

***Ross, Christopher v R* [2019] NSWCCA 314 (20 December 2019) – New South Wales Court of Criminal Appeal**

‘Aboriginal and Torres Strait Islander people’ – ‘Application for leave to appeal against sentence’ – ‘Children’ – ‘Coercion’ – ‘Controlling behaviour’ – ‘History of abuse’ – ‘Non-fatal strangulation’ – ‘People affected by substance misuse’ – ‘Physical violence and harm’ – ‘Specific considerations’ – ‘Stalking’ – ‘Threats to kill’ – ‘Victims as (alleged) perpetrators’

Charges: Stalking or intimidation with intent to cause fear or physical or mental harm x 2; aggravated detain for advantage x 1; common assault x 1; influence witness x 1

Case type: Application for leave to appeal against sentence

Facts: The applicant man was sentenced with respect to 5 offences involving domestic violence against his female de facto partner (complainant), including one offence of seeking to dissuade her from giving truthful evidence. He was sentenced to an aggregate term of 6 years’ 6 months’ imprisonment, with a non-parole period of 4 years 8 months. The applicant and complainant had known each other since childhood, and their relationship commenced in 2016. At that stage, the complainant had 5 children living with her. The Department of Community Services took the children into care as both parties were using drugs. The relationship soon became dysfunctional with constant arguments and pushing and shoving by each party.

The applicant had intimidated the complainant on several occasions by making threats to kill. One incident involved the use of a syringe to intimidate, and another involved the complainant threatening to take her own life ([5]-[7]). The applicant also detained the complainant without her consent with an intention to obtain an advantage, namely psychological satisfaction, and caused actual bodily harm ([10]-[11]). On another occasion, the applicant pushed the complainant, causing her to fall particularly frightened ([13]). Whilst the applicant was shopping, the complainant ran to a nearby police station, claiming to have been kept hostage by him and fearful for her life. He was later arrested, charged and refused bail. The police also gave an ADVO for the complainant’s protection, prohibiting the applicant from contacting her. While in custody, the applicant contacted the complainant and pressured her to give false evidence by making a statutory declaration which described her allegations as false and misleading ([17]). She did so, and the applicant was released on bail. He continued to commit further offences against the complainant. He was arrested again and charged with contravening the ADVO, assault occasioning actual bodily harm, common assault, intentionally choking a person with recklessness, and escaping police custody ([18]-[19]).

Grounds: The aggregate sentence was manifestly excessive

Held: The application for leave to appeal against the aggregate sentence was granted; the appeal was dismissed. The Appeal Court was unable to conclude that the sentencing judge failed to apply the relevant principles such that there was an error in the sentence imposed ([42]-[45]). The sentence was not manifestly excessive ([56]).

It was submitted inter alia that the sentence did not reflect the factual findings made by the judge as to his disadvantaged background and the genesis of his drug dependency ([2]).

The sentencing judge emphasised the need for the court to provide full protection to domestic violence victims, because such conduct involves a violation of trust and the use of physical strength to control and subordinate the other party to an intimate relationship ([28]). The sentencing judge found that the offence of influencing a witness involved overtones of domestic violence in that the applicant, although in custody, continued "to exert the power, influence and control that he had established over the complainant, as a result of her dependency upon him" ([34]).

The applicant's subjective circumstances included that: his father was murdered, he grew up in a household which involved alcohol and drug use, and violence, and he began using drugs and alcohol himself at an early age ([40]). The sentencing judge noted that although his deprived upbringing and early onset of drug and alcohol abuse served to ameliorate his level of moral culpability, he nevertheless had a substantial level of moral culpability ([41]). The Appeal Court considered cases like *R v Fernando and Bugmy v The Queen*, which discussed the role of alcohol abuse and alcohol-fuelled violence in Aboriginal communities. Wood J in *Fernando* recognised that both of these problems are endemic in some Aboriginal communities, and considered that where an offender's abuse of alcohol is a reflection of the environment in which he or she was raised, it should be taken into account as a mitigating factor. In *Munda*, the Court addressed the tension between accepting a reduction in moral culpability due to the offender's disadvantaged background, and the need to provide the victim of violence with "such protection and vindication as the criminal law can provide."