***Carter v The Queen* [2020] VSCA 156 (15 June 2020) – Victorian Court of Appeal**

'Aboriginal and Torres Strait Islander people' – 'Application for leave to appeal against sentence' – 'Breach of protection order' – 'Children' – 'Covid-19 pandemic' – 'Double punishment' – 'Non-fatal strangulation' – 'People affected by substance misuse' – 'People with mental illness' – 'Physical violence and harm' – 'Weapon'

Charges: Recklessly cause injury x 1; intentionally damage property x 1; possess a firearm while a prohibited person x 1; attempt to pervert the course of justice x 1; persistently contravene a family violence intervention order x 1

Case type: Application for leave to appeal against sentence

Facts: The applicant pleaded guilty to recklessly causing injury (grabbing her by the throat causing bruising and breathing difficulty), intentionally damaging property, possessing a firearm while a prohibited person, attempting to pervert the course of justice (a number of phone calls demanding the victim retract her statement), and persistently contravening a family violence intervention order. He also pleaded guilty to a series of related summary charges, including failing to store a firearm in a secure manner, possessing cartridge ammunition while unlicensed, and committing an indictable offence while on bail. The offending occurred in the context of family violence within a domestic relationship. The applicant was sentenced to 3 years' imprisonment with a non-parole period of 2 years.

At the time of the offending, the applicant lived with his former partner (the victim). They had been in a 'turbulent "on again, off again"' relationship for around 16 years. The applicant had been subject to 3 intervention orders and a family violence safety notice prior to the present offending. The relationship came to an end, however, the victim and their daughters had continued to visit the applicant in custody until the recent COVID-19 pandemic.

In relation to the most serious charge of attempting to pervert the course of justice, the sentencing judge noted the fear that the victim must have experienced as a result of the applicant's threats over the phone ([20]). The offences involving the possession of the firearm were linked to, and committed "because of [the applicant's] mental state with the intention of self-harm" ([22]). With regard to the applicant's prospects of rehabilitation, his Honour accepted that the offending occurred "in the context of a daily methamphetamine habit". The applicant had a long history of addiction to drugs, and his prospects of rehabilitation were considered guarded ([25]). The applicant's guilty pleas, however, entitled him to a reduction in sentence ([26]). His criminal history related mainly to driving or drink-driving offences ([27]). With regard to the applicant's Indigenous background, the judge took into account the fact that he came from a disadvantaged background, experienced deprivation and poverty, suffered from learning difficulties, and had been exposed to substance abuse and mental health issues ([28]).

- The sentence was manifestly excessive.
- The applicant had suffered double punishment in that the base sentence of 2 years imposed on charge 4 (attempt to pervert the course of justice), and the sentence of 6 months imposed on charge 5 (persistent breach of intervention order), had resulted in 3 months cumulation.
- The totality principle was offended in cumulation of sentencing.
- Insufficient weight was given to prospects for rehabilitation based on the applicant's limited history of prior offending, his not having served a previous term of imprisonment, Aboriginal background, difficulties faced while in prison and efforts made to participate in programs while on remand.

Held: The Court of Appeal held that the sentence imposed on the charge of attempting to pervert the course of justice was not manifestly excessive. The applicant's conduct was persistent and involved repeated threats of violence to the victim ([69]). "An attempt to pervert the course of justice is a substantive, and not an inchoate offence", and "any conduct that meets [its] description must be viewed seriously and denounced appropriately" ([70]). The submission in relation to double punishment was rejected as the elements of charges 4 and 5 were separate and distinct: "The criminality involved in attempting to persuade [the victim] to withdraw her complaint against the applicant, through the use of threats, harassment, and a form of emotional blackmail, was conceptually, and practically, separate from the deliberate and persistent contraventions of the family violence intervention order". The judge was therefore entitled to order some degree of cumulation between them ([72]). Ground 4 also failed as the judge considered all relevant matters, and it was open, on the evidence, to conclude that the applicant's prospects of rehabilitation were guarded ([73]). As there was no error by the sentencing judge, the Court refused leave to appeal.