***Benson v The Queen* [2014] VSCA 51 (28 March 2014) – Victorian Court of Appeal**

'Exposing children' – 'Miscarriage of justice' – 'Rape' – 'Relationship evidence' – 'Sexual and reproductive abuse'

Charge/s: Rape.

Appeal Type: Appeal against conviction and sentence.

Facts: The male appellant and the female complainant had been in a relationship for 13 years. The complainant alleged that in April 2011 the appellant hit her after she refused to have sex with him. She described this as the 'last straw' and told the appellant she was leaving him. They remained living in the same house. One month later, the intoxicated appellant forced her into bed and penetrated her with his penis. Their son saw the incident and called the police.

At trial, the Crown sought to admit evidence of physical assaults by the appellant against the complainant that occurred between 1999 and 2003 (none of these assaults happened after the complainant refused to have intercourse with the appellant). The Crown argued that this evidence explained the context in which the alleged rape occurred, and was relevant to whether the complainant had freely agreed to have intercourse with the appellant and whether the appellant was aware that the complainant was not consenting or might not be consenting on the night of the alleged offence. The trial judge took account of the highly prejudicial nature of the evidence but considered that it was both relevant to and probative of the facts in issue and should be admitted for the limited purpose described in her ruling (see [19]-[23]).

Issue/s: The trial judge erred in admitting evidence of past conduct by the appellant because the evidence was not relevant.

Decision and Reasoning: The appeal was allowed. Neave JA held (Bongiorno and Coghlan JJA agreeing) that the evidence was inadmissible. Bongiorno and Coghlan JJA also held that there was a miscarriage of justice (Neave JA in dissent). Neave JA first considered whether the 'relationship evidence' (evidence of physical assaults) was relevant. Her Honour stated generally at [29]:

'Evidence of the relationship between an accused and the alleged victim of an offence may be relevant and admissible for the purpose of placing the event which is the subject matter of the offence in context, where such evidence may assist the jury to evaluate the conduct of the complainant and the applicant on the occasion which gave rise to the charge. Where the evidence is of criminal or other disreputable acts committed by the accused, so that there is a danger that the jury will treat it as evidence that the accused has a propensity to commit acts of the kind charged, the judge must warn the jury of the limited purpose for which the evidence can be used. In particular the jury must be told that the relationship evidence cannot be regarded as a substitute for the evidence that the accused committed the charged acts, or for the purpose of showing that the accused is 'the kind of person' likely to have committed that offence (R v Grech (1997) 2 VR 609)'.

Neave JA went on to consider the circumstances in which relationship evidence may be relevant. At [31], Her Honour noted that relationship evidence of prior violence by the accused towards the complainant may be admissible in sexual offence cases 'because it assists the jury to evaluate whether the complainant had freely agreed to sexual activity on the occasion to which the charge relates, or whether the accused knew that the complainant had not consented or might not have consented to having sex on that occasion': see, for example, *R v Loguancio* [2000] VSCA 33; (2000) 1 VR 235, 23 (Callaway JA).

At [33], Her Honour noted that relationship evidence of prior acts of violence by the accused 'may also be admissible where a person is charged with homicide or an offence arising out of the infliction of injury on a victim, because such evidence is relevant in evaluating the accused person's claim that he or she had an amicable relationship with the victim, or that he or she acted in self-defence': see, for example, *Wilson v The Queen* [1970] HCA 17; (1970) 123 CLR 334 and *R v Mala* (Unreported, Court of Appeal, Brooking, Ormiston, Batt JJA, 27 November 1997).

In this case, the appellant correctly conceded that evidence of the April 2011 assault when she refused to have sexual intercourse with him only a month before the alleged rape was relevant in assessing the likelihood that she had in fact voluntarily agreed to have intercourse with him or he believed that she had done so (see [35]). However, Neave JA held at [36]-[37] that:

'[D]espite the appalling nature of the earlier assaults, I consider that the evidence of those assaults was not sufficiently relevant to the nature of the relationship which existed at the time of the alleged rape to the admission of that evidence. There was a lengthy time lapse between the earlier assaults and the alleged rape. Of itself, that time lapse might not have made the evidence irrelevant...'

'However in this case there was not only a significant time delay between the alleged rape and the earlier assaults, but the complainant remained with the applicant despite the assaults and bore him children after those assaults had occurred. It may be that she did not leave him earlier because she was afraid of him, but there was no evidence that he had assaulted her because she refused to have sex with him, prior to April 2011'.

Bongiorno and Neave JJA agreed with the reasons set out by Neave JA as to why the evidence was inadmissible. However, they also held that there was a substantial miscarriage of justice as a conviction in this case was not inevitable: see *Baini v The Queen* [2012] HCA 59; (2012) 246 CLR 469. Neave JA in dissent at [52]-[61].