

## ***Browning v The Queen* [2015] NSWCCA 147 (17 June 2015) – New South Wales Court of Criminal Appeal**

‘Breach of an apprehended domestic violence order’ – ‘Conditional liberty’ – ‘Deterrence’ – ‘People with mental illness’ – ‘Physical violence and harm’ – ‘Protection order’ – ‘Repeated breaches’ – ‘Using etc explosive substance or corrosive fluid etc with intent to burn, maim, disfigure, disable or do grievous bodily harm’

Charge/s: Using etc explosive substance or corrosive fluid etc with intent to burn, maim, disfigure, disable or do grievous bodily harm, breach of an apprehended domestic violence order x 2.

Appeal Type: Appeal against sentence.

Facts: The applicant and the complainant had been married for 30 years but separated in August 2012. The complainant obtained an Apprehended Domestic Violence order (ADVO) against the applicant for 12 months. Notwithstanding this, the applicant breached the order on two occasions. On a subsequent occasion, the applicant doused the complainant in petrol and made a sustained attempt to light her on fire. He was stopped by three teenage boys. The applicant was sentenced to 7.5 years imprisonment for the offence of using an explosive substance or corrosive fluid with intent, with a non-parole period of four years.

Issue/s: One of the grounds of appeal was that the Court’s finding that the offence of using an explosive substance or corrosive fluid with intent was in the mid-range of seriousness failed to adequately account for the Court’s findings that:

1. the offence was not pre-meditated but spontaneous;
2. no significant harm was occasioned to the victim;
3. the applicant’s attempts to carry out his intended actions were less determined than in other examples of this offence; and
4. other matters bore on the assessment of the seriousness of the offence.

Decision and Reasoning: This ground of appeal was dismissed. Garling J held (Gleeson JA and Johnson J agreeing) that the finding of the sentencing judge that this offence was in the mid-range was, if anything, unduly favourable to the applicant. This was a sustained attempt to set the complainant alight after the applicant had doused her in petrol. The only impediment to his success was the repeated intervention of the teenage men (See [96]-[100] and [3]).

Johnson J made some additional observations at [5]-[8]. His Honour cited with approval Spigelman CJ's observations regarding apprehended domestic violence orders in *John Fairfax Publications Pty Limited v Ryde Local Court* [2005] NSWCA 101 at [20]:

*'The legislative scheme is directed to the protection of the community in a direct and immediate sense, rather than through mechanisms such as deterrence. Individuals can obtain protection against actual or threatened acts of personal violence, stalking intimidation and harassment. Apprehended Violence Orders constitute the primary means in this State of asserting the fundamental right to freedom from fear. The objects served by such orders are quite distinct from those that are served by civil adversarial proceedings or proceedings in which an arm of the State seeks to enforce the criminal law.'*

His Honour further noted that the applicant was a repeat domestic violence offender. Accordingly, in sentencing for these offences, it was appropriate to have in mind the statement of the Court in *R v Hamid* [2006] NSWCCA 302 (20 September 2006) at [86]:

*'In sentencing a domestic violence offender, and in particular a repeat domestic violence offender, specific and general deterrence are important factors, together with the requirement of powerful denunciation by the community of such conduct and the need for protection of the community. Recognition of the harm done to the victim and the community as a result of crimes of domestic violence is important.'*

Finally, Johnson J stated:

*'Where a court has made an apprehended domestic violence order to protect a person, and then further orders are made by way of conditional liberty for criminal offences arising from breaches of that order, the commission of another offence, in breach of that conditional liberty, will constitute significant aggravating circumstances: s 21A(2)(j) Crimes (Sentencing Procedure) Act 1999. This is especially so where the offence against the protected person is of the very grave character of the s 47 offence in this case, with the offence being committed so soon after the applicant had been given the benefit of conditional liberty by order of the District Court.'*

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