***DPP v Elfata* [2019] VSCA 63 (21 March 2019) – Victorian Court of Appeal**

'Factors affecting risk' – 'Following, harassing and monitoring' – 'Physical violence and harm' – 'Sentencing' – 'Sexual and reproductive abuse' – 'Stalking'

Charges: Rape x 1; reckless conduct endangering serious injury x 1 (acquitted); common law assault x 1 (acquitted); stalking (intent to cause physical harm) x 1.

Case type: Appeal against sentence.

Facts: The respondent was convicted of rape and stalking with intent to cause physical harm. He was acquitted of reckless conduct endangering serious injury and common law assault. The respondent and the complainant had been in a relationship for two years before the offending conduct. In relation to the charge of rape, it was alleged that the respondent placed his fingers inside the complainant's vagina, so as to constitute digital, rather than penile, penetration ([5]).

The respondent was sentenced to two years and three months' imprisonment with a non-parole period of one year. The Crown appealed on the ground that the individual sentence imposed for the rape charge (two years), the total effective sentence and the non-parole period were manifestly inadequate, and that the sentences imposed failed to:

- Have sufficient regard to the maximum penalty for the prescribed offences;
- Properly reflect the objective gravity of the offending;
- Have sufficient regard to the impact of the offending on the victim;
- Give sufficient weight to principles of community protection, general deterrence, specific deterrence, denunciation and the need for just punishment; and
- Give weight to mitigating factors that was not excessive ([28]).

Issues: Whether the sentence and non-parole period were manifestly inadequate.

Decision and reasoning: The Court (Priest AP, Beach and Forrest JA) noted the difficulty in establishing a ground of manifest inadequacy as it requires the Crown to show that it was not reasonably open to the sentencing judge to come to the sentencing conclusion reached, and that the sentence imposed was 'wholly outside the range of the sentencing options available' ([35]). The appeal was dismissed because the objective gravity of the offending was lower than is often seen for rape offences. The Court distinguished *Shrestha v The Queen* [2017] VSCA 364 as the respondent did not display the same degree of criminality as the offender in that case ([36]). The Court agreed with the sentencing judge's findings that the incident was a single, impulsive act, which did not appear to be premeditated. Excessive violence was not involved and the duration of the incident was relatively brief. Further, as the rape involved digital, rather than penile, penetration, 'the offence could properly be described as a breach of an agreement as to the limits of intimacy, in the context of a longstanding relationship in which intimacy occurred throughout.' ([37])

Moreover, the Court, agreeing with the sentencing judge, held that the fact the respondent exhibited little remorse and ran a trial was an important mitigating factor ([38]). Their Honours also did not disagree with the sentencing judge's finding that the respondent had 'relatively good' prospects for rehabilitation ([27]). Although the sentence imposed was lenient, the Court held that is was within the range of available sentencing options.