

***R v Smethurst* [2018] NSWDC 488 (9 November 2018) – New South Wales District Court**

‘Imprisonment’ – ‘Options’ – ‘People affected by substance misuse’ – ‘Physical violence and harm’ – ‘Protection order’ – ‘Sentencing’ – ‘Suffocation’

Charges: Assault occasioning actual bodily harm x 1.

Case type: Sentencing.

Facts: The offender had known the complainant for a number of years. In the course of a dispute between the parties at the complainant’s residence, the offender put a pillow over her face (common assault). The complainant then ran out of the house, followed by the offender. The offender pushed her on the ground and started to drag her towards the house by the shirt which caused a graze to her back (assault occasioning actual bodily harm). The complainant ran onto the neighbour’s driveway and told the neighbour to ‘call the police’. The police attended the complainant’s residence soon after the incident and recorded her statement on camera.

Issues: The Court determined the appropriate sentence for the offence in the circumstances.

Decision and reasoning: The Court sentenced the offender to an aggregate period of imprisonment of 22 months which, after a discount of 15% for his guilty plea, was a sentence of 18 months ([64]). A non-parole period of 12 months was imposed.

The Court assessed the objective seriousness of the offending, and found that aggravating factors included the offender’s five good behaviour bonds and a string of intensive corrections orders at the time of offending, the place of the offending (complainant’s home), and the brutality of the consecutive acts committed over a short period of time ([13]-[17]).

The Court must be satisfied that imprisonment is more appropriate than all other alternatives, such as non-custodial sentences ([54]). The benefits of rehabilitation in the community were found to be outweighed by the fact that the offender previously had the benefit of conditional liberty orders and failed to comply with them ([56]). General principles of sentencing, such as denunciation, accountability, punishment, deterrence and protection were considered at [46]-[52]. The offender had a number of prior convictions, including common assault, contravention of an AVO, and assault occasioning actual bodily harm ([21]). The matter before the Court was the fourth domestic violence type offence for which the offender had been charged ([30]). Although the number of previous offences was a relevant factor, they were of moderate application as there was no evidence of any present risk. Nevertheless, the court observed at [33] that the offender had a history of domestic violence and non-compliance with court-ordered community based sentencing options.

Although the offender pleaded guilty, the Court was reluctant to accept his expressions of remorse, particularly given his partial attribution of blame to the victim in the Sentencing Assessment Report. The Court referred *Munda v Western Australia* (2013) 649 CLR 600 at [54]-[55] which held that the State has an obligation to 'vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the State to the vulnerable against repetition of violence'. The Court noted the offender's history of drug abuse at [24]-[29], but did not accept that a piece of oral evidence at [29] was sufficient to establish a connection between his domestic violence offending and his substance abuse. The offender's prospects of rehabilitation were also seen to be 'guarded' ([45]).