***Noi v The State of Western Australia* [2021] WASCA 84 (18 May 2021) – Western Australia Court of Appeal**

'Aggravated home burglary' – 'Application for leave to appeal against sentence' – 'Control' – 'Damaging property' – 'Intimidation' – 'Protection orders' – 'Unlawful damage'

Charges: Aggravated home burglary x 1; Unlawful damage x 2.

Proceedings: Application for leave to appeal against sentence.

Facts: The male appellant and female victim were former de facto partners, and have 2 children. They had been separated for approximately 8 years. Shortly after a three-day order protecting the victim expired, the appellant attended the victim's residence to show the victim and their son "who was the boss". He kicked in the front door, and wilfully destroyed the television. He said: "you can get a restraining order that lasts for two years, it's not going to make any difference", and smashed the victim's phone as she tried to call 000. The appellant was arrested and pleaded guilty. He was sentenced to 2 years immediate imprisonment, with eligibility for parole.

Grounds of appeal:

1. A miscarriage of justice occurred when the sentencing judge "adopted the matters set out in the pre-sentence report" and found the offences indicated that the appellant "harboured feelings of entitlement consistent with being a domestic violence perpetrator".
2. Sentences of immediate imprisonment were manifestly excessive as to type and the sentencing judge should have imposed conditionally suspended sentences.
3. 2 years' immediate imprisonment for the aggravated home burglary offence was manifestly excessive as to length.

Held: Application for leave to appeal on ground 1 was dismissed. Leave to appeal on grounds 2 and 3 was also refused and the appeal dismissed.

Ground 1: No reasonable prospect of success.

The finding the offending was "a form of domestic violence" was based on the sentencing judge's own assessment of the circumstances, rather than the impugned pre-sentence report/feelings of entitlement.

“[45]… the sentencing judge was plainly correct to characterise the offending as a form of domestic violence. The victim was the appellant’s former de facto partner and the mother of his two children (the children being co-parented by the appellant and the victim). The appellant violently forced entry into the victim’s home, when he knew she was present, by kicking in the front door. This occurred shortly after the expiry of a police order protecting the victim. The appellant wilfully damaged her property, including a mobile phone which was a means of seeking help, while threatening that the victim obtaining a 2 year restraining order would make no difference. He was clearly using violence to intimidate his former partner with whom he shared the care of their two children. The pre-sentence report was not required to conclude that the offending was a form of domestic violence. Additionally, the report was not actually relied upon by the sentencing judge for the purposes of reaching that conclusion. Even if the pre-sentence report had been relied upon for that purpose, there would be no miscarriage of justice as, in our view, it could not reasonably be contended that the offending in this case did not constitute a form of domestic violence.”

Finding that the appellant intended to intimidate the victim was inevitable, given the admitted conduct constituting the offence.

Grounds 2 and 3: The sentences were not arguably unreasonable or plainly unjust. The offending was serious, as the sentencing judge observed:

> “As I’ve explained, the offending here is serious and included forced entry and the offending being carried out with an intent to intimidate and to assert control over your ex-partner. The offending also instilled fear in her, which it was intended to do.”