***Lutey v Jacques* [2010] WASC 78 (28 April 2010) – Western Australia Supreme Court**

'Breach of violence restraining order' – 'Deterrence' – 'Emotional abuse' – 'Following, harassing, monitoring' – ' People living in regional, rural and remote communities' – 'People with mental illness' – 'Sentencing' – 'Threat of self-harm'

Charge/s: Breach of a violence restraining order (VRO).

Appeal Type: Appeal against sentence.

Facts: The appellant pleaded guilty to three counts of breaching a VRO. Only the second count was the subject of the appeal. The appellant's relationship with the complainant had recently ended. He was served with a VRO which prohibited him from contacting her by any means and from entering or being within 200m of any place where she lived or worked. The second breach of the order (the subject of the appeal) occurred when the appellant attended the Karratha Women's Refuge (where the complainant was staying) and wrote in the dust on the rear window of her car – 'I am a dead man walking'. He later returned to rub the message off. The appellant had no relevant criminal history. He was sentenced to 8 months' imprisonment, suspended for 2 years.

Issue/s:

1. Whether the Magistrate erred by failing to adequately consider sentences other than imprisonment.
2. Whether the sentence was manifestly excessive.

Decision and Reasoning: The appeal was upheld in respect of issue 2.

1. The Court held that the Magistrate did sufficiently have regard to the possibility of other sentencing options, such as an intensive supervision order or a fine.
2. Simmonds J firstly noted that the maximum penalty for breaching a restraining order had been increased which indicates Parliament's intention is that the courts regard these offences more seriously. At [53]-[61], his Honour provided a summary of relevant authorities. He stated at [61] that these authorities (decided before the increase in penalty) take the following approach in sentencing breaches of VROs –

'The approach is one recognising that the Act is social legislation of the utmost importance as part of the legal response to domestic violence: Pillage v Coyne [2000] WASCA 135 [13] (Miller J); it is essential the courts ensure their orders are not ignored: Kenny v Lewis (Unreported, WASC, Library No 990113, 12 March 1999) (Kennedy J) 10; and violence restraining orders are notoriously difficult to enforce, and the need for general and individual deterrence will ordinarily outweigh subjective or other mitigating considerations: Dominik v Volpi [2004] WASCA 18 [80] (Roberts-Smith J).'

However, this does not mean that a custodial sentence will be appropriate in all cases. Simmonds J found that there are various circumstances which made this offence of a less serious kind. The appellant was surprised that the relationship had ended. There was no indication of any 'offence or serious misconduct' that led to the making of the VRO. Furthermore, the appellant made no attempt to enter the refuge and there was no threatening or intimidatory conduct. However, the complainant had recently been hospitalised for heart treatment. The respondent submitted that this as well as the fact that she was living in a refuge was relevant to assessing the seriousness of the offence. Simmonds J found that while these factors would make the offence more serious, evidence of the subjective impact on the complainant would be needed (see at [70]).

The respondent also submitted that the message left on the car might indicate a potential for the appellant to self-harm. His Honour then referred to the equivalent Victorian legislation which defines 'emotional abuse' (see at [71]) and accepted that a threat of self-harm intending to or producing the effect of causing distress or hurt to someone is a factor capable of aggravating the offence of breaching a VRO. However, in this case there was no evidence pointing to a threat of self-harm made with that intention or effect. Furthermore, the fact that the appellant's counsel referred to the protected person as the 'complainant' at trial did not of itself show that she suffered distress or hurt (see at [72]). In fact, the Court accepted that this potential for self-harm indicated the presence of a mental condition which contributed to the offending, notwithstanding the absence of a report from any mental health professional. This lessened the weight to be assigned to general and specific deterrence (see at [93] – [94]).

The respondent submitted that the offences occurred in the remote Pilbara region which had the second highest rates of violence against women in the state. There was data before the Court indicating that remote areas have about five times the rate of domestic violence compared to capitals. His Honour responded to this submission at [81] –

‘*I accept without deciding that I can take judicial notice of these matters, and that I should regard them as going to the prevalence of offences of domestic violence to which the Restraining Orders Act is part of the legal response. On the relevance of the prevalence of offending of a particular type, see Yates v The State of Western Australia [2008] WASCA 144 [55] (Steytler P), [94] (McLure JA). I also accept without deciding that sentences for the same offending committed in different parts of the state may be affected by differences in the prevalence of that offence in those parts of those magnitudes.’*

This could result in the offence being viewed more seriously than otherwise. However, given that there was no element of physical threat or intimidation, the offence remained less serious (see at [82]). The Court held that the main mitigating factor was the appellant’s plea of guilty. Given this and the mental condition as discussed above, the Court concluded that the sentence was manifestly excessive and stated that a community based order was likely to be appropriate.