***Xue v R* [2017] NSWCCA 137 (21 June 2017) – New South Wales Court of Criminal Appeal**

'Cultural considerations' – 'People from culturally and linguistically diverse backgrounds' – 'Physical violence and harm' – 'Starting point'

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: Wounding with intent to cause grievous bodily harm x 1.

Case type Appeal against sentence.

Facts: The applicant pleaded guilty to one count of wound with intent to cause grievous bodily harm, and was sentenced to 6 years imprisonment with a non-parole period of 4 years. The applicant received a discount of 25% for his guilty plea.

The applicant and victim were husband and wife and had been married for 30 years. The witnesses to the incident were the applicant's son and daughter-in-law. There had been some history of domestic violence. The applicant started accusing the victim of having an affair, and began to violently threaten and assault her with a knife. Their son intervened and drove his mother to the hospital where she was admitted for her injuries. The applicant said that he had argued with his wife and had accused her of having an affair. He also said that it was very shameful for a man if his wife had an affair in Chinese culture.

Issue: The issue for the Court was whether the sentence was manifestly excessive. The applicant submitted that allowing for the 25% discount for an early plea of guilty, the starting point for the sentence must have been 8 years, which in the circumstances was excessive. The applicant also argued that the 4 year non-parole period was above the majority of sentences imposed for this offence.

Held: The appeal against sentence was refused. The applicant's circumstances at the time of the offending and his genuine belief that the victim may have been having an affair could not justify or ameliorate the seriousness of the offending. The catalyst of domestic violence is often a genuine, albeit irrational, belief of being wronged in some way by the victim. A resort to violence in such circumstances is unjustifiable, even if the offender's belief is correct. The court regarded the sentencing judge's remarks about the courts' and the community's concern at the level of domestic violence in the community as 'timely and appropriate' ([53]).

Further, the Court found that the notional starting point was not manifestly excessive as no evidence was put before the Court to establish that such a starting point was excessive in the circumstances. In considering whether a sentence is manifestly excessive, approaching the case from a hypothetical starting point diverts attention from the question as to whether the sentence actually imposed was unreasonable ([50]). However, where there is no dispute over whether the discount was excessive, justice demands that the focus be on the starting point ([4], see also *TYN v R* [2009] NSWCCA 146 [33]-[34]).