

***Amante v R* [2020] NSWCCA 34 (11 March 2020) – New South Wales Court of Criminal Appeal**

‘Arson’ – ‘Domestic violence offences’ – ‘Judicial notice’ – ‘People affected by substance abuse’ – ‘Photographic evidence’ – ‘Property damage’ – ‘Protection orders’

Charges: Destroying or damaging property x 1 (domestic violence offence).

Case type: Application for leave to appeal against sentence

Facts: This is an application for leave to appeal against the sentence imposed by Colefax DCJ in *R v Amante* [2019] NSWDC 222. The applicant, whilst under the influence of ice, threatened his estranged partner and subsequently set fire to her Department of Housing unit causing significant damage, potential danger and hardship to other residents ([11]). The applicant was sentenced to 3 years and 9 months imprisonment, with a non-parole period of 2 years.

Issue: The applicant sought leave to appeal against his sentence on two grounds. Firstly, he contended that the sentencing judge erred in taking "judicial notice" of the fact that the fire in the roof cavity "posed a serious structural risk to the integrity of the building". Secondly, he alleged error in the way in which the sentencing judge dealt with the applicant's mental health issues, specifically in finding that they were "largely untreated and largely unresolved".

Held: The application for leave to appeal was granted, but the appeal was dismissed.

Beech-Jones J acknowledged the sentencing judge's remarks at [46]-[48]. The applicant had a dysfunctional upbringing, which reduced his moral culpability. Moreover, he was genuinely remorseful and his rehabilitation prospects were found to be reasonable provided that he "receive appropriate treatment". The sentencing judge also found special circumstances and varied the statutory ratio accordingly.

The first ground was a challenge to the factual finding of the sentencing judge. The applicant contended that the sentencing judge erred in taking judicial notice of the fact that the spread of the fire to the roof cavity "posed a serious structural risk to the integrity of the building". The applicant argued that he had found this fact to be an aggravating factor, and as such was required to be satisfied of it beyond reasonable doubt. The applicant warned of the dangers of relying on photographic evidence, and contended that it was "somewhat remarkable" that the sentencing judge purported to take judicial notice of the structural integrity of the building, whilst also noting the lack of expert evidence in relation to the fire ([52]). N Adams J (Payne JA concurring) found that Ground 1 had not been established. She treated Ground 1 as a challenge to the factual conclusion of the sentencing judge and in submissions counsel for the applicant accepted that the relevant test was whether the conclusion was open to His Honour (R v O'Donoghue (1988) 34 A Crim R 397) [55]. Beech-Jones J agreed the matter should be considered by reference to evidence available to support His Honour's conclusion. Her Honour found that the sentencing judge drew an inference that was open to him based on both the agreed facts that the fire went into the roof void, as well as the photographic evidence which showed that the wooden beams in the roof were burnt ([62]). She was also not satisfied that the sentencing judge found the fact as an aggravating factor, as he had not stated anything to this effect ([64]).

In relation to the second ground, it was submitted that his Honour denied the applicant procedural fairness by finding that considerations of specific deterrence and the need to protect the community were "fully engaged" in the applicant's case because of his "largely untreated and largely unresolved" mental health issues. The applicant submitted that his mental health issues were being treated with medication and that his major depressive disorder was in remission. Ground 2 was also not established. N Adams J (Payne JA and Beech-Jones J concurring) found that it was open to the sentencing judge to find that the applicant's mental health issues were unresolved, given his poor history ([82]-[83]). This case is a "classic example" of how sentencing judges may be required to make "individualised discretionary decisions" based on the available material. The sentencing judge "ameliorated the sentence on the basis that no rational person would react to a break-up by setting fire to their ex partner's house threatening the lives of other people", however, specific deterrence became a relevant consideration as the applicant's mental health and drug issues was found to have led him to commit the offence ([85]).

Consequently, the appeal against sentence was dismissed.