

***Lim v The Queen* [2019] VSCA 182 (16 August 2019) – Victorian Court of Appeal**

‘Assault’ – ‘Contravening a family violence order’ – ‘Exposing children’ – ‘Manifestly excessive’ – ‘Mitigating circumstances’ – ‘Obsessive behaviour’ – ‘Past domestic and family violence’ – ‘People affected by substance misuse’ – ‘Physical violence and harm’ – ‘Step-child in the family’ – ‘Threat to kill’

Offences: Aggravated burglary; intentionally causing injury x2; threat to kill x2; persistently breaching a family violence intervention order; summary assault x1; summary offence of using a drug of dependence; and unlawful assault.

Proceedings: Application for leave to appeal against sentence

Grounds:

- > Whether sentence on summary assault exceeded maximum penalty;
- > Whether the individual sentences and orders for cumulation, the total effective sentence and the non-parole period were manifestly excessive;
- > Whether the sentencing judge paid insufficient regard to the principle of totality; and
- > Whether the sentencing judge erred in treating the applicant’s prior convictions as relevant to the assessment of the gravity of the applicant’s offending.

While drunk and drug-affected, the applicant forced his way into the home of his female ex-partner, the protected person in a FVIO to which he was the respondent. Upon entering, he grabbed KC’s father, threatened to kill him and choked him in a sleeper hold to the point of unconsciousness. He followed KC as she fled the home and similarly choked and threatened her in the presence of her young daughter, continuing the choke hold until a police officer struck him with a torch and placed him in a headlock, having failed to subdue him with pepper spray. An elderly neighbour tried to comfort those at the scene but was also threatened by the applicant. When police arrived, they were only able to subdue the applicant with force.

The applicant persistently breached a family violence intervention order during the month leading up to the offence and had previously committed violent offences against KC and her father. He entered pleas of guilty and was sentenced to a total effective sentence of nine years and seven months' imprisonment with a non-parole period of seven years. The sentencing judge described the offending as "very grave", "sustained and dangerous", "gratuitous" and "cruel and chilling". Sentencing considerations were general deterrence, specific deterrence, denunciation and protection of the community. Weight was placed on the applicant's significant criminal history and "selfish and cowardly" approach to relationships. Significant mitigating factors were raised on his behalf including his early pleas of guilty, remorse, medical conditions causing particular hardship in custody, and reasonable prospects of rehabilitation.

Held: The first ground was conceded by the Crown. In respect to the second and third grounds, it was held that the sentence for aggravated burglary, cumulation, base sentence and resulting total effective sentence were all manifestly excessive and in breach of totality, providing that it is "likely that the judge placed too much weight on Mr Lim's prior criminal history, was overwhelmed by the gravity of the offending or gave insufficient weight to the mitigating factors, or that some combination of these factors was operative" [122]. The sentence for unlawful assault was also held to be manifestly excessive.

The Court rejected the fourth ground of appeal as they considered using the offender's prior convictions to inform an 'assessment of the gravity of his crimes [was] not the same "as speaking of an assessment of the objective gravity of a crime" [53].