 16 years’ – ‘Physical violence and harm’ – ‘Sexual and reproductive abuse’ – ‘Sexual penetration of a lineal relative under 16 years’ – ‘Violence restraining order’

Charge/s: 18 charges of a sexual nature relating to the appellant’s two biological daughters.

Appeal Type: Appeal against conviction and sentence.

Facts: The appellant was charged with various sexual acts relating to his two daughters (see at [22]). He was convicted by a jury of 11 offences of indecent dealing, 4 offences of indecent assault and acquitted of three charges. There was previously an interim violence restraining order (VRO) in place against the appellant. The appellant later breached this order. Evidence of this breach and his subsequent imprisonment for a weekend was inadvertently admitted at trial after one of the complainants mentioned it during cross-examination.

Issue/s: Some of the issues in the appeal against conviction concerned –

1. Whether the trial judge should have discharged the jury after one of the complainants gave evidence during cross-examination of a prior breach of a VRO in place against the appellant.
2. Whether the directions of the trial judge in respect of this evidence were sufficient.

Decision and Reasoning: The appeal against sentence was upheld but the appeal against conviction was dismissed.

1. The appellant submitted that the admission of the interim VRO evidence was inadmissible and so prejudicial it required the trial judge to discharge the jury. The appellant also submitted that this failure to discharge the jury led to further inadmissible evidence concerning other VROs and alleged breaches which compounded the initial prejudice. Mazza J (with whom Buss JA and McLure P agreed) held that the only basis upon which this evidence could be admissible was with respect to the appellant’s character. Generally, evidence of bad character is inadmissible but can be admissible where an accused puts their character in issue, in which case the prosecution is able to call evidence of bad character in rebuttal (see at [144]). In this case, the accused asserted that he was of good character. As such, the prosecution was entitled to adduce rebuttal evidence. The evidence of the VROs could only be admissible for that purpose.

The Court held that in isolation, the making of an interim VRO was not of relevance to an accused’s character. However, the evidence also included the alleged breach of the VRO. Mazza J held that a breach of a VRO ‘amounts to deliberate disobedience of a court order’ and ‘is conduct which is prima

facie inconsistent with the usual behaviour of a person of good character. It is evidence capable of rebutting an assertion of good character' (see at [153]). As such, it was admissible. However, the evidence that he had spent a weekend in jail was not relevant to character and thus inadmissible, but capable of being dealt with by judicial direction. Furthermore, even if the VRO evidence was inadmissible, it was general in nature – 'There was no detail as to when the VRO was made, who was the protected person, what was the basis for the order and what the appellant did to breach it' (see at [157]). As such, any potential prejudice could be dealt with by judicial direction.

2. The Court held that while the trial judge's directions in relation to this evidence could have been 'fuller', they were sufficient. It would have been desirable for him to 'use the authority of his office to confirm that a court had not determined on its merits whether a final VRO should be made'. However, the judge explained to the jury the ex parte nature of an interim order. While the judge did not explicitly tell the jury that it could only take the breaches into account for the purposes of character, he did tell the jury that the State's case was that these breaches were relevant to character and that the ex parte VROs and the time spent in jail were irrelevant. This was sufficient for a reasonable jury to understand that the evidence was only relevant in relation to the appellant's character.