

***Carne v Wride; Carne v Nicholas* [2012] NTSC 33 (15 May 2012) – Northern Territory Supreme Court**

‘Aggravated assault’ – ‘Breach of domestic violence order’ – ‘Cumulative sentences’ – ‘Emotional abuse’ – ‘Exposing children’ – ‘Physical violence and harm’ – ‘Sentencing’

Charges: Breach of domestic violence order, aggravated assault

Appeal type: Appeal against sentence

Facts: The appellant and the victim were in an ‘on again off again’ relationship for approximately 18 years and had four children together. One evening the appellant went to the victim’s house where all four children were residing. The appellant threw the television over the balcony and forcibly took a ring off the victim’s finger. The appellant was charged with aggravated assault and a domestic violence order was made restraining him from contacting, approaching, intimidating or harassing the victim and exposing the children to domestic violence. Nine days later the appellant phoned the victim and visited her at the house. When she refused to let him in, the appellant unsuccessfully attempted to hang himself from the veranda. This was witnessed by his 14 year old son. In relation to this conduct the appellant was charged and pleaded guilty to breaching the domestic violence order.

The two charges were sentenced together. After stating the need for general and specific deterrence in the circumstances, the magistrate sentenced the appellant to eight months’ imprisonment for breaching the domestic violence order and two months’ imprisonment for the aggravated assault. The sentences were to be served cumulatively, suspended after six months on conditions including supervision, counselling and abstinence from alcohol and drugs.

Issues: Some of the grounds of appeal included:

- Whether the magistrate had regard to irrelevant facts and circumstances in accepting the attempted suicide was within the definition of domestic violence;
- Whether the magistrate erred in cumulating the sentences; and
- Whether the sentences imposed were manifestly excessive.

Decision and reasoning: The appeal was allowed on grounds 1 and 3. The appellant was resentenced.

- Under s 5 *Domestic and Family Violence Act 2007* (NT) domestic violence includes causing harm and intimidation. Further, s 6 defines intimidation to include any conduct that has the effect of unreasonably controlling or causing mental harm. It is probable that the appellant’s son suffered psychological harm as a result of witnessing his father attempting to hang himself and having to cut him down. However,

no evidence was adduced to establish mental harm was actually suffered. In the absence of such evidence, Kelly J found it was not open to the magistrate to be satisfied beyond reasonable doubt that the attempted suicide was conduct that caused mental harm to the son in order to amount to domestic violence under s 6(1)(c). It was also not open to the magistrate to conclude the appellant attempted to cause mental harm under s 5(f). There was insufficient evidence to prove beyond reasonable doubt the attempted suicide was aimed at the victim and her children.

- As a general rule, cumulative penalties should not be imposed when a number of offences arise from substantially the same conduct or a series of occurrences. The appellant's two offences of aggravated assault and breach of the domestic violence orders did not arise out of such a closely related series of events. Rather, the conduct constituting the separate offences occurred on different days and were totally different acts. Therefore, the magistrate did not err in ordering the sentences to be served cumulatively rather than concurrently.
- As ground 1 of the appeal was successful, the only actions by the appellant that constituted the breach of the domestic violence order were the conduct of phoning the victim and visiting her home. In these circumstances, the sentence of eight months' imprisonment was manifestly excessive. Kelly J set aside the sentence and imposed a sentence of imprisonment for one month for the breach of the domestic violence order. The sentence was to be served cumulatively on the aggravated assault sentence, suspended after one month.