

***Allen v Kerr* [2009] TASSC 10 (25 February 2009) – Supreme Court of Tasmania**

‘Aggravating factor’ – ‘Assault’ – ‘Damaging property’ – ‘Deterrence’ – ‘Emotional and psychological abuse’ – ‘Exposing children’ – ‘Manifestly excessive’ – ‘Physical violence and harm’ – ‘Provocation’ – ‘Sentencing’

Charge: Common assault

Appeal Type: Motion to review sentence

Facts: The applicant was in a relationship with the victim for three years and they had one child together. The victim also had a child from another relationship. Both of these children were present during the incident. The applicant was intoxicated and swore at the victim. An argument ensued and the victim spat in his face, which the applicant claimed led to his subsequent actions. The applicant took the victim’s house keys and told her to go inside before telling her to get in the car. He then smashed the car window, leaned inside and punched the victim twice to the face and four or five times to the back of the head and bit her multiple times. The police applied for a family violence order to operate for 12 months, which the applicant consented to. The applicant had a significant criminal history (though no convictions for assault) and was subject to a probation order and two suspended sentences. He pleaded guilty and was sentenced to two months’ imprisonment.

Issue: One of the issues concerned whether the sentence was manifestly excessive.

Decision and Reasoning: The motion to review was dismissed.

Porter J found that the assault was not premeditated and arose from the applicant’s state of intoxication. The act of the victim spitting in the applicant’s face was a provocative act and an assault in itself. No weapon was used and the complainant suffered no lasting injury. On the other hand, the assault was serious particularly given the biting. Furthermore, the presence of the two children at the time of the attack was an aggravating factor, as recognised by s 13 of the *Family Violence Act 2004* (Tas): ‘*Violence witnessed by children in the domestic environment not only is distressing (usually the victim is a parent or someone in the place of a parent), but it also serves to desensitise impressionable minds to violence, and to encourage the notion that resort to violence is acceptable*’ ([13]).

The community has a general intolerance towards offences of violence. However, although immediate custodial sentences are appropriate for serious cases of assault, there is no prima facie position that assault offences should be punished by an immediate gaol term. The fact that the applicant was subject to the probation order and suspended prison sentences indicates that these measures did not deter the applicant from offending. 'General deterrence in relation to offences of violence is a weighty factor' ([27]). While the penalty was a relatively severe one, it did not demonstrate error having regard to the applicant's circumstances.