

***Guy v Anderson* [2013] ACTSC 5 (14 January 2013) – Australian Capital Territory Supreme Court**

‘Assault occasioning actual bodily harm’ – ‘Damaging property’ – ‘Forgiveness’ – ‘People affected by substance misuse’ – ‘People with mental illness’ – ‘Perpetrator programs’ – ‘Physical violence and harm’ – ‘Reconciliation’ – ‘Rehabilitation’ – ‘Risk factor- strangulation’ – ‘Victim contribution’

Charge/s: Damaging property, assault occasioning actual bodily harm.

Appeal type: Appeal against sentence.

Facts: The male appellant was in an intermittent relationship with the female complainant. During the course of an argument, the intoxicated appellant shouted in the complainant’s face and hit her. The appellant then sat on top of the complainant and attempted to choke her. He stood up and kicked her in the ribs when she screamed for help. The appellant sat on top of her again and choked her until her vision went blurry. She started retching and the appellant dragged her to the toilet by her hair. When she finished retching, he poured half a bottle of wine over her head and again placed his hands around her throat. The appellant then pulled the complainant into the lounge room and the complainant tried to calm him down. She went to the police the next day. He was sentenced to 3 months imprisonment for common assault and 6 months imprisonment, wholly suspended and conditional on a good behaviour order, for assault occasioning bodily harm.

On a subsequent occasion, the complainant and the appellant again started arguing. The appellant went outside the house to have a cigarette and the complainant locked him out. She packed his bag and left it at the rear door. The appellant, who had not seen the bag, began knocking on the rear door and the window. As the complainant was on the phone to police, she heard the sound of the appellant breaking the window. The complainant told the appellant his belongings were at the front door and he left. He pleaded guilty to damaging property and sentenced to 1 month imprisonment. The conviction constituted a breach of the earlier imposed good behaviour order and the magistrate imposed the full 6 months of this sentence.

Issue/s: The sentence for damaging property and the action taken in respect of the breach of the good behaviour order was manifestly excessive.

Decision and Reasoning: The appeal was allowed. First, the sentence for the offence of damaging property was manifestly excessive in the circumstances. Although this was a domestic violence offence, this did not mandate a particular response and the circumstances as a whole needed to be considered. Refshauge J accepted the fact that complainant and the appellant had reconciled needed to be treated cautiously. He stated that, *'Forgiveness by victims of domestic violence offences is highly problematic and must be treated with considerable caution for the reasons outlined by Simpson J in R v Glen [1994] NSWCCA 1 (19 December 1994) at 8. As her Honour said, "the victim's attitude to sentencing ... was not a matter which should have influenced the sentencing decision".'* However, reconciliation of the complainant and the offender (as opposed to her forgiveness) can be relevant as to prospects of rehabilitation.

Second, the magistrate's decision to impose the full 6 months suspended sentence was manifestly excessive. While the breaching offence was not trivial, it was at the low end of seriousness for the offence and was also of a different character from the original offence. Significantly, the appellant had also complied with the probation condition, sought mental health assistance of his own volition and participated in the Family Violence Cognitive Self-Change Program. See re-sentencing [1]-[5].