

## ***McKenna v Smith* [2014] TASMC 11 (27 March 2014) – Tasmanian Magistrates' Court**

'Assault' – 'Breach of domestic violence order' – 'Conditions of orders' – 'Damaging property' – 'Insanity' – 'People affected by substance misuse' – 'People with mental illness' – 'Physical violence and harm' – 'Protection order' – 'Vulnerable - new partner' – 'Wilfully and unlawful destroying or damaging property'

Charges: Damaging property (3 counts), Breach of police family violence order (2 counts), Assault

Facts: At 2.30pm on 14 July 2013, the defendant smashed the windscreen of her former de facto partner's car. Her former partner saw the incident occur and reported it to the police. A short time later, the defendant went to the police station and said she had smashed the windscreen of a car. At 5.45pm, a police officer who had attended the premises of the defendant's former partner, made and served upon the defendant a police family violence order.

In breach of the police family violence order, at 8.00pm, the defendant again went to her former partner's house. She began to abuse her former partner and his current partner. She threatened them both and at one point pushed the current partner of her ex-partner. Before leaving, she smashed the panels of her former partner's car. The incident was reported immediately to police and the defendant was placed under arrest. She resisted arrest, kicking and screaming. This conduct continued at the police station.

The magistrate was satisfied beyond reasonable doubt that the defendant committed the acts.

### Issues:

1. Whether the police family violence order was not validly made because:
  - it was not made by a police officer of the rank of sergeant or above; and/or
  - the officer who made the order was not satisfied, or the evidence available to him was not sufficient to satisfy him, that the defendant had committed or was likely to commit a family violence offence.
2. Whether the defendant was not criminally responsible for any of the acts charged having regard to her mental illness and the provisions of s 16 of the *Criminal Code 1924 (Tas)*.

Decision and Reasoning: The magistrate rejected defence counsel's submissions in relation to the first issue (the validity of the family violence protection order) but upheld submissions in relation to the second issue (insanity).

1. The police family violence order was validly made because the police officer was acting in the rank of sergeant at the time the order was made. The magistrate also rejected counsel submissions in relation

to the second limb of the argument. These submissions amounted to a collateral challenge to the validity of the police family violence order. A collateral challenge is a challenge to the validity of an order in proceedings where the existence of the order is an element of the offence (not in proceedings to review or set aside the order). The legislation did not permit collateral challenge at least on the basis alleged here i.e. whether the factual basis of the order was sufficient ([26]-[30]). However, even if collateral challenge were available, the ground would not succeed because there was sufficient evidence to support the making of a police family violence order ([19]-[21], [31]).

2. The defendant was not criminally responsible for any of the acts contained in each charge. On the balance of probabilities the defendant was deprived of the capacity of knowing whether the acts that she performed in respect of each charge were ones that she ought not to do because of her mental illness, i.e. the Bipolar Disorder that resulted in her entering into a hypomanic or manic state. The defendant clearly knew what she was doing but was not able to rationally think about her actions with a moderate degree of sense and composure. This was because of the impact of her mental illness.