

***Hurst v R* [2017] NSWCCA 114 (31 May 2017) – New South Wales Court of Criminal Appeal**

‘Delay’ – ‘Objective seriousness’ – ‘Physical violence and harm’ – ‘Sexual violence’

Note: On 25 September 2018 Sections 4A and 4B of the *Crimes (Sentencing Procedure) Act* were introduced imposing additional requirements in sentencing for domestic violence offences in NSW.

Charges: Assault x 2; aggravated detain for advantage x 1; incite another to commit an act of indecency x 1; maliciously inflict grievous bodily harm with intent to do grievous bodily harm x 1; use offensive weapon with intent to commit the indictable offence of assault occasioning actual bodily harm x 2; aggravated sexual intercourse without consent x 1; assault occasioning bodily harm x 1;

Case type Appeal against sentence.

Facts: The applicant pleaded guilty to 9 offences, relating to physical and sexual violence against his then girlfriend (the complainant), with whom he commenced an intimate domestic relationship in 2005. The sentencing judge imposed a total effective sentence of 18 years imprisonment, with a non-parole period of 12 years. His Honour had regard to the delay in prosecution and noted that the delay was largely due to the complainant's decision not to proceed against the applicant at the time that the offences occurred.

Issue: The applicant appealed against the sentence on various grounds, including that the sentencing judge erred by failing to make an assessment of the objective seriousness of the offence of aggravated detention for advantage (Ground 1), and that he did not take into account the delay in prosecution and the prejudice suffered by the applicant on sentence (Ground 3).

Held: The Court granted leave to appeal against the sentence, but dismissed the appeal.

Objective seriousness:

The Court was not satisfied that Ground 1 was established on the evidence ([105]-[110]). When a sentencing judge has made it clear from his or her findings that they regard the offence as serious, little more is required ([105]). While he did not expressly determine the objective criminality of the offence of aggravated detain for advantage, he gave due consideration to the nature of the conduct and the circumstances in which it occurred ([109]). Further, the evidence of the applicant's conduct made a conclusion of significant seriousness self-evident ([109]).

Delay:

Hoeben CJ at CL (with Price and Longergan JJ agreeing) noted that a common aspect of domestic violence related offences is that there may be a considerable delay between the occurrence of the offence and the complaint being made. However such delay should not be held against the victim. It is a direct product of the nature of the offending itself, and it would be incongruous if an offender could gain a benefit from such delay ([132]). Where there is unexplained considerable delay during which there has been steps taken towards rehabilitation, and/or a change of circumstances that increases the hardship brought about by a custodial sentence, it may be appropriate to impose a sentence that would otherwise be considered to fall below the range of an appropriate sentence ([133], see also *Hughes v R* [2013] NSWCCA 129 at [58]).

The Court noted the significant difference between delay that can be attributed to a police failure to charge and what occurred with the complainant. She was a victim of ongoing domestic violence which involved extremely controlling behaviour, and she chose not to proceed with those charges at the time. It appeared that she did not feel ready and able to address these matters for many years ([138]). The applicant did not make any attempt to rehabilitate in the lengthy period between offending and sentencing. It was open to the sentencing judge to take into account the lack of evidence that the applicant suffered any anxiety as a consequence of concern that he would be prosecuted in connection with any of these matters. His Honour's further finding that there was no evidence that the applicant had contributed to any delay was 'somewhat generous' since the applicant could have brought these matters to the attention of the authorities at any time after they occurred ([140]).

Further, there was no evidence that the delay in the proceedings caused the applicant increased hardship. Even if there were, this ground of appeal was founded entirely upon the apportionment of weight to a particular sentencing factor in the exercise of the sentencing judge's discretion. In those circumstances, it is well established that matters of weight will only rarely justify the intervention of the Court. Circumstances warranting the Court's intervention have not been demonstrated in this case ([141]).