

***Hossen v Hughes* [2014] ACTSC 101 (21 May 2014) – Australian Capital Territory Supreme Court**

‘Aggravating and mitigating factors’ – ‘Assault’ – ‘Exposing children’ – ‘People from culturally and linguistically diverse backgrounds’ – ‘Physical violence and harm’ – ‘Sentencing’

Charge: Assault

Appeal type: Appeal against sentence

Facts: The appellant, his wife (the complainant) and their children moved to Canberra in order for him to complete a PhD. After their daughter complained that she did not like the lunch the complainant was preparing, the complainant struck the daughter’s hip with a plastic doll to ‘chastise her for her behaviour’. The appellant became angry at the complainant’s actions and slapped her. When questioned by police, the appellant said ‘I do not think I did anything wrong. In my culture, I did not do anything wrong’. He pleaded guilty to assault at the earliest opportunity and expressed remorse in a letter to the court.

At trial, the appellant was unrepresented but had a Bangladeshi interpreter. A conviction was recorded and the appellant was ordered to sign a good behaviour undertaking for two years. The magistrate noted that ‘cultural differences may be in play here, but I don’t accept them on the basis that you’ve been here for two years, you’ve acknowledged in your own statement to me today that you understand what you did was wrong’.

Issues: Some grounds of appeal were:

1. The magistrate erred in treating the presence of their daughter as an aggravating factor when the assault of the complainant would not have occurred but for her hitting their daughter;
2. The magistrate erred in not giving sufficient reasons for refusing a non-conviction order pursuant to s 17 of the *Crimes (Sentencing) Act 2005 (ACT)* (the Act).

Decision and reasoning: The appeal was dismissed and the sentence imposed by the magistrate was confirmed.

1. In sentencing, the magistrate referred to Refshauge J’s comments in *Elson v Ayton* [2010] ACTSC 70 to conclude that the presence of their daughter was an aggravating factor and that ‘the courts have no tolerance, or very little tolerance, for people who engage in domestic violence, and certainly in the presence of children’. Counsel for the appellant submitted that the presence of their daughter should not have been an aggravating factor because the complainant’s action in hitting her provoked the appellant’s assault and that this provocation was a mitigating factor. However, Penfold J held that there was nothing in the nature of the assault that meant their daughter’s presence was an inherent part of the objective circumstances of the offence. Further, while the complainant’s conduct in hitting her daughter with a doll

may reduce the culpability of the appellant's assault, it is not properly described as a mitigating factor. Therefore, there was no error in the magistrate's approach to the presence of their daughter.

2. The magistrate was obliged to provide an explanation to the appellant for declining to make a non-conviction order. He was unrepresented, inexperienced in the procedures of Australian courts and English was not his first language. The magistrate performed this obligation in explaining that a non-conviction order could not be made due to the nature and circumstances of the offence. However, the magistrate did not allow the appellant to put forward evidence or a proper explanation when he attempted to explain the detriment to his future should a conviction be recorded. Therefore, the magistrate erred in dealing with the appellant's application for a non-conviction order by failing to give proper consideration to the application, having regard to the particular difficulties faced by the appellant.

Despite this error, the appeal was dismissed because re-sentencing was not appropriate. Having regard to the factors in s 17 of the Act, Penfold J held there were no grounds sufficient to make a non-conviction order. In particular, the appellant's character, antecedents, age, health and mental condition; the seriousness of the offence; his extenuating circumstances; and the absence of any properly explained or substantiated claim that a conviction would have negative impacts on his future prospects, would not have excluded the making of a non-conviction order.