

***The State of Western Australia v Clark* [2020] WASCA 103 (25 June 2020) – Western Australia Supreme Court (Court of Appeal)**

‘Attempted murder’ – ‘Children’ – ‘Controlling, jealous, obsessive behaviour’ – ‘Home burglary’ – ‘People affected by substance misuse’ – ‘People with mental illness’ – ‘Physical violence and harm’ – ‘Self-harm’ – ‘State appeal against sentence’ – ‘Weapon’

Charges: Unlawful assault whilst in the place of another person without that person’s consent x 1; attempted murder committed in the course of an aggravated home burglary x 1

Case type: State appeal against sentence

Facts: The respondent was convicted after trial and was sentenced to 15 years’ imprisonment on the count of attempted murder in the course of an aggravated home burglary and to 3 years’ 6 months’ imprisonment for unlawful assault, to be served concurrently such that the total effective sentence was 15 years.

The respondent man and his female ex-partner had been in a relationship for approximately 10 years and had 4 children. They separated in 2017. The respondent had difficulty accepting the end of the relationship, particularly the prospect of his ex-partner dating other men. On the night before the offending the respondent fabricated an incident by texting himself purporting to be from a man who recently had sex with her. The next morning, the respondent broke in to her house and asked her to reconcile. She declined and told him that another man was in her bed (the victim). The respondent took a knife from the kitchen and threw it across the room then left.

Later than morning he returned armed with a knife, assaulted the victim and slashed him across the face causing life-threatening injuries. He also attacked the victim with a screwdriver. The respondent left the house with the knives and began to cut his own wrist with one of them.

The trial judge made the following findings of fact: (1) the respondent did not act in self-defence, but attacked the victim with dangerous weapons; (2) the respondent entered the bedroom with the intention of killing the victim, and this intention was not only momentary; (3) the attack on the victim was premeditated - after leaving the house on the first occasion, he returned with a weapon and entered the house without consent and with an intention to attack the victim; (4) the attack was persistent and violent; (5) the attack resulted in a very serious injury to the victim's face and was likely to have endangered his life without medical treatment. The victim now has permanent facial disfigurement; (6) the respondent fled the scene and rendered no assistance to the victim; (7) the offending likely traumatised his ex-partner; (8) the respondent did not accept responsibility for his offending and sought to blame the victim; and (9) the respondent displayed limited remorse and victim empathy ([34]).

The respondent had a prior criminal record, including a conviction for domestic violence in relation to his ex-partner so was not a person of previous good character ([36]). He had used drugs since he was 18 years old, experienced marked issues with emotional arousal and regulation, and was diagnosed with ADD as a child. Further, longstanding issues with trust, impulsivity, a sense of betrayal, being made a fool of, perceived injustices and poorly developed decision making and coping skills were relevant factors in his offending. The trial judge did not accept that the respondent's health issues, including ADD and epilepsy, reduced his moral culpability for the offending or reduced the necessity for general deterrence.

Issue: The appellant sought leave to adduce further evidence and appealed his conviction on the basis that the verdict was unreasonable or could not be supported having regard to the entirety of the evidence. He also submitted that the evidence against him was unreliable, inconsistent and not capable of supporting a verdict of guilty on Count 3, and that there was no corroborative evidence in relation to the complainant's allegations as to how the strangulation occurred. The Crown argued that whilst there were weaknesses in the complainant's evidence in terms of her reliability, those factors were fairly outlined by the trial judge in the summing up, and that the complainant's evidence was able to be supported by other evidence.

Ground: The sentence was manifestly inadequate.

Held: The Court allowed the appeal, and imposed a total effective sentence was 17 years' imprisonment ([86]). The Court considered the maximum penalty, the statutory minimum penalty, the facts, circumstances and seriousness of the offending (including the victim's vulnerability and circumstances), the importance of appropriate punishment and personal and general deterrence as sentencing considerations, and all aggravating and mitigating factors. It held that the sentence of 15 years' imprisonment was not commensurate with the seriousness of the respondent's offending, and was substantially less than the sentencing outcome that was properly open to the trial judge ([77]).

S 283(2) Criminal Code was introduced "to ensure that burglars who commit numerous home invasions, which can involve serious violent offences, are incarcerated for longer periods; to deter such offenders; to ensure that such offenders are kept out of circulation longer; and to reflect community abhorrence of such offending" ([56]). Section 6(1) Sentencing Act 1995 (WA) provides that a sentence must be commensurate with the seriousness of the offence ([59]). The respondent's offending was a serious example of offending of this type. The attack was premeditated, persistent, and was carried out with weapons. The respondent's intention to kill the victim was not held only momentarily, but was present while he was inflicting the injuries. After attacking the victim, he fled the scene and rendered no assistance to him ([70]). Although his prior criminal record did not aggravate the seriousness of the offending, it indicated that he was not entitled to leniency on the ground that he was of previous good character ([72]). He did not take responsibility for his actions and denied criminal responsibility ([74]). Mitigating circumstances were limited: he had a difficult and problematic childhood, made appropriate concessions at trial which facilitated the administration of justice, showed some remorse and victim empathy, and completed a number of courses and had positively responded to his incarceration ([76]).