

***NS v Hotchkis* [2019] ACTSC 309 (8 November 2019) – Australian Capital Territory Supreme Court**

‘Audio recording’ – ‘Domestic violence offences’ – ‘Evidence issues’ – ‘Protection order’

Charges: 1 x common assault; 1 x contravention of a Family Violence Order

Case type: Appeal against convictions

Facts: The appellant allegedly kicked the complainant’s leg during an argument (assault charge). At that time, the appellant and complainant were married and living together. The complainant had obtained a Family Violence Order against the appellant, which the appellant allegedly breached during the argument by causing or threatening to cause injury to the complainant or by harassing, threatening or intimidating her ([3]). A central issue was whether an audio recording made by the complainant was admissible.

Issue: The appellant appealed the findings of guilt on the basis that 1) the learned Magistrate erred in ruling that the audio recording made by the complainant was admissible pursuant to s 5(2)(d)-(e) of the Listening Devices Act 1992 (ACT) (LDA), and 2) the convictions were unreasonable and could not be supported by the available evidence.

Held: The prosecution sought to adduce a recording of the alleged events said to have been made by the complainant on her mobile. The appellant objected on the ground that the recording was made in contravention of the provisions of the LDA ([10]). Burns J did not challenge the Magistrate’s finding that a ‘private conversation’, for the purposes of the LDA, existed ([13]), and turned his mind to whether any of the exception provisions applied such that the complainant’s use of the listening device was not proscribed by the LDA ([15]). In his Honour’s opinion, the Magistrate was correct in finding that the exception in s 4(3)(b)(i) was satisfied. The complainant feared that the appellant might seriously injure or kill her, and gave evidence that she had regularly been abused by him. Therefore, there were reasonable grounds for her to consider that the recording was necessary to protect her lawful interests ([21]). His Honour also found that the exceptions in s 5(2)(d) and (e) were established ([22]).

His Honour concluded that even if the recording had been obtained in contravention of the LDA, the proper exercise of the discretion found in s 138 of the Evidence Act would have resulted in its admission ([31]). The evidence was important, both in its own right and as support for the complainant's evidence, and its probative value was significant. The gravity of the contravention was low, and there was no suggestion to the complainant that she knew that she was violating the LDA. Further, the offences charged against the appellant were serious domestic violence offences ([26]-[27]). At [30], Burns J noted that '[a] criminal has no right to keep their offending private, or to claim that the gathering of evidence of their crime is a breach of their privacy'.

As to the second ground of appeal, his Honour agreed with the Magistrate that the evidence established a breach of the Family Violence Order, as the conduct was harassing and intimidating. The Magistrate was entitled to consider the aggression by the appellant towards the complainant at the time she said she was kicked. As there was sufficient evidence on which the Magistrate was entitled to convict the appellant, the appeal was dismissed ([40]-[41]).