***Pasoski v The Queen* [2014] NSWCCA 309 (15 December 2014) – New South Wales Court of Criminal Appeal**

'Admissibility' – 'Assault occasioning actual bodily harm' – 'Context evidence' – 'Physical violence and harm' – 'Sexual and reproductive abuse' – 'Sexual assault' – 'Tendency evidence'

Charges: Assault occasioning bodily harm x 2, sexual assault x 5.

Appeal type: Application for leave to appeal against conviction and sentence.

Facts: The applicant and complainant lived together with their daughters and were in a relationship since 2003. In November 2010, the applicant physically assaulted the complainant in their home on two occasions, by kicking her in the legs, and slapping her face, causing her to fall (see [13]). The sexual assault charges were alleged to have occurred on one night, where the applicant had vaginal penile intercourse five times without her consent (see [13]).

At a *voir dire* during trial, the applicant's trial counsel successfully objected to the admission of other evidence of previous penile vaginal penetration without consent (see [27]). That evidence was not admitted because the trial judge found that the '*evidence is more in the nature of tendency evidence than contextual evidence'* (see [31]). However, evidence of the applicant's controlling behaviour was admitted, and was relied upon at trial (see [12]).

In summing up, the trial judge gave directions as to the use of the evidence of controlling behaviour, stating that '*the Crown relies upon this evidence only for one purpose… to put the complainant's allegations concerning the offences in November 2010 into a realistic context'* (see [42]). Her Honour also stated: '*if that evidence was not there, you would be asking yourselves, well, why would the accused throw his weight around in this horrible manner with the complainant completely out of the blue, when they had been in an apparently normal relationship for the previous six years?*' (see [42]).

Issues: Two of the grounds of appeal concerned 'context evidence' (see [6], [44]):

1. 'A miscarriage of justice was occasioned by the admission of the so-called context evidence' because it was not relevant and was prejudicial, and
2. The trial judge erred by failing to identify the precise issues to which the evidence was directed.

Decision and Reasoning: Leave to appeal was refused on both the 'context evidence' grounds.

In relation to the first ground, Meagher JA referred to the use of context evidence as being admissible if it is used to 'remove implausibility that might attach to a complainant's account of what otherwise would be seen as isolated incidents' (see [24]). His Honour referred to *HML v The Queen* [2008] HCA 16; 235 CLR 334 [6] to observe that '*by doing so, it bears upon the assessment of the probability of the existence of facts directly in issue (Evidence Act 1995 (NSW), s 55) …* Similar observations were made in *Roach v The Queen* [2011] HCA 12; 242 CLR 610 at [42] and *BBH v The Queen* [2012] HCA 9; 245 CLR 499 at [146]-[150].'

Meagher JA held that the evidence was properly admitted (see [45]). His Honour found that from the conduct of the trial, *'it was apparent that the Crown was relying upon it only as showing that the relationship was an unhappy one from the complainant's perspective so as to make more plausible her evidence that she did not consent to having sexual intercourse with the applicant on the five occasions in question'* (see [33]). Furthermore, the fact that trial counsel had not objected to the evidence at the *voir dire*, despite having objected to the evidence of the other sexual assaults on the grounds that it might invite propensity reasoning, indicated that '*the parties and the Court were conscious that evidence tendered to explain the context in which the alleged offences occurred might, depending on its content, be relied on or used for a tendency purpose*' (see [30]).

In relation to the second ground, regarding the directions given by the trial judge to the jury, Meagher JA held that the directions did not give rise to a real risk that the jury might employ propensity reasoning, and thus did not occasion a miscarriage of justice (see [49]). His Honour found that the direction regarding the applicant 'throwing his weight around' did verge on an invitation to the jury to employ propensity reasoning (see [47]). However, his Honour held that, assessed in context, the other directions made clear to the jury that the evidence of controlling behaviour was not being relied upon to suggest a 'propensity of the applicant physically or sexually to impose his will on the complainant' (see [48]).

The other issues concerned two failures of the trial judge. First, the trial judge failed to properly comply with s 55F(2)(b) of the *Jury Act 1977* (NSW), and therefore two counts of sexual assault were quashed (see [8]-[11]). Second, the trial judge erred in taking into account as an aggravating factor in sentencing that the offences were committed in the complainant's home: *EK v R* [2010] NSWCCA 199; 79 NSWLR 740 at [79] (see [54]). Accordingly, the aggregate sentence of imprisonment was reduced from five years and six months with a non-parole period of two years and nine months to four years and eleven months with a non-parole period of two years and five and a half months.