***Messiha v Plaucs* [2012] WASC 63 (24 February 2012) – Supreme Court of Western Australia**

'Aggravated assault' – 'Aggravated assault occasioning bodily harm' – 'Character' – 'Criminal history' – 'Exposing a child' – 'People affected by substance abuse' – 'People from culturally and linguistically diverse backgrounds' – ' Physical violence and harm' – 'Sentencing' – 'Threat to injure' – 'Totality' – 'Victim'

Charge/s: Aggravated assault, threat to injure, three counts of aggravated assault occasioning bodily harm (circumstances of aggravation: that the appellant was in a family or domestic relationship with the victim).

Appeal Type: Appeal against sentence.

Facts: The appellant engaged in a verbal argument with his wife. The appellant punched and grabbed the side of her face. She attempted to escape, at which point he threatened to kill her, grabbed her around the neck and stabbed her with a screwdriver. She feared for her life. The appellant then bit her twice and told his son who was attempting to stop the assault to get away several times. The appellant had a serious drug problem and the offending occurred while he was under the influence of drugs. He had prior convictions for violent offences but they did not involve domestic violence. He was sentenced to an aggregate term of 18 months' imprisonment for all offences.

Issue/s: One of the issues concerned whether the total aggregate sentence infringed the totality principle.

Decision and Reasoning: The appeal was upheld.

The Court firstly noted that the offending was sustained, premediated and ferocious. It occurred in the family home in the presence of two young children.

The appellant submitted *inter alia* that the sentences should have been made concurrent because they constituted a single course of conduct. The Court rejected this argument and held that the so called 'one transaction rule' is a general rule and the operative question is whether the total effective sentence properly reflects the overall criminality involved. In this case, the course of conduct had distinct features which increased in seriousness over time so it was open to the Magistrate to impose some cumulative penalties.

The appellant also submitted that the Magistrate erred by giving the appellant's criminal record undue weight, given it did not involve domestic violence. This argument was rejected – the Magistrate correctly stated that the record showed a lack of mitigation in that the appellant did not have past good character. Hall J was of the view that there is little merit in distinguishing past violent offending as irrelevant if it is not committed in domestic circumstances. These offences do have relevance, not necessarily as showing a tendency but in showing 'an absence of mitigation as to past good character' (see at [31]).

Another issue concerned whether the Magistrate erred by not having sufficient regard to the appellant's longstanding relationship with his wife, the fact they have dependent children as well as his wife's wishes. His wife filed an affidavit on appeal indicating that the appellant's imprisonment was causing her extreme hardship. Her mortgage was in arrears. If the appellant was released, she claimed that there would be the prospect that the appellant would obtain employment so the arrears could be paid. The appellant and his wife were migrants and she had no wider family in Australia. The Court referred to McLure P's remarks in *The State of Western Australia v Cheeseman* [2011] WASCA 15 (19 January 2011) and held that the wishes of victims of domestic violence for reconciliation has to be seen in context. Offenders cannot expect leniency because their punishment impacts others. While this issue could be relevant in some cases, it should not have been given much weight in this case.

The appellant also submitted that the fact he had successfully completed three community based orders should have been afforded more weight by the Magistrate. This argument was rejected – the Court held that the mitigatory effect of past completion of community orders can be diminished by reoffending. Reoffending can put into doubt whether the order was successful in bringing about attitudinal and behavioural change (see at [37]).

In relation to the presence of the children at the time of the offending, while it was not included as a formal circumstance of aggravation, it was open to take these facts into account (see at [41]).

The Court then noted that there was no history of domestic violence but the offending was serious and justified immediate imprisonment. In applying comparable cases, the Court concluded that the aggregate sentence was particularly high and did not bear a proper relationship to the overall criminality of the offending. In noting that the appellant had apologised, expressed remorse, expressed a wish to assist his wife with the mortgage and children and that he had his wife's support, the total aggregate sentence was reduced to 15 months' imprisonment with eligibility for parole.