***Ivanov (A Pseudonym) v The Queen* [2019] VSCA 219 (8 October 2019) – Victorian Court of Appeal**

'Application for leave to appeal against sentence' – 'Exceptional circumstances' – 'Manifestly excessive' – 'Perpetrator self-reported to police' – 'Rape' – 'Remorse' – 'Separation' – 'Victim testified in favour of perpetrator'

Offences: Rape x 2

Proceedings: Application for leave to appeal against sentence

Issues: Whether the individual sentences, the total effective sentence and non-parole period were manifestly excessive

Facts: The male appellant and female victim had been partners for 22 years and had three children together. The appellant found out that the victim had been having an affair for the last five years. He lost self-control and raped the victim, verbally abusing her during the assault while she just lay there. Afterwards, the appellant felt terrible and apologised. Two days later, the appellant discovered more details of the affair and lost control and raped the victim again. The couple cried together afterwards and the appellant apologised many times. The day after this, the appellant became concerned that the victim would try to harm herself and the appellant felt guilty about what he had done, so he reported his actions to a mental health clinician. The clinician alerted police and arrested the appellant who plead guilty immediately. The victim never intended to report the offending and saw police involvement in their marriage as ridiculous.

At the sentencing hearing, the victim gave evidence in support of the appellant and told the court that this was a private matter for the appellant and the victim to work out together. She testified that she wanted the appellant to be released as soon as possible so that the couple could start repairing what had happened, but that this had not been allowed to occur because of the imposition of an Intervention Order. Despite this, the judge sentenced the appellant to nine and a half years' imprisonment with a non-parole period of seven years.

Grounds:

1. The sentencing judge failed to synthesise properly the sworn and mostly unchallenged evidence of the victim. Specifically, the sentencing judge made findings on the impact of the offending that:
   (a) were not open to the judge or not properly founded on the victim's evidence, and
   (b) failed, in the circumstances, to accord the appellant procedural fairness.

2. The sentencing judge's discretion miscarried as a result of the judge's findings regarding remorse and the circumstances of the appellant's own reporting of his crime. Specifically, the judge erred by:

3. The individual sentences, the total effective sentence and non-parole period were manifestly excessive.
   (a) departing from the agreed statement of facts, and
   (b) denying the appellant, in the circumstances, procedural fairness.

Judgment: The court allowed all grounds of appeal, holding that the sentences were manifestly excessive and resentencing the appellant to four years' imprisonment, with a non-parole period of two years. The court held that while the appellant's behaviour was reprehensible [2] and involved a "grave breach of trust and violation of … bodily integrity" [153], "the prison sentences in this case must be much shorter than would ordinarily be required" [10]. This was because of two exceptional factors: 1) the appellant's self-reporting and confession (without which he never would have been prosecuted), and 2) the victim's "remarkable and powerful evidence" [10]. The court stressed that this was "an exceptional case" [1] and "these are wholly extraordinary circumstances calling for an equally extraordinary response" [10]. However, the court noted that denunciation and just punishment were relevant sentences factors in this case [153].

The court noted that a twelve-month Intervention Order was previously taken out against the appellant on behalf of the victim for smashing food into the victim's face. However, the couple remained living together and their sexual relationship continued [17]. The court noted that the couple got divorced (because the appellant was frustrated that the victim worked so much), but continued to live together as if nothing had changed [20]. They did not tell the children of the divorce. The victim testified that she was the "Alpha female" and "glory parent" and would only see the children two or three times a week, and that the appellant was the sole carer of the children, the one who did all the hard work [21].

Regarding Ground 1, the court accepted that the sentencing judge erroneously found that the impact on the victim (who would now have to arrange for care of the children and explain the appellant's absence to them) was an aggravating factor, as opposed to a mitigating factor [84]. The court also accepted that it was not open to the judge to have qualified the mitigation resulting from the reduced psychological and emotional impact of the offending on the victim in the way the judge did [95] and that the judge erred in qualifying the mitigatory effect of the victim's evidence by being "mindful of the complex nature of the potential damage resulting from sexual offences committed in the context of family violence, which may not be readily apparent" [102]. While the court accepted the sentencing judge's comments regarding the nature of sexual violence in a family setting and held that it was "therefore appropriate for sentencing judges to be cautious when confronted with evidence of forgiveness by victims of violence, whether sexual or otherwise" [103], the court held that each case turns on its own facts. In this case, there was no evidence that the relationship was afflicted by family violence or that the victim was persuaded to reconcile by the appellant [106]. The court noted that "There is not the slightest suggestion that [the victim] gave this evidence as woman ground down by years of ill-treatment and ensnared in a relationship from which she found it impossible to escape" [5].

The court also upheld Ground 2, finding that the fact that the appellant could not remember certain things was "not inconsistent with a high level of remorse" in part because the appellant consistently make extensive admissions about his conduct to police but also consistently told police that there were parts he could not remember [123]. The court accepted that there was overwhelming positive evidence of remorse [124]. The court considered that it was not open to qualify the level of the appellant's remorse on the basis that his reporting of the offending was about the victim, not the appellant's crimes [125].

The court further upheld Ground 3, holding that the individual sentences, the total effective sentence and the non-parole period were manifestly excessive because they failed to reflect all relevant considerations (including the appellant's early pleas, remorse, previous good character, hardship involved in his imprisonment, and strong prospects of rehabilitation) and the sentencing judge failed to give sufficient weight to the two exceptional factors outlined above [139].

The court noted that the resentenced non-parole period was shorter than what otherwise might be imposed, but that this would still adequately reflect all of the sentencing purposes mentioned [166].