

***James v Tasmania* [2010] TASSC 50 (11 November 2010) – Supreme Court of Tasmania**

‘Breach of domestic violence order’ – ‘Common assault’ – ‘Consent’ – ‘Exposing children’ – ‘Physical violence and harm’ – ‘Risk factor - strangulation’ – ‘Temporary protection order’

Charges: Breach of a family violence order, Common assault, Driving offences, Perverting the course of justice

Appeal type: Appeal against sentence

Facts: The magistrate imposed three terms of imprisonment. First, the applicant was sentenced to 6 months’ imprisonment, suspended after 4 four months, for charges relating to driving a motor vehicle while disqualified and driving with alcohol in his body. Second, the applicant was sentenced to 3 months’ imprisonment, cumulative on the first period of imprisonment, for perverting justice by providing a false name to a police officer. Third, the applicant was sentenced to 6 months’ imprisonment, suspended after 3 months, for 3 charges. These were: breaching a family violence order by sending an abusive and threatening text message to a woman protected by the order; breaching the order by telling the woman he would punch her in the head if she did not pack his property; and committing common assault by placing both hands around her neck and squeezing, threatening to bash her head in if she did not give him a telephone, grabbing her by the back of the neck, and placing his arm around her neck. The magistrate merely expressed this sentence as being ‘cumulative.’ If the third period of imprisonment was cumulative on both sentences, the effective sentence was 10 months’ imprisonment. However, if it was cumulative only on the first sentence, the effective sentence was 7 months’ imprisonment.

Issues: Whether the magistrate erred in failing to make the sentence clear and whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was upheld. The lack of clarity as to the cumulative nature of the third sentence amounted to a sentencing error and the applicant was re-sentenced. The first and second periods of imprisonment imposed were not manifestly excessive. However, the sentence for the assault and the breach of the family violence order was found to be manifestly excessive. A sentence of three months’ imprisonment wholly suspended was substituted. His Honour stated, ‘[t]he nature of the assault was not severe enough to warrant a greater punishment. His culpability for breaching the order was ameliorated by his belief, the claim to which was unchallenged, that the order no longer operated, and by the complainant reconciling and living with him since the order had been made’ ([22]).