

***Ballantyne v The Queen* [2020] VSCA 115 (11 May 2020) – Victorian Court of Appeal**

‘Application for leave to appeal against sentence’ – ‘Early plea’ – ‘Loaded firearm’ – ‘People with mental illness’ – ‘Physical violence and harm’ – ‘Remorse’ – ‘Substance abuse’ – ‘Suicide threat’ – ‘Threat to kill’

Offences: Carrying a loaded firearm in a place with reckless disregard for the safety of another x 1; Making a threat to kill x 1; Possessing drug of dependence x 1; Contravention of family violence intervention order x 2; Failing to store a category A/B long arm correctly x 1; Failing to store category A/B long arm ammunition correctly x 1; Possessing a prohibited weapon x 1

Proceedings: Application for leave to appeal against sentence

Issue: Whether sentence was manifestly excessive.

Facts: The appellant man and female victim had been in a relationship for 14 years and were married at the time of the offending. The appellant threatened to kill himself in front of the victim, leaving the house and returning with a shotgun. He swung the shotgun in front of the victim like a baseball bat, then touched the barrel to her forehead before pushing it into her eye socket and threatening to kill her "slowly" [25]. The appellant fired a shot into the TV then pointed the gun back at the victim's head and threatened to shoot her again [25]. The victim was held like this for around three hours. The appellant plead guilty and was sentenced to four years and three months' imprisonment, with a non-parole period of three years and six months. At the sentencing hearing, the appellant alleged that he did not remember the incident. Medical evidence was also tendered showing that the appellant had a history of depression and alcohol abuse, but that he had committed to make improvements and had ceased alcohol and prescription medication [17].

The appellant appealed against this sentence on the following grounds:

1. The individual sentences on charges 1 and 2 and the total effective sentence are manifestly excessive.
2. The non-parole period is manifestly excessive and in particular:
 - i) The ratio of 17.65% of the head sentence is manifestly low having regard to the fact that the applicant had no relevant prior convictions and his prospects for rehabilitation were relatively good;
 - ii) The purported reason for this ratio that '... there is potentially no remorse ...' ... was not a good reason for denying the applicant a greater period of parole; and
 - iii) The learned sentencing judge erred in finding that in the circumstances there was '... potentially no remorse ...'
3. The learned sentencing judge erred in finding that there was a complete absence of remorse, and as a result the individual sentences, the total effective sentence and the non-parole period are manifestly excessive.

Held: The court refused to uphold ground 1 as the sentences were not manifestly excessive. The conduct founding the Making a threat to kill charge "constituted a very serious example of the offence" [25] and that, balancing the seriousness of the offending with the mitigating factors (see [24]), the sentence was proportionate [26] and punished the appellant to an extent just in all the circumstances [28]. Even though the sentence imposed was more lengthy than the general trend for the offence of threat to kill in recent cases, "[s]entences in comparable cases ... are not precedents which must be applied", but each case must turn on its own facts [28].

However, the court upheld ground 2, providing that the finding by the sentencing judge that the appellant was not remorseful did not justify the imposition of a relatively high non-parole period [32]. The purpose of fixing a non-parole period is to "provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate" (*Power v The Queen (1974) 131 CLR 623* at 629). The court substituted a non-parole period of two years and six months [33].

Furthermore, the court partially upheld ground 3, finding that the trial judge erred in finding that there was a complete absence of remorse. The court provided that it considered "that there was some evidence of remorse to be drawn from the early pleas of guilty and from the applicant's insight and incipient commitment to reform" [19]. The court referred to its reasons for finding against the remainder of ground 3 (namely, whether the sentences and non-parole period were manifestly excessive).