

***R v Evans* [2017] NSWCCA 281 (21 November 2017) – New South Wales Court of Criminal Appeal**

‘Aggravating circumstances: breach of bail and protection order’ – ‘Assault’ – ‘Fair hearing’ – ‘People with children’ – ‘Power and control’ – ‘Sexual abuse’ – ‘Strangulation’ – ‘Systems abuse’ – ‘Text messages’ – ‘Women’

Charges: Indecent assault x 1; Common assault x 2; intentionally destroy property x 1; Contravene apprehended domestic violence order x 1; Do act with intent to influence witness x 1.

Appeal type: Appeal against sentence.

Facts: The applicant and complainant had been in a relationship and had three children ([10]). The common assault charges occurred when the applicant grabbed the complainant’s throat and forced her against the wall, onto the bed and onto the ground ([11]-[14], [22]-[24]). The indecent assault charge occurred when the applicant forced her onto the bed and placed his fingers in her vagina ([15]-[18]). The ‘do act with intent to influence witness’ charge occurred when the applicant asked the complainant over text message to drop the charges on at least 16 occasions ([33]). For example, one of the text messages said, ‘you will be left with the kids full time with no break so I couldn’t handily [sic] going away so that’s why I want you to drop the charges’ ([33]).

After a plea of guilty, the applicant received a head sentence of 5 years and 6 months’ imprisonment with a non-parole period of 3 years and 6 months ([3]). For the ‘do act with intent to influence witness’ charge, the applicant was sentenced to 3 years and 2 months’ imprisonment ([4]).

Issues: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was allowed. Adamson J, with whom Hoeben CJ at CL and Davies J agreed, held that the sentence was manifestly excessive.

In relation to the ‘do act with intent to influence witness’ charge, Adamson J at [38] quoted the sentencing judge:

[the charge] reveals a course of conduct that I regard as being particularly serious. It was repetitive and was clearly designed to emotionally manipulate and blackmail the complainant to discontinue the charges against him. It was also conduct that was in breach of his bail conditions as well as another court order, namely an interim ADVO. These are aggravating features.

Adamson J similarly commented at [46] on the importance of the charge (s 323(a) of the *Crimes Act 1900* (NSW)) in the context of domestic violence offences:

It is within the common experience of courts that many charges of domestic violence cannot be prosecuted because the defendant manages to persuade the complainant, including by threatening violence, not to give evidence against him. Conduct of this nature against complainants is inimical to the interests of justice and the administration of justice. The perpetrators of domestic violence may, by committing offences under s 323(a) of the *Crimes Act*, effectively immunise themselves from prosecution.

However, his Honour considered that the text messages were not as serious compared to other possible offences under s 323(a) of the *Crimes Act*, such as bribing a witness or threatening violence (see [48]-[51]). Therefore, the sentence of 3 years and 2 months was manifestly excessive, and led to the head sentence being manifestly excessive ([51]).

The applicant was re-sentenced to an aggregate sentence of 3 years and 6 months with a non-parole period of 2 years ([61]). On the 'do act with intent to influence witness' charge, the applicant was sentenced to 1 year imprisonment (after applying the 20% reduction for his plea of guilty) ([59]).