

***Atherden v The State of Western Australia* [2010] WASCA 33 (26 February 2010) – Western Australia Supreme Court (Court of Appeal)**

‘Aggravating factor’ – ‘Effect of guilty plea’ – ‘Intention’ – ‘Murder’ – ‘Non-parole period’ – ‘Physical violence and harm’ – ‘Violence restraining order’ – ‘Vulnerable - women’

Charge/s: Murder.

Appeal Type: Appeal against sentence.

Facts: The appellant had been in a relationship with the deceased for some three and a half years before the relationship ended. The deceased obtained a violence restraining order against the appellant which prohibited him from coming within 100m of her home or work and within 20m of her person. The appellant went to the deceased’s house for the purpose of discussing the restraining order – he wanted to ask the deceased to remove the restraining order because it would be difficult to renew his licence as a car dealer with the restraining order in place. When she yelled at him to get off the property, he hit her with a rubber mallet multiple times until she lost consciousness. He then hit her with a brick. She sustained severe head injuries and she later died. The appellant did not seek medical attention for the deceased. He was sentenced to life imprisonment with a minimum non-parole period of 16 years. The appellant had some history of domestic violence – an ex-partner had obtained a violence restraining order against him after he stalked her and punched her several times.

Issue/s:

1. Whether the original sentence was within range of comparable sentences and whether the trial judge gave sufficient weight to the prosecution’s concession that the appellant only intended to cause grievous bodily harm, not death.
2. Whether the trial judge failed to give sufficient weight to the early plea of guilty in combination with the long non-parole period.

Decision and Reasoning: The appeal was upheld in respect of ground 2.

1. This argument was dismissed. Wheeler JA (with whom Owen JA and McLure P agreed) firstly accepted that given the value which the community places on human life, it is likely that (generally) killing with intention to cause death will be more seriously regarded than killing with the intention to cause grievous bodily harm. However, this will not always be the case, and intention is only one of a range of relevant factors in determining an appropriate sentence (see at [30]-[31]). Indeed, there were other aggravating factors which were relevant in this case. These included – ‘*the brutality of the attack on a defenceless woman, the fact that two weapons were used, the stalking behaviour which occurred in the months leading up to the attack, the presence of the violence restraining order, and the appellant’s callous disregard for the victim’s obvious need for medical attention*’

(see at [48]).

2. The trial judge did not state that the guilty plea was a mitigating factor for which some reduction in sentence should be made. Furthermore, both parties accepted that that a non-parole period of 16 years was severe for an offence involving no premeditation and a relatively brief (albeit violent) attack. Wheeler JA stated that where an early plea can be regarded as a mitigating factor, sentencing judges should expressly state in open court that a reduction in sentence has been made for that reason (see at [45]). The non-parole period was reduced to 14 years.