

***Brown v Roe* [2004] WASCA 210 (16 September 2004) – Western Australia Supreme Court (Court of Appeal)**

‘Breach of violence restraining order’ – ‘Conditions of orders’ – ‘Consent’ – ‘Temporary protection order’

Charge/s: Breach of violence restraining order.

Appeal type: State appeal against dismissal of charges of violence restraining order.

Facts: The protected person (the former de facto wife of the respondent) obtained a violence restraining order (VRO). The respondent was charged with three offences of breaching the VRO by communicating or attempting to communicate with the protected person. There was no dispute that the protected person had contact with the respondent during the period the VRO was in place. However, there was a dispute between the parties as to how many times there was contact and whether it was made with the consent of the protected person. The magistrate dismissed the charges because he considered all the evidence showed the protected person, by her actions prior to the contact alleged, had consented to the contact.

Issue/s:

1. The magistrate erred in law in finding that the protected person’s earlier course of conduct could create a continuing general consent entitling the respondent to thereafter breach the restraining order.
2. The magistrate erred in fact in finding that the protected person consented to the respondent’s breaches of the restraining order.

Decision and Reasoning: The appeal was allowed on ground 2. Counsel for the appellant argued that there could not be ‘continuing general consent’ given by a protected person to a person bound by a VRO. Barker J noted that this proposition was probably right *‘but whether or not consent has been given to any particular contact must be decided on the facts of each case’* (See [14]). In relation to ground 2, Barker J held that the magistrate erred in finding that the protected person consented to the respondent’s breaches. The evidence did not support such a conclusion (See [57]-[59]). Barker J further stated that, *‘it is not appropriate for a Court, while a VRO is in place, effectively to suspend the operation of a VRO by taking the view that a person protected is inclined to use the VRO as a “walking stick”, as the Magistrate in this case suggested’* (See [46]). As the protected person explained, it was sometimes easier to tolerate the applicant’s presence and other times it was necessary to call police and enforce the terms of the order (See [42]).

'It may be recognised that, in many circumstances, the continuing relationship between persons who were once in a close personal relationship will be strained, especially after a VRO has been granted by a Court. Nonetheless, a person who is bound by a VRO must take all appropriate steps to ensure that the terms of the order are complied with. It may well be that, on some occasions, by virtue of a course of conduct, a person bound by the order may feel entitled to approach physically or telephone a protected person. It may be that a prior course of conduct in some cases implies a consent to approach the protected person in that way, at least initially. But if the protected person makes it plain that she or he does not consent to that contact or that initial contact continuing, then it behoves the person bound by the order to back off and strictly comply with the order' (See [44]).