

## ***Harwood v Police* [2019] SASC 129 (26 July 2019) – South Australian Supreme Court**

‘Children’ – ‘Cross-examination’ – ‘Domestic relationship’ – ‘Fair trial’ – ‘Intervention order’ – ‘Legal representation and self-represented litigants’

Charges: 3 x contravening a term of an intervention order contrary to s 31(2) of the Intervention Orders (Prevention of Abuse) Act 2009 (SA)

Case type: Appeal against conviction

Facts: The appellant, who was self-represented at trial, was convicted of three counts of contravening a term of an intervention order, contrary to section 31(2) of the Intervention Orders (Prevention of Abuse) Act 2009 (SA). The protected person under the intervention order was the appellant’s ex-partner, the victim ([1]). The agreed facts were that on 3 separate nights, the appellant attended the home of the victim’s father where the victim and their daughter were residing. The appellant left letters addressed to the victim’s father and old family photographs. Although he admitted to attending the premises, he argued that he genuinely believed that the victim and their daughter were residing at a different address ([2], [9]).

Under s 13B of the Evidence Act 1929 (SA), the appellant was not allowed to cross-examine the victim at trial unless it was done so by counsel. The Magistrate failed to refer to the appellant’s rights under s 13B(b)(ii), which includes a reference to the Criminal Law (Legal Representation) Act 2001 (SA). Section 6(1a) of that Act provides that if a defendant who is not legally represented at trial applies to the Commission for legal assistance for the cross-examination of a s 13B witness in the trial, the Commission must, subject to qualifications, grant such assistance ([17]).

Although the Magistrate advised the appellant of his right to apply for legal aid ([14], [16]), he did not advise him that legal assistance must be granted to a defendant subject to certain qualifications (terms), and instead informed the appellant that he probably would not qualify for legal assistance ([18]). The trial was adjourned, and upon resumption, the appellant remained under the mistaken belief that he would not qualify for legal assistance and was not advised of s 6 of the Criminal Law (Legal Representation) Act 2001 (SA). The appellant was unable to test the victim’s evidence in any way. Consequently, the Magistrate accepted her evidence and convicted the appellant ([21]).

Issue: The appellant appealed on the ground that the trial court did not properly and fully advise him of his right to obtain a counsel’s assistance for the purpose of cross-examining the victim ([4]).

Held: Lovell J allowed the appeal and set aside the conviction. Her Honour remitted the matter for retrial before a different Magistrate and ordered the respondent to pay the appellant's appeal costs ([29]). Importantly, her Honour noted a trial judge's obligation to ensure that an accused self-represented person understands their rights and has all the necessary information in order to receive fair trial and make informed choices about his or her case ([22]-[23]). In the present instance, the appellant was required to be aware of and fully understand his rights provided for by s 13B and, by extension, s 6(1a) in order to receive a fair trial ([23]). The Magistrate was obliged to ensure that he fully understood that cross-examination of the victim could only occur if he employed counsel to do so on his behalf, and that if he applied to the Commission for legal assistance, they were bound by law to provide it, subject to any conditions they saw fit ([24]). The trial miscarried because the Magistrate failed to properly and fully advise the appellant of his right to obtain counsel's assistance for the purpose of cross-examination ([25]).