

***Raczkowski v The Queen* [2008] NSWCCA 152 (4 July 2008) – New South Wales Court of Criminal Appeal**

‘Attempted rape’ – ‘Breach of apprehended domestic violence order’ – ‘Detain with intent to obtain advantage occasioning actual bodily harm’ – ‘Indecent assault’ – ‘People affected by substance misuse’ – ‘People with mental illness’ – ‘Physical violence and harm’ – ‘Protection order’ – ‘Relevance of a prior relationship’ – ‘Sentencing’ – ‘Sexual and reproductive abuse’ – ‘Using a prohibited pistol without a licence or permit’

Charge/s: Using a prohibited pistol without a licence or permit, detain with intent to obtain advantage occasioning actual bodily harm, attempted rape, indecent assault, breach of apprehended domestic violence order.

Appeal Type: Appeal against sentence.

Facts: The complainant was the applicant’s wife of over 40 years. Their relationship had deteriorated and an apprehended domestic violence order (ADVO) had been issued for the protection of the complainant. The applicant breached this order on a number of occasions and was charged. He was bailed on conditions which included that he not approach or contact the complainant. However, again, the applicant breached these conditions. He wrote to the complainant. Further, one night the applicant, who was intoxicated, entered the property of the complainant without her consent and engaged in serious misconduct throughout the night including physically assaulting the complainant, tying her up, attempting to rape her, pulling out a pistol and threatening the complainant with it, and sexual assaults.

Issue/s:

- > The sentencing judge gave insufficient weight to the fact that the applicant was suffering from severe depression at the time of the offences.
- > The sentence was manifestly excessive in light of the applicant’s depression and that they occurred in the context of a domestic relationship.

Decision and Reasoning: These grounds of appeal were dismissed but the appeal was allowed on other grounds. First, the sentencing judge was not obliged to find that the applicant's judgment was impaired by his illness. To the extent that the depression may have contributed to the applicant's poor judgement, its significance was diminished by the applicant's voluntary consumption of large amounts of alcohol. Additionally, there was evidence of advance planning by the applicant. In these circumstances, specific and general deterrence were particularly important. This approach of the sentencing judge was amply endorsed by authority, particularly when offences have been committed in a domestic context: *R v Hamid* and when such offences occur in breach of extant restraining orders such as an ADVO: *Hiron v The Queen* (See [33]-[37]).

Second, the sentence could not be said to be manifestly excessive. The relevance of depression was considered in the above ground of appeal. Additionally, in terms of the relevance of a (broken down) domestic relationship, as per Grove J at [46]:

'That a violent and pre planned attack occurred in what might be classified as a domestic setting is not a matter of mitigation. This Court has repeatedly stressed that it is a circumstance of significant seriousness: R v Edigarov; R v Dunn; and R v Burton'.

Here, the applicant detained and abused his wife verbally, physically and sexually. He did so in defiance of the conditions imposed by the ADVO and by bail. The production and use of the pistol, particularly where the applicant was ingesting significance quantities of alcohol, magnified the fear in the complainant (See [47]).