

***Roberts v Smorhun* [2013] ACTSC 218 (1 November 2013) – Australian Capital Territory Supreme Court**

‘Appeal against sentence’ – ‘Breach of domestic violence order’ – ‘People affected by substance misuse’ – ‘Physical violence and harm’ – ‘Protection order’

Charge/s: Contravention of a domestic violence order.

Appeal type: Appeal against sentence.

Facts: The female complainant and the male appellant had been in a relationship for 6-12 months and had lived together until mid-December 2012. After the complainant was granted an interim domestic violence order against the appellant, the appellant telephoned the complainant to meet him at a friend’s place so he could give her the keys back to her place. At this meeting, an argument developed and the appellant started chasing the complainant, yelling abuse. When he caught up to the complainant, he raised his arm as if to punch her, but instead he grabbed the complainant’s sunglasses, snapped them in half and threw them in her face. This caused the complainant injury. The appellant was sentenced to 32 months imprisonment for the charge of contravening a protection order.

Issue/s: The sentence was manifestly excessive.

Decision and Reasoning: The appeal was upheld and the appellant re-sentenced to 23 months imprisonment. Refshauge J noted that there was no doubt that the offending was serious. The fact that the appellant had been convicted of 9 prior offences of the same character against another woman meant that he could be afforded little leniency. However, the sentence was nonetheless disproportionate to the offending conduct.

Three features listed by the sentencing judge as aggravating the offence, were not in fact aggravating features. First, while domestic violence orders play a special place in the criminal law’s efforts to prevent domestic violence, His Honour erred in finding that a domestic violence was a feature of aggravation for the offence of contravening a domestic violence order. Second, His Honour also incorrectly found that the fact the offence occurred in public was a circumstance of aggravation in this particular case as there were no people present at the time of offence. His Honour also referred to *Grimshaw v Mann* [2013] ACTSC 189 at [49]-[51]. Finally, the sentencing judge inferred that the broken part of the complainant’s glasses was sharp and this aggravated the offending. However, this conclusion was not supported by the evidence (See [132]-[138]). Further, the sentencing judge did not take into adequately discount the sentence to account for the appellant’s plea of guilty (See [143]).

Refshauge J quoted from *R v BG* (an unreported judgment from December 2010):

Compliance with any sort of protection order is essential for the court in protecting members of the community from violence and other unwanted behaviour. Breaches of protection orders risk the success of the regime from achieving that purpose, especially if they encourage people to think that they can breach with impunity. A severe approach is necessary, consistent with fairness to the accused. Thus, the Court cannot punish beyond what is appropriate to the offence (See [4]).