

McClung v Vince [2015] ACTSC 255 (27 August 2015) – Australian Capital Territory Supreme Court

‘Common assault’ – ‘Damage to property’ – ‘Damaging property’ – ‘Exposing children’ – ‘People affected by substance misuse’ – ‘Physical violence and harm’ – ‘Rehabilitation’ – ‘Sentencing’

Charge/s: Common assault, damage to property.

Appeal type: Appeal against sentence.

Facts: The appellant and his former female partner had four children together. They separated two months prior to the offending but the appellant had been staying at the family home for a week prior to the offences. On 6 November 2014 at about 11pm, the appellant banged on his former partner’s window demanding she wake up. She let him in and went back to bed (where her 5 year old daughter was sleeping). The appellant went to the bedroom and punched a hole in the door. He started yelling and abusing his former partner. Despite the cries of the 5 year old daughter to stop, the appellant restrained his former partner and started hitting her. He woke up the couple’s 3 year old son. The appellant then hit the bedroom door several more times and started yelling again. The couple’s 13 year old daughter called the police. The appellant was sentenced to 12 months imprisonment for common assault and 6 months imprisonment for damage to property, suspended after 8 months. The appellant had previously been convicted for offences of assault against his former partner in 2006 and 2012. These offences were also committed under the influence of alcohol.

Issue/s: The sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. First, the sentencing magistrate did not fail to consider the possibility of part of the sentence being served by way of periodic detention. Second, although counsel submitted that the appellant had been compliant with bail conditions imposed in 2014 (namely, sobriety), the magistrate was entitled not to place any great weight on this consideration. This was particularly so given that the appellant had assaulted his former partner before under the influence of alcohol. Finally, counsel for the appellant submitted that previous assaults had been dealt with by a non-custodial sentence and to impose a sentence of full-time imprisonment for at least 8 months was an oversized incremental step. Robinson AJ stated: *‘The argument regarding the oversized incremental step is answered by the proposition that the courts dealing with the earlier assaults allowed leniency (perhaps too much) in a desire to rehabilitate the appellant. Further there is no sentencing principle that requires courts to impose sentences incrementally according to some upward scale’* (See [18]).