***Elwood v R* [2019] NSWCCA 315 (20 December 2019) – New South Wales Court of Criminal Appeal**

'Application for leave to appeal against sentence' – 'History of jealous, obsessive and stalking behaviour' – 'History of abuse' – 'Manifestly excessive' – 'Past domestic violence' – 'People with intellectual disability'

Offences: Sexual intercourse without consent; Contravene Apprehended Domestic Violence Order ('ADVO')

Proceedings: Application for leave to appeal against sentence

Grounds:

1. The sentencing judge erred in the assessment of the objective seriousness of the sexual offence.
2. The sentencing judge erred in his approach to the applicant's intellectual disability.
3. The sentencing judge erred by failing to give effect to his findings of special circumstances in relation to the overall effective sentence.
4. The sentence is manifestly excessive.

Facts: The male applicant and female victim had been in a relationship for six years and lived with the applicant's parents (as they were only 18 and 20 years old respectively). At the time of the offending, the applicant was subject to an ADVO not to assault, molest, harass, threaten or otherwise interfere with his partner. The order did not prohibit contact or cohabitation with her. The applicant and victim were having consensual intercourse when the applicant started touching the victim's bottom without her consent. He then inserted his finger into her anus with force, causing the victim to scream so loudly that the applicant's mother called out to them. The applicant responded by pushing the victim away from him with both fists. The victim immediately complained to the applicant's mother and asked her to notify the police.

The applicant plead guilty and was sentenced to four years and six months' imprisonment with a non-parole period of three years, after the sentencing judge took into account an offence of common assault on a Form 1.

Judgment: The court granted leave and allowed the appeal, upholding Ground 3, and resentenced the applicant to three years and two months' imprisonment with a non-parole period of one year and eight months. The court found that the sentencing judge was satisfied that a number of circumstances, both personal to the applicant (such as his compromised level of cognitive functioning) and features of the sentencing process itself, supported a finding of special circumstances [50]. Having made such a finding, the sentencing judge was required to determine the extent or the degree to which the statutory ratio should be reduced, both in the appointment of the aggregate sentence and after accumulation in the ultimate sentencing order [54]. Where a finding of special circumstances is not based solely on the fact of accumulation (as occurred in this case), the sentencing judge is required to carry that finding into effect on accumulation or give an explanation for why it was not done [61]. The court accepted the applicant's contention that the judge's discretion miscarried because the sentencing judge did not indicate that he intended that the effective non-parole period would not reflect the finding of special circumstances that had been given effect to in the appointment of the aggregate sentence [55].

While the court endorsed the sentencing judge's finding that there was an attenuation of the applicant's moral culpability for the sexual offending by reason of his compromised level of intellectual functioning, the court also found that the applicant was, for that reason, an inappropriate vehicle for general deterrence [67]. Furthermore, the court accepted that the applicant had been convicted of multiple charges of assault and offences of stalk and intimidate in a domestic context, both as a juvenile and as an adult, none of which attracted a sentence of imprisonment [28].

The court rejected Ground 1, finding that the sentencing judge made the correct assessment of the objective seriousness of the offence (in the low and middle range) [40], [41]. The court also rejected Ground 2, finding that no sentencing error was committed because the sentencing judge failed to make mention of the impact of the applicant's intellectual or cognitive functioning on the question of either general or specific deterrence [48]. Based on its finding in regards to Ground 3, the court found it unnecessary to consider Ground 4.