

Sexual Assault by Male Partners: A Study of Sentencing Factors

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Abstract

This article reviews an array of sentencing decisions relating to partner sexual assault in various Australian jurisdictions over the past 20 years. Appellate courts seem increasingly disinclined to name the relationship as a mitigator, but violation of trust is seldom recognised as an aggravator. The offender's emotional distress at the termination of a relationship, and the victim's wishes, continue on occasion to mitigate sentence. An apparent lack of knowledge about the dynamics and seriousness of this crime is evident from the light sentences, and the not uncommon articulation by some trial and appellate court judges of archaic constructions of conjugal sex and domestic violence. Wherever possible, such perceptions are contrasted with the voices of those who have been raped by a partner or ex-partner.

Introduction

Few cases of partner rape result in prosecution and those that do are representative of the most violent incidents. However, despite the level of violence in these cases, empirical research undertaken in the United Kingdom in the late 1990s shows that UK courts tend to give lower sentences when there has been a previous sexual relationship between the offender and the victim/survivor.¹ For example, in the case of

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¹ Lees S, *Ruling Passions: Sexual Violence, Reputation and the Law*, Open University Press, Buckingham, 1997, p 123; Rumney P, "When rape isn't rape: Court of Appeal sentencing practice in cases of marital and relationship rape" (1999) 19 *Oxford Journal of Legal Studies* 243; Harris J and Grace S, "A Question

*Stockwell*² Farquharson J, when reducing an offender's three-year sentence to two years, stated:

[An important consideration is] the fact that this was not a rape of a strange woman or a woman hardly known, but the rape of a woman with whom the appellant had lived as man and wife - initially no doubt very happily - for upwards of 10 years. This does add a different dimension to the case and puts the sentence at the lowest end of the bracket.³

Previously published research into Australian case law has revealed a similar tendency. Examination of pre-1998 Australian cases highlighted instances where courts have asserted that the rape of a wife or former wife, or of a woman with whom the offender has had a sexual relationship, is less serious than the rape of a stranger.⁴

This article has several aims. First, it seeks to build on the previous work in this area both by reviewing the pre-1998 cases and by examining more recent ones, including a number of partner sexual assault cases that went to committal in the Australian Capital Territory.⁵ Such analysis demonstrates that low sentences have been and continue to be routinely given to perpetrators of partner sexual assault in Australia. The second and primary aim of the paper is to delve behind those sentences both in a descriptive and a normative context. The authors ask: What mitigating factors do judges focus on as justifying leniency in sentencing for partner rapes, and what approach should be taken to the various mitigators and aggravators that courts do (and are required to) recognise when considering

of Evidence? Investigating and Prosecuting Rape in the 1990s", Home Office Research Study No 196, Home Office, London, 1999.

² *Stockwell* (1984) 6 Cr App R (S) 84.

³ *Stockwell* note 2, at 86 as discussed in Temkin J, *Rape and the Legal Process*, Sweet and Maxwell, London, 1987, p 43.

⁴ For a list of the cases examined see: Easteal P, "Rape in Marriage: has the licence lapsed?" and Warner K, "Sentencing for Rape" in Easteal P (ed), *Balancing the Scales: Rape Law Reform and Australian Culture*, Federation Press, Sydney, 1998, pp 107 and 174 respectively.

⁵ These cases were identified by the ACT Director of Public Prosecutions. There were 21 complainants from 1993-2002 but two trials ran twice due to hung juries so there were a total of 23 cases that went to committal during that period. Thanks to Director Richard Refshauge, Adrian Robertson and Jo Smith for their co-operation.

sentence in such cases? The goal of this examination is not to undertake a quantitative comparative analysis of the sentences handed down in this type of rape and others. Indeed, the sentencing process is a highly complex one involving numerous issues. Accordingly, there are too many potentially confounding variables for such an analysis.⁶ Further, at sentencing, it is often not clear whether the nature of the relationship between the offender and the victim actually played a role in determining the leniency of a sentence.⁷ However, there are a number of specific factors that judges do or might address in sentencing: violation of trust; the offender's problems; prior consensual sex and the negation of consent; and the victim's wishes. Arguably, the manner in which judges often handle these factors leads them to impose unduly lenient sentences given the gravity of the crimes involved. In asking the central questions posed above, the article seeks to look beyond judicial attitudes towards partner sexual assault and to incorporate the viewpoints both of members of the community and of victims of partner sexual assault. Again, it is arguable that judges fail to adequately reflect victims' and community values and attitudes to the gravity of these crimes in the sentences they impose.

In order to meet the multiple aims of this article, various research strategies were pursued in addition to traditional case law analysis. These included interviewing prosecutors at the Office of the Director of Public Prosecutions in the ACT (ACTDPP),⁸ and collecting in-depth histories from 21 women who identified as survivors of sexual

⁶ For example the judge's perception of the victim, such as if she is perceived as a "tainted witness", may play a role in sentencing, but this would be impossible to measure and consider in a sentencing comparison.

⁷ In one particular ACT matter the victim and offender had been living estranged in the same dwelling and there was a lengthy history of domestic violence. On the day of the offences, in addition to being sexually assaulted, the victim was inflicted with a graze to her right forehead, a graze to her scalp, a laceration to the cartilage in her right ear, bruising and a graze to the bridge of her nose, haematomas in both eyes and splenic contusion. The offender pleaded guilty to two counts of assault occasioning bodily harm and was sentenced to ten months (two and a half year head or maximum sentence). No sexual assault charge was laid because the victim first mentioned the rape at the committal. The DPP appealed the sentence, hoping to have it increased to the possible ten years sanction, but was unsuccessful. A prosecutor expressed the view to the researcher that the domestic relationship was not a variable in this judge's thinking or reasoning since he tended to give low sentences on all types of sexual assault.

⁸ There was a 50% participation rate of ACTDPP prosecutors. Participation was limited to individuals with court experience in relation to partner rape cases.

assault by a partner.⁹ They consented to participate in in-depth face-to-face or email interviews. Each of the face-to-face interviews consisted of two sessions of about two hours in duration: they were taped and transcribed. The women were self-selected having learned of the study through its promotion by sexual assault services and support networks locally, nationally and internationally.

There has been little work done in Australia examining this type of sexual assault.¹⁰ This is despite the fact that aside from the plethora of myths that affect perceptions of sexual assault,¹¹ rape by a partner or former partner represents an intersection of the public sphere and the private domain. Thus, perception about this particular act is coloured by beliefs about conjugal relations and domestic violence. Appreciation of victims' experiences and feelings is crucial to dispelling any such inappropriate beliefs. Accordingly, where possible, victims' experiences are included. Research of this kind is an essential first step both to informing legal and social policy development and to ensuring improvements in service delivery.¹²

Background and Context

The Nature of Coercion in Partner Rape

Finkelhor and Yllo identify four types of coercion in wife rape: social, interpersonal, threat of physical force, and physical force.¹³ The literature suggests that victims may experience a combination of these types of coercion, and that the nature of the coercion may change over the course of the relationship in the context of changing abuse

⁹ These 21 life stories form part of a forthcoming book by Patricia Easteal and Louise McOrmond-Plummer, *Real Rape, Real Pain*.

¹⁰ Heenan M, "Just 'keeping the peace': A reluctance to respond to male partner sexual violence", Issues Paper No 1, Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, 2004, p 26.

¹¹ For a list of some of these myths see: Lievore D, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study*, Australian Institute of Criminology, Canberra, 2004, p 74.

¹² Heenan, note 10, p 22, states: "There is a strong, though controversial, consensus among writers who have addressed the issue of rape by male intimate partners that services in both the domestic violence and rape crisis fields have failed to provide adequate support to women survivors of male partner rape."

¹³ Finkelhor D and Yllo K, *Licence to Rape: Sexual Abuse of Wives*, Sage Publications, California, 1985.

patterns.¹⁴ Since the majority of partner rapes prosecuted involve physical violence, the legal process does not necessarily reflect many victims' experience of coercion and sexual assault. In fact, of the 21 women interviewed, the coercion experienced by seven of them was non-physical. Instead, it was personal coercion, such as the husband threatening to leave the marriage or exerting pressure concerning wifely 'duties'. None of these seven women reported the rapes to the police.

Sentencing Procedures, Tariffs and the Role of Appellate Courts

(i) Sentencing Procedures

In any discussion of sentencing for partner rape, it is important to set the context. In the Australian jurisdictions examined in this article, judges exercise discretion in sentencing,¹⁵ applying common law and statutory sentencing principles. In the interests of equal punishment, an important principle is that the sentencing process involves ascertaining the general pattern of sentencing for a particular offence.¹⁶ The judge's discretion is significantly affected by statute. In New South Wales, for example, until 1 February 2003, s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) required that a court impose a sentence "of a severity that is appropriate in all the circumstances of the case." The list of matters to be taken into account (where relevant) was broadly worded and included: the nature and circumstances of the case, the personal circumstances of the victim, any injury resulting from the offence, the degree of contrition exhibited by the offender, and the character of the offender. The new s 21A, which commenced on 1 February 2003, was intended as a re-

¹⁴ See, for example, Mahoney P and Williams L, "Sexual Assault in Marriage: Prevalence, Consequences and Treatment of Wife Rape" in Jasinski JL and Williams LM (eds), *Partner Violence: A Comprehensive Review of 20 years of Research*, Sage Publications, California, 1998, p 113.

¹⁵ For an interesting recent discussion of sentencing discretion see Zdenkowski G, "Limiting Sentencing Discretion: Has There Been A Paradigm Shift?" (2000) 12(1) *Current Issues in Criminal Justice* 58.

¹⁶ See the discussion of this process and the concepts behind the principle as expounded by Street CJ in *R v Oliver* (1980) 7 A Crim R 174 at 177 in *R v AEM Snr; R v KEM; R v MM* [2002] NSWCCA 58 at [103] ff.

statement of common law sentencing principles.¹⁷ The section now requires that particular aggravating and mitigating factors be “taken into account” when a court is determining the appropriate sentence for an offence. Aggravators include: the actual or threatened use of violence, the actual or threatened use of a weapon, whether the injury or emotional harm caused was substantial, and whether the offender abused a position of trust or authority. Mitigators relating to the offender include: absence of a record, remorse, good character, unlikelihood of re-offending, and pleading guilty to the offence.

No guidance is given as to how these factors should impact on the eventual sentence. Thus, significant room for a sentencing judge’s discretion is maintained. In relation to sentencing for all criminal offences, judges traditionally place significant mitigatory weight on a guilty plea by the offender and the absence of a criminal record. Both these factors are likely to be of significance in the context of sentencing for partner sexual assault.

(ii) Tariffs and Sentencing Patterns for Sexual Assault

In NSW, the maximum sentence for aggravated sexual assault is 20 years. Aggravation includes maliciously inflicting actual bodily harm on the victim, and threatening to inflict actual bodily harm on the victim with an offensive weapon.¹⁸ The standard ‘non-parole’ period for this offence is ten years.¹⁹ Recently published research into sentencing practice in NSW revealed that in the year 2002 sentences for this offence were consistently less than this minimum tariff. During 2002, the median sentence for aggravated sexual assault in NSW was six years, with 66 per cent of full term sentences falling within the range of four to 11 years.²⁰ Figures published by the Australian Bureau of

¹⁷ Mr Bob Debus, Attorney General, New South Wales, Legislative Assembly, *Parliamentary Debates (Hansard)*, 23 October 2002, p 5815.

¹⁸ *Crimes Act 1900 (NSW)* s 61J.

¹⁹ *Crimes (Sentencing Procedure) Act 1999 (NSW)* s 54B.

²⁰ Keane J, Poletti P and Donnelly H, “Common Offences and the Use of Imprisonment in the District and Supreme Courts in 2002” (2004) 30 *Sentencing Trends & Issues*, Judicial Commission of NSW, p 10.

Statistics in 2004 suggest that the average full term sentence for this offence across Australia is seven years.²¹

The NSW figures for 2002 appear to demonstrate there has been little change in sentencing patterns for aggravated sexual assault over the past ten years in that state. Data quoted by the court in *R v AEM Snr*²² indicates that of the 243 offenders prosecuted for offences under s 61J of the *Crimes Act 1900* (NSW) in the NSW District Court between January 1994 and December 2000, the median sentence was six years, and 60 per cent of offenders received six years or less. Only 12 per cent of offenders received sentences of ten years or more. Total sentences for all offenders ranged from six months to the maximum sentence of 20 years.

This sentencing information serves as the broad context for the sentencing for partner rape.

(iii) The Role of Appeal Courts in Sentencing

An appeal court will only interfere with a sentence where the sentencing judge erred in the application of sentencing principles, or where the sentence is “manifestly inadequate” given the high level of criminality involved in committing the offence.²³

In the context of Crown appeals against sentence, appellate courts are further constrained by the principle of double jeopardy. This principle requires an appellate court to impose the least sentence that could properly have been imposed by the sentencing judge: the rationale for the principle being that the state should not be permitted to use its resources to repeatedly attempt to convict an individual for an offence.²⁴

²¹ Sexual Assault in Australia: A Statistical Overview, Australian Bureau of Statistics, Victoria, 2004, p 82.

²² *R v AEM Snr; R v KEM; R v MM*, note 16, at [110]. The data was extracted from statistics prepared by the Judicial Commission of NSW for the period January 1994 to December 2000. In “Trends in Sentencing in the NSW Criminal Courts: 1990-2000” (2001) 62 *Crime and Justice Bulletin* 2, Fitzgerald J describes the average length of sentence handed down for sexual assault over the course of the decade as ‘stable’.

²³ See the discussion of these principles in *R v Szabo* [2003] NSWCCA 341; *R v AEM Snr; R v KEM; R v MM*, note 16.

²⁴ *R v Rose*, (unreported, CCA (NSW), Gleeson CJ, Hulme and Dowd JJ, No 60066 of 1996, 23 May 1996), at 3 per Gleeson CJ.

The discussion of appeals that appears below should be understood in this context.

Breach of A Relationship of Trust: Aggravator or Mitigator?

The complainant in one ACTDPP file described her trauma resulting from the brutality, violence and prolonged nature of the rape by her ex-de-facto partner. She asserted that the hardest thing for her about the assault was: “He wouldn’t listen; it was like it wasn’t him.”

A number of the women interviewed, without being asked about it, mentioned breach of trust and its long-term effects on them:

Although I have reclaimed my sexuality, I don’t believe I will ever be able to get truly emotionally close to a man again. I don’t believe I will ever completely trust one. This is not based on stubborn refusal to do so; I honestly believe I *cannot*. It isn’t a matter of finding somebody new to trust; I think the mistrust would extend to *any* man. (‘Rachel’)

I just couldn’t understand why I was curled up in the bottom of the shower in really, really hot water and scrubbing. It made no sense, no sense at all ... Everybody has baggage, but people don’t like to acknowledge that they have baggage, and I have extreme baggage, and they’re sexual and physical ones. Are they going to rip me off? Are they going to be cruel to me? Are they going to hurt me? And I go through a whole panic thing, and if we get past that then the next round of panic sets in. So it has had a huge effect on me physically, emotionally and behaviourally, because I end up being this kind of split personality person. (‘Sarah’)

I felt like everything turned off after that scenario for maybe six years. I couldn’t get intimate with anyone. (‘Helena’)

In the long-term, the scars are there. It took me well over a year before I could even date anyone ... For a long time I still remained sensitive when having intercourse. It takes a lot for me to relax unless I completely trust the person, and I feel like I always have to have some degree of control over what is happening. (‘Natalie’)

I have been left with a dreadful mistrust of people generally. Shaking off the years of conditioning instilled in me by my ex-husband is very hard. ('Melina')

I'm frightened of men now. I have a man for massage and he's very nice but sometimes I'm a bit thingy about him touching me but I can take a friend with me if I want to, and I'm sure he's not going to jeopardise his profession. I may never get into another relationship because I won't trust anybody ever again. How do I know this won't happen again? ('Siobhan')

It does still haunt me. If my husband now just accidentally puts his arm a certain way it triggers me. He understands. He says: "What did I do? But I didn't mean to hurt you." I could be fast asleep and I wake up and he's put his leg over me and he could do it the same way 20 times and then the one time, just the time of night, I don't know, I just freak out. I just say: "Don't do that. Don't touch me like that. Move over, you're squishing me" or whatever. ('Tiffany')

Breach of trust is normatively treated as an aggravating variable in rape sentencing within parenting-type relationships.²⁵ However, it is not always regarded as an aggravator when sentencing partner perpetrators.²⁶ Particularly in the past, the focus of the court tended not to be on the fact that a relationship of trust had been breached, but rather on the fact that there was a prior relationship between the parties. The effect of such an approach, as Kift pointed out in 1995, was likely to be mitigatory:

The Australian cases are littered with continual reference to the existence of the prior relationship while few statements as to its

25 See the discussion in Carter R, *Australian Sentencing Digest*, Law Book Company, Sydney, 1985, p 158, and in Fox R and Freiberg A, *Sentencing: State and Federal law in Victoria*, Oxford University Press, Melbourne, 1985, p 514 note 130.

26 As noted above, breach of a position of trust is an aggravating factor under s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). It should be noted that in *R v Gazi Comert* [2004] NSWCCA 125 the eight years sentence was reduced to six years (four and a half years non-parole) by majority on appeal. The sentencing judge had viewed the fact that the rape occurred in the matrimonial home, "where she was entitled to feel and to be safe", as an additional aggravating factor at sentencing. In the Court of Criminal Appeal, the majority (Hidden and Hislop JJ) did not consider this an aggravating factor, stating at [29]: "we are unable to see how a sexual assault on a woman by her husband is rendered more serious because it was perpetrated in the matrimonial home."

irrelevance for sentencing purposes are to be found. More likely, the Australian courts will observe that there is some mitigatory sentencing relevance to be attached to the offender's prior relationship with his victim, though no foundation in sentencing principle is cited for such an approach.²⁷

*R v Spencer; Ex parte Attorney-General (Qld)*²⁸ serves as an example of this phenomenon. The Queensland Court of Criminal Appeal was considering the sentence of a man who had breached a restraining order, abducted his estranged wife, taken her out to bushland, raped her, and then tied her up. Although Dowsett J acknowledged the seriousness of the crime because of the use of a weapon (and increased the sentence from four to seven years on that basis), he also noted that:

The law now forbids non-consensual sexual intercourse in marriage, however it is obvious that the complex relationship of marriage must be considered in sentencing. ... Generally, I would expect that if the parties were cohabiting at the time of the rape, this would go in mitigation of sentence, recognising *the very special relationship* between husband and wife. (Emphasis added.)²⁹

Ten years later in the New South Wales Court of Criminal Appeal, Hulme J, in a dissenting judgment in the case of *R v Dawson*,³⁰ also took the view that the impact of sexual assault is generally less when the attacker is known:

27 Kift S, "That all rape is rape even if not by a stranger" (1995) 4 *Griffith Law Review* 60, p 86. In the article, Kift discusses at length *Lyttle* (1991) 57 A Crim R 398 and *R v Lightfoot* (unreported CCA (SA), King, Milhouse and Olsson JJ, 22 December 1993).

28 *R v Spencer; Ex parte Attorney-General (Qld)* (unreported, CCA (Qld), Derrington, Ambrose and Dowsett JJ, No 80 of 1991, 24 June 1991). Kift, note 27, p 100 (note 17), states that Spencer's sentence was increased despite the focus upon "the circumstance of marriage rather than on the circumstances of the offence committed."

29 *R v Spencer; Ex parte Attorney-General (Qld)*, note 28, at 4.

30 *R v Dawson (No 2)* [2001] NSWCCA 186.

[T]he impact on the victim is calculated to be significantly different than in the case where an attacker is unknown to her. It may, of course, be worse if, eg prior to the rape, feelings have reached the stage of hatred or revulsion. But one may expect that at least sometimes a victim will not feel as threatened by someone who they know, will not have the same fears of pregnancy or infection, and will not feel as degraded or humiliated, or psychologically traumatised by an event which, albeit with consent, may well have occurred hundreds of times before. I would certainly not be as ready to infer psychological, certainly significant psychological, injury as I would where the rape was by a stranger.³¹

In 1995, Kift pointed out that several recent English guideline rulings had made clear that there was no different scale of sentencing to be applied to marital rape as opposed to other types of sexual assault.³² Indeed, as Owen J suggested in 1994, the prior relationship might serve as an aggravating factor:

Rape is rape whether it is within a relationship, whether it is after the termination of a relationship, or whether it is in fact between strangers. Indeed it might be said that to rape the mother of your children makes the offence that much worse.³³

In Australia, the trend over the past decade or longer has also been to reject the view that a prior relationship is a mitigating factor. In separate judgments in 1991 two judges clearly took this position. In *R v S*³⁴ Slicer J, holding that a prior sexual relationship was not a mitigating factor, expounded the view that the law had never countenanced the use of violence in sexual relations between any man

³¹ *R v Dawson (No 2)*, note 30, at [74]

³² See Kift, note 27, at pp 86 ff for a discussion of a number of guideline judgments including *Stephen W* (1993) 14 Cr App R (S) 256, *Michael Guy C* (1993) 14 Cr App R (S) 642 and *Robert Leonard T* (1994) 15 Cr App R (S) 318.

³³ *Hutchinson* (1994) 15 Cr App R (S) 134 at 136. For a discussion of this quote and the implications of this case see Kift, note 27, at 92 ff. See the discussion of the current UK sentencing guidelines at note 110 below.

³⁴ *R v S (No 2)* [1991] Tas R 273 at 280.

and woman. Justice Cummins' minority view in *R v Ramage*³⁵ went even further and came closer to reflecting the 'reality' of the survivors:

[I]t is an exacerbating factor that the victim was the applicant's former wife, because of her situation of vulnerability ... there was an abuse of trust because the offences occurred in the home of the victim, in utter disregard of her rights and within hearing or potential hearing of the children.

Warner notes that a comparable view was reflected in the Queensland Court of Criminal Appeal decision of *Stephens* in 1994.³⁶ In this case, the Crown appealed a sentence of three years with a six months non-parole period for two counts of rape and one of indecent assault:

The offences committed upon the respondent's de facto spouse were accompanied by extreme violence, the respondent showed no remorse and defended the charges. It was held the trial judge was wrong in taking a more lenient view of rape which takes place within an existing de facto relationship. Counsel for the respondent conceded that had this been a rape between strangers, an appropriate sentence would have been one between five and seven years. The Court of Criminal Appeal stated they could see no reason to distinguish the case from one in which the parties were strangers and imposed a sentence of five years.³⁷

About the same time in New South Wales, a number of decisions in appellate courts were giving similar (more 'enlightened') messages. In *Brooking*,³⁸ the court increased the sentence originally imposed by the sentencing judge who in the course of his remarks had said:

³⁵ *R v Ramage* (unreported, CCA (Vic), Crockett, Vincent and Cummins JJA, No 146 of 1993, 15 September 1991), at 11.

³⁶ *Stephens* (1994) 76 A Crim R 5; see Warner, note 4, pp 175-176.

³⁷ Warner, note 4, p 176. Warner further states that parole was recommended after two years because the accused was young and did not have relevant priors: pp 175-176.

³⁸ *Brooking* (unreported, CCA (NSW), Carruthers, Newman and Dowd JJ, No 60563 of 1994, 7 December 1994).

“[T]he context of this rape occurring within a marriage that had stood for 26 years is a matter that I must take into account.”³⁹ Justice Carruthers (Newman and Dowd JJ agreeing) stated that the trial judge “had been wrongfully influenced by the mere fact that the parties had been married for a lengthy period at the time of the commission of the subject offences.”⁴⁰ The couple had been estranged and physical force had been used. In addition, the offender had violated his bail by breaking into his estranged wife’s house. His overall sentence of three years periodic detention was amended to 15 months imprisonment.

The 15-month sentence in *Brooking* was higher than the increased sentence in *R v Hunter*⁴¹ despite the several similarities with the former case. In *Hunter*, the couple were separated but residing in different rooms in the same house. Hunter was convicted of having intercourse with his estranged wife, without her consent, on two consecutive nights, having coerced her both times with a rifle. He was sentenced to a total of two years periodic detention. The Court of Criminal Appeal later changed this sentence to a fixed term of nine months imprisonment because Hunter did not report regularly for detention.

More recently, the New South Wales Court of Criminal Appeal has held that a prior relationship should not mitigate the sentence imposed. In *R v Glen Michael Dawson*,⁴² the estranged couple were having occasional consensual sex prior to the rape, and the assault itself involved a knife and lacerations. In sentencing Dawson to concurrent minimum terms of four years with an additional term of two years for aggravated sexual assault, Dodd DCJ stated:

But no amount of prior sex or physical contact can override the fact as found by the jury that on this occasion your ex-wife said no. Instead of accepting that you resorted to threatening her with a knife and forced her to have sex with you.⁴³

39 *Brooking*, note 38.

40 *Brooking*, note 38, at 18.

41 *R v Hunter* (unreported, CCA (NSW), Sheller JA, Mathers and Sharpe JJ, No 060656 of 1991, 12 August 1992).

42 *R v Dawson (No 2)*, note 30.

43 *R v Dawson (No 2)*, note 30, as quoted by Giles JA at [13].

At Dawson's appeal on sentence, Giles JA agreed with Sully J in *R v O'Grady*:⁴⁴

The Courts have said - although, indeed, it should not be necessary to emphasise the point at all - that it must be a feature of the way in which modern personal relationships are conducted that if, for whatever reason, they break down, then the woman who is in the relationship is entitled to feel that whatever other consequences ensue, her personal safety will not be threatened at all, let alone by the commission of criminal offences of the gravity of those with which we are called upon to deal.⁴⁵

Justice James concurred and the appeal was dismissed, Hulme J (quoted above) dissenting.

In *R v GAR*,⁴⁶ Miles AJ (Spigelman CJ and Bell J agreeing) clearly stated the relationship between the offender and the victim (married for 20 years) should not reduce the sentence:

However it is not possible to regard the fact that the victim had been married to him for about twenty years up until a few days before the offence as any sort of mitigating factor. The injuries and bruises that were evident to Dr Sterrett were not serious, but they were sufficient to be observable by the doctor and to show up in photographs, and they indicate a measure of violence. The callousness and the arrogance with which the offence was committed indicate the appellant's refusal to accept the right of the victim to her own dignity. A heavy sentence was inevitable. There are no special circumstances justifying a reduction of the proportion of the non-parole period to the head sentence.⁴⁷

A similar shift away from viewing a prior relationship as a mitigating factor has also be observed in Victorian case law from the mid-1990s onwards:

⁴⁴ *R v O'Grady* (unreported, CCA (NSW), Gleeson CJ, Hunt CJ at CL and Sully J, No 60037 of 1997, 13 May 1997).

⁴⁵ *R v Dawson (No 2)*, note 30, at [18].

⁴⁶ *R v GAR* [2003] NSWCCA 224.

⁴⁷ *R v GAR*, note 46, at [73].

The Court of Criminal Appeal also appears to have resiled from the position expressed in earlier decisions such as *O'Neill*, *Halliday* and *Rivett*. In *Szasz* the leading judgment was delivered by Southwell J who denied that *O'Neill* lays down a binding proposition that in all cases the fact of previous sexual contact must be a mitigating factor. His comment that counsel 'in the end' did not assert the judge was bound to regard the prior sexual contact as a mitigating factor but merely that it should have been taken into account in some unspecified way, suggests counsel was discouraged from asserting it was mitigating.⁴⁸

Such repudiation of *O'Neill* has continued in Victoria with *R v Harris*⁴⁹ and *R v Mason*.⁵⁰ In *Mason*, the applicant provided a number of English and Australian authorities in support of the proposition that where rape occurs against the background of a previous settled sexual relationship it should be regarded by a sentencing court, at least in circumstances such as in his case, as less serious than a rape by a total stranger.⁵¹ However, the court rejected the applicant's argument that the sentencing judge had erred in failing to give sufficient weight to the pre-existing relationship between himself and his wife. The court also rejected the argument that the victim's post-incident behaviour demonstrated that less trauma was inflicted by the offences he had committed on her than if she had been assaulted by a stranger:

I do not regard them [the authorities cited] as laying down a sentencing principle of inflexible or universal application. A rape committed in the context, and against the background, of a previous settled relationship may in certain circumstances be a factor which a court can take into account in mitigation where it can be seen that the impact upon the victim has, for that reason, been less traumatic than otherwise it might have been. *But*,

48 Warner, note 4, p 176 (footnotes omitted).

49 *R v Harris* [1998] 4 VR 21.

50 *R v Mason* [2001] VSCA 62. The applicant had received a sentence of 14 months non-parole for guilty pleas to one count each of indecent assault, common assault and digital rape.

51 *R v Berry* (1988) 10 Cr App R (S) 13; *Wiren v R* (1996) 135 FLR 382; *R v Halliday* (unreported, CCA (Vic), Crockett, McGarvie and Beach JJ, No 255 of 1989, 21 March 1990).

*equally, it is not difficult to imagine a rape, committed by a man who has been in a previous relationship with his victim, which would be every bit as frightening as a rape committed by a stranger. ... It should not be forgotten that the crime of rape is an intensely personal crime which, for sentencing purposes, cannot be divorced from its effects on the victim. But the effects include not only those which flow from the physical invasion of the victim's person and security, but also those which flow from the violation of the more intangible intellectual properties of the victim's rights and freedoms. In a society in which there is an increasing number of couples becoming estranged, the courts have a heightened obligation to deter those who have previously lived in a stable relationship with a wife or partner from regarding such wife or partner as akin to a chattel devoid of rights or freedoms, and as an object readily available for their sexual gratification. (Emphasis added.)*⁵²

The court in *Harris* agreed but offered a more equivocal view: “[T]he penalty to be imposed for rape cannot be regarded as necessarily conditioned by the relationship of the parties to it.⁵³ ... In some circumstances a prior relationship may serve as a factor of mitigation, but it need not, and it may indeed serve to aggravate the offence.”⁵⁴ This view leaves the door open for future sentencing judges to examine the specific features of each case.

While a few judges continue to voice the older view, the recent case law demonstrates an increasing willingness on the part of judges to overtly reject the notion that a prior relationship is a mitigatory factor. It is questionable, however, whether courts are manifesting a corresponding readiness to focus specifically on breach of trust as an aggravating factor in partner rape sentencing. Section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) requires courts to treat the abuse of a position of trust or authority as an aggravating factor for the purposes of sentencing. For this to impact in sentencing for partner rapes, sentencing and appellate judges need to explicitly

⁵² *R v Mason*, note 50, at [7] per Winneke P.

⁵³ *R v Harris*, note 49, at 28 per Tadgell JA.

⁵⁴ *R v Harris*, note 49, at 29 per Tadgell JA.

recognise the role of trust in partner relationships.⁵⁵ It remains to be seen whether this will occur, and whether other jurisdictions will follow suit.

Recent Consensual Sex

If the woman has willingly had sex with the rapist at some point in the recent past, this may affect the judge's construction of the offence. In *R v Goodall*, the fact that there had not been recent consensual sex was mentioned almost as an aggravating factor.

Nor do I consider the head sentence of eight years imprisonment for the rape here in question was manifestly excessive. That crime, too, was attended by circumstances of aggravation. *It is true, too, that Mrs W and the applicant had previously had a consensual sexual relationship, but that no longer existed.* (Emphasis added.)⁵⁶

In *Ramage*,⁵⁷ the offender pleaded guilty to eight counts of rape (arising from three separate acts) and received a sentence of eight years non-parole. He appealed, and his sentence was reduced to five and a half years. Although divorced, he and his ex-wife occasionally had intercourse during access visits. Thus, the three rapes (with tearing and bleeding) were interspersed both by time and by consensual sex. The Court of Criminal Appeal noted: “[A]bout a month [after the rape] consensual intercourse of the normal vaginal type again took place.” One wonders why this contextual history was included and how Crockett J's perception of its relevance contributed to the following rationale for Ramage's violence:

There seems to be little doubt that [the offender's] conduct was the product of a release of inhibitions brought about by his drunken condition.⁵⁸

⁵⁵ As discussed in note 26, the majority decision in *R v Gazi Comert* [2004] NSWCCA 125 suggests that courts may not recognise this dimension of the relationship, although the sentencing judge appeared to do so.

⁵⁶ *R v Goodall* [2000] VSCA 106 at [24] per Batt JA.

⁵⁷ *R v Ramage*, note 35.

⁵⁸ *R v Ramage*, note 35, at 6.

In *Cowey*,⁵⁹ the on-again, off-again nature of the relationship also appeared to be regarded as relevant by the court:

Given that the last of those occasions [reconciliation with consensual sex] was only a month or so before this offence took place, it might not be possible to say that the relationship was then obviously at an end. The respondent probably hoped to repair the rupture and resume living with his wife. ... However, the fact was that the parties were living apart, and this cannot be explained as the case of a husband losing his self-control during the continuance of the cohabitation.⁶⁰

In that last sentence Cox J made a revealing distinction between legitimate rape and a loss of ‘self-control’; no doubt reflecting a view of the male libido as unstoppable if aroused.

Warner points out that another reason why recent “conjugal relations” might be regarded as a mitigator is that the judge may have a perception that the offender had a genuine but unreasonable belief in consent. She cites a Western Australia case, *R v B*,⁶¹ in which the judge observed that the conduct of the offender “showed a modicum of good intention” on the basis that he claimed in his plea for mitigation that on other occasions sexual intercourse had been the ‘rekindling’ of the relationship.⁶² Warner argues that such judicial thinking “reinforces a male construction of sexual relations which assumes women in a relationship derive erotic pleasure from having their will overborne by a masterful male.”⁶³

A history of consensual sex, no matter how recent, is irrelevant to sentencing in partner rape. Indeed, given that by their very definition all partner rapes take place in the context of previous or on-going consensual sexual relations, it is hard to understand why judges address this issue at all. Sentencing remarks focusing on the

⁵⁹ *DPP v Cowey* (unreported, CCA (SA), Cox, Prior and Lander JJ, No 204 of 1995, 18 July 1995).

⁶⁰ *DPP v Cowey*, note 59, at 2.

⁶¹ *R v B* (1996) 88 A Crim R 91.

⁶² *R v B*, note 61, at 94; Warner, note 4, p 177 (Warner cites this case as ‘*Blurton*’).

⁶³ The Crown successfully appealed *B*’s 12 months sentence: Malcolm CJ (at 95) criticised the sentencing judge’s finding that the offender was attempting a reconciliation because this finding contradicted the facts.

motivation of the perpetrator in initiating sex may in fact serve to undermine appropriate construction of the seriousness of the crime.

Victim's Wishes

Of the 21 women interviewed, all those who reported the sexual assault to the police had a history of emotional and physical victimisation by their (ex) partner. Similar backgrounds were apparent in over 75 per cent of the ACTDPP cases. Therefore, despite the fact that sexual assault by a partner is not necessarily accompanied by other types of domestic violence, it would appear that for those cases that go to court, there is a greater likelihood that physical domestic violence was also present.⁶⁴ The effects of living in a situation of domestic violence, the victim's erosion of spirit and fear for her own safety and that of her children, are well documented.⁶⁵ As 'Jennifer' described:

Days, even weeks pass and he'd behave as a loving spouse. I'd start to believe that this time I had changed enough, cleaned the house just enough, cooked the right foods, did the right things to his body, kept the baby quiet enough. ... Then suddenly everything I'd do was an excuse to be angry. It's difficult to play by the rules because they change instantly. One day everything is fine and the next you are inadequate.

My self-esteem was non-existent. This was only one of the reasons I didn't leave. "Who else would want you? ... You're lucky I put up with you at all. ... Why do you make me do this? ... You're a worthless piece of shit ... a worthless fuck ... a stupid cunt." At first it makes me angry and hurts so much I want to die but over time they become my truth.

⁶⁴ This is both logical and intuitive since women who have injuries and women whose consent was vitiated by physical force are more likely to report rape.

⁶⁵ Walker L, *Terrifying Love*, Harper & Row, New York, 1989 described battered women as developing a psychological condition of learned helplessness, which makes leaving the relationship highly problematic. As Astbury J, Atkinson J, Duke J, Eastaer P, Kurrie S, Tait P, and Turner J, "The Impact of Domestic Violence on Individuals" (2000) 173 *The Medical Journal of Australia* 427 state: "Feelings of self-blame, shame and loss of self-esteem are extremely common. At the same time, psychological defenses used to cope with violence include denial of its existence and minimisation of its severity."

So why didn't I leave? I didn't leave because he controlled all the money and all the vehicles and my every move. I didn't leave because he threatened my child and my friends. He threatened to kill me. I didn't leave because I had no place to go. I didn't leave because the shame was so intense that I would rather die than let people know what I had made him do. I didn't leave because I did not believe things would ever be different. I didn't leave because I did not want him to kill me. I didn't leave because I did not know I could.

This phenomenon needs to be borne in mind by sentencing judges when a victim/witness recommends leniency for her (ex) partner/perpetrator.

In one of the four ACT sample cases where the victim stated that there had not been any prior violence, the estranged husband/offender pleaded guilty to unlawful confinement, an act of indecency and common assault. He was released on his own recognisance. At sentencing, the judge mentioned receiving a letter from the victim stating she wished to withdraw from the prosecution, as during the course of their relationship the offender was never violent to her. She also stated she did not feel intimidated and she wanted to reconcile. However, there were indications in the background material that in fact the victim may have been operating under some degree of duress.⁶⁶ This example is not uncommon. A recent study across all Australian jurisdictions found that 38 per cent of adult sexual assault cases are withdrawn from prosecution.⁶⁷ Of these cases, approximately 50 per cent are withdrawn because of the victims' reluctance to proceed with prosecution. In the context of rape where the offender was not a stranger, the number of withdrawn prosecutions was even higher.⁶⁸ As the victim will be the primary witness, it is understandable that the victim's wishes will impact on the strength of the case and will

⁶⁶ In her original statement the victim said there had been ongoing marital problems. The rape occurred in the context of the perpetrator expressing jealousy about her seeing another man. This could be an indicator of control, which is at the heart of domestic violence. The sexual assault involved the offender forcing the victim into his car, grabbing her breast and vaginal area very roughly, and calling her a "fucking slut".

⁶⁷ Lievore, note 11, p 37.

⁶⁸ Lievore, note 11, p 32.

influence the decision whether to prosecute. However, this high withdrawal rate of cases may also demonstrate prosecutorial attitudes. As Lievore concluded in her study, it can be questioned “whether prosecutors continue to regard ‘acquaintance rapes’ as less serious than ‘real rapes’ (ie stranger rapes).”⁶⁹ If this is indeed the case, such an attitude might well filter through to the courts.

A decade ago, the dynamics of domestic violence and its effects were recognised in *R v Glen*.⁷⁰ Given the history of abuse in the relationship in *Glen*, Simpson J, while recognising that forgiveness by a victim can be relevant in some situations, held that the victim’s desire for leniency should not affect the sentencing:

In my opinion, exceptional caution should be exercised in the receipt, and the use, of evidence of that kind in cases that fall within the general description of domestic violence offences, of which this case is one. It is a fact known to the courts and to the community that victims of domestic violence frequently, and clearly contrary to their own interests and welfare, forgive their attackers.⁷¹

Justice Simpson stressed deterrence was especially important in domestic violence situations:

This Court must send a signal to domestic violence offenders that, regardless of self interest denying forgiveness on the part of victims, those victims will nevertheless receive the full protection of the law, insofar as the courts are able to afford it to them.⁷²

Similar reasoning was applied by Hunt CJ in *Rowe v R*⁷³ in dismissing an appeal on sentence.

It is certainly ironic that given this understanding by some members of the judiciary, other judges, despite an offender’s history of violence,

⁶⁹ Lievore, note 11, p 2.

⁷⁰ *R v Glen* (unreported, CCA (NSW), Grove, Simpson JJ and Loveday AJ, No 60738 of 1993, 19 December 1994).

⁷¹ *R v Glen*, note 70, at 2.

⁷² *R v Glen*, note 70, at 3.

⁷³ *Rowe v R* (1996) 89 A Crim R 467.

seem to be particularly concerned about whether imprisonment will jeopardise the existence of the family as a unit. In *Hodder v R*⁷⁴ the victim (both of sexual assault and domestic violence), expressed the wish that her husband not be jailed so that the family could remain intact. Those wishes contributed to a lower sentence at trial and then to a majority of the Court of Criminal Appeal granting probation.

In *R v Huggett*,⁷⁵ Lunn J did not mention the background of serious abuses; his reluctance to consider the victim's wishes derived from another reason:

This is not a case where the offender's imprisonment will disrupt a natural family unit as the de facto relationship was doomed in any event and there are no children involved ...⁷⁶

One of the three judges in *R v M*⁷⁷ did bear in mind the victim's request for leniency but ultimately did not reduce the sentence:

In relation to the sentence, it occurs to me that a sentence of nine years (top) was perhaps high in the light of the fact that the complainant considers the applicant to be a useful and trustworthy father of their children apart from his drinking problem, puts his conduct on this occasion down to drink and speaks of getting back together again with him after he has been away for a few years.

It is significant, however, from the appellant's submissions to this Court that he is quite without remorse and has little consciousness of any wrongdoing. Having regard to this and the

⁷⁴ *Hodder v R* (1995) 81 A Crim R 88, discussed by Warner, note 4, p 178 (Warner cites this case as 'H')

⁷⁵ *R v Huggett* [2001] SADC 3 is one of only two cases identified where the couple were cohabiting at the time of the assault. The victim had threatened to leave the offender because of ongoing violence. Justice Lunn cited *Coulthard v Kennedy* (1992) 60 A Crim R 415, *Hodder v R* (1995) 81 A Crim R 88, and *R v F* (1998) 101 A Crim R 578 before commenting (at [13]): "The wish of the victim is but one of many factors which the Court must weigh in the balance in determining what is the proper and just penalty to be imposed for the offence. The wishes of the victim do not bind the Court to impose what would otherwise be an unduly lenient sentence."

⁷⁶ *R v Huggett*, note 75, at [13].

⁷⁷ *R v M* [2001] QCA 166. The offender was convicted on one count each of burglary, rape, assault, assault occasioning bodily harm and deprivation of liberty, and two counts of indecent assault with aggravating circumstances.

fact that he was convicted after a trial and additional factors which have been referred to by Mr Justice McPherson, I cannot say that the operative sentence of nine years is manifestly excessive.⁷⁸

In *R v Harris*,⁷⁹ the Victorian Court of Appeal found that the low sentence imposed on the offender at first instance was manifestly inadequate given the seriousness of the crime, and that the victim's wish that the perpetrator be treated leniently had influenced the judge:

[T]he learned [sentencing] judge was plainly influenced to some extent by the fact that the complainant, during evidence, had said that she did not wish the respondent to go to gaol, a matter upon which the respondent's counsel placed great emphasis during the plea.⁸⁰

The original two-year sentence (one-year non-parole) was increased to a total effective sentence of three and a half years imprisonment with a non-parole period of two years.

The case law indicates that some sentencing judges and appellate courts recognise the abusive context in which pleas for leniency by a victim need to be understood. Greater and more overt recognition of this context is required.

Offender's Emotional State/Stress

A lack of comprehension of the seriousness of domestic violence is evident in early 1990s judgments such as *Spencer*⁸¹ and *Ramage*.⁸² In both those cases, the fact that the offender was emotionally upset by the break up of his marriage was named as a mitigating variable at

⁷⁸ *R v M*, note 77, at 15 per Thomas JA.

⁷⁹ *R v Harris*, note 49.

⁸⁰ *R v Harris*, note 49, at 25 per Charles JA.

⁸¹ *R v Spencer; Ex parte Attorney-General (Qld)*, note 28.

⁸² *R v Ramage*, note 35.

sentencing. Warner discusses other sexual assault by partner cases where the offender's emotional state has been raised:⁸³

Absent countervailing factors, emotional stress is regarded as mitigating sentence.⁸⁴ Whilst this has been applied to cases of rape committed in the context of a deteriorating relationship,⁸⁵ some courts have shown reluctance to give too much weight to the offender's emotional state. In *Harvey*,⁸⁶ a Crown appeal was successful in the case of a rape of an estranged wife on the basis that the sentence gave too much weight to the respondent's emotional state. And in *Harradine*,⁸⁷ White J refused to regard the appellant's stress at the termination of his relationship with the complainant as an excuse for his violence over a prolonged period.

The judges in *Harris*⁸⁸ agreed that the cessation of a relationship did not justify violent behaviour. They found that the sentencing judge had erred in giving too little weight to "the degree of violence used, the lengthy period involved, and the fact that it occurred before, during and in large measure after the rape."⁸⁹ The offender's sentence was increased to a total effective sentence of three and a half years. The following is a "blow by blow" description of the assault given by the Court of Criminal Appeal:

The respondent then came up from behind and grabbed her by the hair. He dragged her back into the lounge room and sat her down on a chair ... The respondent then picked up the complainant and threw her onto the coffee table and she landed on the coffee cup. He pinned her to the table and leaned over her. He then stepped backwards, grabbed her feet, pulled her off

83 Warner, note 4, p 177.

84 *Neal* (1982) 149 CLR 305 at 315 per Murphy J and 324 per Brennan J.

85 *Lord* (1986) 131 LSJS 420; *R v Lightfoot*, note 27; *Stephens*, note 36, citing *R v Beaver* (unreported, CCA (Qld), Pincus, McPherson JJA and Demack J, No 114 of 1992, 2 June 1992).

86 *Harvey* (unreported, CCA (NSW), Studdert, Sully and Abadee JJ, No 060110 of 1996, 23 August 1996).

87 *Harradine v R* (1992) 61 A Crim R 201.

88 *R v Harris*, note 49.

89 *R v Harris*, note 49, at 27 per Charles JA: Tadgell and Phillips JJA agreed at 29.

the table and onto the floor. The respondent then knelt down over the complainant and pinned her to the floor with his knees on her elbows. He held her by the hair and by the neck and shook her twice.

On the third occasion the respondent tightened his hands around her neck, choking her. She was fearful that she would be killed and could not breathe and was attempting to wriggle out of his grip. While she was pinned down, she scratched the respondent's face, causing it to bleed. The respondent then lifted up the complainant's skirt and pulled down her pantyhose and underpants. She said to him at this time: "Don't be stupid. This isn't right. It's not proving anything." The respondent continued to hold the complainant down while using his other hand to undo his jeans. He pulled down his trousers and inserted his penis into her vagina. The penetration lasted about 30 seconds, after which he withdrew, having ejaculated inside the complainant. The complainant continued struggling and protesting until eventually the respondent released her ... He grabbed her and struck her head against the wall denting the plaster. The respondent then punched the complainant in the stomach with his clenched fist and she doubled over and fell to the floor.

The respondent then kicked her with his foot, and kicked her in the back about three times while she was curled up in a ball trying to prevent injury. When the respondent stopped, he took the complainant into the bathroom. Her face was bleeding from repeated blows. Once in the bathroom the respondent used a towel to clean up the complainant. He then repeatedly banged her head into the tiled wall and threw her into the bathtub ... but once in the lounge room the respondent again punched the complainant in the nose causing blood to spurt out from her nose, and the assaults continued ...⁹⁰

⁹⁰ *R v Harris*, note 49, at 23-24.

It is arguable that even the increased sentence of three and a half years did not correlate with this extreme level of violence.⁹¹ Certainly, it was more than the two-year total effective sentence for rape and recklessly causing serious injury that was originally imposed. It appears that the sentencing judge's consideration of the offender's mental anguish may have served to deflect focus from the seriousness of the offence:

There was obviously a strong bond in your mind between yourself and [the complainant] and I am satisfied that your mind at the time that you committed these offences was affected by a combination of feelings of jealousy, failure to be able to accept the relationship that your wife had commenced with one [name of person], and a level perhaps of confusion, although certainly not confusion about your wife's attitude towards intercourse with you on the occasion in question ... you were well aware that she was not consenting ...⁹²

In *Dawson*⁹³ Hulme J, by linking the offender's violence with his emotional anguish triggered by a relationship breakdown, pointed to a lesser risk of recidivism (except towards the original target) when the offender and victim have been in an intimate relationship:

With respect, this seems to me to be a better way of putting the matter and one which is more in accord with sentencing principles, and in particular the requirement that one must always consider the facts of the particular case. For while I can accept that marriage is not, per se, a relevant factor, it would be wrong to ignore those factors which are commonly incidents of marriage or other emotional or sexual relationship. If Mathews J in *Hunter* was intending to make more limited the relevance of marriage I would, with respect, disagree with her.

In the first place, a prior or existing marriage or other sexual relationship, or the breaking up of it, is not unlikely to be a major catalyst or inspiration for the offence and one may well be entitled to conclude that an offender who yields to the

⁹¹ The authors included this lengthy account in order for the reader to appreciate the severity of the violence.

⁹² *R v Harris*, note 49, at 25 per Charles JA quoting the trial judge.

⁹³ *R v Dawson (No 2)*, note 30.

emotion and frustrations which can arise out of such circumstances is less of a danger to the community than someone who is a predator on the female population at large. Particularly is this so if the offence is unpremeditated. Of course, danger in the future to the particular victim is not to be ignored but time is a great healer of emotions. So may well be the shock, particularly to someone who has otherwise led a blameless life, of incarceration for even a relatively short period.

Such factors may also lead to the view that personal deterrence is of less significance in a particular case compared with sexual offenders generally. (Emphasis added.)⁹⁴

Such thinking not only minimises the harm to an individual woman but also is indicative again of misunderstandings about violence in the home. A large proportion of rapes by partners are not ‘one-off’ rapes, but take place within the context of other types of abuse.⁹⁵ Sexual violence may commence at separation as a manifestation of the individual’s inability to let go of control.⁹⁶

Understanding The Scale of Harm

Partner rape has a very high incidence of physical injury: in the *Voices of the Survivors* sample, two-thirds of those raped by a partner in contrast to 56 per cent of those raped by strangers suffered physical injury.⁹⁷ Similarly, the NSW Sexual Assault Committee survey found that physical force was most likely with sexual assaults by partners or ex-partners (in 92 per cent of that group).⁹⁸ As one survivor tells:

⁹⁴ *R v Dawson (No 2)*, note 30, at [71]-[73].

⁹⁵ Three of the 21 narratives contained ‘one-off’ rapes: each was preceded by other types of violence.

⁹⁶ Much of the literature as summarised by Heenan, note 10, confirms that rapes begin or increase with pregnancy or estrangement.

⁹⁷ Eastaie P, “Survivors of Sexual Assault: An Australian Survey” (1994) 22 *International Journal of Sociology and the Law* 337.

⁹⁸ New South Wales, Sexual Assault Committee, *Sexual Assault Phone-In Report*, Ministry for the Status and Advancement of Women, Sydney, 1992, p 21.

I walked away from the hospital the next day with a fractured skull, a stress fracture in my pelvis, a vaginal tear that required 16 stitches, three bruised and cracked ribs, a bruised kidney and a lifetime memory in the form of a sexually transmitted disease. I will live with the embarrassment and shame for the rest of my life. Forever I will have to tell my lovers about this night or at least about the aftermath. It's been 25 months and 2 days and I still have blazing headaches every morning. I still walk with a limp and I still take medication daily for a disease that will never go away. ('Kuriah')

There are also particular psychological effects suffered by victims of partner rape, such as a sense of betrayal, as well as feelings of being trapped and of anxiety and fear. There may be significant trauma associated with these women being less likely to obtain counselling or to be believed by the police.⁹⁹

Survivors of sexual assault by a partner describe the behaviours and feelings typical of sexual assault trauma experienced by those assaulted by strangers or acquaintances:

But I felt so dirty all the time. I spent hours in the shower, even when the water was running freezing, even when there was no more soap, I used cleaning products. ('Charlotte')

I was just a waste disposal for his testosterone build-up. I struggled out of bed and showered under the hottest water I could. I felt like a used dishrag. No thought for my condition or feelings. Nothing. Words can never describe how I felt. I just cried and cried. Just another item to add to the long list of atrocities I will never forgive him for. ('Jennifer')

Now I'm terrified. I want to run. No energy. I am constantly crying. My emotions are running rampant. I'm on anti-depressants although I fought them for a long time. I still have

⁹⁹ Within the sample in Easteal P, *Voices of the Survivors*, Spinifex, Melbourne, 1994, those women who did go to the police after being assaulted by a partner generally assessed the police as non-supportive. Only 28.2% of survivors felt that the police had been understanding, as compared to half of those assaulted by a stranger and almost half attacked by ex-partners. It should be noted, however, that the assistance offered in the latter cases was centred around the other physical violence and not the sexual assault.

trouble sleeping. I have an inability to relax and to leave the house. I am physically drained and have a great deal of pain from my rheumatoid arthritis. I am extremely emotional. ('Samantha')

Under s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), both the use of violence and the substantial level of physical and emotional injury sustained are named as aggravators in relation to sentencing. However, it is questionable whether the courts do in fact recognise the magnitude of harm suffered by victims of sexual assault by a partner. As has been highlighted in this article, sentencing remarks in some cases indicate that a judge's insight into the seriousness of the offence can be impaired by a range of notions about the nature of the relationship between the parties.

In some cases, as in *R v M*,¹⁰⁰ courts do appear to recognise the magnitude of harm. The partner relationship assault in that case was placed at the serious end of the continuum:

Dissecting that term of imprisonment for the purpose of this appeal, it seems to me quite clear that the appellant could not have expected a sentence of less than seven years imprisonment for the rape and associated indecent assaults considering them in isolation from the other offences of which he was convicted.

As to the other offences, when it is considered that he broke into the complainant's house at night, terrified her and the children, punched her, giving her a black eye, threatened her with a knife and tied her up so as to deprive her of her liberty, it seems to me that a cumulative addition of two years to cover those particular offences was well merited.

He was, as has been mentioned, subject to a domestic violence order at the time of these offences, and he is a person with a considerable prior history of criminal offending. He is 31 years old and among the offences recorded against him are four previous convictions for assault occasioning bodily harm, one of which was committed against the complainant's mother, as well as the domestic violence order that I have mentioned and

¹⁰⁰ *R v M*, note 77: the court upheld the nine years head sentence imposed by the sentencing judge.

some convictions for breaching it or some other similar order which had been made at an earlier time.

In the circumstances, I do not think there is any basis on which this Court could properly interfere with the sentence imposed in the case. The trial Judge mentioned a number of features of the appellant's conduct which led him to conclude that it was an appropriate case for a sentence of the dimensions which he imposed. Among the factors that he referred to were that it was a case of gratuitous violence on a defenceless woman. The appellant was oblivious to the presence of the children in the house. A degree of deliberation and planning evidently went into it. It is true that the appellant was affected by alcohol, but that does not excuse his conduct, and it is plain that he was sufficiently aware of what he was doing to be able to plan the entry, to interfere with the telephone and to bring the zip ties with him.¹⁰¹

It is arguable, however, as can be seen from the sentences in the cases discussed in this article, that sentences for partner rape are low given the violence of the assaults and the magnitude of the harm suffered. This may well reflect a significant focus by sentencing judges on mitigatory factors (remorse, no prior criminal record) that are traditionally accorded great importance in the exercise of sentencing discretion for all criminal offences. The significance of a guilty plea as a predictable and valid mitigatory factor should also not be overlooked.

Indeed, examination of the few ACT partner sexual assault cases during the period surveyed reveals that the most crucial determinant of leniency in sentencing in that jurisdiction was the offering of a guilty plea (the offender pleaded guilty in six cases from the sample of 21).¹⁰² In each case, this resulted in sentences at the lower end of the

¹⁰¹ *R v M*, note 77, at 13-14 per McPherson JA.

¹⁰² Of the remaining 15 complaints, there were three acquittals, two hung juries and ten instances where the DPP did not pursue prosecution. There were no guilty verdicts from juries. See Easteal P, *Sexual Assault by Male Partners: Is the Licence Still Valid?* (forthcoming) for more details. It is possible to infer from this data that it is difficult to get a conviction for partner sexual assault in a contested trial. In such circumstances, a guilty plea with a lenient sentence is a good result for the DPP.

available tariff: a recognisance, 52 weeks periodic detention,¹⁰³ and 18 months, two and a half years, and four and a half years respectively for one count of sexual assault without consent and one count of assault occasioning actual bodily harm, each in differing circumstances.¹⁰⁴

Conclusion

The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case.¹⁰⁵

It is a central common law principle that “sentencing does not involve precise mathematical formulae nor admit of a single correct answer.”¹⁰⁶ Discretion is at the heart of the sentencing process. It is legitimate to ask: How and how well is that discretion being exercised in relation to partner sexual assault?

Although judges appear to be increasingly disinclined to name the relationship, recent sex and the offender’s emotional state as mitigators in sentencing, there are still individual judges who regard these factors as relevant. Further, some judicial comments about the offence reflect myths about gender, sexuality, relationships, domestic violence, and rape that are still pervasive in Australian culture. Phrases like “little short of rape”¹⁰⁷ and “special relationship”¹⁰⁸ to describe a violent marriage significantly minimise the nature and

¹⁰³ The offender pleaded guilty to sexual assault on the basis of his recklessness not his knowledge of lack of consent.

¹⁰⁴ In the first case the offender slapped the victim and threatened her with a knife. In the second case the offender had a lengthy criminal record and had used considerable force, including gagging the victim, causing serious injury to her neck and upper back. In the third case the offender had a prior criminal record for incest: the judge did not give details about injuries, however the anal rape had necessitated the victim being taken to hospital.

¹⁰⁵ *Wong v The Queen* (2001) 207 CLR 584 at 591 per Gleeson CJ.

¹⁰⁶ *R v AEM Snr; R v KEM; R v MM*, note 16, at [63] citing *R v Oliver* (1982) 7 A Crim R 174; *Pearce v The Queen* (1998) 194 CLR 610.

¹⁰⁷ In *In the Marriage of Schwarzkopff* (1992) 15 Fam LR 545, the estranged husband breached orders of the Family Court, violently assaulting his ex-wife and forcing her to have intercourse. This was described (at 555) as “events ... which fell little short of rape.” A sentence of two years imprisonment was imposed.

¹⁰⁸ *R v Spencer; Ex parte Attorney-General (Qld)*, note 28.

effects of sexual assault in an intimate relationship. Perhaps for some, such assumptions are unconscious and are therefore not explicitly articulated in their decision-making reasoning. Others, like the several judges cited in this article and the legal academic quoted next, are unequivocal that rape by a partner is less serious than other sexual assault:

First and foremost, other things being equal, rape by a cohabitee or ex-cohabitee, though horrible, as all rape is, cannot be so horrible and terrifying as rape by a stranger. I speak with the handicap of being a male, but a male can empathise with the female victims of crime, and anyway I take courage from the support of some women (including the woman most important to me), even though they are not the vociferous ones.

Secondly, the stranger who pounces, perhaps wearing a mask, is a greater menace to society and a greater terror to women than the known attacker who acts in pursuance of what he misguidedly thinks of as his rights, or who is suffering from an unbearable sense of the loss of his partner by separation (he may even, stupidly, think that by forcing himself upon her he may regain her affection).¹⁰⁹

Whilst legislative provisions, such as s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), may guide the exercise of judicial discretion, there are no specific guidelines in relation to partner rape as there are in the United Kingdom,¹¹⁰ nor indications as to the relative importance of the multiple factors to be considered.

¹⁰⁹ Williams G, "Rape is Rape" (1992) 142 *New Law Journal* 11.

¹¹⁰ In the United Kingdom, more specific sentencing guidelines for rape offences exist: United Kingdom Sentencing Guidelines Council, *Rape*, 24 May 2002, <http://www.sentencing-guidelines.gov.uk/docs/rape.pdf>, (17 December 2004). These guidelines, updated in 2002, clearly state (at p 7) that cases of "relationship rape" and "acquaintance rape" are to be treated as being of *equal seriousness* to cases of "stranger rape". (Emphasis added.) The guidelines also make clear (at p 6) that the breach of trust issue goes to making this a crime of equal seriousness. This guideline was accepted by the Court of Appeal in *R v Milberry; R v Morgan; R v Lackenby* [2003] 2 All ER 939. If similar guidelines were issued in Australia, they would be likely to withstand a challenge in the High Court because, although minimum sentences for rape are specified, judicial discretion is not unduly hampered. The guideline judgment in *Wong v The Queen*, note 105, was not favoured by a majority of the High Court because it rested the sentence to be imposed on a single variable.

It is also arguable that increased awareness of aggravating factors (at least as expressed by the judges in their sentencing remarks) is not translating into increased sentences. This leaves open the issue of whether judges are simply becoming better at saying the right things (or not saying the wrong things), but not at converting that awareness into sentencing practice.

The situation is further exacerbated by the pattern of sentencing principles discussed above. By requiring judges to engage in an investigation into patterns of sentencing in relation to partner rape, an odd circularity is introduced into the process whereby judges tend to reinforce each other in maintaining relatively low sentences. This may also mean that 'ideas' about partner rape and perceptions of the crime are reinforced and remain static. A conscious and concerted change is required if those patterns of sentencing are to change.

The double jeopardy rule in relation to the extent to which appellate courts can interfere with sentencing decisions means that it is even more important for lower courts to impose an appropriate sentence. How might this be facilitated?

In order to combat the myths about domestic violence and sexual assault, and their intersection in the perception of rape by a male partner, expert reports by people working in the area of violence against women and/or victim impact statements should be used routinely to facilitate an understanding of the reality of domestic violence and the trauma of 'marital' rape. The women's statements quoted in this article demonstrate that the effects of partner rape are not dissimilar to those of rape victims generally, apart from their references to the additional effects of breach of trust. There is a strong argument that courts should overtly recognise and treat breach of trust as an aggravating factor for the purposes of sentencing for partner rape.

Under Part 3 Division 4 of the of the *Crimes (Sentencing Procedure) Act 1999* (NSW),¹¹¹ guideline judgments can be made by the NSW Court of Criminal Appeal which identify the appropriate pattern of sentencing for particular offences.¹¹² The High Court has criticised the notion that guideline judgments should set particular sentences for

¹¹¹ See also, *Sentencing Act 1995* (WA), s 143.

¹¹² See the discussion in *Wong v The Queen*, note 105, at 600 ff per Gaudron, Gummow and Hayne JJ in the context of importing heroin.

specific crimes or attribute chief importance to a particular factor.¹¹³ Nevertheless, there is room for guidelines spelling out the attitude of the appellate court to factors that might *not* be considered relevant in sentencing for partner sexual assault. The guideline judgment would have to focus on all forms of the offence, but could specify that partner rape is to be treated as being as equally serious as stranger rape for the purposes of sentencing. It could also articulate the significance of breach of trust, and could give the concept sufficient breadth to be relevant to partner rape.

As one victim, 'Rachel', states:

The law must stop being seen to give actual permission for sexual violence to happen in relationships by making comments and passing sentences which show that they view the rape of wives and girlfriends with less gravity. It must be a crime in practice, not just theory.

¹¹³ See *Wong v The Queen*, note 105, at 609 per Gaudron, Gummow and Hayne JJ and at 634 per Kirby J.