

***Stevens v McCallum* [2006] ACTCA 13 (30 June 2006) – Australian Capital Territory Court of Appeal**

‘Assault’ – ‘Contravention of a protection order’ – ‘Evidence issues’ – ‘Hearsay’ – ‘Hostile witness’ – ‘Incompetence of counsel’ – ‘Physical violence and harm’ – ‘Protection orders’ – ‘Unco-operative witness’

Charge/s: Assault, contravention of a protection order.

Appeal type: Appeal against conviction and appeal against sentence.

Facts: The appellant was charged with assaulting his female partner (‘the complainant’) and contravening a protection order in her favour. He pleaded guilty to assault but not guilty to contravening a protection order. The offending came to light after a police officer (‘the informant’) attended the complainant’s premises. The informant observed that the complainant was very distressed and had bruises on her body. A conversation between the complainant and the informant was recorded. In this conversation, the complainant made some allegations that the appellant had hit her but she was largely unresponsive to questions and was affected to a considerable degree by alcohol (See [41]-[43]). At trial, the prosecution sought to prove the tape and transcript of this conversation only for its possible use in refreshing the complainant’s memory. However, counsel for the appellant, Mr Elmarazey, tendered this document as evidence (‘exhibit 3’).

The complainant was called to give evidence after the informant. When asked about whether there was an incident between her and the appellant, she stated ‘I can’t remember the exact details’ and proceeded to give an account of the evening that made no reference to any physical violence. She agreed that she had a conversation with the informant but could not recall its contents. The prosecution then proceeded to cross-examine the complainant about the various bruises that had been observed on her that evening. The complainant said she could not remember how the bruises happened. The prosecution applied to the magistrate for leave to cross-examine the complainant on the basis that the witness had made a prior inconsistent statement with reference to exhibit 3. Mr Elmarazey did not object. The complainant’s response was to accept that exhibit 3 accurately reflected what she had told the informant but she could neither confirm nor deny that it represented what actually happened (See [26]-[40]). Accordingly, absent the tender of exhibit 3 as evidence, there would have been insufficient evidence to convict the appellant (See [47]).

The magistrate found the appellant had assaulted the complainant and sentenced him to 12 months imprisonment for the assault and 3 months imprisonment for the breach of protection order. He was sentenced to an additional 6 months imprisonment for breach of an earlier imposed recognisance.

Issue/s:

1. The incompetence of counsel for the appellant, Mr Elmarazey, led to a miscarriage of justice.
2. The sentencing magistrate erred in assuming that the injuries sustained by the complainant were the result of a 'violent and prolonged' assault.

Decision and reasoning: The appeal was allowed. First, in the absence of the tender of exhibit 3 by Mr Elmarazey, it was, at the very least, unlikely that the statement would have been admitted as evidence that the appellant assaulted the complainant. It was open to the prosecutor to seek leave to give the statement to the complainant to refresh her memory, if s 32 of the Evidence Act were satisfied. However, the failure of this process to refresh the complainant's memory meant the prosecutor could not tender the prior statement as evidence of the truth of its contents (See [145]-[180]). There was a resulting miscarriage of justice (See [181]-[191]).

Second, the sentencing judge erred in assuming that all the injuries resulted from the charged assault. Even if the terms of exhibit 3 had been properly proved, they included an allegation of assault that had occurred the previous evening. The only unequivocal allegation of recent violence was that the appellant hit her in the face on their return from the shops. It was an error not to attempt to distinguish between the violence inflicted the previous night and those in the hours preceding the interview with the informant (See [196]-[207]).