

***R v Mason* [2001] VSCA 62 (2 May 2001) – Victorian Court of Appeal**

‘Common assault’ – ‘Digital rape’ – ‘Existence of prior relationship not mitigating’ – ‘Indecent assault’ – ‘Mitigating factors’ – ‘Physical violence and harm’ – ‘Sentencing’ – ‘Sexual and reproductive abuse’

Charge/s: Indecent assault, common assault, digital rape.

Appeal Type: Appeal against sentence.

Facts: The offences were committed by the applicant against his estranged wife, the complainant, with whom he had two children. During the course of an argument, the applicant grabbed the complainant by the crotch and lifted her up, slamming her into the bed on a number of occasions. Three days later, the applicant broke into the complainant’s house and started to choke and slap her. She struggled against him and he pushed her to the floor and penetrated her vagina with his finger. The applicant was sentenced to a total effective sentence of three years and four months, with a non-parole period of 14 months.

Issue/s: One of the issues was that the sentencing judge erred by failing to give sufficient weight to a number of factors including the pre-existing relationship between the applicant and his wife.

Decision and Reasoning: The appeal was dismissed. Winneke P addressed the submission that where the rape occurs against the background of a previous settled sexual relationship, it should generally be regarded by a sentencing court as less serious than a rape by a total stranger. Winneke P considered the authorities led in support of this submission and at [7] and [8] expressed the following conclusions:

‘I do not regard them as laying down a sentencing principle of inflexible or universal application. A rape committed in the context, and against the background, of a previous settled relationship may in certain circumstances be a factor which a court can take into account in mitigation where it can be seen that the impact upon the victim has, for that reason, been less traumatic than otherwise it might have been. But, equally, it is not difficult to imagine a rape, committed by a man who has been in a previous relationship with his victim, which would be every bit as frightening as a rape committed by a stranger. The one thing which the authorities to which this Court has been referred demonstrate is that the crime of rape, whatever the circumstances, and upon whomsoever committed, is regarded by the courts as a grave insult to its victim and a crime which can rarely give rise to a non-custodial sentence.

It should not be forgotten that the crime of rape is an intensely personal crime which, for sentencing purposes, cannot be divorced from its effects on the victim. But the effects include not only those which flow from the physical invasion of the victim's person and security, but also those which flow from the violation of the more intangible intellectual properties of the victim's rights and freedoms. In a society in which there is an increasing number of couples becoming estranged, the courts have a heightened obligation to deter those who have previously lived in a stable relationship with a wife or partner from regarding such wife or partner as akin to a chattel devoid of rights or freedoms, and as an object readily available for their sexual gratification'.