***R v Harris* (1998) 4 VR 21 (3 December 1997) – Victorian Court of Appeal**

'Deterrence' – 'Existence of a prior relationship' – 'Physical violence and harm' – 'Rape' – 'Recklessly causing serious injury' – 'Sentencing' – 'Sexual and reproductive abuse'

Charge/s: Rape, recklessly causing serious injury.

Appeal Type: Crown appeal against sentence.

Facts: The respondent was convicted of raping and recklessly causing serious injury to his estranged wife. During the assault, which lasted one and a half hours, the respondent punched the complainant over 200 times, predominately to the face. He was sentenced to two years imprisonment, with a non-parole period of one year. The sentencing judge relied on four matters in deciding to impose a sentence at the lower end of the scale: (a) the offender was unlikely to reoffend, (b) the confusion in his mind as to where his relationship with the complainant was going, (c) the offender's previous good record (which indicated the actions were out of character), and (d) the fact that, since the complainant was his wife, she would not have suffered the long-term traumatisation endured by other rape victims.

Issue/s: The sentence was manifestly inadequate.

Decision and Reasoning: The appeal was allowed. Charles JA (Phillips JA agreeing) held that the sentences imposed were manifestly inadequate. None of the first three factors (a), (b) or (c) identified by counsel justified the low penalty for the rape of the complainant. Charles JA did not accept the Crown's submission that factor (d) disclosed a significant error of principle. The sentencing judge's statement as to traumatisation was no more than a finding of fact in the circumstances of this particular case, and not purely premised on the fact that the complainant was his former wife. Notwithstanding this, a substantially heavier sentence was warranted in the circumstances.

Charles JA further held that the imposition of such a lenient sentence here undervalued two important sentencing considerations. First, general deterrence plays an extremely important role in warning the community that rape, within or outside of marriage, will not be tolerated and will attract condign punishment. Second, the considerations which influenced the sentencing judge to impose a lower sentence suggested that His Honour gave little weight to specific deterrence. In light of the respondent's lack of remorse for his actions, specific deterrence ought to have played a significant role in the construction of an appropriate sentence. Error was also shown in the sentencing judge's decision not to direct any cumulation of sentence for the serious physical violence inflicted upon the complainant (See 27).

Tadgell JA also agreed with Charles JA but provided some additional observations. In particular, at 28-29, His Honour stated:

*'In particular, it cannot be said that [the sentencing judge] purported to apply any principle to the effect that rape by a man of his wife or former wife or of a person with whom he is or has been in a close relationship is to be treated more leniently than a rape by a stranger. The authorities do not appear to support any such principle. The most that can be said, in my opinion, is that the penalty to be imposed for the crime of rape cannot be regarded as necessarily conditioned by the relationship of the parties to it. Any relationship or lack of it between them will no doubt usually fall to be considered as one of the circumstances to be taken into account in a determination of the appropriate penalty. In some circumstances a prior relationship may serve as a factor of mitigation, but it need not, and it may indeed serve to aggravate the offence'.*

There was no error of that kind here but the sentence was still manifestly inadequate for the reasons articulated by Charles JA.