

***R v Burton* [2008] NSWCCA 128 (20 June 2008) – New South Wales Court of Criminal Appeal**

‘Assault occasioning bodily harm’ – ‘Common assault’ – ‘Community protection’ – ‘Denunciation’ – ‘Detain for advantage’ – ‘Deterrence’ – ‘Emotional and psychological abuse’ – ‘Exposing children’ – ‘Influencing witness’ – ‘People affected by substance misuse’ – ‘Physical violence and harm’ – ‘Relevance of victim's expression of forgiveness’ – ‘Victim contribution’ – ‘Victim's wishes’

Charge/s: Common assault x 3, assault occasioning actual bodily harm x 2, detain for advantage, influencing witness.

Appeal Type: Crown appeal against sentence.

Facts: The respondent was released on parole as part of a sentence of imprisonment for break, enter and steal. He subsequently commenced a relationship with the female complainant, who was eight years older than him, and moved into her home with her two children. The respondent committed a series of offences against the complainant involving violent assaults and threats, including an offence of influencing a witness by convincing the complainant to withdraw the charges against him. The total effective sentence included a non-parole period of one year and nine months with a balance of term of one year. The sentencing judge backdated sentences for Counts 1, 2 and 3 so that they operated concurrently with the balance of parole. Even at sentence, the victim provided a measure of support to the respondent.

Issue/s: The sentence was manifestly inadequate.

Decision and Reasoning: The appeal was allowed. The sentences imposed failed to reflect the objective seriousness of the offences and were so inadequate as to be plainly unjust. Several aspects of the sentence imposed supported this conclusion. First, the approach of making the sentences concurrent meant that no effective sentence was imposed for three separate and serious offences of violence (See [92]-[93]). Second, the sentence for the detain for advantage offence did not reflect its objective seriousness, which was aggravated by the use of a knife. It was committed in the context of a ‘controlling and violent relationship’, extended over some hours, and involved actual threats of violence towards the victim (See [94]-[95]). It was additionally noted at [97] domestic violence offences involve the exercise of ‘power, dominance and control’ over the victim.

Third, the use of a bond for the offence of influencing a witness diluted significantly, and erroneously, the objective criminality in this case and a custodial sentence should have instead been imposed. Johnson J then made some observations regarding the role of victim's attitude towards the respondent in sentencing, noting that it ought to play 'no part on sentence' at [102]. His Honour quoted (at [104]) the remarks of Simpson J in *R v Glen* [1994] NSWCCA 1 (19 December 1994) which deal directly with this issue:

'There are two main arguments of principle against the proposition that this Court should give any weight to the expressed wish of the victim in this case that the applicant not be incarcerated. The first concerns the importance, especially great in cases of domestic violence, given the history that I have alluded to, of general deterrence. This Court must send a signal to domestic violence offenders that, regardless of self interest denying forgiveness on the part of victims, those victims will nevertheless receive the full protection of the law, insofar as the courts are able to afford it to them. It must not be forgotten, that, if it is to be accorded weight by the courts, forgiveness by the victim also operates contrary to the interests of other victims. Until it is recognised that domestic violence will be treated with severe penalties regardless of a later softening of attitude by the victim, no progress is likely to be made in its abolition or reduction. Put simply, the importance of general deterrence in such cases overrides any minor relevance that evidence of forgiveness might have.'

Fourth, the sentencing judge's remarks made no reference to specific deterrence, general deterrence nor the need for denunciation of the respondent's conduct (See [106]-[107]). Finally, the final count of assault was a significant and unusual feature, committed after the respondent had been in custody for over two months. It was a further incident of control or dominance by the respondent over the victim, this time in a prison setting (See [108]-[110]).

In resentencing, the Court emphasised the importance of general and personal deterrence, denunciation and community protection, and noted that the offending took different forms and occurred at different times against the same victim and often in the presence of his children. The respondent had a substantial criminal history and showed little prospects for rehabilitation. The total effective sentenced was increased to four years and six months, with a non-parole period of three years (See [115]-[130]).