Larsen v The State of Western Australia **[2019] WASCA 181 (15 November 2019) – Western Australia Supreme Court (Court of Appeal)**

'Application for leave to adduce additional evidence' – 'Application for leave to appeal against conviction following guilty pleas' – 'Burglary' – 'Following, harassing and monitoring' – 'Mandatory minimum sentence' – 'Physical violence and harm' – 'Stalking' – 'Weapon'

Charges: Being armed in a way that may cause fear x 1; aggravated home burglary x 1; act intended to cause grievous bodily harm or prevent arrest committed in the course of an aggravated home burglary x 1.

Case type: Applications for leave to adduce additional evidence, application for leave to appeal against conviction following guilty pleas

Grounds:

The appellant suffered a miscarriage of justice in relation to Count 3 because he pleaded guilty to the charge without understanding its nature.

There was an abuse of process by reason of the amendment of the indictment on the morning of the appellant's sentencing.

The appellant suffered a miscarriage of justice by failing to apply for an adjournment of the proceedings in respect of Counts 2 and 3 following the amendment of the indictment.

Facts: The appellant was convicted on his guilty pleas of being armed with a dangerous instrument, namely a knife, in circumstances likely to cause fear to any person (Count 1), aggravated home burglary (Count 2), and unlawful wounding with intent to maim, disfigure, disable or do some grievous bodily harm in the course of the aggravated home burglary, contrary to s 294(1) and (2) Criminal Code (Count 3). On Count 3, the appellant was sentenced to 15 years' imprisonment, and received concurrent terms of imprisonment with respect to the other offences. Count 3 on the indictment was amended on the day of the appellant's sentencing. The appellant claimed that he had not been advised of the nature of the amended charge or that the amended charge carried a mandatory 15 year sentence of imprisonment.

The circumstances of the offending are as follows. In 2016, the appellant and victim met through an online website, and commenced an intimate relationship. Their relationship eventually broke down, and a violence restraining order protecting the victim was served on the appellant in late-2016. In 2017, the appellant breached the restraining order by attempting to communicate with the victim via mobile. He called the victim 243 times in an attempt to contact her. The appellant continued to breach the order by following the victim to her sister's unit. Once inside the unit, he slashed and stabbed the victim with a knife in a frenzied and concerted attempt to seriously injure her. The victim feared that she was going to die. Family, neighbours and other members of the public intervened in the appellant's assault, and he was eventually restrained.

Held: Applications for leave to adduce additional evidence granted; application for leave to appeal on ground 1 granted, appeal dismissed; applications for leave to appeal on grounds 2 and 3 dismissed. It is difficult to set aside a conviction based on a guilty plea, because there is a strong public interest in the finality of proceedings. There are 3 well-recognised circumstances in which courts may set aside guilty pleas: (1) the appellant did not understand the nature of the charge or intend to admit guilt; (2) upon the admitted facts, the appellant could not, in law, have been guilty of the offence; or (3) the guilty plea was obtained by improper inducement, fraud or intimidation ([44]-[46]). The appellant alleged that he suffered a miscarriage of justice because had he been informed that he would be liable to be sentenced to a mandatory minimum sentence of 15 years' imprisonment, he would have pleaded not guilty ([50]).

Mazza and Beech JJA rejected the submissions that the appellant did not understand the element of intent in Count 3 ([88]) and the fact that if he pleaded guilty to Count 3, he would be liable to a mandatory minimum sentence of 15 years' imprisonment ([89]-[106]). The appellant understood the advice which he was given ([97]). Their Honours also dismissed the alleged abuse of process for two reasons: first, there was no abuse in the making of an application to amend the indictment, and second, the amendment was unnecessary and did not prejudice the appellant because he was liable to the minimum term stipulated in s 294(2) regardless of whether the indictment stated that the offence was committed in the course of a home burglary ([111]). After analysing the authorities, their Honours determined that the State was not required to plead that fact in order to make the offender liable to the mandatory minimum penalty in s 294(2) ([123]). Ground 3 was found to have no reasonable prospects of success, as the appellant did not suffer a miscarriage of justice as a result of his counsel failing to seek an adjournment of the sentencing principles ([128]-[129]).

Allanson J agreed with the orders and reasons of Mazza and Beech JJA, but believed that it was not necessary to decide whether the State was required to plead that the offence in Count 3 was committed in the course of conduct that constituted an aggravated home burglary in order to make the appellant liable to the mandatory minimum penalty in s 294(2) of the Code. That the appellant failed to show that he did not understand the indictment, as amended, or the advice given to him, was sufficient reason to refuse leave to appeal on Ground 2 ([133]).