

***Shaw v The Queen* [2008] NSWCCA 58 (14 March 2008) – New South Wales Court of Criminal Appeal**

‘Aggravated break and enter (with actual bodily harm)’ – ‘Damaging property’ – ‘Denunciation’ – ‘General deterrence’ – ‘Malicious damage’ – ‘Offender character references’ – ‘Relevance of victim's expression of forgiveness’ – ‘Sentencing’ – ‘Specific deterrence’ – ‘Victim contribution’ – ‘Victim's wishes’

Charge/s: Aggravated break and enter with actual bodily harm, malicious damage to property.

Appeal Type: Appeal against sentence.

Facts: The male applicant and the female complainant had been in a domestic relationship for approximately five years and lived together with their three children. Following a domestic dispute, the complainant went with the three children to stay at a friend's place. Over the next five days, the applicant made a number of threats to the complainant's physical safety by telephone before he, intoxicated, broke into the friend's place. He demanded to see his son before grabbing the complainant by her hair and striking her a number of times. The applicant had a long criminal history of offending in the domestic context and while those incidents did not involve actual violence, they evidenced a propensity to harassment in domestic situations and a failure to manage his anger. The complainant submitted a statutory declaration taking some responsibility for what she considered to be her part in provoking the applicant to act as he did. The applicant pleaded guilty and was sentenced to six years imprisonment, with a non-parole period of four years.

Issue/s: Whether the sentence was disproportionate to the gravity of the offending.

Decision and Reasoning: The appeal was allowed. Fullerton J found that the fact the offence was a domestic violence offence and that the victim was in a vulnerable position, did not elevate the offending to an ‘objectively high’ level. (See at [36]). The offending was not planned or premeditated, and the applicant did not arm himself with a weapon to inflict injury. As such, the offending was better characterised as in the middle of the range. In relation to the victim's strong expression of support for the applicant, His Honour acknowledged the caution that must be exercised in attaching weight to such sentiments. In *R v Glen* [1994] NSWCCA 1 (19 December 1994) Simpson J said:

'In my opinion, exceptional caution should be exercised in the receipt, and the use, of evidence of that kind [general evidence of forgiveness and desire that the assailant/ partner not be imprisoned] in cases that fall within the general description of domestic violence offences, of which this case is one. It is a fact known to the courts and to the community that victims of domestic violence frequently, and clearly contrary to their own interests and welfare, forgive their attackers. It is said, and has been said so often and for so long as to be almost notorious, that it was this pattern of post offence forgiveness, accompanied by apparent remorse or contrition on the part of the offender, that prevented the prosecution of such offenders. In turn, it appeared that the victim of domestic violence was in a class different to the rest of the community insofar as the protection of the law was concerned. Domestic violence was not seen as a crime which attracted the sanction of the law in the same way or to the same extent as other crimes, whether or not of violence. The perpetrator of domestic violence was relatively safe to commit crimes with impunity, at least provided he or she (and, in the cases that have to date come before the courts, it has almost invariably been he) could attain the victim's forgiveness.

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.

For too long the community in general and the agencies of law enforcement in particular, have turned their backs upon the helpless victims of domestic violence. Acceptance of the victim's word that he/she forgives the offender, casts too great a burden of responsibility upon one individual already in a vulnerable position. Neither the community, the law enforcement agencies, nor the courts can be permitted to abdicate their responsibility in this fashion. Protection of the particular victim in the particular case is a step towards protection of other victims in other cases...'

Notwithstanding this, Fullerton J was persuaded to give the victim's support significant weight in this case. The victim's view that the offending was 'totally out of character' was also supported in evidence from the applicant's work supervisor. The sentence was reduced accordingly (See at [48]).