NRR

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

AP.11/87

LOW PRIORITY

BETWEEN: JURY

Appellant

AND: POLICE

Respondent

Hearing: 27 May 1987

Counsel: J. Roberts for the Appellant
D.J. McDonald for the Respondent

Judgment: 27 May 1987

ORAL JUDGMENT OF DOOGUE J

This is an appeal against conviction and sentence but the appeal against sentence was not pursued.

The Appellant was convicted on 14 October 1986 of an offence under the Family Proceedings Act 1980 in that on the 19th of September 1986 at Taupo, while a non-molestation order was in force against him, he entered into a building situated at Road, which was in the occupation of the applicant, Jury.

The onus in this appeal is upon the Appellant to satisfy the Court that in all the circumstances the District Court Judge was not warranted in entering a conviction or at least that his mind should have been left in a state of reasonable doubt. Thus the onus is upon the Appellant to show the decision was wrong. Any advantages the District Court Judge may have had in seeing and hearing the witnesses have to be borne in mind in this Court.

The primary submission for the Appellant in this Court was that under Section 15(2) of the Domestic Protection Act 1982, a non-molestation order cannot be made in proceedings in which a separation order has been sought, unless a separation order has been made in respect of those proceedings.

An alternative submission was made that there was no evidence before the District Court that any occupation order or tenancy order had been made to which the non-molestation order could relate.

Section 15(2) of the Domestic Protection Act 1982 reads:-

> "Where the application for a non-molestation order is made in proceedings in which a separation order or an occupation order or a tenancy order is sought, the Court shall not make a non-molestation order unless it makes a separation order or an occupation order or a tenancy order in the proceedings."

It is common ground that in this case an ex parte non-molestation order had been made pursuant to Section 14 of the Domestic Protection Act 1982. There was also an ex parte non-violence order pursuant to Section 5 of the same Act. In the material before this Court there is Exhibit 1, produced in the District Court which contains within it the interim non-violence order dated 8 September 1986, the interim non-molestation order dated 8 September 1986, an interim custody order of the same date, and an interim occupation and ancillary orders of the same date. The interim occupation order is made pursuant to Section 20 of the Domestic Proceedings Act 1982.

The Domestic Proceedings Act also provides under Section 25 for ex parte applications for tenancy orders. That Act does not deal with separation orders, which are part of the subject matter of the Family Proceedings Act 1980. I am informed from the Bar that there is no provision for ex parte separation orders, which would certainly be in keeping with common sense.

Having regard to Exhibit 1 before both the District Court and this Court, it is apparent that there was evidence before the District Court that an interim occupation order had been made and an interim non-molestation order had been made, both under the provisions of the Domestic Protection Act 1982 which were applicable at the time of the alleged

offence on 19 September 1986.

The District Court Judge held:-

> "There is nothing put before me as a matter of fact from which I could find that the interim non-molestation order made on 8th October ..."

(that date must have been meant to read 8 September 1986, having regard to the chronology already referred to)

> "... was made without jurisdiction and there is certainly no justification for me to find as a matter of law that it may have been made without jurisdiction. On the face of it that document was a valid, enforceable order of the Court that was still current at the time that these incidents allegedly occurred on 19th September. There is equally no doubt that the Defendant entered onto and into a building at 60 Taupo View Road which was in the occupation of his wife and in respect of which, according to evidence before the Court there was a non-occupancy order and there was a non-molestation order."

Having regard to what I have already said in respect of Exhibit 1 and the reasons for the decision of the District Court Judge, it is clear that there was evidence before him that an occupation order has been made and accordingly the second submission of Mr Roberts' cannot succeed.

That leaves his first submission. Mr McDonald, in response to that submission, pointed to the framework of the Domestic Proceedings Act 1982, to which I have already referred, which indicates that there are provisions within it for ex parte orders to be made in respect of all matters other than separation orders.

It was Mr Roberts' submission that the evidence before the District Court disclosed that there had been an

application by the Applicant, Mrs Jury, for a separation order. However, it is apparent from the findings of the District Court Judge, to which I have referred, that he found, as a matter of fact, at the hearing of all the evidence, that he was not so satisfied. There is nothing before me which would entitle me to interfere with his finding of fact.

So far as interpretation of Section 15(2) of the Domestic Protection Act 1982 is concerned, the essence of Mr Roberts' submission was that if there were proceedings before a Court in which a separation order had been sought, then the Court cannot make a non-molestation order unless a separation order has been made.

Mr McDonald, in response to that submission, submitted that Section 15(2) must be read in a manner which enables the Court to make a non-molestation order whenever it makes either a separation order or an occupation order or a tenancy order in the same proceedings. Mr Roberts argued that the subsection was ambiguous and should not be read in that way. I can see no ambiguity in the subsection of the sort argued by Mr Roberts. These were proceedings in respect of which an occupation order was sought and made. That being so, it seems to me to be clear, giving the subsection its ordinary meaning, that the Court was entitled to make a non-molestation order. To adopt the interpretation urged upon me by Mr Roberts would not only make nonsense, in my

view, of the subsection, but would make nonsense of the provisions of the Act entitling a Court to make ex parte non-molestation orders in the circumstances set out in Section 14 of the Act.

I therefore uphold the decision of the District Court Judge and reject the submission of the Appellant.

Before leaving the appeal, I should mention that Mr Roberts, in his submissions in reply to those of Mr McDonald, submitted that the ex parte non-molestation order, the subject matter of the proceedings, may have been a nullity and made without jurisdiction because it was not the first ex parte non-molestation order made in the proceedings. That was not a matter before the District Court and not a matter that was put to me in the Appellant's original submissions, nor was it a matter to which Mr McDonald had any opportunity to make response. The Appellant must be left to such other rights as he may have in respect of that matter.

The appeal is dismissed.

J.

Solicitors for the Appellant: J. Roberts
Taupo

Solicitors for the Respondent: Crown Solicitor
Rotorua