

***R v Wyper* [2017] ACTCA 59 (11 December 2017) – Australian Capital Territory Court of Appeal**

‘Appeal against conviction’ – ‘Complainant’s credibility’ – ‘Crown appeal against sentence’ – ‘Intensive correction order’ – ‘People from culturally and linguistically diverse backgrounds’ – ‘Post-separation violence’ – ‘Sentencing’ – ‘Sexual and reproductive abuse’

Charges: Engaging in sexual intercourse without consent and being reckless as to whether the person was consenting x 1.

Appeal type: Defendant’s appeal against conviction and Crown appeal against sentence.

Facts: The complainant and defendant were in a relationship ([11]). The defendant asked the complainant to leave the house; she did not want to leave. The complainant alleged that the defendant held her down and digitally penetrated her ([13]). The defendant denied that he digitally penetrated the complainant, and alleged that she damaged a number of his belongings ([14]). The defendant called the police about the property damage, and the complainant called the police about the sexual assault 2 hours later ([20]-[21]). A medical examination of the complainant revealed abrasions consistent with assault ([23]).

The defendant was convicted at trial. He was sentenced to 2 years and 6 months’ imprisonment, served by way of intensive correction order (‘ICO’), and 100 hours’ community service ([2]).

Issues: The defendant appealed against conviction on 3 grounds: (a) the verdict was unsafe and unsatisfactory; (b) the trial judge caused a miscarriage of justice by failing to fairly put the defence case to the jury; and (c) the trial judge caused a miscarriage of justice by failing to direct the jury that the complainant had a motive to lie.

The Crown appealed on the ground that the sentence was manifestly inadequate.

Decision and Reasoning: Both the defendant’s appeal against conviction and Crown appeal against sentence were dismissed ([8]).

Appeal against conviction

On ground (a), the defendant argued that the verdict was unsafe and unsatisfactory having regard to the unreliability of the complainant’s evidence. The Court (Murrell CJ, Bromwich J and Robinson AJ) held that while it was ‘somewhat implausible’ that the complainant did not cause the property damage, it was open to the jury to convict the defendant ([53]).

On grounds (b) and (c), the defendant argued that the judge should have directed the jury on the complainant's possible motive to lie to avoid the consequences of her causing the property damage. However, the Court stated that the summing up was fair, given that the motive to lie was not a large issue in the trial ([66]-[68]).

Crown appeal against sentence

The Crown argued that by ordering an ICO, the trial judge failed to give adequate weight 'to the principle that, for family violence offences, the sentencing purposes of general deterrence and denunciation are particularly important' ([96]). The Court reiterated the importance of general and specific deterrence in sentencing family violence offenders ([97]), however, the Court emphasised the exceptional nature of the offending at [99]:

This was not a typical offence of family violence. There was no evidence of a history of domestic violence, controlling behaviour or psychological abuse. There were none of the typical indicia of power imbalance. Rather, the offence occurred in the context of a relationship ending, without those features apparently being present.

Imposing an ICO, while lenient, was justified by the defendant's subjective circumstances, such as his lack of criminal history, and the fact that there was no history of domestic violence in the relationship ([129]-[130]).