***Connelly v Allan* [2011] ACTSC 170 (13 October 2011) – Australian Capital Territory Supreme Court**

'Evidence' – 'People with mental illness' – 'Sentencing' – 'Voice recognition evidence'

Charges: Contravening a domestic violence order (two counts)

Appeal type: Appeal against conviction and sentence

Facts: The appellant was subject to a domestic violence order that prohibited him from contacting his former partner (the applicant), behaving in a harassing manner towards her or threatening her. The appellant breached this order by making a number of phone calls to the applicant. He was charged with two counts of breaching the domestic violence order and was convicted of both charges. Those convictions amounted to a breach of two good behaviour orders previously made when the appellant was convicted of stalking and two additional counts of contravening a protection order in December 2007 and common assault in June 2007. He was sentenced to six months' imprisonment on each of the counts of breaching the domestic violence order, to be served concurrently. On the breach of the first good behaviour order he was sentenced to four months' imprisonment, one month of which was to be cumulative on the other sentences. All the imprisonment to be served by periodic detention.

In convicting the appellant, the magistrate accepted evidence from the applicant and a friend that they recognised the appellant's voice. The phone calls were allegedly made using a public phone, so this voice recognition was the only evidence to support that the appellant was guilty of the offences.

The appellant had a long history of criminal offending comprising of 52 charges. A pre-sentence report stated that the appellant had suffered a dysfunctional, violent and unstable family background. His father was an alcoholic and was violence towards his mother. The appellant also abused alcohol, drinking about six stubbies every night. Since the offending, the appellant reported that he was still drinking but not at a problematic level. However, there was no evidence to support these assertions. The appellant suffered from depression and anxiety that 'result in markedly diminished capacity in judgement', according to a psychologist's report. Another psychologist concluded that the appellant's offending history was alcohol induced and based.

Issues:

1. The ground of appeal against the conviction was that the magistrate failed to direct and warn herself adequately in relation to the voice identification evidence.
2.

The grounds of appeal against the sentence were:

(a) The sentence was manifestly excessive;

(b) The magistrate failed to have proper regard to the significance of the appellant's alcoholism in structuring an appropriate sentence; and

(c) The magistrate erred in not finding that community service was appropriate in all the circumstances.

Decision and reasoning: The appeal against the conviction was dismissed. In considering whether the appellant was guilty, the magistrate scrutinised the applicant's evidence as to voice recognition carefully. Both witnesses knew the appellant well and recognised his voice on the phone. While the magistrate should have given a warning, it would have been confined to the fact that the conversations were limited and that people can be mistaken about the voices of those they know well. Despite the lack of warning, Refshauge ACJ held there was no miscarriage of justice, as even if a warning was given, it would not have affected the magistrate's conclusion.

However, the appeal against the sentence was allowed and the appellant was ordered to be re-sentenced. The appellant's offending was at the lower end of the spectrum of contravening a domestic violence order. However, the magistrate did not err in concluding that imprisonment was the appropriate punishment when considering his offending history and breaches of good behaviour orders. Rather, the magistrate erred in dismissing the option of suspending a term of imprisonment with a good behaviour order to include a community service condition. The offences were not so serious that a suspended sentence was too lenient.