

## ***R v O'Brien* [2003] NSWCCA 121 (6 May 2003) – New South Wales Court of Criminal Appeal**

'Battered woman syndrome' – 'Defences' – 'Expert evidence' – 'Forensic psychiatrist's evidence' – 'Manslaughter' – 'Physical violence and harm' – 'Where the victim is an offender'

Charge/s: Manslaughter.

Appeal Type: Appeal against conviction and appeal against sentence.

Facts: The appellant was found guilty of the manslaughter of her daughter, who died of malnutrition at the age of 14 months. The appellant refused to take the child to the hospital, against the advice of medical practitioners and friends. In a record of interview, the appellant said that she did not take the deceased to the hospital because her husband believed that children should not be infused with fluids or have any artificial substances injected into their bodies. At trial, the appellant gave evidence that her husband was controlling, verbally abusive and violent, and she was afraid to contravene his wishes. Defence counsel also called evidence from a forensic psychiatrist, Dr Nielssen. Dr Nielssen did not find that the appellant suffered from any kind of psychiatric disorder but that her situation fitted 'battered wife syndrome'. As a result of this, the appellant accepted the decisions made by her husband, despite having reservations about them (See [31]). The appellant was sentenced to five years imprisonment with a non-parole period of two years.

Issue/s: Some of the grounds of appeal included –

- > The trial judge erred in summarising Dr Nielssen's evidence altogether, as it related to the defence of duress. Rather, His Honour ought to have summarised the parts of Dr Nielssen's evidence that were relevant to the subjective test, and then after describing the objective test, directed the jury's attention to those parts of Dr Nielssen's evidence that were relevant to that test and how a hypothetical person in the same circumstances, i.e. a battered wife, would have acted as to withdrawing from the relationship etc.
- > The trial judge's summing-up on the evidence of battered wives syndrome from Dr Nielssen was inadequate.

Decision and Reasoning: The appeal was dismissed. First, as per Durford J at [43], *'although it is undoubtedly the duty of a trial judge in summing up to relate the different pieces of evidence to the different issues in the trial: R v Zorad (1990) 19 NSWLR 91 at 105, this was a "single issue" trial and that single issue was duress. The evidence of Dr Nielssen about the battered wife syndrome was relevant to both the subjective and objective tests and there was no need to divide it up in a way which had not been suggested by either counsel in their addresses: Osland v The Queen [1998] HCA 75 at [59]-[60]'*.

Second, a trial judge is not required to read or summarise the whole of the relevant evidence to the jury which has already been heard from witnesses, but merely to present a balanced summary of the salient parts which is fair to both sides. The evidence of Dr Nielssen was sufficiently and fairly summarised by the trial judge. Some of the questions and answers not repeated in the summing-up were merely elaboration of general propositions of the doctor which had been summarised, and one answer in particular which it was claimed should not have been omitted had been substantially paraphrased by the appellant's trial counsel in his final address (See [47]-[48]).