

***R v Shepherd* [2020] NSWDC 273 (3 June 2020) – New South Wales District Court**

‘Appeal against sentence’ – ‘Breach of protection orders’ – ‘Covid-19 pandemic’ – ‘History of domestic violence’ – ‘People affected by substance misuse’ – ‘Significant criminal history’

Charges: Contravening a prohibition or restriction under an Apprehended Violence Order (AVO) x 2

Case type: Appeal against severity of sentence

Facts: The appellant man was sentenced to 12 months’ imprisonment with a non-parole period of 9 months. He pleaded guilty to 2 charges that he contravened a prohibition or restriction under an AVO. The appellant has remained in custody for a period of around 2 months. Although he lodged an appeal in May 2020, he was refused bail.

The appellant was in a relationship with his then female partner (the victim). As at 26 March 2020, there was an enforceable AVO for her protection which named the appellant as the defendant. A condition of the order was that the appellant not approach or be in her company for at least 12 hours after drinking alcohol or taking illicit drugs. At about 1:00 am on 26 March 2020, police attended the couple’s residence after a domestic dispute. The appellant admitted that he had breached the AVO and had consumed a large quantity of alcohol. There was no suggestion that the appellant was likely to inflict imminent violence or commit some other more serious contravention of the AVO at that time. He was arrested and released on conditional bail at 3:00 am. At about 4:00 am on the same day, police returned to the same address following another complaint of a domestic dispute, and found the appellant intoxicated again.

Grounds: Whether an Intensive Correction Order (ICO) is more appropriate than a period of full time custody; whether there are special circumstances to justify variation of non-parole period.

Held: The appeal was dismissed, but the Court varied the statutory ratio for the non-parole period on account of special circumstances in order to assist with rehabilitative efforts with respect to the appellant’s alcohol consumption issues. Consequently, the Court varied each sentence to 1 year imprisonment, with a non-parole period of 7 months, to be served concurrently ([43]-[47]).

Held: Aggravating circumstances included the fact that the offending conduct occurred not only in contravention of an AVO, but whilst the appellant was subject to an ICO. Further, the second offence occurred when he was on conditional bail after having committed the first offence ([12]-[15]). There was little evidence of the appellant's circumstances that directly explained why he acted as he did. In May, the appellant acknowledged to a community corrections officer that he breached the condition of the AVO because he had "no choice". However, the Court accepted the characterisation of the community corrections officer that he "blatantly disregarded" the condition twice on the one night ([16]-[18]). The appellant also has a significant criminal history, and has been convicted of several domestic violence offences in the past. Most of these offences were the product of alcohol consumption ([22]). There was no evidence before the Court to indicate remorse or contrition: the appellant blamed the victim and was said to have showed no insight into his offending ([24]). The appellant had a long history of alcohol dependence, and had been diagnosed with depression, post-traumatic stress and attention deficit hyperactivity disorder. He made attempts to rehabilitate himself, but relapsed into consuming alcohol on a regular basis ([25]-[27]).

The ICO breach report noted that since the order had been imposed, the appellant had minimal engagement with community corrections, which impeded his attempts to treat his alcohol usage. The report also expressed concerns for the victim's safety. The appellant's prospects of rehabilitation were no more than reasonable. Despite his demonstrated ability to overcome illicit substance abuse, he has struggled to deal with his alcoholism. The Court also noted that the level of community service work that the appellant needs to undertake may be reduced or altered as a result of the COVID-19 pandemic ([28]-[33]).

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