

***R v Argyle* [2021] NSWDC 267 (18 June 2021) – New South Wales District Court**

‘Aggravated sexual intercourse without consent’ – ‘Coercive control’ – ‘People affected by trauma’ – ‘People with disability and impairment’ – ‘Pregnant people’ – ‘Sexual abuse’ – ‘Sibling abuse’ – ‘Victim as (alleged) perpetrator’

Charges: Aggravated sexual intercourse without consent x 2; Form 1 attached to count 1.

Proceedings: Sentencing.

Facts: The then 21-year-old female offender was pregnant and living in a de-facto relationship with the male co-accused. She assisted the male co-accused to rape her 17-year-old sister on multiple occasions.

Issues: Sentence to be imposed.

Decision and reasoning: A Community Corrections Order for 2 years was made.

Aside from pure objective considerations, there were a number of factors which, likely individually and certainly in combination, powerfully diminished the offender’s moral culpability. Those factors included:

- > The deprivations and the enduring trauma of her developmental background, including the untreated trauma of the sexual abuse she herself had suffered as a child and young adult.
- > Her cognitive impairment and the psychological and other compromises that may or may not have been connected to her developmental background.
- > Her experience of the coercive controlling behaviour of the co-accused and the attendant duress and fear that he would harm her unborn child and/or herself. In the whole of the circumstances, the offender was under the coercive control of the co-accused and unable to think through the consequences either of her actions or of her failure to respond differently to, and to report, what had happened to her sister.
- > There was a causal connection between the offender’s impaired intellectual capacity and her offending.

The court rejected the prosecution’s submission that the offender played an important role in restraining the victim and encouraging the victim’s compliance. This was in light of the objective reality of the circumstances and particularly taking into account the offender’s particular compromises including:

- > The co-accused could have, and almost certainly would have, done what he did, with or without the physical participation he exacted from the offender. He was large, stronger than both women, forceful and determined, and needed no assistance either in terms of restraint or securing compliance.
- > The likelihood that the offender was herself in genuine fear of the co-accused if she failed to be

compliant.

- > The likelihood that the offender, with the deficits in agency and cognitive compromises she suffered, and bearing in mind her own fear, was attempting (in a misguided way) to make the situation better for her sister than it otherwise may have been.

Due to the offender's diminished moral culpability, she was an inappropriate vehicle for general deterrence and her circumstances meant specific deterrence had no substantial operation. The offender had to be made accountable for her actions but had accepted criminal responsibility for her conduct. While her guilty plea was late, this seemed directly connected to complications or delays in advising her properly without first ensuring her intellectual and psychological capacity was properly explored and exposed (as opposed to any reluctance to accept responsibility). The offender was genuinely remorseful. At the time of the offending she was young and vulnerable. She was unlikely to re-offend.