***Armstrong v R* [2017] NSWCCA 323 (15 December 2017) – New South Wales Court of Criminal Appeal**

'Conviction' – 'Exposing children to violence' – 'Humiliation' – 'Sentencing' – 'Sexual abuse' – 'Tendency evidence' – 'Women'

Charges: Assault x 1; Sexual assault x 2; Aggravated sexual assault x 2.

Appeal type: Appeal against conviction and sentence in relation to the two counts of aggravated sexual assault.

Facts: The appellant and complainant were in a relationship. In the presence of the complainant's son, the appellant punched and bit the complainant, held her down while she was screaming and pushed his fingers into her vagina and anus ([15]).

The prosecution sought to adduce tendency evidence ([8]). CCTV footage showed the appellant dragging the complainant by her hair ([13]). The Crown relied upon the CCTV evidence to argue that the appellant had a tendency to be violent towards the complainant ([8]). The tendency evidence was admitted, and the appellant was found guilty of the two counts of aggravated sexual assault and was sentenced to a head sentence of 8 years and 9 months' imprisonment with a non-parole period of 5 years and 9 months.

Issues: Whether the tendency evidence) should have been admitted; and whether the sentencing judge erred in determining the objective seriousness of the offences by not taking into account the fact that they were not committed for sexual gratification.

Decision and Reasoning: The appeal against conviction was dismissed and leave to appeal against sentence was refused. In relation to the appeal against conviction, the Court (Meagher JA, Rothman and Button JJ) stated that tendency evidence need not directly establish the elements of an offence charged, but should make one or more of the facts in issue significantly more likely ([20]). The Court at [19] quoted the majority of the High Court in *Hughes v The Queen* [2017] HCA 20 (14 June 2017) at [40]:

> The test posed by s 97(1)(b) [of the Evidence Act 1995 (NSW)] is as stated in Ford [(2009) 201 A Crim R 451 at [125]]: 'the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged'. The only qualification to this is that it is not necessary that the disputed evidence has this effect by itself. It is sufficient if the disputed evidence together with other evidence makes significantly more likely any facts making up the elements of the offence charged. [emphasis in original]

Since the appellant's case was that he was acting in self-defence, the Court held that the trial judge did not err in admitting the CCTV footage. The footage was sufficiently probative of the appellant's propensity to act violently towards the complainant ([21]).

In relation to the appeal against sentence, the Court held that the trial judge did not err, Meagher JA stated that: 'there is nothing to commend the proposition that engaging in sexual intercourse without consent to gratify oneself is in any sense more objectionable than doing so to humiliate and physically dominate another' ([35]). Thus, the trial judge did not err in measuring the objective seriousness of the offence.