

***R v Kershaw* [2005] NSWCCA 56 (1 March 2005) – New South Wales Court of Criminal Appeal**

‘Breach of apprehended violence order’ – ‘Rape’ – ‘Relevance of victim's expression of forgiveness’ – ‘Sentencing’ – ‘Sexual and reproductive abuse’ – ‘Victim's wishes’

Charge/s: Rape, breach of an apprehended violence order.

Appeal Type: Appeal against sentence.

Facts: The applicant and the complainant had been married for 16 years and lived with their eight year old daughter. They had been arguing when the applicant pushed the complainant forcefully. She rang the police and obtained an apprehended violence order (AVO) restraining intimidating conduct and restraining the applicant from being at their premises under the influence of alcohol, liquor or drugs. The applicant arrived back at their premises and complained about the AVO. He then stripped naked. The complainant told the applicant that she was not willing to have sex with him and was not going to change her mind about the AVO. He then raped the complainant. The applicant pleaded guilty and was sentenced to 5 years imprisonment, with a non-parole period of two and a half years. A 10 percent reduction in sentence was made to take into account this guilty plea.

Issue/s: The sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed. The Court held that the discount for the guilty plea was appropriate, was not ‘meagre’ and was actually quite significant. Further, the applicant contended that the trial judge erred by taking a ‘harsh view’ in finding that the applicant and the complainant continuing their relationship is an issue with regards to the applicant’s rehabilitation. The complainant maintained a ‘favourable’ view of the applicant and the relationship (See at [21]). Bryson JA held that the complainant’s ‘forgiving and optimistic attitude’ should not play a large part in the sentencing decision. The trial judge was correct to conclude that the fact that the offence was committed against his wife was an aggravating factor. As per the trial judge, at [24] *‘The sentencing process is not and of course should not be in the hands of complainants, and the merciful or relenting attitude of a complainant does not reduce the gravity of the offence and does not have much effect on the interest of justice in imposing an appropriate sentence’*.

The trial judge’s view that the gravity of the offence was severe was correct. Other aggravating factors included his previous conviction for assaulting his wife, the fact that offence was committed after ongoing supervision and a good behaviour bond was completed, and it was in breach of an AVO. This justified a correspondingly high sentence.