

***R v Cortese* [2013] NSWCCA 148 (26 June 2013) – New South Wales Court of Criminal Appeal**

‘Indecent assault’ – ‘Mitigating factors’ – ‘Rape’ – ‘Relevance of a prior relationship in sexual assault offences’ – ‘Sentencing’ – ‘Sexual and reproductive abuse’

Charge/s: Indecent assault, rape.

Appeal Type: Crown appeal against sentence.

Facts: The female victim told the male respondent that she wanted to end their relationship. They argued, during which the respondent tried to make sexual advances towards the victim, including trying to kiss her and rubbing her vagina. Despite protestations from the victim, the respondent stayed over the night. The next morning the respondent forced himself on top of the victim, forced at least two fingers into her vagina, and then forced his penis into her vagina and had penile/vaginal intercourse with the victim without her consent. The respondent was sentenced to a good behaviour bond for twelve months for the indecent assault and two years imprisonment, wholly suspended, for the rape offence. In assessing the seriousness of the offending, the sentencing judge stated that the ‘prior sexual relationship [between the respondent and the victim] is an important mitigating factor’ and held the offending was at the bottom of the range (See [36]-[39]).

Issue/s: One of the grounds of appeal was that the sentencing judge erred in her assessment of the objective seriousness of each offence.

Decision and Reasoning: The appeal was allowed and the respondent re-sentenced to three years imprisonment with a non-parole period of 18 months. The sentencing judge erred in her characterisation of the seriousness of the offending. In reaching this conclusion, Beech-Jones J stated at [55] that:

‘...cases confirm that the mere fact that there was a pre-existing relationship between an offender and a victim does not mitigate the criminality involved. Needless to say, each case will depend upon facts, but one common circumstance in which a pre-existing relationship has been found to diminish the seriousness of the offence is where it suggests some prevarication or at least initial consent on the part of the victim. Thus, if sexual contact is initiated by the victim or initially consented to by the victim, then the ensuing offence may be considered less serious’: See *NM v R* [2012] NSWCCA 215; *Bellchambers v R* [2011] NSWCCA 131; *R v Hendricks* [2011] NSWCCA 203; *Stewart v R* [2012] NSWCCA 183.

Here, the pre-existing relationship had no relevance as the victim repeatedly expressed her lack of consent (See [55]). Following from this, it was clear that the sentencing judge's assessment of the culpability of the respondent was clearly erroneous. This was a case involving the rape of a young woman which occurred in the context of threats of violence, as well as aggressive and humiliating language. It came after she was detained overnight. The offending would likely fall below the mid-range of offences of this character but was not 'bottom of the range' (See [56]-[58]).