***Uzun v The Queen* [2015] VSCA 292 (27 October 2015) – Victorian Court of Appeal**

'Aggravated burglary' – 'Common assault' – 'Community education' – 'Contravening a family violence intervention order' – 'General deterrence' – 'Making threat to kill' – 'Persistent breach' – 'Physical violence and harm' – ' Protection order' – 'Reckless conduct endangering a person' – 'Sentencing' – 'Tendency evidence'

Charge/s: Aggravated burglary, making a threat to kill x 3, common assault, contravening a family violence intervention order, reckless conduct endangering a person x 2.

Appeal Type: Appeal against conviction and appeal against sentence.

Facts: The male applicant and his wife were married and had three children together but separated in 2007. A family violence intervention order was later made against the applicant. In 2013, the applicant went to his wife's home and committed a number of offences including aggravated burglary, breach of a family violence intervention order, threatening to kill and common assault. At trial, evidence was adduced of three previous incidents where the applicant had been physically and verbally abusive towards his wife and their children. It was adduced as tendency of the applicant to act in a particular way namely, to make threats to kill family members, to assault family members, to falsely imprison family members, and to contravene family violence orders. The applicant was sentenced to a total effective sentence of ten years imprisonment, with a non-parole period of eight years.

Issue/s:

1. The trial judge erred in admitting tendency evidence sought to be adduced by the prosecution.
2. The sentence was manifestly excessive or 'crushing'.

Decision and Reasoning: Priest JA (Maxwell P and Beale AJA agreeing) dismissed the appeal against conviction. The principles governing the admissibility of tendency reasoning were formulated in *Velkoski v The Queen* where it was said that:

'The features relied upon must in combination possess significant probative value which requires far more than 'mere relevance'. In order to determine whether the features of the acts relied upon permit tendency reasoning, it remains apposite and desirable to assess whether those features reveal 'underlying unity', a 'pattern of conduct', 'modus operandi', or such similarity as logically and cogently implies that the particular features of those previous acts renders the occurrence of the act to be proved more likely. It is the degree of similarity of the operative features that gives the tendency evidence its relative strength'.

Here, consistent with the principles in Velkoski, *'the evidence impugned by the applicant met the necessary high threshold of admissibility. Indeed, the conduct revealed by the tendency evidence was, as I have mentioned, conceded to be strikingly similar to the charged conduct. Given that the live issue for the jury was whether the charged conduct occurred, the evidence introduced as tendency evidence had the potential to shed considerable light on that issue, in circumstances where it could hardly be realistically contended that the probative value of the evidence did not substantially outweigh its prejudicial effect'* (See [27]).

Priest JA (Maxwell P and Beale AJA agreeing) also dismissed the appeal against sentence. The total effective sentence and non-parole period could not be said to be excessive in light of the applicant's extensive and persistent history of criminal offending, the need for general and specific deterrence, his lack of remorse and rehabilitation, and the need for denunciation of his conduct. In particular, Priest JA stated that: *'general deterrence is important in cases such as this of violence against domestic partners, so as to deter other like-minded individuals from similar offending'* (See [32]-[40]).

Maxwell P (Beale AJA agreeing) made some additional observations at [48]-[50]:

'Priest JA has referred to the importance of general deterrence and this Court's repeated statements that sentences imposed for family violence should be set at a level which will send a message to those — predominantly men — who might offend violently against domestic partners or former partners or family members.

Plainly enough, the sentences which the courts impose will not serve that purpose unless the sentences and the reasons for them are properly publicised. As the Court said last year in DPP v Russell (in relation to sentences for random street violence) at [5] and [6]:

'Obviously enough, … a prison sentence can only have that wider deterrent effect if it is publicised across the community, especially amongst those … who are at risk of offending in this way. Courts have neither the expertise nor the resources to engage in the kind of sustained community education which is necessary if general deterrence is to be a reality. That is a task for government.

After all, it is the responsibility of government to ensure public safety. And government must therefore take responsibility for communicating the deterrent message to those who need to hear it. That requires sustained effort and the commitment of substantial resources. Without that, the community simply will not derive the benefit — in greater public safety — which should flow from the painstaking work of sentencing judges and magistrates in this State. Self-evidently, if the message is not getting through no change in sentencing law can make the difference'.

In view of the community concern about domestic violence and the importance of deterring it, those considerations are particularly pertinent in this area. A copy of the Court's decision in this matter will be forwarded to the Royal Commission on Family Violence for its consideration'.