

## ***Lusted v MRB* [2013] TASMC 9 (19 February 2013) – Magistrates Court of Tasmania**

'Assault' – 'Emotional abuse' – 'Evidence' – 'Exposing children' – 'Following, harassing, monitoring' – 'Physical violence and harm' – 'Relationship evidence' – 'Risk factor - strangulation' – 'Tendency evidence' – 'Uncooperative witness'

Charge: Assault (6 counts)

Facts: The alleged assaults involved the defendant grabbing, pushing, striking, punching and pinching the complainant. One count involved the defendant grabbing her throat and pinning her against a table. Another involved pushing hot chicken into her face, grabbing hold of her by the chest and pouring cold water over her head ([17]-[28]). The complainant's relationship with the defendant started when she was 15 and lasted for about 6 years. The prosecution's evidence indicated that the defendant was controlling and violent towards the complainant throughout their relationship. The complainant was socially isolated and the defendant prevented her from contacting friends. He demanded that she wait on him and would strangle and abuse her if she did not comply with his demands. On one occasion, he threw a bottle at her. For further detail of the 'uncharged acts', see paragraphs [8]-[16]. There was one child of the relationship. The infant daughter witnessed two of the assaults.

Issue: Whether the defendant was guilty of the charged offences.

Decision and Reasoning: The charges were dismissed.

The prosecution adduced various circumstantial evidence from other witnesses ([29]-[42]). This included evidence of witnesses who noticed that the complainant had various physical injuries. The prosecution also sought to adduce evidence of the defendant's tendency to engage in violent conduct against the complainant. This evidence was admissible on the basis that it had substantial probative value because it could be inferred that the relationship involved violent and controlling behaviour. The danger of unfair prejudice posed by the evidence was low, particularly in circumstances where no jury was involved. The prosecution also sought to adduce relationship evidence relating to uncharged conduct. This evidence was also admitted on the basis that it removed the implausibility of the assault being isolated. It also supported the assertion that the defendant exercised dominance and control and that the complainant feared the defendant.

This case involved serious and prolonged domestic violence. However, the complainant had not been entirely truthful about the relationship and her evidence was inconsistent with her parents'. She had discussed the possibility of ending the relationship with her parents and decided to leave him at the urgings of her mother once her father returned to town. However, on the day she decided to leave the defendant, she decided to return to him because he seemed remorseful and he offered to buy her dinner. As such, given the gravity of the conduct that was the subject of the complaint, the magistrate found it difficult to believe that the fear of what might happen in her father's absence was a plausible explanation for her not leaving him. While the magistrate acknowledged that other explanations such as the fact that she may have become conditioned to such behaviour could be relevant, her account was doubted. There were no photographs, medical reports, phone records or other corroborating evidence. As such, the complaints were not proven beyond reasonable doubt.

The magistrate nonetheless emphasised the widespread scale and seriousness of family violence. '*It is a significant social problem, of concern to the community and the justice system. The parliament saw fit to enact legislation, the Family Violence Act 2004, expressly to "provide for an integrated criminal justice response to family violence which promotes the safety of people affected by family violence". The nature of family violence is that it is difficult to detect and prosecute. It is frequently the case that offences are committed in private and with little or no independent corroborative evidence. Moreover, family violence offences are often characterised by reluctance on the part of the victim to assist in the prosecution of offences. That is so for a range of factors including fear and a wish to preserve relationships, even dysfunctional ones, for the sake of loyalty, affection, companionship, economic and domestic support and in the perceived interest of children. Sometimes those motivations are misguided but persist nevertheless. As a consequence of such factors victims sometimes act in a way that seems to an outside observer to be incongruous and difficult to understand, including by failing to complain about, or hiding or lying about violence directed at them. Even if victims are willing to give evidence then the success of prosecutions depends principally on credibility of the uncorroborated account of the victim, a factor often taken advantage of by perpetrators and further adding to the reluctance of victims to complain.*' ([68]).