

***Kennedy v The Queen* [2008] NSWCCA 21 (22 February 2008) – New South Wales Court of Criminal Appeal**

‘Aboriginal and Torres Strait Islander people’ – ‘Aggravating factor’ – ‘Grievous bodily harm with intent’ – ‘People with mental illness’ – ‘Physical violence and harm’ – ‘Protection order’ – ‘Sentencing’

Charge/s: Grievous bodily harm with intent.

Appeal Type: Appeal against sentence.

Facts: The male Aboriginal applicant had been in a de facto relationship with the female Aboriginal victim of the assault. Their relationship had been volatile and the police had taken out an interim apprehended violence order (AVO) on behalf of the victim. Three weeks prior to the offence, the victim had ended the relationship and taken the applicant’s medication for schizophrenia with her in her handbag. The applicant began experiencing auditory hallucinations and attacked the victim. She suffered severe physical injuries including facial fractures, fractures to her nasal bones and fractures of the mandible.

At sentence, the applicant explained that he did not obtain replacement medicine because there was no doctor and he did not want to leave his sick father. Nevertheless, the sentencing judge found that the applicant’s state of mind was induced by his failure to take his medication, such that his psychological status was of his own default. The applicant was sentenced to a term of imprisonment consisting of a non-parole period of four years, with a balance of term of three years.

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

- > The sentencing judge erred in finding that the applicant’s psychological status was his own fault.
- > The sentencing judge erred in his assessment that the offence was in the ‘upper level of seriousness’.
- > The sentencing judge failed to appropriately take into account the applicant’s mental disorder when imposing sentence.

Decision and Reasoning: The appeal was allowed. First, the sentencing judge failed to give reasons for his finding that the applicant's psychological status was his own fault. In particular, the sentencing judge failed to examine the circumstances which led to the applicant ceasing to take his medication. Such failure means that the sentencing judge could not arrived at such a conclusion beyond reasonable doubt (See [25]-[27]). Second, the sentencing judge erred in determining the objective seriousness of the offence by only having regard to the physical aspects of the assault and failing to consider the applicant's psychological condition (See [38]-[40]). Third, the sentencing judge failed to take into account the applicant's mental disorder as being relevant to the applicant's moral culpability (See [46]-[49]). Relevant to domestic violence, an aggravating factor of this offending was that at the time of the offence, the applicant was subject to an AVO, taken out to protect the victim (at [8]).