

***R v Quach* [2002] NSWCCA 173 (15 May 2002) – New South Wales Court of Criminal Appeal**

‘Contrition’ – ‘Forgiveness by the victim’ – ‘Good character’ – ‘Grievous bodily harm with intent to murder’ – ‘Physical violence and harm’ – ‘Sentencing’ – ‘Victim contribution’

Charge/s: Grievous bodily harm with intent to murder.

Appeal Type: Appeal against sentence.

Facts: The applicant began to suspect that his wife, the victim, was having an affair (an allegation without basis). One morning, while the children were at school, the victim was lying in bed and was struck several times, mainly on the head, with a bottle wielded by the applicant. The applicant said to the victim that he wanted to kill her because she did not respect him. He then tied the victim up and gagged her whilst continuing to threaten to kill her and then himself. The victim was not released until her children returned home from school and the victim lost a lot of blood. The applicant was sentenced to nine years imprisonment with a non-parole period of five years. In imposing this sentence, the sentencing judge made reference to the former good character of the accused and stated:

‘We must all accept the fact that differences in marriages do occur and it is expected that people will try and resolve any differences without violence. However to go to the stage of wanting to end the marriage by killing someone is quite unacceptable of course and quite frightening to the wider community. There can be no mitigating factors in such an act with that intention. We do accept the realities of marriages breaking up and people separating but we can never accept or tolerate any person killing someone as the solution. And so it is difficult with reference to a person being a man of good character up until now. It is difficult to know what relevance that has where a person has considered the final solution’ at [16].

The fact is that at the start of the assault that morning the prisoner did state and evidence an intention to kill. Such an expression and intention must immediately negate any consideration of mitigating factors because of good character, then to extend the trauma and terror of the assault all day until the late afternoon takes the actions of the prisoner into a further level of callousness’ at [17].

Issue/s: Some of the grounds of appeal included –

- > The sentencing judge did not take into account the previous good character of the applicant when fixing the sentence.
- > The sentencing judge failed to consider the contrition of the applicant.

Decision and Reasoning: The appeal was dismissed. First, O’Keefe J noted that there is nothing wrong with a judge discussing the weight which should be given to the previous good character of an offender. While the sentencing judge’s remarks at [16] were unexceptional, the sentencing judge erred at [17] when he completely excluded the applicant’s previous good character as a mitigating factor and therefore did not take it into consideration in mitigation of the penalty (see [19]). However, the sentence imposed by the judge and the non-parole period were very lenient given the objective gravity of the offence and taking into account the subjective features of the applicant, and a lesser sentence would not have been appropriate in the circumstances. This ground of appeal was therefore dismissed.

Second, on the facts, it was arguable that the applicant showed contrition and further, the absence of an affirmative finding in relation to contrition by the sentencing judge was not to be regarded as a matter overlooked by His Honour (See [27]). Additionally, O’Keefe J commented on forgiveness of the victim at [28] and stated:

‘The fact that he expressed contrition to his wife and that she said that she forgave him did not detract from the duty of the judge to impose a proper sentence. Her views in relation to the contrition of the Applicant, as opposed to what he said to her, do not seem to have been tested. Furthermore, even the stated acceptance by the victim of her acceptance of her attacker’s contrition does not bind the court, nor does it detract from the need to give proper weight to the principle of general deterrence, R v Kanj [2000] NSWCCA 408, a principle that is important in cases of domestic violence (R v Green [2001] NSWCCA 258 ; R v Glen [1994] [1994] NSWCCA 1). Furthermore, the fact that a victim may forgive her attacker is not determinative. Indeed, its weight in relation to general deterrence will be a variable depending on the offence and the circumstances. It is a matter for judgment by the sentencing judge.’