

***Kien v R* [2012] ACTCA 25 (24 May 2012) – Australian Capital Territory Court of Appeal**

‘Choking so as to render unconscious’ – ‘Exposing a child’ – ‘Intentionally inflicting actual bodily harm’ – ‘Physical violence and harm’ – ‘Provocation’ – ‘Risk factor- strangulation’ – ‘Sentencing’

Charge/s: Intentionally inflicting actual bodily harm, choking so as to render unconscious.

Appeal Type: Appeal against sentence.

Facts: The appellant’s marriage with his wife ended and she obtained a domestic violence protection order against him (though this was not in place at the time of the offence). The appellant went to the family home and an argument ensued, which developed into a physical fight. The appellant then took a chair from his wife (which she was threatening to throw at him) and struck her with it so forcefully that it broke into pieces. He then choked her until she became unconscious. He then wrapped a towel around her neck and used both hands to pull the material down toward the floor. A domestic violence protection order was previously in place in favour of the victim. He was subject to a good behaviour order at the time of the offences imposed for a prior breach of the protection order. He was sentenced to a total of four years and seven months’ imprisonment with a non-parole period of three years and one month.

Issue/s:

1. Whether the sentencing judge erred in finding that the offences were unprovoked.
2. Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed.

1. The appellant submitted that the fact the offences were not unprovoked should have mitigated the severity of the sentence. This argument was rejected — the actions of the victim were all in response to the appellant coming to the matrimonial home where he was not welcome. He was asked to leave but did not do so. His response to his wife’s actions were so disproportionate that they could not have been seen as provocative.
2. Counsel for the appellant submitted that two comparable cases showed the sentence was manifestly excessive. This argument was rejected, with the Court holding that the offences were serious and resulted in severe facial injuries committed in a context where the appellant was not welcome in the house. While they were heavy sentences, they were proportionate to the criminality involved.