Green v Queensland Police Service **[2015] QDC 341 (27 November 2015) – Queensland District Court**

'Contravention of a domestic violence order' – 'Following, harassing and monitoring' – 'Prior history of contravention of domestic violence orders' – 'Sentencing' – 'Too much emphasis on prior criminal history' – 'Totality ,

Charge/s: Contravention of a domestic violence order.

Appeal Type: Appeal against sentence.

Facts: The appellant was 24. He had a criminal history, including nine previous convictions for contravention of domestic violence orders. The appellant was hospitalised when his female partner, the aggrieved, stabbed him in the leg and foot with a knife during an argument. A temporary protection order was made prohibiting the appellant from contacting the aggrieved. The stabbing incident was not the subject of any charge. Over the next two days, the appellant contacted the aggrieved on her mobile phone 60 times. These calls did not involve any threats or actual violence. The appellant was on parole for a sentence imposed at an earlier time. The appellant was sentenced to six months imprisonment, which was to be served cumulatively upon the 15 month prior sentence.

Issue/s: The magistrate erred in two significant respects which resulted in an excessive sentence:

1. The magistrate placed too much emphasis on the appellant's criminal history for like offending and imposed a sentence which was disproportionate to the gravity of the instant offence; and
2. In imposing a cumulative term, the magistrate failed to review the aggregate sentence and consider whether the total sentence imposed was just and appropriate.

Decision and Reasoning: The appeal was allowed. First, Morzone QC DCJ noted that the surrounding circumstances, the appellant's criminal history and the stabbing incident, were properly provided by the prosecution by way of context for the subject offending. However, His Honour continued at [17]:

'[t]he danger was that that context could potentially take on an overwhelming character with the prospect of elevating the nature of the offending the subject of the sentence. It seems to me that that danger was realised and can be demonstrated by the sentencing remarks of the magistrate where she conflated the past criminal history, other intervening behaviour and the subject offending'.

Here, the criminal history and the conduct that constituted it were not as proximate to the subject offending as apprehended by the magistrate. Evidence of the stabbing was accepted in the context that the police did not press charges against the aggrieved but the magistrate determined that the aggrieved was acting in self-defence. Further, there was little or no regard given to any particular findings of fact surrounding the subject offending, namely, the 60 occasions of telephone contact. Rather, this was relegated to almost incident behaviour. Thus, Morzone QC DCJ held that '[b]y conflating the historical criminal behaviour and other violent behaviour with the subject offending, it seems to me that Her Honour mistook the facts and allowed erroneous or irrelevant matters to guide or affect her exercise of discretion' (see [18]-[21]).

Second, Morzone QC DCJ held that at [30]:

'the magistrate acted on a wrong principle by characterising the pre-existing sentence to a "different issue altogether" because the appellant breached his parole by reoffending. She apparently had no regard to the "period of imprisonment" required by section 160F of the [*Penalties and Sentences Act* 1992 (Qld)]… and the extension of the totality principle … It seems to me that her approach caused her to fall into error by failing to take into account material considerations of the whole period of imprisonment (including the balance of the previous sentence), reviewing the aggregate sentences and considering whether the latter was just and appropriate'.

The appellant was re-sentenced to three months imprisonment, to be served concurrently with the existing sentence.