

***R v Glen* [1994] NSWCCA 1 (19 December 1994) – New South Wales Court of Criminal Appeal**

‘Deterrence’ – ‘Physical violence and harm’ – ‘Relevance of victim’s forgiveness’ – ‘Sentencing’ – ‘Sexual intercourse with consent’ – ‘Victim contribution’

Charge/s: Sexual intercourse without consent.

Appeal Type: Appeal against conviction and appeal against sentence.

Facts: The male appellant and the female victim had been in an intermittent relationship for two years and had a daughter together. The appellant had sexual intercourse with the victim without her consent in the front yard of his premises. At the time of offence, he was upset about his possible denial of access to his daughter.

Issue/s:

1. The appellant did not appreciate when he pleaded guilty that he was acknowledging the absence of consent of the victim to sexual intercourse.
2. The admission of guilt involved in the plea should be regarded as tainted and not a free and voluntary confession.
3. The sentencing judge fell into error by failing to give adequate weight to the lack of any relevant prior record, the emotional background to the incident - including the appellant’s fears concerning future contact with his daughter, the remorse expressed and the attitude of the complainant.

Decision and Reasoning: As per Grove J (Loveday AJ and Simpson J agreeing) the appeal against conviction and the appeal against sentence was dismissed. First, counsel for the appellant at trial obtained adequate written instructions prior to the arraignment that the appellant wished to plead guilty. These evidenced that the appellant knew the consequences of pleading guilty (See 5-6). Second, the terms of the written instructions, the evidence of the solicitor and the lack of credibility attaching to the appellant’s assertion combine to make this ground of appeal untenable (See 7). Finally, none of the above matters were overlooked by the sentencing judge and no error was accordingly demonstrated. In particular, the sentencing judge made express reference to the attitude of the complainant, which cannot govern the duty of the court when proceeding to sentence (See 8).

After agreeing with the reasons of Grove J, Simpson J made further comments on the relevance of the victim’s attitude of the offences to the sentence which should be imposed. Her Honour provided:

'In my opinion, exceptional caution should be exercised in the receipt, and the use, of evidence of that kind in cases that fall within the general description of domestic violence offences, of which this case is one. It is a fact known to the courts and to the community that victims of domestic violence frequently, and clearly contrary to their own interests and welfare, forgive their attackers. It is said, and has been said so often and for so long as to be almost notorious, that it was this pattern of post offence forgiveness, accompanied by apparent remorse or contrition on the part of the offender, that prevented the prosecution of such offenders. In turn, it appeared that the victim of domestic violence was in a class different to the rest of the community insofar as the protection of the law was concerned. Domestic violence was not seen as a crime which attracted the sanction of the law in the same way or to the same extent as other crimes, whether or not of violence. The perpetrator of domestic violence was relatively safe to commit crimes with impunity, at least provided he or she (and, in the cases that have to date come before the courts, it has almost invariably been be) could attain the victim's forgiveness.

There are two main arguments of principle against the proposition that this Court should give any weight to the expressed wish of the victim in this case that the applicant not be incarcerated. The first concerns the importance, especially great in cases of domestic violence, given the history that I have alluded to, of general deterrence. This Court must send a signal to domestic violence offenders that, regardless of self interest denying forgiveness on the part of victims, those victims will nevertheless receive the full protection of the law, insofar as the courts are able to afford it to them. It must not be forgotten, that, if it is to be accorded weight by the courts, forgiveness by the victim also operates contrary to the interests of other victims. Until it is recognised that domestic violence will be treated with severe penalties regardless of a later softening of attitude by the victim, no progress is likely to be made in its abolition or reduction. Put simply, the importance of general deterrence in such cases overrides any minor relevance that evidence of forgiveness might have.

For too long the community in general and the agencies of law enforcement in particular, have turned their backs upon the helpless victims of domestic violence. Acceptance of the victim's word that he/she forgives the offender, casts too great a burden of responsibility upon one individual already in a vulnerable position. Neither the community, the law enforcement agencies, nor the courts can be permitted to abdicate their responsibility in this fashion. Protection of the particular victim in the particular case is a step towards protection of other victims in other cases.

The second reason of principle for treating with extreme caution the evidence of the forgiveness of the victim in the circumstances of this case is that the legislature has, since 1982, made clear its intention that special considerations apply to offences of domestic violence'.