IN THE MAGISTRATES' COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Case No. L11052828

DIRECTOR OF PUBLIC PROSECUTIONS — Prosecution

v

NATHAN COPE (a pseudonym)[1] — Accused

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| MAGISTRATE: | Magistrate Foster |
| WHERE HELD: | Melbourne |
| DATE OF HEARING: | 21–23 April 2021, and 12 July 2021 |
| DATE OF DECISION: | 17 September 2021 |
| CASE MAY BE CITED AS: | *DPP v Cope (a pseudonym)* |
| MEDIUM NEUTRAL CITATION: | [2021] VMC 014 |

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CRIMINAL LAW – Contravention of family violence intervention order contrary to s 123(2) of the *Family Violence Protection Act 2008* – Whether offence is one of strict liability – Defence of honest and reasonable mistake of fact – Charges dismissed.

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| APPEARANCES: | COUNSEL | SOLICITORS |
|---|---|---|
| Prosecution | Mr S Davison | Ms A Hogan, Solicitor for Public Prosecutions |
| For the Accused | Ms B Franjic | Tony Hargreaves & Partners |

[1] To ensure that there is no possibility of identification of the protected person, this judgment has been anonymised by the adoption of pseudonyms in place of the accused and protected person's names.

HIS HONOUR:

**Background**

1 The accused is the respondent in a family violence intervention order that was made on 11 October 2019 for a period of three years. The protected person named in the family violence intervention order, is 'FG'.

2 The accused is charged with contravention of a family violence intervention order, contrary to s 123(2) of the *Family Violence Protection Act 2008* (*'FVP Act'*). The charge alleges that the accused did so by being within 200 metres of FG's place of work.

3 The order includes a condition that the accused not

> go to or remain within 200 metres of [FG's residential address] or any other place where [FG] lives, works or attends school/childcare.

4 The order does not specify a place or location where FG worked.

5 On 16 January 2020, the accused attended at a café, which was within 200 metres of one of FG's places of work at that time. This is the conduct that gives rise to the charge. The accused has pleaded not guilty to the charge.

6 At the hearing, the accused gave evidence that he did not know that FG worked within 200 metres of the café he attended.

7 On 23 April 2021, at the conclusion of a three day hearing, I determined that, as a matter of fact, the accused did not know that FG worked at an address which was within 200 metres of the café that he visited on 16 January 2020.[2]

8 The prosecution then asserted that the offence was still made out, by reason of the offence being one of strict liability. The prosecution further asserted that the accused had not made out any defence of honest and reasonable mistake of fact. These matters were the subject of further extensive legal argument which is detailed below.

**Competing submissions**

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2 Transcript of Proceedings (21–23 April 2021) 288.23-289.6.

9 The prosecution submits that the offence under s 123(2) is one of strict liability. It argues that

> the only intention that the prosecution must prove in the proceedings is an intention by the defendant to do the acts that constitute a breach of the intervention order.[3]

10 The accused contends that the prosecution must prove that the accused knew, when he went to the café on 16 January 2020, that FG worked within 200 metres of the café.

**Legislative provisions**

11 Section 123 of the *FVP Act* sets out the following:

> **123 Contravention of family violence intervention order**
>
> (1) This section applies if a person against whom a family violence intervention order has been made—
>
> (a) has been served with a copy of the order; or
>
> (b) has had an explanation of the order given to the person in accordance with section 57(1), 60G(1) or 96(1).
>
> (2) The person must not contravene the order.
>
> Penalty: Level 7 imprisonment (2 years maximum) or a level 7 fine (240 penalty units maximum) or both.
>
> (2A) It is immaterial that some or all of the course of conduct constituting an offence against subsection (2) occurred outside Victoria, so long as the protected person was in Victoria at the time at which that conduct occurred.
>
> (2B) It is immaterial that the protected person was outside Victoria at the time at which some or all of the course of conduct constituting an offence against subsection (2) occurred, so long as that conduct occurred in Victoria.
>
> (3) In a proceeding for an offence against subsection (2) constituted by contravening a family violence intervention order, it is a defence to the charge for the accused to prove that—
>
> (a) the accused was the respondent under the family violence intervention order; and

(b) a family violence safety notice in relation to the same protected person and respondent was also in force at the time the offence was alleged to have been committed; and

(c) the accused's conduct was not in contravention of the family violence safety notice.

**Legal principles**

12 Section 123 of the *FVP Act* does not expressly provide for a *mens rea* element.

13 At common law there is a presumption that *mens rea* is an essential ingredient of every offence.[4] *Mens rea* need not be expressed in legislation as an element of an offence for it to exist. It is presumed. This presumption, however, may be displaced.

14 The reason for the presumption "is that it is repugnant to basic and long-accepted notions of criminal responsibility to hold a person to be guilty of a crime without some element of mental fault, such as intention or knowledge".[5]

15 In *CTM v The Queen*, Hayne J said:[6]

> To read a statute which creates a statutory offence that forms part of the general criminal law as subject to the general principles according to which the criminal law is administered does no more than reflect the fact that '[s]ociety and the law have moved away from the primitive response of punishment for the actus reus alone'. It avoids what has been called 'the public scandal of convicting on a serious charge persons who are in no way blameworthy'. And '[i]t is now firmly established that mens rea is an essential element in every statutory offence unless, having regard to the language of the statute and to its subject matter, it is excluded expressly or by necessary implication'.[7]

16 The presumption is particularly strong where the offence is "truly criminal" in character.[8]

17 Typically, strict liability offences are regulatory in nature, such as public safety or environmental offences.[9]

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3 Prosecution, 'Outline of Submissions', [22].
4 *He Kaw Teh v The Queen* (1985) 157 CLR 523, 528 ('*He Kaw Teh*').
5 *Azadzoi v County Court of Victoria* [2013] VSC 161, [22].
6 (2008) 236 CLR 440, 483–4 [148].
7 See, also, *He Kaw Teh*, 566 (Brennan J).
8 *Gammon v Attorney-General (Hong Kong)* [1985] 1 AC 1, 14 (cited with approval in *He Kaw Teh*, 566 (Brennan J)).
9 *R v Wampfler* (1988) 11 NSWLR 541; *Kidd v Reeves* [1972] VR 563.

18 The principles that determine whether an offence is one of *mens rea* are found in the High Court case of *He Kaw Teh*. Gibbs CJ cited with approval the principles stated in *Sherras v De Rutzen*:[10]

> There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered.[11]

19 Gibbs CJ then outlined that in considering whether the presumption as to *mens rea* has been displaced by Parliament the following matters should be considered:

(a) the words of the statute creating the offence (and thus the intention of Parliament);
(b) the subject matter with which the statute deals and the seriousness of the consequences; and
(c) whether strict liability would assist law enforcement.[12]

20 The legal principles that are derived from *He Kaw Teh* were further considered and summarised by the Victorian Court of Appeal in the case of *Stanojlovic v DPP*:[13]

(a) The question of the relevant state of mind, if any, is essentially one of the construction of the statute creating the offence.
(b) The statute is to be interpreted in light of the general principles of the common law which govern criminal responsibility.
(c) It is a principle at common law that an honest and reasonable, but mistaken, belief in a set of facts which, if they existed, would have made the defendant innocent provides a ground of exculpation. The evidentiary onus of raising the ground is on the defendant. Once that occurs, the legal onus lies on the prosecution to prove beyond reasonable doubt the absence of an honest and reasonable belief.
(d) There is a strong presumption that proof of state of mind is relevant where an offence carries serious penal consequences. Conversely, the strength of the presumption is weaker for offences that 'are not criminal in any real sense'.
(e) The presumption may be displaced where the statute is regulatory in nature and is concerned with issues of social concern, such as environmental or industrial requirements or public safety.
(f) In deciding whether the presumption has been displaced, it is necessary to consider: (1) the words of the statute creating the offence; (2) the subject matter and purpose of the statute; and (3) whether imposing absolute liability will promote the observance of the statute. These considerations do not necessarily lead to the same conclusion.
(g) Ultimately, it is the language of the statute that is controlling. The presumption may be displaced by a sufficiently plain manifestation of legislative intention, either by express words or necessary implication.[14]

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10 (1895) 1 QB 918.
11 Ibid 912.
12 *He Kaw The*, 528–30.
13 [2018] VSCA 152 (***Stanojlovic***).
14 Ibid [22] (citations omitted).

21 The question of whether *mens rea* is required for the offence under s 123(2) of the *FVP Act* has not been decided in Victoria, in any reported cases.

22 The prosecution relies on the South Australian case of *Police v Beukes*[15] (the persuasive, but not binding authority) which dealt with the offence of contravening a domestic violence intervention order.

23 The issue considered in *Beukes* was

> whether the prosecution was required to prove as an element of the offence that the respondent intended by his actions to breach the restraining order. That could be put more specifically as to whether proof was required, not only of the voluntary and deliberate nature of the acts amounting to the breach, but also of the knowledge that those acts would breach the order….[16]

24 The breach in *Beukes* involved the respondent attending the house of the affected family member at her request when he was prohibited from doing so under the order. The respondent to the order told police he believed the order had been revoked and that the affected family member had told him so.

25 The relevant provision was s 15(1) of the (now repealed) *Domestic Violence Act 1994* (SA) ('the SA Act'), which read:

> (1) A person who contravenes or fails to comply with a domestic violence restraining order or a registered foreign domestic violence restraining order is guilty of an offence.
>
> Maximum penalty: imprisonment for 2 years.

26 In *Beukes*, the court said:

> Therefore, I agree with the submission by the appellant that the offence created is one of strict liability. The only intention which must be proved by the prosecution is an intention to do the acts which constitute the breach of the order. The prosecution must prove that those acts were intentional or reckless. It is not necessary to prove that the defendant intended by those acts to contravene the order, or that he knew that his actions amounted to a contravention of the order. That leaves the prosecution with the task of excluding the defence of honest and reasonable mistake of fact, if it is raised. [17]

27 Counsel for the accused, in closing submissions, contended that:

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15 [2011] SASC 9 ('*Beukes*').
16 Ibid [6].
17 Ibid [10].

(a) The Court in *Beukes* placed significant reliance on the possibility that the protective purposes of the Act could be undermined if it was required to be proved that the accused intended to breach the order.

(b) The Court made only brief reference to the other two considerations in *He Kaw Teh*.[18] Effective service was considered to be a strong argument in favour of strict liability, as service ensures a respondent is appraised of their obligations and can "take care" not to breach the terms of the order.

(c) *Beukes* can be distinguished on at least two bases.

(d) Firstly, in *Beukes* the Court was dealing with a broader offence that contemplated offending by *omission* as well as by act (which s 123(2) does not). Specifically:

(i) The South Australian provision made it an offence to either "contravene" *or* "fail to comply" with a domestic violence restraining order.

(ii) In contrast, the offence created by s 123(2) refers solely to contravention of an order. The word "contravene" suggests a positive act, whereas the term "fail to comply" may include an omission or an oversight, which may be passive or deliberate. The Court in *Beukes* was therefore dealing with a provision that is broader than s 123(2). This is a point of distinction between *Beukes* and the case before this Court.

(e) Secondly, the *FVP Act* contains surrounding offence provisions that provide for *mens rea*, whereas the *Domestic Violence Act 1994* (SA) did not.[19]

(f) The analysis in *Beukes* is not persuasive and should not be followed by this Court.

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18 Ibid [8]–[10].

19 The SA Act contained only one offence provision, which is the one that was considered by the Court in *Beukes*.

**Application**

28 I turn now to analysing s 123(2) of the *FVP Act* together with each of the considerations that were identified by Gibbs CJ in *He Kaw Teh*.

*Construction of the statute creating the offence*

29 Section 123 of the *FVP Act* is silent as to *mens rea*.

30 From the terms of the section itself, it is not clear that Parliament intended the offence to be one of strict liability. There is certainly nothing on the face of the section to indicate that *mens rea* is expressly excluded.

31 The interpretation of a statute requires consideration of the text, context and purpose of the statute in question, including the consequences of a literal or a grammatical construction.[20] It must also be interpreted in a way that does not encroach on human rights, and should that occur, clear and unequivocal language would be used so that Parliament may be accountable to the electorate.[21]

32 Enacted in 2008, the *FVP Act* replaced the *Crimes (Family Violence) Act 1987*. It provides for the making of civil intervention orders that place restrictions on the conduct, movement and behaviour of respondents.

33 When the *FVP Act* was enacted in 2008, it included s 123 in essentially the same terms as it is today.

34 Contravening a family violence intervention order attracts a maximum penalty of level 5 (two years) imprisonment or a level 7 fine (240 penalty units), or both.

35 This undoubtedly reflects Parliament's intention that a breach of an intervention order be considered a serious criminal offence.

36 In considering the construction of s 123(2), one must (consistent with the approach that was taken by the Court in *He Kaw Teh*[22]*)* look to the surrounding provisions in

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20 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [78].
21 *Momcilovic v The Queen* (2011) 245 CLR 1, [43].
22 *He Kaw Teh*, 529.

the *FVP Act*.

37 *He Kaw Teh* dealt with drug importation charges under the *Customs Act 1901* (Cth). The relevant provision (s 233B(1)(b)) was silent as to *mens rea* or about whether the accused would be excused from liability for having a reasonable excuse. In contrast, surrounding paragraphs in the same subsection relating to the possession of drugs (ss 233B(1)(a), (c) and (ca)) expressly provided for *mens rea*, stipulating that an accused would be excused from liability if he/she had a reasonable excuse. Gibbs CJ addressed this "marked contrast", in considering whether the presumption of *mens rea* was displaced in s 233B(1)(b):

> In deciding whether the presumption has been displaced by s.233B(1)(b), and whether the Parliament intended that the offence created by that provision should have no mental ingredient, there are a number of matters to be considered. First, of course, one must have regard to the words of the statute creating the offence. The words of par.(b) of s.233B(1) themselves contain no clear indication of Parliament's intention. However they stand in marked contrast to pars.(a), (c) and (ca) of the subsection, all of which deal with the possession of prohibited imports in certain circumstances and all of which contain the words "without reasonable excuse (proof whereof shall lie upon him)". The absence of those words from par.(b) suggests that no reasonable excuse will avail a person who imports narcotics. That would lead to an absurdly Draconian result if it meant that a person who unwittingly brought into Australia narcotics which had been planted in his baggage might be liable to life imprisonment notwithstanding that he was completely innocent of any connexion with the narcotics and that he was unaware that he was carrying anything illicit. On the other hand, if guilty knowledge is an ingredient of the offence, it becomes understandable that no excuse should be allowed to a person who has knowingly imported narcotics. This provides an indication, although only a slight one, that by par.(b) the Parliament did not intend to displace the presumption of the common law that a blameworthy state of mind is an ingredient of the offence. [23]

38 The *FVP Act* contains two other criminal offences that pertain to contravening an intervention order. They were introduced in 2012.[24] They are found in s 123A (contravention to cause harm or fear for safety) and s 125A (persistent contravention of an intervention order or safety notice).

39 These offences carry higher maximum penalties of level 6 imprisonment (five years), a level 6 fine (600 penalty units) or both. In essence, they are aggravated forms of a s

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23 Ibid.

24 *Justice Legislation Amendment (Family Violence and other matters) Bill 2012*.

123 breach of intervention order. Both sections expressly refer to a mental element.

40 Section 123A creates the offence of *contravention of order intending to cause harm or fear for safety*. That offence includes reference to a *mens rea*. It says:

> …
>
> (2) A person against whom a family violence intervention order has been made and who—
>
> (a) has been served with a copy of the order; or
>
> (b) has had an explanation of the order given to him or her in accordance with section 57(1), 60G(1) or 96(1)—
>
> must not contravene the order intending to cause, or knowing that his or her conduct will probably cause—
>
> (c) physical or mental harm to the protected person, including self-harm; or
>
> (d) apprehension or fear in the protected person for his or her own safety or that of any other person.

41 The offence under s 123A is essentially an aggravated version of the offence under s 123(2). It otherwise uses the same language as s 123.

42 Section 125A creates the offence of *persistent contravention of notices and orders*. An offence under this section comprises a series of s 123(2) offences within a 28-day period.

43 In order to prove the offence, s 125A(2)(c) requires *in respect of each breach* that "the accused *knew or ought to have known* that the conduct constituted a contravention of the family violence safety notice or family violence intervention order".

44 Section 125A, relevantly, reads:

> (1) A person must not persistently contravene a family violence safety notice or a family violence intervention order.
>
> (2) To prove an offence against subsection (1) it is necessary to prove that—
>
> (a) the accused engaged in conduct that would constitute an offence against section 37 or 123; and

(b) on at least 2 other occasions within a period of 28 days immediately preceding the conduct referred to in paragraph (a), the accused engaged in conduct that would constitute an offence against section 37 or 123 in relation to—

(i) the same protected person; or

(ii) the same family violence safety notice or family violence intervention order (whether an interim order or a final order), whether or not in relation to the same protected person; or

(iii) a family violence safety notice and a family violence intervention order (whether an interim order or a final order) made on the family violence safety notice as an application, whether or not in relation to the same protected person; and

(c) on each of the occasions referred to in paragraphs (a) and (b) the accused knew or ought to have known that the conduct constituted a contravention of the family violence safety notice or family violence intervention order (as the case requires).

…

45 It can be seen that s 125A(2)(c) clearly identifies a *mens rea* that must be proved for a contravention of that section.

46 It would be incongruous for the two aggravated contravention offences under ss 123A and 125A to require *mens rea*, but for the *simpliciter* offence under s 123 to be one of strict liability.

47 Most significantly, to require proof of *mens rea* for the individual s 123(2) offences that make up the persistent s 125A offence, but to not require *mens rea* for a standalone offence under s 123(2) would promote inconsistency within the structure and operation of the *FVP Act*.

48 Both the *simpliciter* and the aggravated offences carry considerable terms of imprisonment. The serious nature of the subject matter of family violence and accompanying serious consequences for all three contravention offences strongly suggests that the presumption of *mens rea* has not been displaced in s 123(2).

49 Similar reasoning to that adopted by Gibbs CJ in *He Kaw Teh* can be applied in this case.

50 As in *He Kaw Teh*, it would produce an "absurdly Draconian result" if s 123(2) did not contain a *mens rea* element.

51 A consideration of the surrounding provisions in the *FVP Act* provides an indication that by s 123(2), the Parliament did not intend to displace the presumption of *mens rea*.

*The subject matter with which the statute deals and the seriousness of the consequences*

52 The *FVP Act* is intended to "maximise safety for children and adults who have experienced family violence; to prevent and reduce family violence to the greatest extent possible, to promote the accountability of perpetrators of family violence for their actions".[25]

53 The preamble to the *FVP Act* recognises that family violence is a fundamental violation of human rights and is unacceptable in any form.

54 Offences involving the breach of an intervention order are "truly criminal".[26] Such offences are not regulatory or civil matters.

55 Section 123(2) carries a maximum penalty of 2 years' imprisonment, including for a first offence. Imprisonment is, of course, the harshest sanction that a court may impose.

56 As outlined above, a strong presumption exists that proof of *mens rea* is necessary where an offence carries serious sanctions. The words of Gibbs CJ in *He Kaw Teh* are apposite:

> A convicted offender is exposed to obloquy and disgrace and becomes liable to the highest penalty that may be imposed under the law. It is unlikely that the Parliament intended that the consequences of committing an offence so serious should be visited

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25 Second Reading Speech, 21 August 2008, *Family Violence Protection Act 2008*.
26 *He Kaw Teh*, 530.

> on a person who had no intention to do anything wrong and no knowledge that he was doing so.[27]

57 The serious consequences available for contravening an intervention order, including deprivation of liberty for up to 2 years, strongly suggests that the presumption of *mens rea* has not been displaced by Parliament.

*Where strict liability would assist in law enforcement*

58 In *Beukes,* in applying *He Kaw Teh* to the question of whether putting the defendant under strict liability will assist in the enforcement of the relevant provision, Vanstone J said:

> It is noteworthy that by s 11(1) of the Act a domestic violence restraining order is not binding until it has been personally served upon a defendant. Variations or revocations of such orders must also be served personally: s11(2). These requirements tend to ameliorate what might otherwise be a harsh result if *mens rea* is not required. The scheme of the legislation is to ensure that a person against whom a restraining order is made is apprised of his obligations. Plainly, he is in a position where he can take care that the terms of the order are not breached. [28]

59 This factor (namely, whether the absence of *mens rea* would assist in the law enforcement of the provision in question) was discussed in the case of *Lim Chin Aik v The Queen*, where the court said: [29]

> It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly … which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislative imposed strict liability merely in order to find a luckless victim.[30]

60 The intervention order regime is not like a regulatory scheme that requires the interests of the individual to be subjugated to the welfare of the public as a whole if the scheme is to operate effectively.[31]

61 This was a persuasive factor for the court in *Stanojlovic*, where it was held by the Court of Appeal that the offence of probationary driver failing to display P plates is one of absolute liability. There the Court said that compliance with the regulation "is

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27 Ibid.
28 *Beukes*, [9]
29 (1963) AC 160.
30 Ibid 174.
31 See *Stanojlovic,* [31] , [46].

likely to be more effective if a charge for failure to display the applicable P plate brooks no argument about the honesty and reasonableness of the belief of the driver".[32]

62 In most cases of an alleged breach of s 123(2), it may not be difficult for the prosecution to prove *mens rea*. The guilty mind of the respondent is usually evident from their conduct and the surrounding circumstances.[33]

63 It therefore cannot be said that putting a respondent under strict liability meaningfully assists in achieving compliance with the legislation and in achieving the stated purposes of the *FPA Act*.

64 Instead, the imposition of strict liability is prone to creating a 'luckless victim'[34] – the respondent who finds themselves charged with breaching an intervention order through no fault of their own. Without a *mens rea* element, a person could potentially find themselves in breach of an intervention order by simply passing through an area where, completely unbeknownst to them, a protected person is present or works or attends school. This could befall the most conscientious and careful respondent.

65 Putting a respondent under strict liability would clearly be a significant impingement on the interests of the individual and could lead to an "absurdly Draconian result".[35]

66 The prosecution, in its outline of submissions asserts that "it is apparent that putting the defendant under strict liability will assist in the enforcement of the relevant provision…"[36] The prosecution does not say how.

67 When one considers the nature of the offence and the ways that it can be committed,

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32 Ibid [49].

33 In the present case, had I accepted the evidence of FG that the accused had previously dropped her off at the relevant work address, the prosecution would have succeeded, in my view. However, I have rejected FG's evidence on this point as being unreliable.

34 *Lim Chin Aik v The Queen* (1963) AC 160, at 174.

35 *He Kaw Teh*, 529.

36 Prosecution, 'Outline of Submissions', [21].

it is difficult to see how putting a person under strict liability would realistically assist in the enforcement of s 123(2) of the *FVP Act*.

68 When one considers what was said in *Beukes*, namely:

> Plainly, he is in a position where he can take care that the terms of the order are not breached.

the accused, in the present factual circumstances, is plainly not in a position where he can take care that the terms of the order are not breached, unless the most onerous and counter-intuitive obligations are placed upon him.

69 The accused could not ask FG to identify her workplace, so as to avoid it, because he is not entitled to contact her.

70 Perhaps (it might be asked rhetorically) the accused is required to:

(a) enquire from mutual friends or acquaintances; or
(b) undertake online searches,

to identify where FG works, so as to avoid that workplace?

71 If so, how often must the accused repeat this process so as to ensure that FG has not moved to a new workplace? Further, those enquiries identified in the preceding paragraph are likely to be in breach of the standard form of intervention order which often require a respondent not to keep the protected person under surveillance. Such a requirement upon the accused would seem to be contrary, at the very least, to the spirit of the *FVP Act*.

72 Perhaps the accused ought to have contacted the police applicant involved in making the intervention order application on behalf of a protected person. Even if the police applicant was inclined to provide the protected person's hitherto silent work address to the respondent (which, in my view, is highly unlikely) how often must a respondent follow up with a similar request so as to guard against breaching the order at any time in the future, should the protected person change workplaces? Perhaps there is not even a police applicant to contact in the first place.

73 It is readily apparent, in my view, that the mere service of the intervention order upon the accused does not "plainly" put the accused in a position where he can take

care that the terms of the order are not breached, especially where the terms of the order require him not to go within 200 metres of FG's workplace, that he does not know the existence of.

*Other considerations*

74 Furthermore, if s 123(2) of the *FVP Act* is one of strict liability, it is not difficult to think of other perverse examples of the application of this law, which would make criminal that which is otherwise perfectly innocent.

75 One example is a respondent and a protected person rounding the corner of the supermarket aisle and bumping into one another quite unexpectedly.

76 Another is a situation whereby a respondent and a protected person are seated close to one another in a darkened movie cinema, only becoming aware of the other's existence at the conclusion of the movie when the lights come on.

77 Both situations would involve the breach of the usual condition, existing in many such intervention orders, that the respondent not approach within 5 or 10 metres of the protected person.

78 It is difficult to see how a defence of honest and reasonable mistake of fact could be established by this hypothetical respondent, for the respondent would not have positively turned his mind to the fact of the protected person being in the same supermarket or movie theatre.

79 When discussing one of these examples with the prosecution, the following exchange took place:[37]

> HIS HONOUR: Yes. What about a situation whereby (an order requires you) not come within 10 metres of a person. What if you're both sitting in a movie theatre, it's all dark, someone comes in late and sits down 10 metres away and then the lights come at the end of the movie theatre and you're sitting only three seats away from someone, is that a breach of the order?
> PROSECUTOR: Technically it is, Your Honour.

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37 Transcript of proceedings (12 July 2021) 6.23

> HIS HONOUR: It is a breach of the order. So what do you say, there should be criminal liability with up to two years' imprisonment applying in such circumstances?
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> PROSECUTOR: (indistinct) by application of the law, yes, Your Honour. Of course, it's not a matter for me but it comes down to prosecution discretion as to whether they would charge an offence for such a circumstance.
>
> HIS HONOUR: It always concerns me when things come down to prosecutorial discretion as opposed to people being able to actually know (whether or not) they are committing offences.
>
> PROSECUTOR: Yes, and that brings a problem with this act, Your Honour.

80 The problem with relying on prosecutorial discretion to ameliorate the harsh application for which is being contended by the prosecution, is evident in this case.

81 Having already determined on 23 April 2021, that as a matter of fact, the accused did not know that FG worked at an address which was within 200 metres of the café that he visited on 16 January 2020 the prosecution persisted with submissions that:[38]

(a) the offence for which the accused was charged was a strict liability offence;

(b) it was open for the accused to run a defence of honest and reasonable mistake of fact; however

(c) the accused had not, on the evidence, established a defence of honest and reasonable mistake of fact because the accused had neither adduced evidence nor pointed to evidence in the proceedings tending to show his relevant belief and reasonable grounds for it.[39]

82 To my mind, there is some force in what the prosecutor asserts, namely:

(a) the accused did not turn his mind to where FG worked[40]; and therefore

(b) the accused could not be said to have held any positive honest and reasonable belief that FG did not work there.

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38 Transcript of Proceedings (21–23 April 2021) 288.3 (further expanded upon at 288.23 – 289.6).

39 Prosecution, Submissions dated 18 May 2021, [26]–[27].

40 This, to my mind, is because the accused did not know and had no reason to think that FG worked within 200 metres of the café.

83 However, this provides yet another reason why the offence should be construed as one requiring the proof of *mens rea*.

84 No person ought be exposed to obloquy and disgrace and become liable to the highest penalty that may be imposed under the law simply by:

(a) going about their lives in a lawful fashion; and

(b) being unaware that an unidentified address might be a prohibited location to visit.

85 As is evident here, the law should be slow to adopt "prosecutorial discretion" as the basis upon which to avoid the harsh outcomes that may arise if the offence was to be one of strict liability.

**Honest and reasonable mistake of fact**

86 The accused submits that the facts of this case give rise to a defence of honest and reasonable mistake of fact, in the event that the court decides that the offence under s 123(2) is one of strict liability.

87 Specifically, the accused submits that the court can be satisfied that the accused honestly and reasonably believed that FG did not work within 200 metres of the café visited by the accused on 16 January 2020.

88 Under the *Proudman v Dayman* defence, the prosecution must disprove beyond reasonable doubt the accused's state of mind that he had an honest and reasonable belief in a set of facts at the time which, if they existed, would have made him innocent of the offence.[41]

89 The accused bears only an evidentiary burden; the prosecution retains the burden of proving guilt by establishing beyond reasonable doubt that the accused did not hold

41 (1941) 67 CLR 536.

the belief in question.[42]

90 In *He Kaw Teh*, the High Court made some observations about the nature of the mistaken belief required before an accused person can avail themselves of the *Proudman v Dayman* defence. Brennan J said:

> An absence of an honest and reasonable but mistaken belief is not the equivalent of knowledge of the facts which make the act criminal: in the first place, an absence of a mistaken belief is something less than knowledge. Thus inadvertence to a fact does not amount to knowledge of that fact, but it is consistent with the absence of a mistaken belief about it.[43]

91 The accused's state of mind must involve an affirmative belief in a certain fact or state of affairs, rather than mere inadvertence. It was said by Gleeson CJ in *State Rail Authority of NSW v Hunter Water Board*:[44]

> ... what is involved is something more than inadvertence. In a number of different contents courts have stressed the need to show an affirmative belief in a certain fact or state of affairs, as distinct from a mere absence of knowledge.[45]

92 In this case, counsel for the accused contends that:

(a) there is evidence of a positive belief held by the accused that the complainant was a community nurse and that she did not work in the vicinity of the café in question. Evidence of that affirmative belief comes from the accused's police interview and from sworn evidence that he gave to the Court.

(b) the accused gave evidence of the basis for that belief. He said that during his relationship with FG:

(iii) he understood that she was a mobile nurse[46] and she made it clear to him that she was a mobile nurse, "she started from home, she finished from home";[47]

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42 *Proudman v Dayman* (1941) 67 CLR 536, 582 (Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ).
43 Ibid 575.
44 (1992) 28 NSWLR 721.
45 Ibid 725 (citations omitted).
46 Transcript of Proceedings (21–23 April 2021) 256.12.
47 Ibid 261.15–20.

(iv) she told him that "she went and visited patients within the community";[48]

(v) he was not aware that she went to an office to collect supplies or attend meetings;[49]

(vi) he does not recall her telling him that her office was in Ravenhall;[50]

(vii) there was never any conversation about the physical location of her office;[51]

(viii) she did not indicate to him either directly or by reference to something else where her office was;[52]

(ix) the location of her office was never elaborated on and he did not "probe into or ask further questions as to where she went";[53]

(x) he never drove her to any place of employment or picked her up from any place of employment;[54]

(xi) he never dropped her off at her Ravenhall workplace address;[55] and

(xii) he did not realise that the Bolton Clark office was at that location until he spoke to his friend Nicole after the alleged breach.[56]

(c) This is not a case involving 'inadvertence to a fact'. Rather, the court can be satisfied that the accused held an affirmative belief as to the complainant's place of work. His belief was based on his previous knowledge of the

48 Ibid 256.21.
49 Ibid 257.1–15.
50 Ibid 258.2–4.
51 Ibid 266.8.
52 Ibid 259.5.
53 Ibid 261.11.
54 Ibid 266.19–266.22.
55 Ibid 267.16.
56 Ibid 271.28–272.2.

complainant's work habits and locations and on things she had said to him during their relationship. The basis for that belief was disclosed in his record of interview and in sworn evidence. It amounts to an honest and reasonable belief in the existence of a state of affairs that made his act innocent.

**Conclusion**

93 Having assessed each of the considerations that were identified by Gibbs CJ in *He Kaw Teh,* and having considered the persuasive, but not binding, authority of *Beukes*, I conclude that the prosecution is required to establish a *mens rea* element in any prosecution under s 123(2) of the *FVP Act.*

94 The prosecution was required to prove beyond reasonable doubt that the accused knew, when he went to the café on 16 January 2020, that FG worked within 200 metres of the café.

95 The prosecution has failed to do so. Accordingly, I must dismiss the charge.

96 It is not necessary for me to consider the remaining matters put to me by the parties as to whether (if the charge was one of strict liability) the accused had established a defence of honest and reasonable mistake of fact.

97 Had I been required to determine this issue, I would not have been satisfied that a defence of honest and reasonable mistake of fact had been made out by the accused on an evidential basis.

98 The evidence revealed a classic example of "mere inadvertence". The evidence does not rise to the level of a positive belief, on the part of the accused, that FG did not work at the subject premises.

99 That is no criticism of the accused. The "mere inadvertence" finding is a corollary of my finding that the accused had no cause to believe that FG worked in the vicinity of the café and therefore did not further turn his mind to it. I refer, once again, to my comments at paragraphs [82]–[84] of this judgment.

100 Nor is it necessary for me to deal with the prejudice argument put by counsel for the accused although those submissions[57] (and, in particular, the change in position adopted by the prosecutor concerning the need to establish mens rea in this proceeding) cause me great concern with the manner in which this case was prosecuted.

57 Accused, Submissions dated 7 May 2021, [63]–[64].