

***R v Barnett* [2020] NSWDC 193 (12 May 2020) – New South Wales District Court**

‘Alcohol abuse’ – ‘Jealous behaviours’ – ‘Physical violence and harm’ – ‘Relevance of covid-19 pandemic to sentencing considerations- breach protection order.’ – ‘Sentencing’ – ‘Threat to kill’ – ‘Weapon’

Offences: Aggravated detention of a person with intent to obtain advantage occasioning actual bodily harm x 2; Reckless wounding causing actual bodily harm x 1; Contravention of a prohibition/restriction under an AVO x 1

Proceedings: Sentencing

Issues: The relevance of a pre-existing alcohol disorder to the assessment of the objective seriousness of the offending; relevance of the COVID-19 pandemic to sentencing considerations.

Facts: The female victim was married to the offender man, although they had not resided together for eight to nine years. The victim was the subject of an Apprehended Domestic Violence Order (AVO) that protected her from the offender. A condition of the order prohibited the offender from approaching the victim or being in her company for at least 12 hours after drinking alcohol or taking illicit drugs. The offender asked the victim to stay with him for a few days at a caravan park where he lived. The victim agreed. On one night, the victim and offender met with Mr Wallace at his caravan and drank alcohol. The offender left earlier than the victim, but later returned and accused Mr Wallace and the victim of being unfaithful together. The offender produced a knife and pressed it to Mr Wallace’s chest before placing it on Mr Wallace’s throat, creating a superficial laceration. The victim attempted to grab the offender’s arm but the offender pushed her backwards where she fell and hit furniture, losing consciousness. Every time the victim tried to get up, the offender hit her against the walls and furniture. He also cut her right leg, causing three wounds. Mr Wallace tried to remove the knife from the offender, but the offender lacerated Mr Wallace’s finger. He told the victim that if she screamed, he would kill Mr Wallace, and told them both that they could not leave.

During the period when the victim and Mr Wallace were detained, the victim also suffered a subdural haematoma, bruising under her right eye, a fractured rib and many abrasions. The offender was heavily intoxicated at the time, having suffered from an alcohol use disorder since he was nine years old.

Held: The offender was sentenced to seven years and six months' imprisonment, with a non-parole period of four years and six months. The sentencing judge found that the prospects of rehabilitation were reasonable to good [62] because the offender entered an early plea, his conduct was out of character (he had not previously engaged in violent conduct) [49], he was sincerely remorseful, he was suffering significant grief over the death of his wife [53], he behaved in an exemplary fashion whilst in custody [56], and he had agreed to avail himself of alcohol and drug treatment programs upon his release [58].

However, His Honour held that the offending was objectively very serious [70]. The Detention charges fell at the mid-range of objective seriousness for that kind of offence as the detention was relatively short and its purpose was to exert "psychological control" and "emotional ascendancy" [21]-[22]. Furthermore, the offender made numerous threats to kill the victim and Mr Wallace when he was unstable. His Honour held that the Wounding charges fell above mid-range as the victim was conscious at the time the wounds were inflicted but was unable to resist [25]-[26]. Breach of the AVO was held to be an aggravating factor [27], as was the use of a weapon [28].

His Honour held that there was a causal connection between the Offender's alcohol use disorder and the offending, because the disorder led him to misperceive the dealings between the victim and Mr Wallace [11]. As such, His Honour held that the disorder "mitigate[d] to some degree the level of the objective seriousness of the offending" and also had implications for the offender's prospects of rehabilitation [11]. However, His Honour found that the offender was still culpable for his actions because he had not previously engaged in violent conduct and had stopped making efforts to manage his alcoholism six years earlier [33]. The judge further held that the offender's culpability was not reduced because of a combination of intoxication and sexual jealousy because he had previously managed these conditions prior to the offending [38].

In relation to the relevance of the COVID-19 pandemic as a sentencing consideration, His Honour provided that "in the short term, the [offender] is likely to find custody generally more onerous to some degree as a result of the general restrictions imposed because of the pandemic" [70], however, "because of the objective gravity of his conduct, he will receive a very substantial period of incarceration" [71]. His Honour further stated that "It is realistic and not unfair to say that the incidence and effect of the pandemic may be more keenly felt for an offender who has a short non-parole period ... in comparison to someone who will receive a significant head sentence" [71] and warned that "courts should not be too ready, in the absence of express legislative action, to be unduly influenced by the pandemic when weighting its significance in the sentencing exercise" [71].