

***Johns v The Queen* [2020] VSCA 135 (29 May 2020) – Victorian Court of Appeal**

‘Application for leave to appeal against conviction’ – ‘Application for leave to appeal against sentence’ – ‘Female perpetrator’ – ‘Manifestly excessive’ – ‘Mental element’ – ‘Obsessive behaviours’ – ‘Physical violence and harm’ – ‘Threats to kill’ – ‘Unsafe and unsatisfactory verdict’

Offences: Recklessly cause serious injury in circumstances of gross violence; Intentionally destroy property

Proceedings: Application for leave to appeal against conviction; Application for leave to appeal against sentence

Grounds (conviction):

1. The jury verdict was unsafe and unsatisfactory, where there was a marked disparity between the size and weight of the appellant’s car and the victim’s truck and trailer such that it was not open to the jury to find that by consciously voluntarily and deliberately colliding with the truck and trailer she:
 - (a) Foresaw the likelihood that the collision would cause serious injury, or
 - (b) When planning her conduct, either intended, was reckless that or foresaw it was more likely than not that her conduct would cause serious injury to the victim.
2. The judge incorrectly directed the jury that the Intentionally destroy property charge could be established by an intent to damage or destroy the truck, when the indictment alleged that the appellant intended to destroy the truck, resulting in a miscarriage of justice.

Grounds (sentence):

1. The judge erred by applying the wrong test under s 10A(2)(e) Sentencing Act 1991 (Vic) when considering whether "special reasons" existed to justify imposing a non-parole period of less than four years.
2. The judge should have imposed a large, if not complete, degree of concurrency in relation to the sentences for the two charges.
3. The head sentence imposed was outside the permissible range, the non-parole period was excessive, and the judge failed to give sufficient weight to the appellant’s previous good character and prospects of rehabilitation.

Facts: The female applicant was driving a Toyota Camry car when it collided with a truck and tanker trailer which was driven by the male victim. The vehicles were travelling in opposite directions on an open stretch of highway; the applicant's car crossing the centre line and colliding with the front right-hand side of the truck. The truck rolled, causing the victim serious injury (a severe laceration to his scalp and two fractured vertebrae in his neck) and extensive damage (\$900,000 worth) to the truck and trailer (which were later written-off). The applicant sustained minor injuries.

The applicant and victim had been in a sexual relationship for some time and had a daughter together, although they disagreed as to the nature of the relationship (the victim believed it to be only sexual/physical while the applicant was "besotted" with the victim). When the victim was driving his truck, the appellant would often follow him in her car and turn up at his home. On the day of the offending, the victim had stopped for a break at a parking bay and was approached by the applicant who threw the remote control to the victim's garage at him, told him she was pregnant and yelled "I'll kill you" before driving off. The applicant had stated on numerous occasions that "if she couldn't have [the victim], nobody would" and that she should "take him out" by "driving straight into him".

The applicant was convicted of recklessly causing serious injury in circumstances of gross violence and intentionally destroying property, and sentenced to seven years' imprisonment with a non-parole period of five years.

Judgment: The court dismissed the application for leave to appeal against conviction. The court rejected Ground 1, finding that it was open to the jury to conclude that the appellant knew the collision would probably cause serious injury to the victim because of the nature of the collision (high speed, head-on, on an open road) and the threats made by the applicant [40]. The court noted that "The issue for the jury was not which of the two drivers bore the greatest risk of injury but whether the applicant knew the truck driver would probably be seriously injured" [39]. The court also rejected Ground 2, finding that the applicant did not seek to make a distinction between damage and destruction at trial [48] and in any event, any disconformity between the indictment and the way the case was run at trial could have been resolved by amending the indictment [49].

The court also dismissed the appeal against sentence. The court rejected Ground 1, finding that while the judge incorrectly approached s 10(1) as if it called for an assessment of a non-parole period for the s 15B offence alone, the answer the judge gave to that assessment demonstrated that "there was never any possibility of a non-parole period for the whole of the offending of less than four years" and that there was no basis to consider that the judge could have found substantial and compelling circumstances justifying a non-parole period of less than four years [94]. The court further held that, "When regard is had to the additional criminality of the conduct underpinning [the Intentionally destroy property charge], we are satisfied that any error in applying the 'special reasons' provisions could not have played any role in the sentence imposed on the individual charges or in setting the non-parole period" [94].

The court also rejected Ground 2, holding that the two charges were very serious, and separate, offences and the extent to which the sentences were to be made concurrent was the discretion of the sentencing judge [99]. The court further rejected Ground 3, holding that neither the sentence nor its constituent parts were wholly outside the permissible range [100]. The court noted that the offending was grave and "exceptionally dangerous conduct" that had "very serious consequences" for which the conduct needed to be denounced and punished [103]. The appellant did not have the utilitarian benefit of a plea and there was no evidence of remorse [103].