***Norman v The Queen* [2012] NSWCCA 230 (9 November 2012) – New South Wales Court of Criminal Appeal**

'Evidence' – 'Rape' – 'Relationship evidence' – 'Sexual and reproductive abuse'

Charge/s: Rape x 3.

Appeal Type: Appeal against conviction and appeal against sentence.

Facts: During the course of the complainant's 13 year marriage to the appellant, the complainant and the appellant had anal intercourse five times but only twice with her consent. At trial, the Crown sought to tender evidence of non-sexual domestic violence (see [22]). They argued that the evidence was not being admitted as evidence indicating a propensity on the part of the appellant which rendered it more likely that he had committed the crimes with which he was charged (therefore ss 97 and 101 of the *Evidence Act* and the test in *Pfennig v R* [1995] HCA 7; 182 CLR 461 did not apply). The trial judge accepted this argument and ruled that evidence of non-sexual domestic violence could be admitted for the purpose of showing the relationship between the appellant and the complainant. The appellant was found guilty.

Issue/s: One of the grounds of appeal was that 'relationship' evidence should not have been admitted.

Decision and Reasoning: The appeal was dismissed. MacFarlane J noted the relevant law, stating that: *'As pointed out in Roach v R* [2011] HCA 12; 242 CLR 610, *evidence which incidentally shows propensity but which is otherwise relevant will not be excluded provided that the jury is properly warned against its use as propensity evidence (see also BBH v R [2012] HCA 9 at [146] - [149])'.*

Relationship evidence may be relevant if it assists in the evaluation of other evidence such as that of a complainant. His Honour continued at [26]: *'In other words, relationship evidence may be admitted on the basis that, without it, the jury would be faced with a seemingly inexplicable or fanciful isolated incident. To enable complainants to give their account of events comprehensively, they must be permitted to place the incidents of which they complain in a meaningful context'.*

However, the Courts have emphasised that it is necessary to consider carefully the basis upon which 'relationship' evidence is relevant in a particular case (see *Qualtieri v R* [2006] NSWCCA 95; 171 A Crim R 463 at [112]; *DJV v R* [2008] NSWCCA 272; 200 A Crim R 206 at [28] - [30] and *RG v R* [2010] NSWCCA 173 at [36] - [37]) (at [29]).

Here, MacFarlane J held that evidence of two isolated incidents of non-sexual domestic violence was irrelevant and should have been excluded. While the Crown submitted that the evidence was relevant to demonstrate 'the nature of the relationship,' MacFarlane J noted:

'[C]onsistently with the approach taken by this Court in Qualtieri and DJV, it is insufficient to rely solely upon such a proposition. Evidence "is not relevant merely because it discloses aspects of the relationship between an accused and a complainant. There must be an issue which the evidence may explain or resolve by placing the alleged events in their true context": DJV per McClellan CJ at CL at [29]. Particularly because of its potentially prejudicial character, the precise basis upon which the evidence is relevant must be closely analysed'.

The evidence was also not relevant to demonstrate why the alleged sexual assaults were not reported earlier, and nor could it be said that the evidence would have assisted the jury, in any permissible way, in evaluating the complainant's evidence (see [32]-[34]).

Therefore, His Honour concluded at [35]-[36]:

'[E]vidence of the two isolated incidents of non-sexual domestic violence was not necessary to place the sexual assaults within a meaningful context… [I]t is difficult to see what, if any, use the jury could have made of the evidence other than to engage in impermissible propensity reasoning that the appellant was the type of man who might have sexual intercourse with a woman without her consent. Whilst the trial judge directed the jury not to reason in that way, there was unfairness to the appellant in the evidence being before the jury when it was not relevant on any basis'.

Despite this, on the facts, there was no substantial miscarriage of justice. The Crown case against the appellant was so overwhelming there was no significant possibility that a jury would have acquitted the appellant (See [38]).