

***Howell v Davies* [2019] WASC 220 (27 June 2019) – Western Australia Supreme Court**

‘Application for leave to appeal against sentence’ – ‘Breach of protection order’ – ‘Children’ – ‘Court safety’ – ‘Family violence’ – ‘Intimidation’ – ‘Repeated breaches’

Charges: 1 x breach of restraining order

Case type: Application for leave to appeal out of time and leave to appeal against sentence

Facts: The appellant man pleaded guilty to a charge of breaching a family violence restraining order. He breached the order by approaching his female former partner outside court immediately following the restraining order final hearing for which he had failed to appear and asking "when am I going to see my kids?" He was sentenced to 7 months' imprisonment. He sought leave to appeal against that sentence. The application for leave to appeal was lodged 12 days after the last date for filing an appeal. An application for expedited hearing had already been granted.

Ground: The learned magistrate erred in finding that it would be necessary to find 'unjust circumstances' in order to suspend the term of imprisonment ([24]).

Held: The breach in question did not involve any actual or expressly threatened violence, however Hall J noted that 'protected persons can feel intimidated or threatened by being contacted or approached by the person they fear'. The orders intended to provide protection from such fear, as well as the risk of physical harm ([31]).

In assessing the gravity of the offence, Hall J listed relevant factors:

- > The breach occurred in the surroundings of a court, where the protected person was entitled to feel secure;
- > The appellant attended court for a hearing in relation to the order, so its requirements must have been known to him;
- > The approach was physical, and it is more likely that fear would be caused to a protected person in such a case;
- > This was the third breach of the same order within a 4-month period, demonstrating a persistent disregard for court orders and the appellant's failure to be deterred by previous prison sentences;
- > The breach occurred just over 10 days after the appellant was released after serving, concurrently, 2 months for previous breaches (aggravating feature);
- > This was the eleventh offence of this nature over a 5-year period. The appellant had clearly shown

contempt for authority on previous occasions, which thereby increased the need for specific deterrence.

These factors, as well as the appellant's explanation for and nature of the breach, his early guilty plea and the risk of institutionalisation, led his Honour to find that it would have been inappropriate to suspend the term of imprisonment. Accordingly, there was no substantial miscarriage of justice and the appeal was dismissed ([39]).