Her Majesty's Attorney-General v O **[2004] TASSC 53 (9 June 2004) – Supreme Court of Tasmania**

'Assault' – 'Delay' – 'Exposing children' – 'Indecent assault' – 'Manifestly inadequate' – 'Physical violence and harm ' – 'Sexual and reproductive abuse'

Charges: Assault, indecent assault

Appeal type: Attorney-General appeal against sentence

Facts: The responded pleaded guilty to assault and indecent assault against a woman with whom he cohabited for seven years. They had four children together. In March 2001, the respondent assaulted the complainant by raising his fist at her, waving a knife in her face and threatening to kill her. The relationship ceased some weeks prior to 30th May 2002. On 30th May 2002, the respondent trespassed into the complainant's home and ejaculated over her legs while she was asleep. The complainant reported the incident to police soon after it occurred and, at the same time, reported the assault of March 2001. Considerable time was taken to obtain a DNA analysis of the semen on the complainant's legs. As a result, police did not interview the respondent until a little more than a year after the indecent assault. The respondent was ordered to perform 80 hours of community service.

Issue: Whether the sentence was manifestly inadequate.

Decision and Reasoning: The appeal was dismissed by Underwood and Slicer JJ but upheld by Blow J in dissent. The judges provided different reasoning.

Underwood J, in the majority, agreed with Blow J (in dissent) that the sentence imposed was manifestly inadequate. However, he dismissed the appeal. The time in custody the respondent would have to serve would unlikely exceed 6 months and absent some point of principle, *'it was unjust to take away the respondent's liberty and put him in prison because an undefined error, not caused or contributed to by him in any way, infected the sentencing discretion exercised with respect to crimes that occurred two and three years ago*' ([7]).

Slicer J, also in the majority, held that the sentence was not manifestly inadequate. His Honour quoted *Parker v R* [1994] TASSC 94 which in turn quoted from a Canadian case *R v Brown* (1992) 73 CCC (3d) 242, 249 articulating principles for the sentencing of crimes of domestic violence: *'When a man assaults his wife or other female partner, his violence toward her can be accurately characterised as a breach of the position of trust which he occupies. It is an aggravating factor. Men who assault their wives are abusing the power and control which they so often have over the women with whom they live. The vulnerability of many such women is increased by the financial and emotional situation in which they find themselves, which makes it difficult for them to escape'.*

However, His Honour nonetheless held that the circumstances of this case did not show manifest disparity or inconsistency with the sentencing standard (which was not to say that a more severe penalty would not have been appropriate). Here, the original assault (followed by the resumption of cohabitation) and the act of indecency were not charged for a further period of 12 months. There was no material advanced that suggested continuation of harassment or manifestation of aggression. The respondent had successfully completed the order of community service ([19]-[20]).

Slicer J also stated: *'Resolution of the problem of violence within a domestic situation is complex and resumption of cohabitation, as in this case where the complainant had decided to give her partner another chance, makes any assessment of sanction difficult'* ([19]).

Blow J, in dissent, held that the nature of the indecent assault (ejaculating over a former partner's legs) and the circumstances of aggravation in which it occurred made it a particularly serious example of that sort of crime such that a community service order was so inadequate a penalty that the appeal ought to be allowed ([30], [36]). The circumstances of aggravation were that the respondent entered the complainant's house as a trespasser at night, the complainant was asleep, and it was committed in the immediate presence of the couple's four young children which created a strong risk of them witnessing the incident ([26]). A sentence of 11 months' imprisonment, suspended after 8 months, was appropriate.

His Honour disagreed with the comments of Slicer J as to delay insofar as they related to the indecent assault. He noted that, *'Certainly fairness to an offender can require a judge imposing a sentence for a stale crime, long after it was committed, to extend what otherwise might be an undue degree of leniency: R v Todd [1982] 2 NSWLR 517 at 519 - 520. There is also authority that a delay need not be inordinate before it deserves to be taken into account: Miceli v R [1997] VSC 22; (1997) 94 A Crim R 327 at 330. However the respondent was sentenced for the indecent assault some 20 months after committing it, and a delay of that order is now, regrettably, quite normal in this State. I therefore think that the delay in relation to that charge is of little significance'.*