



Why intimate partner
violence is difficult to
see as grounds for self-
defence:

OLD COMMON LAW LEGACIES

The Old Common Law

- ▶ Murder & manslaughter: “felonious homicides”
- ▶ “Petit treason”: a “most odious” form of murder.
- ▶ Defences:
 - ▶ Justified killings in the “advancement of public good”.
 - ▶ Includes killing in defence against rape.
 - ▶ Excused killings include killing *se defendendo*.
 - ▶ In a sudden affray, a chance medley, during a fight; and having
 - ▶ “Given back” where possible.

The Old Common Law

- ▶ The principle of “marital unity”:
- ▶ “By marriage, the husband and wife are **one person in law**: that is, the **very being or legal existence of the woman is suspended during the marriage**, or at least is **incorporated and consolidated into that of the husband**, under whose **wing, protection, and cover, she performs every thing**; and is therefore called in our law-french; a feme-covert; is said to be covert-baron, or **under the protection and influence of her husband, her baron, or lord**; and her condition during her marriage is called her coverture”.
(Blackstone Vol I, p430.)

The Old Common Law

- ▶ The principle of “marital unity”.
- ▶ The “rape immunity rule”.

Law Reforms

- ▶ **No Australian jurisdiction restricts SD to a “fight” context.** (late 20th century; WA: 2008)
- ▶ **The rape immunity rule abolished.** (Common law: *PGA v the Queen* (2012) HCA 21 -?late 19th century/1980s; WA: 1976/1985)
- ▶ **Marital Unity principle abolished.** (Late 19th century, remnants remain)

Western Australia v Liyanage

- ▶ The rape immunity rule: factual knowledge of sexual violence precluded from sounding in law.
- ▶ Liyanage: factual knowledge of sexual violence precluded from sounding in law.

Western Australia v Liyanage

- ▶ The rape immunity rule: factual knowledge of sexual violence precluded from sounding in law.
- ▶ Liyanage: factual knowledge of sexual violence precluded from sounding in law.
 - ▶ **The State's position with respect to the truth of evidence of sexual violence: made unclear.**

- ▶ Dr Liyanage says she was **forced to do that** [perform sexually in front of Skype cameras] and the evidence is that someone was **driving those machines** at the time.
- ▶ She says it was the deceased and the State can't disprove it was or it wasn't. The State **just doesn't know who was driving the machines** and neither do the experts. You will remember even [the electronics expert] yesterday couldn't say who was behind the account "Dine". But you may think, well, if the account is name[d] Dean and it's on a device that is usually operated by Dinendra who was also known as Dine, then **it may have been Dinendra or was probably Dinendra** that was **driving the device**.
- ▶ **It's a matter for you**. But remembering that's *[sic]* it's not a conclusion that is necessarily beyond doubt. But it's one of those issues which **a jury has to deliberate over** and apply common sense. And if you come to the conclusion, well, "we don't know", **the State would say**, in this regard, **it probably doesn't matter in relation to the Skype sex chatting**. Because Dr Liyanage says she was forced to Skype chat and **it's quite possible, if not entirely within the realms of possibility** in this case, **that that was happening**. (*Tr*, p. 1348)

Western Australia v Liyanage

- ▶ The rape immunity rule: factual knowledge of sexual violence precluded from sounding in law.
- ▶ Liyanage: factual knowledge of sexual violence precluded from sounding in law.
 - ▶ Obfuscation of the State's position with respect to the truth of evidence of sexual violence.
 - ▶ **The State's case theory and sentencing rationale.**

Western Australia v Liyanage

- ▶ You had a genuine concern...that the deceased **wanted to go further** and have a **sexual relationship with the girl**. You **related to her** because...what had **happened to you** as a naïve, albeit much older woman, was something that **you saw happening to the girl**. You were concerned that **he would discard her**, having had a **sexual relationship with her**, and destroy her life. (*Western Australia v. Liyanage* [2016] WASC SR 31, [18])

Western Australia v Liyanage

- ▶ *Silva v R* [2016] NSWCCA 284
- ▶ *R v Stephen (No 6)* [2018] NSWSC 243
- ▶ *R v Barrett* 2019 SKCA 6