

***The State of Western Australia v Cheeseman* [2011] WASCA 15 (19 January 2011) – Supreme Court of Western Australia (Court of Appeal)**

‘Aggravating factor’ – ‘Assault occasioning bodily harm’ – ‘Deprivation of liberty’ – ‘Deterrence’ – ‘Fines’ – ‘Mitigating factors’ – ‘People living in regional, rural and remote communities’ – ‘People with mental illness’ – ‘Physical violence and harm’ – ‘Reconciliation’ – ‘Sentencing’ – ‘Threat to kill’

Charge/s: Deprivation of liberty (two counts), assault occasioning bodily harm, threatening unlawfully to kill.

Appeal Type: Appeal against sentence.

Facts: The first victim (K) was the respondent’s former partner, with whom he had a 2-year old child. The second female victim (C) commenced an intimate relationship with K. The respondent believed that the relationship between K and C had begun before he had separated with K. After the separation, the respondent asked K and C to meet at his home to discuss their relationship with each other. The respondent then left with K, at which point an argument developed. The respondent refused to permit K to leave his car and detained her while he drove her back home. He prevented her from escaping the house. He then armed himself with a spear gun and loaded it with a barbed spear. C then returned to the respondent’s home, whereupon the respondent pointed the spear gun at her, forced her to enter the house and prevented her from leaving. C refused to give the respondent her car keys. In response, the respondent punched C hard in the left cheek which knocked her down. He then picked her up by the throat and lifted her from the ground. He made a number of threats to kill C. C was left with severe injuries and the mental effect has been ‘profound’. She was in fear of her life (see at [47]-[53]). He later reconciled with K. There was no evidence of domestic violence by the respondent towards K before he became suspicious about her relationship with C. He was sentenced to 12 months’ imprisonment (conditionally suspended for 18 months) for both counts of deprivation of liberty, fined \$1000 for assault occasioning bodily harm and sentenced to 24 months’ imprisonment (conditionally suspended for 18 months) for threatening to kill. These terms (as well as a fine for unrelated offending) were imposed concurrently which resulted in a total effective sentence of 2 years’ imprisonment, conditionally suspended for 18 months and a \$2000 fine.

Issue/s: Some of the issues concerned –

1. Whether the fine imposed for assault occasioning bodily harm was manifestly inadequate.
2. Whether the sentencing judge erred in suspending the terms of imprisonment by not having sufficient regard to the seriousness of the conduct and the impact on the victims
3. Whether ordering the sentences be suspended resulted in a sentence that was manifestly inadequate.

Decision and Reasoning: The appeal was upheld in respect of issues 1 and 3.

1. Buss JA (Mazza J agreeing) noted that the assault against C was serious, unprovoked, committed against an unarmed victim who offered no resistance and part of a prolonged episode of intimidation. The fact that the respondent was armed with a spear gun was likely to have increased the victim's fear. The context of the assault (the breakdown of the domestic relationship between the respondent and K and the new relationship between K and C) made personal and general deterrence relevant. This made a \$1000 fine manifestly inadequate notwithstanding the respondent's personal circumstances, including that he was suffering from a mental illness. McLure P agreed and noted that a fine cannot be justified on totality grounds and 'falls well short of appropriately recognising the degree, effect and context of the physical violence inflicted by the respondent on C' (see at [1]).
2. Buss JA (Mazza JA agreeing) held that the remarks of the sentencing judge did sufficiently refer to the seriousness of the conduct and the impact on the victims, as he noted that the issue of suspension required him to consider all aggravating and mitigating factors as well as the objective features of the offence (see at [89]).
3. Buss JA (Mazza JA agreeing) noted that the deprivation of liberty and threat to kill offences were objectively very serious. His Honour disagreed with the sentencing judge and noted that a matrimonial breakdown, reconciliation and the presence of a child in the relationship cannot be regarded as mitigating factors. However, the fact that the respondent's mental state has improved following therapy could indicate progress towards rehabilitation. Nevertheless, the seriousness of the offending and the associated need for deterrence outweighed other factors such as rehabilitation and mercy. McLure P noted that C suffered greater actual and threatened violence than K, such that it was difficult to understand the sentencing judge's explanation for suspending the deprivation of liberty and threat to kill sentences.

See also her Honour's remarks at [3] – *'The circumstances to which the sentencing judge referred are neither unique nor mitigatory. The hallmark of domestic or relationship related violence is the readiness of many victims to return to, or remain in, a relationship with the perpetrator of the violence. The otherwise appropriate penalty should not be reduced because there is a return to the status quo that existed prior to the breakdown of the relationship which precipitated the violence. It is also circular to rely on the return to the relationship status quo as the route to rehabilitation. Moreover, the emphasis on the domestic context marginalises the actual and threatened violence inflicted by the respondent on C.'*

As such, these offences warranted immediate imprisonment. A total effective sentence of 18 months' immediate imprisonment was imposed.