***Drew v R* [2016] NSWCCA 310 (16 December 2016) – New South Wales Court of Criminal Appeal**

'Aboriginal and Torres Strait Islander people' – 'Aggravating factor' – 'Aggravation' – 'Culture considerations' – 'Judicial notice' – 'Physical violence and harm' – 'Vulnerability' – 'Worst category'

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: Initially charged with wound with intent to murder. He entered into a plea of guilty to a charge of wound with intent to cause grievous bodily harm, as well as one count of contravening an Apprehended Domestic Violence Order (ADVO).

Case type Appeal against decision.

Facts: The appellant pleaded guilty to a charge of wounding with intent to cause grievous bodily harm, as well as one count of contravening an ADVO. He was sentenced to 12 years and 6 months imprisonment, with a non-parole period of 9 years and 4 months. The sentencing judge made a number of observations, including a statement that the victim was a vulnerable person due to the culture of silence and ostracism of those who complain in relation to acts of violence in the Indigenous community. Her Honour also stated that the offence fell within the worst category of offences of its kind.

The appellant was in a domestic relationship with the victim at the time of the offending. There was a history of domestic violence in the relationship to the extent that an ADVO had been taken out against the appellant. He has a long and varied criminal history which included numerous violent offences against 13 separate victims. 3 of those victims were his domestic partners at the time of the offence, and one was his own son. 9 of those instances involved a weapon.

Issue: The appellant relied on the following grounds of appeal:

- The judge erred by finding the offending was aggravated due to the victim being Aboriginal and thereby a vulnerable person.
- The judge erred in the characterisation of the offence as falling within the 'worst category'.
- The sentence imposed was manifestly excessive.

Held: The Court granted leave to appeal, but dismissed the appeal. It made remarks on the need to take special care when making findings of fact about vulnerable victims.

Vulnerability:

A question arose as to whether the sentencing judge was entitled to take into account the serious problem of under-reporting of domestic violence in Indigenous communities due to a culture of 'silence and ostracism', and aggravate the offence on that basis ([83]). Her Honour was entitled to note both the high rates of domestic violence, and the vulnerability of women and children in Indigenous communities, but she erred in finding the offence to be aggravated on account of the victim being classified 'vulnerable' due to this under-reporting problem ([85], [90]). 'A Court may not aggravate an offence by taking judicial notice of the fact that some Aboriginal women might be less likely to complain of domestic violence because of a culture of silence and ostracism in their communities' ([84], see also [1], [8]). No evidence was capable of establishing beyond reasonable doubt that the victim was a member of a particular class bearing those characteristics ([90]).

Further, the aggravating factor of vulnerability under section 21A(2)(l) of the *Crimes (Sentencing Procedure) Act 1999* is only engaged where the victim belongs to a class that is vulnerable because of a common characteristic ([8], [75]-[78]). An ultimate finding of vulnerability of the victim in the more general sense of being under an impaired ability to avoid physical conflict with the appellant or to defend herself in the event of conflict was open as an inference from primary facts ([5]).

Fagan J noted that it was a circumstance of the offence, relevant to determining an appropriate sentence, that because of the victim's emotional and intimate attachment to the appellant, she was less likely than any other potential victim to avoid him or to put herself out of harm's way ([7]). The individual vulnerability of the victim was an 'inescapable conclusion from the evidence' and had, in practical terms, the same consequence for assessment of the objective seriousness of the offence ([8]).

'Worst category':

The use of the phrase 'worst category' should be avoided by judges unless it is in the context of imposing the maximum penalty available for that offence ([105]). However, when taking into account the features of the offence, such as the seriousness of the victim's injuries, the appellant's earlier threat to the victim, the fact that the offence occurred without regard to the ADVO, the prolonged nature of the attack, the location of the offence (the victim's home), and the appellant's intoxication at the time of the offence, it was open to the sentencing judge to classify the objective seriousness of the offence as her Honour did ([106]-[114]). It is not necessary for the injuries to be of the 'worst type' for an offence to fall into the 'worst case' category. The nature of the offence can bring a case within that category ([107]).

Manifestly excessive:

The sentence imposed was not manifestly excessive. The appellant had a history of violent offending, which included offending during parole periods. The sentencing factors of specific deterrence and community protection meant that no shorter sentence could be warranted in law.