

***R v Edigarov* [2001] NSWCCA 436 (5 October 2001) – New South Wales Court of Criminal Appeal**

‘Assault police officer occasioning actual bodily harm’ – ‘Common assault’ – ‘Deterrence’ – ‘Double jeopardy in sentencing’ – ‘Exposing children’ – ‘Kidnapping’ – ‘Mitigating factors’ – ‘Physical violence and harm’ – ‘Protection order’ – ‘Sentencing’

Charge/s: Common assault, assault police officer occasioning actual bodily harm, kidnapping.

Appeal Type: Crown appeal against sentence.

Facts: On 3 August 1999, the respondent assaulted his wife (the victim) in the presence of their three year old daughter by pushing her against a refrigerator, pursuing her into the bedroom and pushing her to the floor. After throwing and kicking items, he left the unit and the victim went to a friend’s unit for safety. The respondent arrived there an hour later and threatened to kill her if she did not return home. Police were called and the respondent assaulted these officers. The respondent was released on bail and became subject to an apprehended domestic violence order. On 7 October 2000, the respondent kidnapped the victim while she was walking along the street with her daughter. He drove her to his parents’ home and repeatedly punched and kicked her. The victim managed to escape and called the police. The sentencing judge imposed the following sentences:

- > Common assault: six months imprisonment.
- > Assault police officer occasioning actual bodily harm: 18 months imprisonment, suspended upon the condition that he enter into a good behaviour bond.
- > Kidnapping: two years imprisonment with a non-parole period of six months and 12 days.

In imposing the sentence for kidnapping, His Honour found that there were special circumstances in that all of the offences of the respondent were *‘by-products of (his) anger and frustration and disappointment at the failure of (his) marriage and at the imposition of the apprehended violence order against (him)’*.

Issue/s: One of the grounds of appeal was that the sentencing judge failed to give sufficient weight to the objective seriousness of the combination of the offences involved.

Decision and Reasoning: The appeal was allowed. Wood CJ held that the sentence imposed failed to give sufficient weight to the objective seriousness of the offences and too much significance was attached to the emotional reaction of the respondent to being thwarted in the marriage, a circumstance that provided no excuse whatsoever for his behaviour (See [39], [52]). In relation to the assault of his wife, Wood CJ found that the offence involved the sustained use of physical violence causing fear in the presence of an equally terrified child. It could not be characterised as a momentary or uncharacteristic loss of self-control, as the aggression continued into the evening. Further, at [41]:

'As this Court has confirmed in Glen NSWCCA 19 December 1994, Ross NSWCCA 20 November 1996, Rowe (1996) 89 A Crim R 467, Fahda (1999) NSWCCA 267 and Powell (2000) NSWCCA 108, violent attacks in domestic settings must be treated with real seriousness. 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'.

Additionally, the kidnapping offence involved sustained violence by the respondent who caused substantial injury to his wife and again threatened to kill her. It was again committed in the presence of their young daughter and caused significant fear. Further, the sentencing judge failed to reflect three aggravating factors in the sentence namely, this was not an isolated act of violence, and the offence was committed while the offender was on bail and while the offender was subject to an apprehended violence order in relation to the same victim (See [47]-[51]). In re-sentencing the respondent, the court took into account the principle of double jeopardy (See [55]-[65]).