

## ***Roberts v Smorhun* [2013] ACTSC 218 (1 November 2013) – Australian Capital Territory Supreme Court**

\*Note: this case referenced now superseded legislation, however the statements of principle are unaffected by the legislation change.

‘Appeal against sentence’ – ‘Breach of protection order’ – ‘People affected by substance misuse’ – ‘Physical violence and harm’ – ‘Protection order’

Charge/s: Contravention of a domestic violence order.

Appeal type: Appeal against sentence.

Facts: The female complainant and the male appellant had been in a relationship for 6-12 months and had lived together until mid-December 2012. After the complainant was granted an interim domestic violence order against the appellant, the appellant telephoned the complainant to meet him at a friend’s place so he could give her the keys back to her place. At this meeting, an argument developed and the appellant started chasing the complainant, yelling abuse. When he caught up to the complainant, he raised his arm as if to punch her, but instead he grabbed the complainant’s sunglasses, snapped them in half and threw them in her face. This caused the complainant injury. The appellant was sentenced to 32 months imprisonment for the charge of contravening a protection order, with no further penalty for the charge of assault occasioning actual bodily harm..

Issue/s: The sentence was manifestly excessive.

Decision and Reasoning: The appeal was upheld and the appellant re-sentenced to 23 months imprisonment. Refshauge J noted that there was no doubt that the offending was serious. The fact that the appellant had been convicted of 9 prior offences of the same character against another woman meant that he could be afforded little leniency. However, the sentence was nonetheless disproportionate to the offending conduct.

The prosecution submissions on sentence at first instance referred to the fact this was a family violence offence, referring to dicta of the Alberta Court of Appeal in *R v Brown* (1992) 73 CCC (3d) that:

When a man assaults his wife or other female partner, his violence toward her can be accurately characterized as a breach of the position of trust which he occupies. It is an aggravating factor. Men who assault their wives are abusing the power and control which they so often have over the women with whom they live. The vulnerability of many such women is increased by the financial and emotional situation in which they find themselves, which makes it difficult for them to escape.[81]

The court noted that this statement had been cited with approval by the Court of Criminal Appeal of the Supreme Court of Tasmania in *Parker v R* [1994] TASSC 94 (21 July 1994) and in the NSW Court of Criminal Appeal in *R v Hamid* [2006] NSWCCA 302. [82]

Three features listed by the sentencing judge as aggravating the offence, were not in fact aggravating features. First, while domestic violence orders play a special place in the criminal law's efforts to prevent domestic violence, His Honour erred in finding that a domestic violence was a feature of aggravation for the offence of contravening a domestic violence order. Second, His Honour also incorrectly found that the fact the offence occurred in public was a circumstance of aggravation in this particular case as there were no people present at the time of offence. His Honour also previously referred to this issue in the case of *Grimshaw v Mann* [2013] ACTSC 189 at [49]-[51], where he expressed some difficulty with characterising the public nature of an assault as an aggravating feature, as it implies that a private assault is less serious. Finally, the sentencing judge inferred that the broken part of the complainant's glasses was sharp and this aggravated the offending. However, this conclusion was not supported by the evidence (See [132]-[138]). Further, the sentencing judge did not take into adequately discount the sentence to account for the appellant's plea of guilty (See [143]).

In dicta, His Honour considered the principles in *Pearce v The Queen*. The sentencing judge pointed out that the appellant's assault covered most, if not all, of the conduct prohibited by the protection order, and decided to impose no penalty, other than the conviction, for the assault offence. His justification was that there was no element in the assault offence that had not been encompassed in the offence of contravening the protection order. Refshauge J stated that '[i]f that were strictly correct, then the conviction for the offence of contravening the protection order would have resulted in a requirement that there be a verdict of autrefois convict in respect of the offence of assault occasioning actual bodily harm. That would have been the appropriate response if the elements [were] such that the whole of the criminality of offence of assault occasioning actual bodily harm was contained in the offence of contravening the protection order.' However, as the parties did not argue on this issue, it was unnecessary for His Honour to resolve it on the appeal. The appellant brought the appeal against the sentence on the charge of contravening the protection order. There was no cross-appeal that the sentence for the assault offence was manifestly inadequate, 'which would be likely if it was thought that there was criminality in that offence separate from the other such that, for example, the plea of autrefois convict would not apply' ([150]). In any event, Refshauge J concluded that the offence of contravening the protection order did not include any of the fault element of the offence of assault ([151]).

Refshauge J quoted from *R v BG* (an unreported judgment from December 2010):

*Compliance with any sort of protection order is essential for the court in protecting members of the community from violence and other unwanted behaviour. Breaches of protection orders risk the success of the regime from achieving that purpose, especially if they encourage people to think that they can breach with impunity. A severe approach is necessary, consistent with fairness to the accused. Thus, the Court cannot punish beyond what is appropriate to the offence (See [4]).*