

***R v Barnes* [2014] SASCFC 79 (18 July 2014) – Supreme Court of South Australia (Full Court)**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

‘Aggravated assault causing harm’ – ‘Aggravating factor’ – ‘Damaging property’ – ‘Deterrence’ – ‘Exposing a child’ – ‘Physical violence and harm’ – ‘Sentencing’

Charge/s: Aggravated assault causing harm (two counts) – Circumstance of aggravation: that the victim was the defendant’s domestic partner.

Appeal type: Appeal against sentence.

Facts: The defendant discovered messages from his cousin to his de facto partner on her phone. After waking her up at 3am to question her about these messages, he hit her on the left side of the head before he gave her time to explain. This caused bleeding. He then pinned her down after she tried to break free. Their son, who was sleeping in the same room, witnessed the defendant hitting the complainant. A similar incident occurred the following evening. The defendant punched her to the right of the face with a closed fist and hit her in the right eye. He tried to strangle the complainant who could still breathe so she pretended to pass out. He held up her phone, put it on a coffee table and stomped on it which caused the phone and the table to break. After carrying their son towards his bedroom, he kicked her on the lower back despite her begging him not to hit her again. His criminal history included many driving offences as well as dishonesty and drug offences. He was sentenced to 18 months’ imprisonment for each count to be served cumulatively, with a non-parole period of 18 months. The judge stated he reduced the sentence by 25% on account of the guilty plea.

Issue/s:

1. Whether the sentences were manifestly excessive.
2. Whether the sentences should have been made concurrent.
3. Whether the sentence should have been suspended.

Decision and Reasoning: The appeal was allowed in respect of concurrency.

1. Gray J (with whom Peek and Stanley JJ agreed) firstly noted that the offences were unprovoked. The defendant was woken from sleep and defenceless. The Court then acknowledged the various mitigating factors, including the defendant taking steps towards rehabilitation and the fact that he had formed a new relationship with no evidence of domestic violence. However, in applying the authorities which indicate the seriousness of domestic violence and the need for strong personal and general deterrence

and noting the defendant's long criminal history of defying court orders, the Court held that a head sentence of 18 months' imprisonment for each offence was open. See in particular from [17] – [22] for a summary of the relevant authorities.

2. The Court noted that when there are two truly separate occurrences of criminal conduct, cumulative sentences are likely to be appropriate. When a number of offences form a course of criminal conduct, concurrent sentences are likely to be appropriate. As such, the Court held that the sentence should have included some element of concurrency because the offending was, in substance, a course of conduct separated by a short period of time. Partial concurrency of 6 months was appropriate. As such, the 18 month sentence for the second count was made concurrent for 6 months, so that the total effective sentence became 2 years and 6 months.
3. This argument was rejected. It was within the discretion of the trial judge to not suspend the sentence notwithstanding the applicable mitigating factors. The offending was extremely serious, cowardly and brutal. Furthermore, it partly took place in the presence of a child, who became distressed on the second occasion.