

***Orsto v Grotherr* [2015] NTSC 18 (31 March 2015) – Northern Territory Supreme Court**

‘Aboriginal and Torres Strait Islander people’ – ‘Aggravated assault’ – ‘Character’ – ‘Exceptional circumstances’ – ‘Exposing children’ – ‘Mandatory minimum sentence’ – ‘Sentencing’ – ‘Victim’

Charge: Aggravated assault

Appeal type: Appeal against sentence

Facts: The appellant was the subject of a domestic violence order that restrained her from harming the victim. On the day of offending, the appellant and the victim got in an argument after the victim returned home from work for lunch against the appellant’s wishes. The appellant was upset that the victim woke up their daughter. She then forcefully struck the victim’s head. In relation to this conduct the appellant was charged, pleaded guilty and convicted of aggravated assault, with the circumstance of aggravation that the victim suffered harm. The victim had a prior conviction for aggravated assault (weapon-harm) in respect to the same victim. In his victim impact statement, the victim said he did not wish the appellant serve gaol time, as she was pregnant. A character reference was also provided by aboriginal community members that outlined the appellant’s positive characteristics as a mother who had suffered hardship throughout her life. The magistrate heard the appellant had previously been the victim of domestic violence in the relationship and grew up in a household with her parents who had domestic violence issues.

Section 78D of the *Sentencing Act 1995* (NT) requires a mandatory minimum sentence of three months actual imprisonment for aggravated assault, unless exceptional circumstances exist under s 78DI. The appellant’s counsel submitted exceptional circumstances existed on the facts. These circumstances were constituted by a combination of factors including that the victim did not wish the victim to go to gaol; the appellant had sought counselling; she was suffering hardship having attempted suicide the previous year and losing a child two months prior to sentencing; she had previously been the victim of domestic violence herself; and she had ongoing employment within the community. After determining these factors did not amount to exceptional circumstances, the magistrate sentenced the appellant to three months imprisonment.

Issue: Whether the magistrate erred in finding the circumstances of the case were not exceptional for the purposes of s 78DI.

Decision and reasoning: The appeal was allowed and the appellant was resentenced.

Referring to the obiter comments made in *R v Duncan* [2015] NTCCA 2, Blokland J stated that exceptional circumstances do not exist unless the minimum term is greater than the term that would ordinarily be imposed ([37]). This was the case on the facts, as the magistrate noted he would have suspended the sentence but for the mandatory prescribed minimum. In determining whether exceptional circumstances exist, the court must consider the whole of the circumstances in the case. The individual factors do not need to be exceptional. Rather, the factors considered together must amount to exceptional circumstances.

The magistrate erred in his consideration of whether exceptional circumstances existed. The remarks were 'unnecessarily constrained' and the magistrate failed to consider a number of mitigating factors. In support of the magistrate's reasoning, Blokland J emphasised the need for general and specific deterrence given the offence occurred in the vicinity of a young child. Further, the victim's wish that the appellant not be imprisoned has little weight in domestic violence cases. The fact the victim was previously a victim of domestic violence herself without additional information about the duration and extent of the abuse also carried little weight towards exceptional circumstances existing. However, Blokland J concluded that the appellant's personal circumstances of having just lost a child at the time of sentencing and attempting suicide the year prior made the case exceptional. These personal circumstances were such that being away from family and community support whilst grieving meant imprisonment would be more burdensome on the appellant than other offenders. The sentence was quashed, and the appellant was resentenced to three months imprisonment wholly suspended with an operational period of six months.