***Bussey v R* [2020] NSWCCA 280 (16 November 2020) – New South Wales Court of Criminal Appeal**

'Application for leave to appeal against conviction' – 'Application for leave to appeal against sentence' – 'Rape where parties formerly in intimate relationship' – 'Separation' – 'Sexual abuse' – 'Strangulation'

Charges: Indecent assault x 1; Sexual intercourse without consent x 1; Aggravated sexual assault without consent (deprivation of liberty) x 2.

Proceedings: Application for leave to appeal against conviction and sentence.

Facts: The applicant man and female victim had remained in contact following the end of their relationship as they were in a music band together. The victim refused the applicant's request to revive the relationship. The applicant strangled her until she passed out. When he then asked whether she "was going to fight him", she said "no and reluctantly gave in to intercourse".

The victim reported the incident to her friends and the police. The victim identified prior sexual practices between the applicant and herself, including regular consensual choking, physical restraint, being thrown onto a bed, role playing and "rough sex". The defence case was that all sexual contact between the applicant and the victim was consensual. The applicant was found not guilty on Counts 1, 2 and 4, and guilty on one charge of aggravated sexual assault without consent (Count 3).

Grounds of appeal:

1. The verdict was unreasonable, as it was inconsistent with the not guilty verdicts on the other three counts.
2. The sentence was manifestly excessive.
3. The sentencing judge erred by not having sufficient regard, or giving weight, to the historical extent and nature of the prior sexual experience between the applicant and the victim.

Held: Appeal dismissed (per Harrison J, Hoeben CJ and Bellew J agreeing).

Ground 1: In a case where there are mixed verdicts of guilty and not guilty, and the complainant's evidence is the only evidence of an accused's guilt, a court may (but not must) conclude the verdicts are factually inconsistent: citing *MFA v The Queen*, *R v Markuleski*, and *Mackenzie v The Queen*. The court held that the verdicts of not guilty on Counts 1, 2 and 4 were explicable without leading to the conclusion that the jury formed an adverse impression about the victim's credibility. As such, the guilty verdict on Count 3, dependent on the jury's acceptance of the victim's credibility, was not inconsistent and unreasonable ([62]-[70]).

Grounds 2 and 3: The seriousness of the offending was not mitigated by the prior sexual relationship between the applicant and the victim. Harrison J (Hoeben CJ and Bellew J agreeing) held at [87]-[88]:

"Mr Bussey maintained that, but for his Honour's failure to have sufficient regard to the fact that he and RM had, until only a relatively short time before the commission of the offence, been in a close and enthusiastic personal relationship, he would have concluded that Mr Bussey's objective criminality was reduced and would have imposed a less severe sentence. In this sense, it is said that his Honour allegedly failed to have regard to a relevant consideration:

> In my opinion, that submission falls foul of the principle that just because it may be possible to contemplate more serious examples of the same offence does not mean that the particular offence being considered is for that reason less serious."

And at [95]-[97], with Hoeben CJ and Bellew J particularly noting their agreement with these remarks:

> "The cases reveal a consistent and commendable emphasis upon the need to consider each offence of sexual assault upon a woman by her partner or former partner with special and particular regard to the circumstances of the case. However, there has in my view been a regrettable tendency in some cases to refer to the fact that the assault occurred within, or following the breakdown of, a relationship as something that might "mitigate" the seriousness of the particular offence. This type of language has the unfortunate potential erroneously to dilute the significance of the offence under consideration. Put simply, the objective seriousness of sexual intercourse without consent cannot be reduced because of factors such as a prior sexual history between an offender and his victim without making unjustified and impermissible assumptions about the effect upon the victim. It depreciates the notion that no means no, whatever other factors may be involved. To accept that a prior relationship can ever operate to mitigate the seriousness of the offending completely abandons that uncontroversial wisdom and reverts to the type of attitude that once saw domestic violence treated as less culpable than other assaults. It also proceeds upon the implicit and unsafe adoption of non-consensual sexual intercourse with a stranger as the default position.

I cannot accept that a statement such as “the violation of the person and the defilement that are inevitable features where a stranger rapes a woman are not always present to the same degree when the offender and the victim had previously had a longstanding sexual relationship” is now or could ever have been an acceptable, far less correct, summary of the law or that it should continue to influence this Court in the determination of cases such as the present. Violation and defilement of the victim are quintessential aspects of the offence and the victim’s familiarity with an assailant can have no bearing upon that fundamental circumstance. Indeed, such an assault, committed by a person with whom the victim may have had a formerly close and respectful relationship, is potentially more likely to exacerbate the seriousness of the offence than otherwise. I cannot accept the proposition that there can be varying degrees of violation and defilement. Such a concept appears to derive from the offensive notion that a man should in certain circumstances be entitled to raise his prior relationship with the victim as some kind of limited excuse for disregarding the absence of consent to an act of intercourse with him to which activity the victim had historically consented.”

As I have indicated, Mr Bussey’s submissions implicitly rely upon the proposition that the offence of which he was found guilty could have been more serious. The fact that one can imagine the commission of more serious offences of this type is not controversial. It does not, however, mean that the sentence imposed by his Honour for the offence committed by Mr Bussey should somehow be assessed by reference to that fact. It certainly does not mean that the objective seriousness of Count 3 is diminished or reduced because Mr Bussey and RM had previously been in a consensual sexual relationship. Once it is accepted that no means no, that should be the end of the matter.”