

## ***Ashley v Marinov* [2007] NTCA 1 (4 May 2007) – Court of Appeal of the Northern Territory**

‘Aggravated assault’ – ‘Breach of domestic violence order’ – ‘Concurrent criminal proceeding’ – ‘Double punishment’ – ‘Physical violence and harm’

Charges: Breach of domestic violence order, aggravated assault

Appeal Type: Appeal against conviction

Facts: The appellant was charged with breaching a domestic violence order and aggravated unlawful assault. The facts that formed the basis of both charges were the same. At trial, the prosecution was not able to disprove provocation, so the appellant was acquitted on the assault charge. However, he was then convicted of the breach offence.

Issue: Whether the defence under s 18 of the *Criminal Code* (NT) would apply. In particular, the Court had to consider whether the appellant had already been convicted of a ‘similar offence’, within the meaning of s 17 of the *Criminal Code* (NT).

Decision and Reasoning: The appeal was allowed and the conviction was quashed. The appellant had already been acquitted of a similar offence. The impugned conduct relied upon for the breach offence was ‘substantially the same or includes the conduct impugned in the offence of aggravated assault’ ([14]). Applying *R v Hofschuster* [1994] NTCCA 73, the Court found that ss 17 and 18 of the Code substantially replicate the existing common law principle that ‘a person is not to be prosecuted twice for the same criminal conduct’ ([11]).

However, the Court noted at [17] that this conclusion does not mean that a person charged with assault cannot also be convicted of a breach of a Domestic Violence Order – ‘Much will depend on the precise terms of the order said to be breached, the facts relied upon to constitute the breach and whether or not, even if a defence under s 18 is not open, the court should nevertheless stay the prosecution as an abuse of process: see for example *R v Carroll* (2002) 213 CLR 635.’