

***Tuckey v Ede* [2010] ACTSC 95 (8 September 2010) – Australian Capital Territory Supreme Court**

‘Assault’ – ‘Non-conviction order’ – ‘Physical violence and harm’ – ‘Victim contribution’

Charge/s: Summary offence of assault.

Appeal type: Appeal against conviction.

Facts: The intoxicated male appellant started arguing with his partner (the female complainant) in their house. The appellant kicked a chair at the complainant and broke it. She threw the broken chair at him and he slapped her in the face. The complainant called the police. After discussion, the appellant agreed to plead guilty to a summary charge of assault and the prosecution agreed to make submissions not opposing the making of a non-conviction order. Her Honour refused to make a non-conviction order, convicted the appellant and imposed a 12 month good behaviour order.

Issue/s: One of the issues was that the sentencing process was flawed.

Decision and Reasoning: The appeal was upheld because the sentencing process in the Magistrates Court was flawed in light of further evidence provided about the agreement between the prosecution and the defence before the hearing. Although the appellant was not entitled to assume that the magistrate would make the orders that had been agreed upon, he was entitled to expect that the prosecution’s attitude to a non-conviction order would have been articulated during the hearing (See [26]-[42]).

Another sentence was appropriate in this case. The appellant had no criminal record nor any identified problem with alcohol or anger management. The offence was an isolated incident in which the complainant also took part. The couple had reconciled and were again living with their child. The appellant had a sound employment record, had already been punished by spending the night in police custody and was unable to return home for 3 weeks because of his bail conditions. Finally, the conviction would make it difficult for him to see his partner’s family in Vietnam (See [43]-[45]).

The appellant’s conviction was set aside and a good behaviour order imposed for 12 months. In re-sentencing the appellant, Penfold J stated:

'However, the appellant should not interpret this conclusion as in any sense condoning of his use of physical violence on his partner (or anyone else for that matter). Rather, it is a recognition that while it is vital for domestic violence to be taken seriously by the police and the prosecuting authorities and the courts, it is also important for a victim of domestic violence to be able to call for help when she needs it in the belief that after her immediate needs have been addressed, the longer-term consequences of the call for help will be decided in a calmer environment in which her longer-term interests and wishes will also receive recognition. The appellant should be aware however, that if there were any repetition of this kind of behaviour by him, I expect that a sentencing court would take it very seriously' (See [47]).