

***Vu v The Queen* [2020] VSCA 59 (23 March 2020) – Victorian Court of Appeal**

‘Appeal against sentence’ – ‘Physical violence and harm’ – ‘Remorse’ – ‘Totality principle’

Offences: manslaughter x1; attempted murder x1 and recklessly causing serious injury x1.

Proceedings: Appeal against sentence

Facts: The applicant man and the female victim lived together in a domestic relationship for many years and had two children together. In 2013 the applicant was charged with drug-related offences and imprisoned for three years. During this time, the female and male victims commenced a relationship and were married. Shortly before the applicant was released, the male victim moved out of the female’s house and into a nearby residence. They continued their relationship in secret after the applicant was released and resumed living with the female victim.

The applicant was later informed of the victims’ relationship and confronted them about it. The victims’ stated they were just friends, but the applicant refused to accept their denials. The applicant then grabbed a hunting knife he had previously hidden and stabbed both victims in the chest. The male victim died at the scene and the female was seriously injured, though there was no evidence of any permanent or ongoing impairment as a result of the injury.

Applicant was charged with murder of the male victim and attempted murder of the female victim and in the alternative either intentionally or recklessly causing serious injury. Prior to trial the applicant offered in writing to plead guilty to manslaughter. No offer was made in respect to the charges relating to the female victim’s injuries. Following trial he was convicted of the manslaughter of the male victim and recklessly causing serious injury to the female victim. He was given a total effective sentence of 15 year’s imprisonment with a non-parole period of 11 years.

Grounds of appeal:

- > The order for cumulation was excessive and thereby infringed the totality principle.
- > The learned sentencing judge erred by granting the applicant only a modest benefit for the utilitarian value of his plea offer.
- > The learned sentencing judge erred by granting the applicant no benefit for his plea offer other than for its utilitarian value.
- > The learned sentencing judge erred by not treating the applicant’s post-offence conduct as mitigatory.
- > The individual sentences imposed for both offences, the order for cumulation and the total effective

sentence were manifestly excessive, particularly in light of:

The totality principle (see ground 1 above);

The finding that the recklessly causing serious injury was mid-range example of the offence;

The applicant's offer to plead guilty (see grounds 2 and 3 above);

The mitigatory effect of the applicant's conduct immediately after the offending (see ground 4 above);

There being, it is argued, some evidence of remorse, acceptance of responsibility and a willingness to facilitate the course of justice;

The finding that the applicant's prospects of rehabilitation are 'quite good';

The finding that specific deterrence 'does not loom large' in this case.

Held: The Court allowed the appeal on against sentence on grounds 1 and 5 (in part), limited to the order for cumulation only. The order for cumulation was quashed and ordered a total effective sentence of 13 years and six months' imprisonment with a non-parole period of 10 years.

In regard to Grounds 2 and 3, the Court held the sentencing judge was entitled to consider the utilitarian value of the applicant's offer to plead guilty as 'relatively modest' given the overall circumstances of the case and rejected the second ground. While the offender offered to plead guilty, this is not necessarily a sign of remorse and agreed with the sentencing judge's conclusion that the offer was most likely motivated by pragmatic considerations [40], thus also rejecting the third ground. In light of the Court's rejection of an inference of remorse, they noted that the sentencing judge's reasoning "embraced a consideration of the entirety of [the] post-offence conduct, favourable and unfavourable to the applicant" and rejected the fourth ground [44].

Turning to Grounds 1 and 5, the Court noted that while the individual sentences were each particularly stern but not wholly outside the range of sentencing discretion [48], this was not the case for the order for cumulation. "Given the very significant overlap in time, context and conduct, and particularly, the high sentences imposed on both charges, [the Court] consider[s] that the principles of totality and proportionality ought to have operated to moderate the order for cumulation to a considerably greater extent" [54]