

***McIlwraith v R* [2017] NSWCCA 13 (22 February 2017) – New South Wales Court of Criminal Appeal**

‘Intimidation’ – ‘Intoxication’ – ‘Property damage’ – ‘Specific intent’

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: Numerous charges, including aggravated breaking etc into any house etc and committing serious indictable offence under section 112(2) of the *Crimes Act 1900* (NSW).

Case type Appeal against conviction.

Facts: On 18 June 2014, the applicant entered 3 properties, and was arrested and charged with a number of offences alleging breaking and entering, and stealing property. The applicant pleaded guilty to one (Count 5) of 8 counts, and elected to be tried by judge alone. The trial judge acquitted the applicant on Counts 1, 2, 3 and 8, and convicted him on Count 7 (an offence of aggravated break, enter and commit serious indictable offence under section 112(2) of the *Crimes Act 1900* (NSW)). The serious indictable offence was one of intimidation with intent to cause fear of physical or mental harm under section 13(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

The applicant was sentenced to 22 months imprisonment with a non-parole period of 14 months with respect to Count 5. He was also sentenced to 4 years imprisonment with a non-parole period of 3 years with respect to Count 7. The first sentence was wholly concurrent with, and consumed within, the longer second sentence.

The applicant appealed on the ground that the trial judge erred in finding that the offence of intimidation under section 13 is not an offence of ‘specific intent’.

Issue: A key question for the Court was whether the offence of intimidation under section 13 is one of ‘specific intent’, and whether the applicant’s intoxication at the time of the offending can be taken into account in determining his guilt.

Held: The Court refused to grant leave to appeal with respect to the challenge to the findings of fact, and otherwise dismissed the appeal against the conviction. It also refused leave to appeal against the sentence imposed in the District Court.

The provisions of Part 11A dealing with intoxication are concerned with circumstances in which a particular state of mind is required and can be viewed as wrongful. A particular state of mind can involve a specific intent to achieve an identified consequence (as in section 13(1) or section 13(3)), matters of which the accused is aware and consequences which he or she knows to be likely ([39]). The question for the Court was whether the offence of intimidation is an offence of specific intent and whether the provisions under Part 11A of *Crimes Act* regarding intoxication apply to it.

Basten J found that the offence of intimidation under section 13(1) is one of specific intent, and thus subject to the provisions of Part 11A ([39]). Therefore an offender's intoxication can be taken into account in determining criminal liability. His Honour reached this conclusion by considering the decisions of *R v Grant* (2002) 55 NSWLR 80 and *Harkins v R* [2015] NSWCCA 263 ([39]-[42]).