

***Osborne v Commissioner of Police* [2020] QDC 249 (30 September 2020) – Queensland District Court**

‘Appeal against sentence’ – ‘Appellant’s belief that his girlfriend and her children were victims of domestic violence perpetrated by the complainant’ – ‘Effect of deportation / visa cancellation on sentencing’ – ‘Non-fatal strangulation’ – ‘Vigilantism’

Charges: Forcible entry x 1; Wilful damage x 1; Assault occasioning bodily harm x 1.

Proceedings: Appeal against conviction and sentence (appeal against conviction abandoned).

Facts: The appellant believed that Ms MB was his girlfriend. Ms MB was in fact in a relationship with the complainant. On the date of the offence the complainant telephoned the appellant and told him that he (the complainant) was in a relationship with Ms MB. The appellant then went to the complainant’s house. He banged on the front door and said, “I’m going to kill you, cunt”; “You want war, brother? You got war.” The complainant approached his front door holding a knife which he had been using to prepare food. A verbal argument ensued, the appellant became enraged and ripped the screen door off the hinges. He lunged at the complainant grabbing him around the shirt. Both the appellant and complainant were cut with the knife during the struggle. The appellant put his left elbow and forearm around the complainant’s neck and pressed it into the complainant’s neck, choking him. The appellant continued to threaten the complainant saying, “I will kill you, cunt”. He did not stop his attack until police arrived. Prior to the incident, Ms MB and her children had told the appellant that there had been episodes of domestic violence committed by the complainant towards her. The appellant said that he went to the complainant’s house to talk to him about his behaviour and to protect the children. The appellant made full admissions to the police. The appellant was admitting to a mental health unit following the incident.

Issues: (1) Whether the sentence was excessive; (2) Whether the magistrate failed to take into account the appellant’s guilty plea and mitigating factors.

Decision and reasoning: *Appeal allowed. Appellant resentenced.*

The respondent concedes that the magistrate failed to take into account a number of relevant mitigating factors including: the appellant’s mental health condition, the appellant’s physical health, his mistaken belief and the likely consequence of the appellant’s conviction on his visa (see [39]-[41]). The respondent further concedes that the sentence imposed was excessive. There was no reference to any mitigating factors in the reasons of the magistrate, which tends to suggest that he failed to take those factors into account.