

The defendant has been committed to this Court for sentence having pleaded guilty in the Magistrates Court at a very early stage to one charge of *Criminal Code* assault, one charge of wounding, six charges of common assault and one charge of destroying property.

This case presents a difficult sentencing problem because ordinarily, and even in this case, at first blush, one would consider that the only outcome that respects modern sentencing trends for family violence offences committed by men against their partners would be an immediate custodial sentence. For a recent discussion of the matter see *Director of Public Prosecutions v Karklins* [2018] TASCCA 6 per Geason J, at [54]–[60].

As will be seen, however, there is about the present case, in relation to almost every facet, an unusual aspect, the combination of all of which calls for a sentencing order which does not see the defendant sent immediately to prison.

The defendant is a 41 year old employed building worker. Until recently he resided with his partner of several years, also aged 41 and his infant daughter. The couple had recently been through two years of IVF treatment and the complainant, through six miscarriages, but happily, at the very time of these offences they were the proud parents of a daughter.

The family lived in a recently purchased home. The property is subject to a mortgage of \$350,000, repayable by instalments of \$385 per week. The defendant is the only wage earner in the family at the moment, as might be expected. His annual salary ranges from \$80,000 to \$100,000.

On 21 November 2018, just six weeks after their daughter's birth, the complainant saw a social media alert on Instagram that caused her to suspect that a female from Queensland was communicating with the accused, and that she was more than just an acquaintance. The couple had previously quarrelled about the defendant's relationship with this person.

The complainant rang the defendant at work and confronted him about the matter and an argument raged via SMS and telephone calls throughout the day. At one point the defendant told the complainant to get out of the house and said "*I only have my job left*". I take that to mean he was concerned that the telephone calls and messages could be viewed with disapproval by his employer. He threatened the complainant with legal action. In the end she sent the defendant an SMS message saying that he could come home, and that she would not utter a word unless it was about their daughter.

The defendant arrived home around 5:30 p.m. He did not speak to the complainant who was cooking dinner. He said hello to his daughter and had a shower. After he had showered he had a beer and went outside. The complainant informed him that his dinner was ready and placed it on a table beside a lounge chair. The defendant came inside and sat in the lounge chair but he picked up the dinner plate and smashed it on the floor. The child was in the lounge room in a baby rocker. The complainant yelled, "*don't hurt my daughter*". The defendant told her to clean up the mess and called her a "*dog*" and a "*stupid cunt*". Oddly the defendant assisted the complainant to clean up while continuing to verbally abuse her.

After cleaning the mess up the complainant told the defendant that she was going to call the police, but the defendant smashed her phone. This is the charge of destroying property.

The defendant went outside to speak to neighbours and the complainant, crying uncontrollably went to the bedroom in order to pack clothes for the defendant, with the intention of telling him to leave. She noticed the defendant's mobile phone on table. She tried to contact the police on this phone but was unable to do so. She placed it into a bag with the defendant's clothes.

The defendant returned and repeatedly asked where his phone was. The complainant did not respond and returned to the kitchen to clean up the dinner preparations. She then went to the bedroom. The defendant followed her continuing to demand his phone.

It was in the bedroom that the *Criminal Code* assault occurred. The defendant grabbed the complainant by the throat and threw her onto the bed. As she was lying on the bed, the defendant straddled her and placed both his hands around her throat. He applied pressure to her throat causing her difficulty in breathing. The defendant continued to yell "*where's my phone you stupid cunt*". The complainant was able to reply "*I'll give you your phone if you just go*". After about twenty seconds she managed to put her hand into the defendant's mouth and this caused him to let her go.

I have seen photographs of the complainant taken two days after this assault and it is difficult to discern any significant marking to her throat although there was light bluish bruising to her upper arms. Common experience however teaches that bruising is not always discernible and may appear at a later time. I have not listed in these comments all of the bruises observable in the photographs I have seen, but it is reasonable I think, to describe all of the bruising as relatively minor.

The couple both stood up and the complainant told the defendant that she would give him his phone if he collected his work clothes and left. The defendant then pushed her into a clothes-airer, causing her to fall to the ground. This is the first of the common assault, and this may have caused the small bruises to the complainant's bottom, depicted in the photographs.

The second common assault occurred when the complainant went to return from the bedroom to the lounge room where the child was still asleep. The defendant blocked he way and pushed her backwards. The complainant then kneed the defendant in the groin.

The defendant thereupon threw the complainant to the floor where he punched her two or three times to the back of the head. This was the third common assault and was followed by the wounding which occurred while the complainant was still on the floor, and the defendant struck her about five times to the back of the head with a miniature velvet chaise lounge weighing several kilograms which was used as a door stop. This caused blood to flow from her head.

It is useful to interpolate at this point that the complainant was assessed at the scene by ambulance officers who did not consider that her injuries were serious, and did not require hospitalisation. Relevant also is the fact that the complainant has a medical condition that causes her to bleed easily. She attended her GP the following day and was provided with advice about cold packs and simple analgesics. The wound did not require suturing and a subsequent CT scan returned normal results. Photographs of her injuries taken two days later were unable to depict the 1.5 cm cut because it was not discernible within her hair.

The fourth common assault was when the defendant who was wearing Ugg boots stepped on the complainant's head as he walked away after wounding her. This may account for the slight bruising and reddening under the complainant's left eye, depicted in the photographs.

The fifth common assault was a threat. The complainant was covered in blood and ran to the bathroom. She screamed out that she was going to the police. She then went into the bedroom where she was met by the defendant. He picked up her broken mobile phone and grabbed hold of her whilst saying "*give me my phone or I will shove this down your throat*".

The sixth common assault occurred when the complainant went to the front door and opened it, yelling out for help. The defendant grabbed her by the waist and pulled her back inside. He told her to "*stop being such a clown*".

They both then sat down and the complainant repeated her request for the defendant to leave. She told him that she would go next door and call the police if he did. The defendant ultimately agreed to leave the house, and returned to the bedroom. The complainant grabbed the child and left the house and police were contacted.

The defendant cleaned up inside and left after about five minutes. He was charged subsequently, and a Police Family Violence Order was issued and served upon him, operative for a period of twelve months. The order includes a condition that the defendant not enter the premises or other premises where the complainant is presently living.

It will be observed that the order does not prevent contact and the complainant and the defendant have been having contact. The defendant has been living with his parents. The couple are liaising with police to have the order modified to facilitate a reconciliation. I will say a little more as to this in a moment because I believe from her victim impact statement that the complainant is behaving sensibly and lucidly in this regard. However, as was said in *Chatters v Tasmania* [2011] TASSCA 8 at [60]:

"[A]lthough forgiveness is relevant, it must be given very limited weight. As Howie J, with whom Levine and Hidden JJ agreed, said in *R v Palu* [2002] NSWCCA 381; (2002) 134 A Crim R 174 at [37], 'Sentencing proceedings are not a private matter between the victim and the offender, not even to the extent that the determination of the appropriate punishment may involve meting out retribution for the wrong suffered by the victim. A serious crime is a wrong committed against the community at large and the community is itself entitled to retribution. ... Matters of general public importance are at the heart of the policies and principles that direct the proper assessment of punishment, the purpose of which is to protect the public, not to mollify the victim.' See also *R v Begbie* [2001] NSWCCA 206; (2001) 124 A Crim R 300 at [43]; *R v Burton* [2008] NSWCCA 128 at [102]; *Menichelli v Tasmania* [2009] TASSC 111 at [16]."

The word "aberration" is much overused, but from what I have been told by the defendant's counsel, without dispute, and by counsel for the State, and from the documents to which I have been referred, it would seem to be no exaggeration to describe the defendant's behaviour on this occasion as just that, an aberration. It was entirely inexcusable criminal conduct but it was also totally at odds with the defendant's character and past history, and altogether inexplicable unless it was in some way associated with a build-up of pressure which may have begun after

the defendant was involved in a near fatal accident in Western Australia in 2012. As a result of that accident he required a great deal of rehabilitation over a long period of time. There then followed, as already noted, throughout 2016 and 2017, 2 years of participation with the complainant in an IVF program, six miscarriages, the worry of their daughter being born with a disability, and the stress the couple would no doubt have felt, in common with many first time parents, of bringing home a new born child.

The defendant has no relevant prior convictions and there is no hint of violence in his past.

He appeared unrepresented on his first appearance before a magistrate and on his next appearance with counsel pleaded guilty to all charges.

I accept the submission of counsel for the State that the defendant did not express remorse when interviewed by police on the evening of the offending, suggesting rather that the complainant "*went off her trolley*" and "*was out of control and flipped out*". However it is quite clear that he very quickly accepted responsibility for his actions, seeking the help of Relationships Australia even before he entered his early pleas of guilty.

He has substantially completed that organisation's Men Engaging New Strategies, Family Violence behaviour change program (MENS). That program consists of four pre-group individual counselling sessions, ten group sessions, four post-group sessions and a final group meeting. The defendant has attended the four pre-group sessions and the ten group sessions, and by letter from the organisation dated 5 April 2019, I am advised that he is invited to undertake the four post group sessions.

The defendant's immediate superior, a Mr D has provided a letter to the Court. Mr D has worked with the defendant for the last six years. He believes that the defendant is the most trusted person he works with, and he has never heard a bad word said about the defendant by any other team member. He notes that the defendant has expressed solemn remorse for his actions and would do anything he could to reverse what has happened. Mr D believes that the incident was a terrible one off action and something that he believes would never happen again.

The complainant has provided a victim impact statement in which she states that the incident has affected her greatly. She writes:

"That evening I was in shock at what happened, not only physically but emotionally as [the defendant] had always been there to support and care for me. I was utterly heartbroken *after all we had endured together*" (My emphasis.)

I take the reference to "*all we had endured together*" to be one directed at the defendant's recovery from his life threatening injuries, and the couples journey through IVF and multiple miscarriages prior to their daughter's fraught birth. This inference also dovetails with the comment by counsel for the State that the complainant has advised her that the defendant had been "*incredibly supportive*".

The complainant confirms that nothing like that which occurred that night had ever happened before, that their relationship had always been strong, although not perfect. She states that she knew that the defendant would never harm their daughter, and indeed there is no hint of anything but love for their daughter, who fortunately slept through almost all of the defendant's violence.

I alluded earlier to the fact that I sensed that the complainant was approaching with maturity the prospects of reconciling with the defendant, and not rushing into ill thought out forgiveness. I draw that inference from the following statements made by her in her victim impact statement:

"I believe people make mistakes and that [the defendant] has truly made a monumental one but also believe that if a person accepts responsibility and gets help and support it shows true remorse and character. I do believe this will never happen again and I know [the defendant] wants to be home with his family. I also wish for him to return home but understand this will take time as does he.

Whatever the outcome of legal proceeding I shall be standing by [the defendant]. I will be giving him the support he needs as well as working together on our relationship and our family"

I propose a sentencing disposition involving a suspended term of imprisonment. Doing so is not to treat the defendant's violent offending as a private matter between victim and offender, nor as an outcome designed to mollify the victim. It is a strategy to keep a family unit together, housed and with an income. I fully accept that family violence is a serious crime committed against the community at large and that the community is itself entitled to retribution, however a suspended sentence of imprisonment is, nonetheless, an actual prison sentence which has real consequences and is entirely apt in the present case.

A home detention order which would allow the defendant to continue his employment cannot be made in circumstances where the offences are family violence offences and the victim is to live at the subject premises. The defendant has been told that his employment of 14 years will not be kept open for him if he is subject to an immediate term of imprisonment, and that would have the consequence that he would not be able to maintain the mortgage payments and would lose the home where his partner and baby daughter live. The complainant's mother lives in Launceston but I am told that the complainant has no real family support structure outside of the defendant and the home in which she is living with her daughter.

I gave consideration to coupling a suspended sentence with a community correction order with a condition requiring community service, but with full time employment somewhat remote from his ordinary place of employment, and a baby in arms I feel that it is more important that he complete the MENS program and engage with the complainant in rehabilitating himself and in reinstating their relationship over time.

Taking into account all matters and not losing sight of s 13(a) of the *Family Violence Act 2004*, the defendant is convicted of all 9 charges to which he has pleaded guilty and is sentenced to 15 months' imprisonment, which sentence I wholly suspend on the conditions that he commit no offence punishable by imprisonment for a period of two years from today's date, that he comply with the terms of any order in force with respect to him and the complainant under the provisions of the *Family Violence Act 2004* during that period, and that he satisfactorily complete the MENS behaviour change program with Relationships Australia Tasmania Inc within a reasonable time.

The Crown makes application pursuant to s 68(1) of the *Sentencing Act 1997* for a compensation order in favour of the complainant in an amount to be assessed. I make that order.

Pursuant to s 13A of the *Family Violence Act* I direct that the offences committed against the complainant be recorded as a family violence offences.