

***Mercer (a pseudonym) v The Queen* [2021] VSCA 132 (14 May 2021) – Victorian Court of Appeal**

‘Application for extension of time within which to file application for leave to appeal against conviction and sentence’ – ‘Attempting to pervert the course of justice’ – ‘Coercive control’ – ‘Emotional and psychological abuse’ – ‘False imprisonment’

Charges: False imprisonment x 1; Attempt to pervert the course of justice x 1; Persistent contravention of a family violence intervention order (FVIO) x 1.

Proceedings: Application for extension of time within which to file application for leave to appeal against conviction and sentence.

Facts: The male applicant was charged with 5 offences against his de facto female partner (the complainant). The applicant instructed her to drop the charges over telephone calls while remanded in custody. At trial, she gave evidence unfavourable to the prosecution case, recanting statements previously made to police, and giving evidence that the applicant had neither imprisoned nor assaulted her. The judge gave the prosecution leave to cross-examine the complainant about prior inconsistent statements she had made and in relation to her evidence on charges 1-4. The applicant was sentenced to a total effective sentence of 5 years and 3 months imprisonment, with a non-parole period of 3 years and 9 months.

Grounds of appeal:

1. The trial judge should not have given any direction on incriminating conduct as: (a) The prosecutor did not rely on the relevant phone calls as incriminating conduct in his final address; and (b) Using phone calls as evidence of incriminating conduct involved the jury engaging in impermissible ‘bootstraps’ reasoning.
2. The sentence imposed on the charge of attempting to pervert the course of justice, the total effective sentence and the non-parole period was manifestly excessive.

Held: Application for extension of time within which to file application for leave to appeal against conviction and sentence dismissed.

Re conviction:

Re Ground 1(a), it was difficult to see how there was any miscarriage of justice in the judge giving a direction under s 21. If defence counsel had raised the prosecutor’s failure to address the incriminating conduct, the judge would have granted the prosecutor leave to address the jury further and given the same direction.

Re Ground 1(b), it was well open to the jury to conclude beyond reasonable doubt that the applicant was attempting to persuade the complainant to lie in the relevant phone conversations. There was no issue that the applicant told the complainant:

- > she should tell the police that she was not in her right state of mind when she made the allegations and that she wished to drop the charges;
- > he would pay for a lawyer to make a statutory declaration for her, in which she would state that she was not in her right mind when she made her statement and could not remember making the allegations against him; and
- > she should not talk on the phone about him assaulting her, as the calls between them were being recorded.

These words were not neutral as to the applicant's guilt or otherwise of the offending. Nothing he said suggested that the complainant's allegations were false or that the alleged events had not taken place. On the contrary, it was open to the jury to view the statements as demonstrating his belief that he was guilty.

Re sentence:

The court made the following observations relevant to coercive control at [65]:

In our view, the applicant's persistent and cynical assertion of control over the complainant, and his exploitation of her known vulnerabilities, made this case just as serious as if there had been explicit threats or actual violence. The transcripts of the calls make plain his exertion of coercive psychological pressure on her, encouraging her to think that they can 'work things out' between them and asking questions like 'Do you want me to get out or not?' The fact that the conduct about which he was asking her to lie involved his own criminal violence against her was a further aggravating feature. In our view, the applicant's moral culpability for this offence was high.

The sentence could not be said to be manifestly excessive including in light of: the applicant's high moral culpability, not guilty plea, seriousness of the offending, significant prior criminal history, and the importance of general and specific deterrence.

Re delay:

The lack of an adequate explanation for months of delay was unsatisfactory. It provided further basis upon which to refuse the extension of time applications.