

***BRK v Police* [2020] SASC 116 (26 June 2020) – South Australia Supreme Court**

'Appeal against sentence' – 'Breach of protection order' – 'Children' – 'Home detention' – 'People with mental illness' – 'Physical violence and harm' – 'Property damage'

Charges: Aggravated assault x 1; property damage x 1; resist police x 1; breach of intervention order x 2

Case type: Appeal against sentence

Issue: Whether special circumstances exist.

Facts: The appellant man was sentenced to 5 months and 2 weeks imprisonment suspended after 2 months upon the appellant entering into a good behaviour bond for 2 years. At sentencing the appellant conceded incarceration was appropriate but argued it should either be wholly suspended under s 96 Sentencing Act 2017 (the 'Act') or served on home detention pursuant to s 71 of the Act.

The appellant and his daughter argued and she rang her mother (the victim and his former domestic partner) to ask her to collect her. The appellant was argumentative, aggressive and assaulted the victim by pushing her towards the wall. The appellant also damaged the victim's vehicle. A mental health assessment deemed the appellant suicidal (he had a history of depression and bi-polar disorder). He resisted police when arrested 5 days later and breached an intervention order by failing to attend the Safe Relationships Abuse Prevention Program, and sending a SMS message to the victim asking for a character reference.

Grounds: That the Magistrate erred:

1. By imposing a sentence that was manifestly excessive in that an immediate custodial sentence was imposed and the sentence was not wholly suspended;
2. In the alternative to ground 1, in declining to order that the custodial sentence be served on home detention under s 71;
3. In erring in the approach taken to the 'sentencing hierarchy', in particular, the interpretation and application of ss 71 and 96.
4. In the alternative to ground 3, in failing to provide adequate reasons for refusing to order that the appellant serve the custodial sentence on home detention.

Held:

1. The Magistrate erred in failing to consider whether the sentence of imprisonment should be served on home detention. [Section 71\(1\)\(b\)](#) of the [Sentencing Act 2017](#) (SA) does not prevent a sentencing court from considering home detention where partial suspension is in contemplation.

2. The Magistrate erred in failing to provide adequate reasons for declining to order that the term of imprisonment be served on home detention.
3. The parties will be heard on the factual basis on which the Court should exercise its discretion when considering whether to re-sentence the appellant.

It is a benefit of suspension under s 96 that a bond with a duration longer than the period of incarceration can be imposed with scope for supervision and directed counselling to facilitate ongoing rehabilitation [98]. Home detention cannot be 'partially' ordered under s 71, only ordered for the whole term of a sentence of imprisonment. If some period of imprisonment is considered necessary home detention must be rejected in favour of partial suspension [101]. In deciding whether to make a home detention order, the paramount consideration is community safety, whether that is the offender's family in the case of domestic violence or the community generally [102]. Another important factor is whether a home detention order "would, or may, affect public confidence in the administration of justice", in which case it must not be made. The sentencing court must consider the impact home detention is likely to have on the victim, spouse, domestic partner or any other person residing with the offender ([103]). The sentencing court must also reflect on whether home detention exposes the community and domestic violence victims to safety risks. The fact that the Magistrate was prepared to partially suspend the sentence suggested the appellant is not currently thought to represent an immediate threat. It also appeared that the appellant had been on bail without incident pending the outcome of this appeal [104].

As his Honour had little information about the steps taken to assist with the appellant's rehabilitation, the availability of courses or counselling for his difficulties in managing violence and intimate relationships, and his current work and family circumstances, he proposed to stand the matter over for further submissions or evidence on the factual basis on which the Court should exercise its discretion when considering whether to re-sentence the appellant [106].