

***Stewart v The Queen* [2012] NSWCCA 183 (29 August 2012) – New South Wales Court of Criminal Appeal**

‘Dominance’ – ‘Mitigating factors’ – ‘People affected by substance misuse’ – ‘Psychological consequences’ – ‘Rape’ – ‘Relevance of a prior relationship in sexual assault offences’ – ‘Sentencing’ – ‘Sexual and reproductive abuse’ – ‘Victim impact statements’

Charge/s: Rape.

Appeal Type: Appeal against sentence.

Facts: The male applicant and female complainant had been in a somewhat disrupted and non-continuous relationship for some years. On the day of the offence, the complainant informed the applicant that their relationship was over and she was communicating with other men on Facebook. Jealous, the applicant smashed the complainant’s mobile phone. Later that evening, the intoxicated applicant lay on top of the complainant and, while she was struggling, placed his fingers into her vagina for about 30 seconds. The applicant was sentenced to five years and six months imprisonment, with a non-parole period of two years and eight months. In his remarks, the sentencing judge noted that:

‘I just want to make it clear, as I have to do unfortunately in cases of this nature, as far as I am concerned, cases of sexual assault have significant effects on the victim. There are two particular ways, they result in significant distrust as far as the victim is concerned in forming relationships, particularly with males if the assailant was a male. The other very broad area that is affected is the confidence or self-confidence of the victim is significantly damaged, they have concerns about their own self-worth, sometimes that is demonstrated by self-harm but there are other ways in which it is demonstrated. There is no satisfactory material yet available to indicate how long those matters may last, I always proceed on the basis that they will continue to be present for a very long time’ at [58].

Issue/s: Some of the grounds of appeal included –

1. The sentencing judge erred in his consideration of the impact of the offence on the victim.
2. The sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. The first ground of appeal was dismissed. It would have been preferable for the sentencing judge not to state that he 'always' proceeded on the basis that the psychological effects of sexual assaults would last for a long time. This ground of appeal may have had some force if there had been evidence that the complainant had not suffered psychological injury. However, here, the victim impact statement contained clear evidence of the significant psychological injuries the complainant had suffered (See [62]-[64]).

The second ground of appeal was also dismissed. This was a serious example of an offence against the section. Button J noted at [69] that:

'The matter can be sharply contrasted with a case where two persons are engaged in intimate contact by consent, and one of them fleetingly goes too far. The digital penetration in this case was not fleeting, and it was preceded by a physical assault upon the victim. Throughout the sexual offence the victim was making her lack of consent abundantly clear and struggling to put an end to the invasion of her body. Most importantly, His Honour found that the offence was an attempt to demonstrate dominance over a young woman who was in truth free to engage in Facebook contact, or any other kind of contact, with whomever she wished. An offence of sexual penetration that is motivated by a desire to dominate the victim, because he or she has failed to comply with the expectations of the offender, will very rarely be anything other than a serious offence'.

Further, while this was a stern sentence in light of the applicant's subjective circumstances, it was not manifestly excessive (See [71]).