***McLean v The Queen* [2018] VSCA 209 (24 August 2018) – Victorian Court of Appeal**

'Damaging property' – 'Factors affecting risk' – 'Sentencing'

Charges: Aggravated burglary x 1; Criminal damage x 1; Resisting an emergency worker on duty x 1.

Appeal type: Applicant for leave to appeal.

Facts: The applicant and his ex-partner argued by text message, culminating in the applicant's text: 'Addie won't had no mother from today' and 'I'll have the last laugh I promise you that'. Addie was their six-month old daughter. On the same day, the applicant broke into his ex-partner's home, causing damage and turning on the gas before leaving. The applicant was charged with aggravated burglary, in that he entered as a trespasser, intending to destroy property with reckless disregard as to the presence of another person. He was also charged with causing criminal damage and resisting an emergency worker. He was sentenced to two years and six months' imprisonment, with a non-parole period of two years.

Issues: The applicant sought leave to appeal on the basis that (1) the sentencing judge erred by imposing a manifestly excessive non-parole period of 80% of the total effective sentence; and (2) his Honour did not explain the necessity for the imposition of the relatively high non-parole period.

Decision and reasoning: The high ratio between the non-parole period and the head sentence was such that leave to appeal was granted, but the appeal was dismissed ([27]). Given the nature of the offending and the applicant's criminal history, the sentences imposed (leaving to one side the non-parole period) were very modest and not excessive. The Court found that the explanation for the moderate sentence was largely the significance placed by the judge on the prospect of deportation. As the sentence exceeded two years' imprisonment, the sentencing judge was required by s 11(1) of the *Sentencing Act 1991* (Vic)to fix a non-parole period, unless he considered it inappropriate to do so, having regard to the nature of the offence or the offender's past history. Clearly, his Honour considered it appropriate to fix a non-parole period. s 11(3) required that period to be at least six-months less than the term of the sentence. Here, the non-parole period fixed was, in a sense, the 'maximum' period that could be fixed. In determining the non-parole period, the judge was required to take into account the purpose of parole, namely, to provide for mitigation of punishment in favour of rehabilitation after the offender had served the non-parole period (see *Power v The Queen* [1974] HCA 26). The seriousness of the offending was such that justice required a non-parole period of at least two years. Therefore, the high ratio between the head sentence and the non-parole period was explicable by the very modest sentences imposed (and cumulation ordered) for the offences. There was no error in his Honour fixing the non-parole period.