***Grimshaw v Mann* [2013] ACTSC 189 (29 August 2013) – Australian Capital Territory Supreme Court**

'Aboriginal and Torres Strait Islander people' – 'Anger management programs' – 'Applications and orders for child residence, contact and parenting orders' – 'Common assault' – 'Drug and alcohol programs' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Protection order' – 'Public/private space' – 'Victim impact statements'

Charge/s: Common assault.

Appeal type: Appeal against sentence.

Facts: The Aboriginal male appellant was involved in an altercation with his former female partner (the complainant) of 7 years. The relationship ended in 2010 due to the appellant's use of drug and alcohol, and he had not seen the children since. In May 2012, the appellant moved to Canberra to be closer to his children and commenced proceedings in the Family Court for access rights. On 2 June 2012, outside a late night convenience store, the appellant started arguing with the complainant and struck her three times with a closed fist. She fell to the ground and hit her head. She was helped up by her two friends and threw a glass soft drink bottle at the appellant. She missed but smashed another glass bottle over his head. The appellant needed four stiches. The appellant voluntarily handed himself into the police two days later. The complainant had previously obtained two protection orders against the appellant. Both had expired at the time of offence.

At the sentencing hearing, a lengthy Victim Impact Statement was tendered. However, it contained a good deal of irrelevant and inadmissible material. Refshauge J on appeal stated:

'Allegations of further serious offending cannot come within the definition of "harm suffered by the victim [as a result of, or in the course of, the commission] of the offence": s 47 of the Crimes (Sentencing) Act 2005 (ACT). While defence counsel may be wary of exercising their rights to cross-examine a victim on a Victim Impact Statement, discussions with prosecutors should result in an appropriate response from responsible prosecutors about inadmissible material and such statements. Without that proper approach, it is likely that such statements will lose their value and that the courts will have to intervene to ensure that the legislation is respected to ensure inadmissible, and often inflammatory, material is not included in such statements' (See [41]).

The appellant pleaded guilty to common assault and was sentenced to 10 months imprisonment, three months to be served by full-time custody, three months by periodic detention and the balance suspended and a two year good behaviour order made. The appellant sought assistance for his alcohol and drug issues, made contact with the Aboriginal Justice Centre, and enrolled in a men's anger program.

Issue/s: The sentence was manifestly excessive.

Decision and Reasoning: The appeal was allowed and the appellant re-sentenced to 10 months imprisonment to commence on 28 May 2013, suspended for two years from 27 August 2013. The sentence was manifestly excessive in all the circumstances. First, the sentencing magistrate did not take into account the appellant's injuries caused by the complainant which occurred when the appellant was no longer a threat to the complainant. Second, the injuries sustained by the complainant, as apparent from photographic evidence, were not as serious as what was described in the Victim Impact Statement. Finally, the appellant's criminal history, although containing prior convictions for violent offences, did not demonstrate a propensity to violence. He had not been charged with any domestic violence offences and he had not breached two personal protection orders (See [77]-[82]).

His Honour further stated:

'The prosecution referred to the aggravating factor that the assault "took place in a public place." I have some difficulty with that factor as an aggravating one. It implies that an assault in private is less serious. I am not sure that this follows.

Most family violence occurs in private yet is regarded as very serious. Indeed, privacy can emphasise the vulnerability and helplessness of the victim.

However that may be, intermediate Courts of Appeal have regularly referred to the fact that violent offences committed in public are more serious. See, for example, R v Freestone [2009] QCA 290 at [30], Ludeman v The Queen (2010) 208 A Crim R 298 at 321; [132], Smith v Tasmania [2012] TASCCA 3 at [32], R v Edwards [2012] QCA 117 at [23], Shoard v Van Der Zanden [2013] WASC 163 at [41]. This is the not the place to consider the rationale for such an approach; that will have to wait for another day. It is enough that the reliance by the learned Magistrate on the fact that the assault occurred in public as an aggravating factor was not an error' (See [49]-[51]).