

***R v McMutrie* [2002] SASC 253 (8 August 2002) – Supreme Court of South Australia**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

‘Aggravating factor’ – ‘Attempted murder’ – ‘Breach of restraining order’ – ‘Deterrence’ – ‘Double jeopardy and other charges’ – ‘People with mental illness’ – ‘Physical violence and harm’ – ‘Possession of a knife with intent to kill or to cause grievous bodily harm’ – ‘Sentencing’ – ‘Unlawful wounding’

Charge/s: Attempted murder, wounding with intent to kill or do grievous bodily harm, unlawful wounding, breach of restraining order.

Appeal Type: Appeal against conviction and sentence.

Facts: The appellant’s relationship with his former de facto partner had recently ended. The appellant approached her at a club because he wanted her to come outside to witness him attempt to cut his own throat. As he attempted to force her to leave, a struggle ensued and she was wounded by his knife. They had been in a relationship for 20 years. The appellant had a history of domestic violence, mental health issues and various other illnesses. His criminal history involved alcohol and drug related offending and prior breaches of restraining orders. He was acquitted of attempted murder and wounding with intent but convicted of unlawful wounding and possessing a knife with intent. The trial judge indicated that the possession of the knife and unlawful wounding offences arose out of the same events. He pleaded guilty to breaching the restraining order. He was sentenced for all three offences to three years’ imprisonment with a non-parole period of 18 months.

Issue/s:

1. Whether the appellant was convicted twice for the same offending conduct, as the same facts were relied upon for the possess knife with intent charge and the unlawful wounding charge, such that the rule against double jeopardy was infringed.
2. Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal against conviction was upheld and the appeal against sentence was dismissed.

1. The Crown conceded that there was a risk of a miscarriage of justice and acknowledged that the jury may have relied on the same factual circumstances for both convictions. As such, the appellant would have been entitled to the defence of ‘autrefois acquit’. The conviction for the possess knife offence was therefore set aside.

2. In upholding the original sentence, Gray J (with whom Perry J and Williams J agreed) noted the lasting impacts of the history of domestic violence on the victim and their children. The Court held that an immediate custodial sentence was needed. See in particular these remarks at [15]-[18] –

‘Domestic violence is not just physical abuse but includes a range of violent and abusive behaviours perpetrated by one person against another. A high percentage of victims are women and children. Domestic violence has existed for centuries. However over the last 30 years its prevalence has been increasingly recognised. This has caused considerable community and governmental concern. More recently legislation has evolved in an effort to protect the vulnerable... The law seeks to protect the innocent and vulnerable. The legislative scheme is directed towards providing protection. This protection is primarily provided through the mechanism of restraining orders (Now known as intervention orders). Restraining orders are the principal legal response to domestic violence. They can be (sic) obtained expeditiously from a magistrate’s court. The standard of proof is on the balance of probabilities. Orders can be tailored to the particular conduct of the abuser and breaches are a criminal offence. In this case the victim had obtained a restraining order. She had done all she could to protect herself. The breach of that order is a matter of particular gravity. The use of the knife to engender fear and wound was an aggravating feature to the appellant’s crime. The gravity of his conduct called for the imposition of an immediate custodial sentence’

See further at [23] – *‘A restraining order had been obtained to prevent the very conduct the subject of the wounding conviction. The need for personal deterrence is a significant factor in this case. The appellant needs to understand that court orders must be obeyed and that non compliance in circumstances of domestic violence will be viewed very seriously. General deterrence is also an important consideration in sentencing.’*