***ZZ v The Queen* [2013] NSWCCA 83 (19 April 2013) – New South Wales Court of Criminal Appeal**

'Aggravated rape' – 'Mitigating factors' – 'Physical violence and harm' – 'Rape' – 'Relevance of a prior relationship in sexual assault offences' – 'Sentencing' – 'Sexual and reproductive abuse'

Charge/s: Aggravated rape (recklessly inflicting actual bodily harm), rape.

Appeal Type: Appeal against sentence.

Facts: The sexual offences were committed in the context of a sexual relationship between the male applicant and the female complainant. The applicant and complainant had been drinking, taking drugs and engaging in consensual sexual relations. The applicant then asked the complainant to drink his urine and, after urging the uncertain complainant to try it, the applicant urinated into her mouth. The complainant, gagging and nearly vomiting, tried to pull away but the applicant forced her head back towards his penis (count 1 — rape). After further sexual activity, the complainant became increasingly distressed and uncomfortable. She attempted to leave but was pushed into the bathroom wall by the applicant. He penetrated her anus with his penis so forcefully that she smashed her head against the tiles and suffered a deep four-centimetre laceration to her forehead. He continued penetrating her and smashed her head against the wall again (count 2 — aggravated rape). The applicant was sentenced to a total effective sentence of nine years and six months with a non-parole period of seven years.

Issue/s: Some of the grounds of appeal were that –

1. The sentencing judge erred in the assessment of the objective seriousness of count 1.
2. The sentencing judge erred in the way the applicable standard non-parole periods in respect of the sexual assault offences were taken into account.

Decision and Reasoning: The appeal was allowed. First, while the sentencing judge accepted the offence as 'being in the mid range of seriousness', His Honour later incorrectly referred to count 1 as 'being at the top of the mid range' and erroneously sentenced the applicant on this basis. Second, the standard non-parole period played a greater role in the sentencing judge's decision than as a guidepost, to be taken into account with other factors on sentence, contrary to the principle articulated in *Muldrock v The Queen*.

In re-sentencing the applicant, Johnson J took into account the objective gravity of the applicant's offences, his subjective circumstances and other aspects bearing upon the question of sentence, including the maximum penalty and the standard non-parole period for counts 1 and 2. Johnson J noted that the objective gravity of the applicant's offences needed to be assessed in the context of the relationship between the applicant and the victim. It was true that the complainant was not sexually assaulted by a stranger, where, if she had been, a further element of fear and terror would have been expected. However, the fact that the victim knew the offender and trusted him provided her with 'little comfort' here (See [103]). In a case such as this, involving significant violence and infliction of injury, the context of this relationship offered no real assistance to the offender on sentence (See [107]).