

***Diaz v The Queen* [2018] NSWCCA 33 (14 March 2018) – New South Wales Court of Criminal Appeal**

‘Aggravated kidnapping’ – ‘Damaging property’ – ‘General deterrence’ – ‘Physical violence and harm’ – ‘Sentencing’ – ‘Sexual and reproductive abuse’ – ‘Specific deterrence’ – ‘Women’

Charges: Aggravated kidnapping x 1; Sexual intercourse without consent x 1; Destroying or damaging property x 4; Assault occasioning actual bodily harm x 1; Common assault x 1.

Appeal type: Appeal against sentence.

Facts: The applicant and victim had been in a relationship for approximately 5 months. The assault and destroying property charges were in relation to arguments where the applicant pulled out some of the victim’s hair, and smashed her phone, a vase and a television set ([13]-[15]). The aggravated kidnapping and sexual intercourse without consent charges occurred when the applicant pinned the victim onto a bed ([17]). He digitally penetrated her, became angry about the contents of her Facebook and text messages ([18]) and punched her approximately 20 to 30 times ([19]-[20]). This continued for about 5 hours ([21]). The applicant had a ‘disturbing’ criminal history including two similar domestic violence offences where the applicant detained the victim in her apartment ([28]-[31]). The applicant was on parole for those sentences at the time of this offence ([33]).

The applicant was sentenced to a head sentence of 7 years and 9 months imprisonment with a non-parole period of 4 years and 6 months ([10]).

Issues: Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. Acting Justice Hidden at [47] endorsed the trial judge’s characterisation of the manner in which the applicant detained the victim “by instilling fear and control over her... by his conduct, demeanour, words and assault” (at [39]).

It was significant that the offences were committed while the applicant was on parole. The domestic violence context of these offences was also important, with Hidden AJ quoting from Johnson J’s judgement in *R v Hamid* [2006] NSWCCA 302 at [86]:

In sentencing a domestic violence offender, and in particular a repeat domestic violence offender, specific and general deterrence are important factors, together with the requirement of powerful denunciation by the community of such conduct and the need for protection of the community. Recognition of the harm done to the victim and the community as a result of crimes of domestic violence is important.

Justice Garling added: '[in] *R v Edigarov* [2001] NSWCCA 436, Wood CJ at CL (with whom Studdert and Bell JJ agreed) said at [41] of violent attacks in domestic settings this:

Regrettably, that form of conduct involves aggression by men who are physically stronger than their victims and who are often in a position economically or otherwise to enforce their silence and their acceptance of such conduct. In truth, such conduct is brutal, cowardly and inexcusable, and the courts have a duty to ensure that it is adequately punished, and that sentences are handed out which have a strong element of personal and general deterrence.