

DIRECTOR OF PUBLIC PROSECUTIONS

v

TROY JENKINS

JUDGE: O'Connell
WHERE HELD: Melbourne
DATE OF HEARING: 18, 19, 20 March, 4 December 2019, 10 March, 8, 29 May 2020
DATE OF SENTENCE: 4 June 2020
CASE MAY BE CITED AS: DPP v Jenkins
MEDIUM NEUTRAL CITATION: [2020] VCC 749

REASONS FOR SENTENCE

Subject: CRIMINAL LAW
Catchwords: Rape; Stalking; Family violence; Persistent offending; Obsessive and controlling behaviour; Accused self-represented; Lengthy procedural history; Significant criminal history; Serious example of offence of rape and stalking; High moral culpability; Accused found to pose a real risk to the sexual safety of women; sex offender registration with a reporting period of life; Just punishment; Denunciation; General deterrence; Totality.
Legislation Cited: *Crimes Act 1958; Criminal Procedure Act 2009; Sentencing Act 1991; Sex Offenders Registration Act 2004*
Cases Cited: *Shrestha v The Queen* [2017] VSCA 364; *DPP v Fuiava* [2018] VCC 76; *Forbes v The Queen* [2018] VSCA 341; *Samuels v The Queen* [2019] VSCA 14; *Bolton v The Queen* [2019] VSCA 21; *DPP v Elfata* [2019] VSCA 63; *DPP v Macarthur* [2019] VSCA 71; *Sayer v The Queen* [2018] VSCA 177; *Bowden v The Queen* (2013) 44 VR 229.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the DPP	Mr C. McConaghy	Office of Public Prosecutions
For the Accused	Self-represented	

HIS HONOUR:

Introduction

1 Troy Jenkins, on 20 March 2019 you were arraigned before a jury panel in respect of 11 charges on Indictment number H12995908.1.

2 You pleaded not guilty to one charge that between 19 September 2017 and 20 September 2017, you raped Naomi Burgess¹ contrary to s 38 of the *Crimes Act 1958* [Charge 1].

3 You pleaded not guilty to a further charge that on 5 October 2017 you raped Naomi Burgess contrary to s 38 of the *Crimes Act 1958* [Charge 3].

4 However, you pleaded guilty to the balance of the charges on the Indictment comprising:

- Charge 2: That on 29 September 2017 you intentionally and without lawful excuse damaged an Apple iPhone 6 belonging to Naomi Burgess contrary to s 197(1) of the *Crimes Act 1958*
- Charge 4: That on 5 October 2017 you recklessly caused injury to Naomi Burgess contrary to s 18 to the *Crimes Act 1958*
- Charge 5: That on 5 October 2017 you made a threat to kill Naomi Burgess contrary to section 20 of the *Crimes Act 1958*
- Charge 6: That on 5 October 2017 you assaulted Naomi Burgess by punching her to the arm and pulling her hair contrary to common law
- Charge 7: That on 12 October 2017 you assaulted Naomi Burgess by grabbing her arm and pushing her to the ground contrary to common law
- Charge 8: That between 12 October 2017 and 20 October 2017 you stalked Naomi Burgess contrary to s 21A of the *Crimes Act 1958*
- Charge 9: That on 13 October 2017 you assaulted Naomi Burgess by twisting her arm contrary to common law
- Charge 10: That on 20 October 2017 you made a threat to kill Quan Tran contrary to s 20 of the *Crimes Act 1958*

¹ A pseudonym.

- Charge 11: That on 20 October 2017 you made a threat to kill Naomi Burgess to Quan Tran contrary to s 20 of the *Crimes Act 1958*

5 A jury of 12 was then empanelled to determine Charges 1 and 3, being the two charges of rape. After the prosecutor, Mr McConaghy, had concluded his opening address to the jury, your counsel, Dr Boas, sought to have you re-arraigned in respect of Charge 3.

6 You then pleaded guilty to the charge that on 5 October 2017, you raped Naomi Burgess. I discharged the jury from delivering a verdict on that charge and directed that an entry of guilty be made in the records of the Court.

7 Mr McConaghy then indicated that the prosecution would not lead any evidence in respect of Charge 1 on the Indictment namely, that between 19 September 2017 and 20 September 2017, you raped Naomi Burgess.

8 Pursuant to s 241(2) of the *Criminal Procedure Act 2009* I then discharged the jury from delivering a verdict on that charge and directed that an entry of not guilty be made in the records of the Court.

9 Your counsel Dr Boas sought and was granted an adjournment of your plea hearing to 20 June 2019, to enable his instructing solicitors to obtain material that might be used in mitigation.

10 For reasons which I will explain shortly, your plea was adjourned on a number of occasions and did not proceed until May 2020. You were not represented at the plea hearing.

Circumstances of offending

11 An amended summary of prosecution opening for plea was tendered which sets out in some detail your offending.

12 In short, you met the victim Ms Burgess at a music festival in mid-2016 and reconnected with her via an online dating site in mid-July 2017. From that point, the relationship developed such that by mid-August you were staying each night at Ms Burgess' residence.

13 By early September, your behaviour towards Ms Burgess became controlling. You became obsessed with knowing her whereabouts at all times and you would

frequently argue with her about your paranoid suspicions concerning her engaging in sexual activity with other men.

- 14 On 5 September 2017, Ms Burgess returned home after going out to dinner with a friend. She was immediately questioned by you about where she had been and accused of lying. You accessed her Facebook account and using the messenger application sent messages to her friend, Amanda Rogerson², where you purported to be the victim and asked questions of her to confirm the name and location of the restaurant where they had dined.
- 15 This type of controlling behaviour escalated. You started accusing the victim of being a police informer and having hidden cameras in her house. This caused a great deal of distress and anxiety to her.
- 16 On 9 September 2017, a friend of the victim, Alex Jackson³, sent an SMS message to the victim asking if she had arrived home safely. When you saw this message you grabbed Ms Burgess' phone and replied to the message as follows:
- 'Sorry alex I got fucked in an alley'
 - 'Yeah it was a different nice guy'
 - 'It was good'
- 17 On 13 September 2017, you had another argument with the victim concerning your suspicions about her fidelity. She became heavily intoxicated. She went to the kitchen and took possession of a knife, threatening to stab you and herself before ultimately self-harming and making superficial cuts to her wrists with a knife. At 10:27pm that night, you called '000' stating that the victim was trying to stab you and herself. Ultimately, the victim was taken to the Northern Hospital for mental health assessment. That incident illustrates the level of distress the victim was suffering at that time.
- 18 As the relationship progressed, you continued to exhibit obsessive and controlling behaviour towards her. You constantly demanded to know where she had been, checked her emails, social media accounts, call logs and you would call her place of work to check if she was in fact at work.

² A pseudonym.

³ A pseudonym.

- 19 Without her knowledge, you accessed Ms Burgess' phone and linked it to your Google account. This allowed you to check the location of her phone and track her movements when she had her phone with her. You were fixated with the notion that she was sleeping with other men and would constantly accuse her of being unfaithful.
- 20 In an argument on 29 September 2017, you demanded to see the victim's phone. She refused, so you took the phone and demanded the passcode which she also refused to provide. In response, you snapped the phone in half. The phone was valued at \$600. That conduct gave rise to Charge 2 on the Indictment – damaging property.
- 21 On 3 October 2017, you argued with the victim about a party she had attended on 30 September for the AFL grand final. During the course of that argument, you again accused Ms Burgess of infidelity. You told her that her hair 'smelt like pussy'.
- 22 On 4 October 2017, you questioned her about the location you believed she had attended instead of going to work. You made her get into her car and you drove to that address. You then knocked on the front door to establish who lived there. No one answered the door which increased your suspicions.
- 23 On 5 October 2017, the victim went to work but was feeling unwell because she had consumed too much alcohol the night before. You collected her from work at about midday and returned to her home. You both lay on the bed watching television and commenced engaging in sexual foreplay. You inserted your fingers into the victim's vagina. You said that you felt a substance that you believed was another man's ejaculate and accused the victim of having an affair with her boss. You said that she had her boss' ejaculate left inside her.
- 24 The victim denied the allegation and an argument ensued. You then held the victim down with one arm and forced her legs apart before violently forcing your fingers in and out of her vagina. She was screaming, crying and trying to push you off. Whilst you did this you yelled at her calling her 'a liar', 'a dog' and 'a slut'. It is that conduct which constitutes Charge 3 on the Indictment – rape.
- 25 You then grabbed the victim around the throat with your right hand and, using your left fist, you struck her to the forehead and down the side of her face. You used

the knuckles of your closed fist to continually strike the victim approximately eight times. She was also struck near her right eye and sustained a black eye. You continued to abuse her, demanding to know with whom she was sleeping. Ms Burgess repeatedly denied seeing anyone else. This conduct constitutes Charge 4 on the Indictment – recklessly causing injury.

26 During this incident, you also threatened that you would cut the victim's throat and that threat constitutes Charge 5 on the Indictment – make threat to kill.

27 You also punched the victim to the left arm. You then grabbed her hair and dragged her from one side of the bed to the other. This caused her to lose a significant amount of hair and suffer pain to her scalp. That conduct constitutes Charge 6 on the Indictment – common law assault.

28 During this incident, Ms Burgess was naked and wanted to put her clothes on but you would not let her telling her 'you can sit there like the fat slut that you are'. After a couple of minutes, you allowed her to put her clothes back on. You calmed down and became apologetic. You begged her for another chance and told her that you would go to a doctor to organise drug and alcohol counselling.

29 On 12 October 2017, you had a further argument with the victim at her house. During that argument, you snatched the victim's new mobile phone and refused to give it back to her. The victim told you that the relationship was finished and demanded that you leave the premises however you refused to do so. The victim then rang '000' using your mobile phone, to have the police attend and remove you from the house. When you realised what she was doing you grabbed her by her left forearm, pushed her to the ground and took back the phone. This action caused pain to the victim and she sustained red marks to her body. That conduct constitutes Charge 7 on the Indictment – common law assault.

30 Ms Burgess, still in fear, left the house and drove to the Northcote police station where she reported what you had done. In doing so, she provided a formal statement setting out some of the matters I have just described. As a result, you were arrested and released on bail with conditions prohibiting you from contacting the victim or attending at her address. Despite that, after leaving the police station, you sent a series of text messages to the victim expressing your love for her, and wanting another chance.

31 You continued to exchange messages with the victim into the early hours of 13 October 2017. In part of that exchange, the following messages were sent:

JENKINS 'Did you just send me a photo I never got it'

VICTIM 'Yes'

'It's of what you did to my face'

JENKINS 'What'

'I never got it but I will send you those videos today'

VICTIM 'I don't give a fuck if I get charged with assaulting you'

'I obviously did it, so that's the consequences'

JENKINS 'You deserved that'

VICTIM 'Deserved what'

JENKINS: '& I never charge people your face'
'Should gave you more'

32 At about 3:45 pm that same day, you contacted the victim telling her that you knew she had left work early that day. You knew this because you had been tracking her using Google maps. You asked her to leave your personal belongings outside the front door.

33 At 6:05pm, you sent a message to her telling her that you would come over and remove the cameras that you had installed at her address. The victim knew nothing about any installed cameras.

34 Throughout the evening, you continued to message the victim asking for forgiveness and telling her that you needed to tell her 'things'. At 10:30pm, you rang the victim and told her that you were outside her premises and that you had come to collect your property. You requested to speak to her. Reluctantly, the victim allowed you to enter her house. Once inside you began to beg and plead with her to take you back, but you once again accused her of sleeping with other

people. You were told to leave but you refused. The victim asked you to leave a further five times and each time you again refused.

35 Becoming fearful, the victim walked into her bedroom where she attempted to call the police on her mobile phone. You followed her into the bedroom and grabbed her right forearm, twisting it and forcing her to the ground whilst grabbing her phone out of her hand. That action caused the victim to cry and scream both in fear and pain. That conduct constitutes Charge 9 on the Indictment – common law assault.

36 You then demanded the passcode to the victim's phone, which she provided out of fear that you would assault her again. You went through her messages and saw that she had been disclosing the abuse you had inflicted on her to her friends. This made you even angrier.

37 You saw one contact in the victim's phone in the name of Alessandra De Bono⁴. You believed that was a fake contact, so you called the number using the victim's phone. When the call was answered by a female you immediately ended the call. Ms De Bono then sent a message to the victim's phone asking if she was okay. You responded, 'pocket dialled'.

38 Ms De Bono became suspicious and responded by sending a coded message to ascertain whether Ms Burgess needed help. You worked out the purpose of the message and demanded that Ms Burgess tell you the answer. She did so out of fear.

39 You left the address with the victim's phone and yelled to her to come to the park area behind the residence. Ms Burgess then sent three emails to her ex-boyfriend stating 'MY PHONE IS STOLEN AND I NEED HELP'... 'CALL THE POLICE RIGHT NOW'.

40 Soon afterwards, a witness in a nearby apartment heard you and Ms Burgess arguing in the laneway that ran past her bedroom and led to the park. Once the witness heard Ms Burgess crying she opened her window and told the victim to go to the letterboxes at the front of the premises where she would meet her. Police were contacted but you left the area before their arrival. The phone was located on a pole close to the entrance to the park.

- 41 At about 9:30pm on 15 October 2017, Ms Burgess again contacted '000' because you had continued to contact her frequently causing her further distress and fear. She thought that you were in the front yard of her premises and she described to investigators how at that time she sat in her shower, crying and feeling as though she was going to vomit.
- 42 Around this time, the same neighbour, who had previously witnessed your arguments with the victim, walked past the front of the apartment block and saw you standing in the corner of the alcove to Ms Burgess' front entrance. The police were contacted but you again left the area before they arrived. At that time, Ms Burgess showed police the texts, Facebook messages and records of phone calls which she had received from you since the time you had been bailed on 13 October 2017 with conditions that you be prohibited from contacting her. Police took photographs from Ms Burgess' phone of more than 100 messages you sent to her.
- 43 At about 1:30am on 20 October 2017, Ms Burgess was with police when you contacted her by phone. First Constable Tran took the phone and identified himself to you. You immediately began to make threats to 'cut Tran's throat' and accused Tran of 'fucking' the victim. You also made a further threat to cut the victim's throat. That conduct constitutes Charge 10 – make threat to kill (Tran), and Charge 11 – make threat to kill (victim).
- 44 Your conduct between 12 October 2017 on 20 October 2017, which consisted of following Ms Burgess' movements, loitering near her residence, conducting visual and electronic surveillance of her, accessing her computer and engaging in the controlling and obsessive behaviour I have otherwise described, constitutes Charge 8 – the offence of stalking.
- 45 On 27 October 2017, you were arrested and taken to the Prahran police station where you interviewed in relation to all of the allegations, save for the allegation of rape. You made 'no comment' to those allegations, and later refused to participate in a further interview in relation to the rape allegation.

⁴ A pseudonym.

46 At the return of the plea hearing on 29 May 2020, you pleaded guilty to two related summary offences comprising a contravention of your bail conditions as to attending Ms Burgess' residence and committing family violence.

Impact of offending

47 Ms Burgess provided two victim impact statements describing how she has been affected by this offending. She read the second of those statements, dated 19 February 2020, to the Court at your plea hearing.

48 Her life has been completely shattered by what she experienced in her relationship with you. She describes struggling to perform simple daily tasks such as working, eating, sleeping and taking care of herself.

49 She has lost her confidence and any sense of security. She feels constantly anxious and fearful that she is being followed. She has needed to seek professional assistance and treatment including medication in order to cope. Her study and work prospects have diminished.

50 Because she continues to suffer in this way, she is unable to enjoy life at all or as she puts it, to even 'appreciate my survival'.

Procedural history

51 There has been a significant delay in the resolution of this matter and for much of the proceeding, including the plea hearing, you were unrepresented. It is instructive I think to set out in some detail the procedural steps that were required.

27 October 2017	Troy Jenkins arrested
	Filing hearing <ul style="list-style-type: none">• Troy Jenkins remanded in custody
19 January 2018	Committal mention
9 March 2018	Bail application <ul style="list-style-type: none">• Application refused
28 May 2018	Contested committal <ul style="list-style-type: none">• Ms Burgess and two police officers cross-examined• Plea of not guilty, committed to the County Court to stand trial
29 May 2018	Initial directions hearing <ul style="list-style-type: none">• 7-10 day trial listed for 18 March 2019
4 December 2018	Solicitors acting for Troy Jenkins file 'Notice of Practitioner Ceasing to Act'

6 December 2018	Final directions hearing <ul style="list-style-type: none"> • Troy Jenkins appeared unrepresented
19 December 2018	Funding mention <ul style="list-style-type: none"> • Troy Jenkins appeared unrepresented
23 January 2019	Further funding mention <ul style="list-style-type: none"> • New solicitors acting on behalf of Troy Jenkins appear
27 February 2019	Final directions hearing <ul style="list-style-type: none"> • Trial date confirmed
18 March 2019	Trial <ul style="list-style-type: none"> • Day 1
19 March 2019	Trial <ul style="list-style-type: none"> • Day 2 • Troy Jenkins arraigned and pleaded guilty to Charges 2, 4, 5, 6, 7, 8, 9, 10 and 11 and pleaded not guilty to Charges 1 and 3.
20 March 2019	Trial <ul style="list-style-type: none"> • Day 3 • Troy Jenkins re-arraigned and pleaded guilty to Charge 3. Jury discharged and in relation to Charge 3 and entry of guilty directed. • Prosecution led no evidence in relation to Charge 1, jury discharged and a verdict of not guilty entered.
18 June 2019	Mention <ul style="list-style-type: none"> • Solicitors advised a conflict had arisen, and that Troy Jenkins had been given advice to seek alternative legal representation
19 June 2019	Solicitors acting for Troy Jenkins file 'Notice of Practitioner Ceasing to Act'
27 June 2019	Mention <ul style="list-style-type: none"> • Troy Jenkins appeared unrepresented • Advised the Court he had been attempting to obtain legal representation, adjournment granted to enable this to occur
21 August 2019	Mention <ul style="list-style-type: none"> • Troy Jenkins appeared unrepresented • Advised still trying to arrange legal representation
11 September 2019	Solicitors acting for Troy Jenkins file Notice of Practitioner Ceasing to Act
	Mention <ul style="list-style-type: none"> • Troy Jenkins appeared unrepresented • Matter listed for Application for Change of Plea
14 November 2019	Mention <ul style="list-style-type: none"> • Orders made for filing of material for Application for Change of Plea
4 December 2019	Application for Change of Plea <ul style="list-style-type: none"> • Troy Jenkins refused to appear • Application dismissed, reasons given • Matter listed for Plea, psychological report

	pursuant to s 8A of the <i>Sentencing Act 1991</i> ordered
15 January 2020	Troy Jenkins informed assessing psychologist from Forensicare that he did not wish to participate in the assessment
10 March 2020	Plea hearing <ul style="list-style-type: none"> • Solicitors appear on Troy Jenkin's behalf, plea adjourned to allow defence time to prepare
24 April 2020	Solicitors acting for Troy Jenkins file 'Notice of Practitioner Ceasing to Act'
1 May 2020	Special mention <ul style="list-style-type: none"> • Troy Jenkins appeared unrepresented
8 May 2020	Plea hearing <ul style="list-style-type: none"> • Troy Jenkins appeared unrepresented, matter adjourned part-heard to allow opportunity to obtain legal representation
29 May 2020	Plea hearing <ul style="list-style-type: none"> • Troy Jenkins appeared unrepresented
4 June 2020	Sentence

- 52 As that chronology demonstrates your pleas of guilty were entered at the commencement of your trial. They could not therefore be characterised as early pleas. I particularly note that Ms Burgess was cross-examined at committal. However, I also note that you pleaded guilty to Charges 4, 5, 6, 7, 8, 9, 10 and 11 before the jury at the commencement of your trial, and that you pleaded guilty to Charge 3 once the prosecution indicated it would lead no evidence in respect of Charge 1. In the ordinary course, pleas of guilty in those circumstances should still attract a sizeable reduction in your sentence.
- 53 Unfortunately, the matter was delayed whilst you prevaricated on the question of representation and sought to change your plea. On 4 December 2019, your matter was listed for an application to change your plea of guilty. You had been given a number of opportunities to pursue that application but ultimately chose not to do so. Your application was therefore refused.
- 54 Your conduct did not indicate any willingness to facilitate the course of justice or show that you were at all remorseful for treating Ms Burgess in the way that you did. Indeed, Ms Burgess indicated in her victim impact statement that her recovery was made all the more difficult by these delays.
- 55 In my view, the prosecution of this matter was conducted with conspicuous fairness and you were afforded every opportunity to avail yourself of

representation and the opportunity to be heard. It is difficult not to conclude that you took advantage of those opportunities to frustrate and delay the process.

56 Despite those misgivings, the reduction in sentence flowing to you from your pleas of guilty will not be diminished by the delays you have caused to the resolution of this matter. As the procedural chronology indicates, I ordered a pre-sentence report be prepared, but the short report received by the Court stated that you did not wish to participate in the assessment. I do not therefore have the benefit of a psychological or psychiatric assessment which could potentially provide some explanation or perspective that might assist you. In those circumstances, I have determined that the fairest and most appropriate course is to ensure that you are not penalised for adopting that somewhat uncooperative approach.

57 It follows that you will be sentenced on the basis that your pleas of guilty still entitle you to a sizeable reduction in your sentence.

Personal history

58 You were born on 28 November 1978 and are now 41 years of age. You were 38 at the time of the commission of these offences.

59 Although you were unrepresented at the plea hearing, a solicitor from Victoria Legal Aid provided a handwritten template document which set out something of your personal history. On the plea, that document was read to you and you were provided with an opportunity to comment as to its accuracy and expand on any detail.

60 As best can be gleaned, your father was a council worker and your mother worked in childcare. You have one older sister and one younger brother. You spent your formative years in the Latrobe Valley and in answer to the question 'what was it like growing up in your family?' you wrote, 'good family'.

61 You attended primary and secondary school in Churchill and Morwell and completed year 11. You appear to have done reasonably well at school and got on well with your peers.

62 It seems your main work once you left school was as a scaffolder and trades assistant working at the Hazelwood power station and later at the Yallourn power station when you were in your 20s and 30s.

- 63 You have extended family in Ararat and played football there when you turned 18. You have a daughter who is 14 years of age although you have not seen her in a number of years. She lives in Perth with her mother and you remain in touch with her.
- 64 You explained that you have seen many different doctors in the past for 'drug dependency, depression, drug psychosis and attempted suicides'. You appear to have suffered a number of head injuries over the years but I note from the sentencing remarks of her Honour Judge Rizkalla of 26 October 2010, which I will come to shortly, that you were assessed by a neuropsychologist at that time who concluded that you did not have an acquired brain injury.
- 65 You abused alcohol from an early age. You indicated that you started using heroin and abusing prescription medication when you were 18 years of age, and from the age of 36 or so you developed an addiction to methamphetamine.
- 66 You said that you had lost everything as a result of drug use including your relationships, houses, cars and family. You have sought treatment for drug abuse particularly through implants and methadone. You are currently stabilised on a methadone program and are also prescribed medication from psychiatrist. You say that that calms you down. I do not have any information as to what condition is being treated.
- 67 On the plea, you said that you wanted to work on rebuilding relationships with your family, particularly your niece and your daughter. You said that you were sorry for your behaviour and that you know you need a lot of support and counselling. You have also undertaken some educational and vocational courses whilst in custody, as well as some rehabilitative courses relating to relationships and group counselling.
- 68 You are also subject to the restrictions imposed as a result of the COVID-19 crisis. Since March 2020, you have been required to remain in your cell 20 hours of each day, you do not receive visits and you do not currently have access to programs.

Previous criminal history

- 69 You have a significant criminal history. Your offending from your late teens throughout your 20s could be characterised as alcohol-related street and driving

offences, although they include two convictions for recklessly causing injury. There is also a prior conviction for indecent assault for which you were convicted and fined at the Ararat Magistrates' Court on 21 June 1999. On that occasion, you were at the Commercial Hotel in Ararat and whilst affected by alcohol when you grabbed a woman's breasts.

70 In December 2009, you were dealt with in the Magistrates' Court for charges of contravening a family violence intervention order, making threats to kill, harassing a witness and reckless conduct endangering serious injury for which you were sentenced to 6 months' imprisonment which was wholly suspended for a period of 12 months. You subsequently breached that suspended sentence and were therefore required to serve the six month term of imprisonment.

71 As you got older, you acquired convictions for drug offences. On 26 October 2010, you were before the County Court at Latrobe Valley in respect of charges of unlawful assault, criminal damage and a threat to inflict serious injury. As I mentioned earlier, you were dealt with on that occasion by her Honour Judge Rizkalla. The victim of those offences was your ex-partner and her new partner. In the circumstances described by her Honour, you attended at the victim's property and walked into her home. You began yelling at her and threw a child's bike across the room. You went to leave, but then turned back and yelled at the victim, again pushing her and then striking her to the right eye with an open hand. You then threatened to kill her partner. On the way out, you kicked the victim's car causing damage to it. Fortunately, the injury to the victim was not serious. You were sentenced to a total of 7 months' imprisonment in respect of those matters, five months of which was to run concurrently with the sentence you were then undergoing.

72 Over the next few years, you committed some relatively minor drug offences until you appeared at the Melbourne Magistrates' Court on 20 June 2017. On that occasion, you were sentenced in relation to three charges of contravening a family violence safety notice, criminal damage, recklessly causing injury, criminal damage by fire and unlawful assault. The victim was another woman who had been in an intimate relationship with you for about eight weeks.

73 On 23 November 2016, you argued with that partner in what was described by police as a 'verbal dispute over the victim's social media account'. As the victim

dialled '000', you pushed her back onto the bed and grabbed her by the right side of the collar of her clothing and hit her to the right side of the jaw with a closed fist. The police summary indicates that she did not sustain any injury. You then smashed the victim's iPhone and burnt her personal belongings in the kitchen sink. You were served with a family violence safety notice which you breached a number of times by attending at the victim's address.

74 For those matters, you were sentenced to 6 months' imprisonment with 169 days reckoned as time already served by way of presentence detention. In addition, you were required to undertake a Community Correction Order ('CCO') for a period of two years. You would therefore have been released in late June or early July 2017. You committed these offences three months or so later, whilst subject to that CCO, against a different female partner.

75 You were finally dealt with for the breach of the CCO in the Melbourne Magistrates' Court on 5 May 2020. The CCO was cancelled and you were re-sentenced to an aggregate term of imprisonment of two months.

Crown submissions

76 As to the prosecution submissions on sentence, it was put that with the exception of the stalking offence, each of the charges occurred apparently spontaneously, but that your behaviour should be viewed against the background of persistent controlling and obsessive behaviour which was often callous and uncaring. The conduct involved in your stalking of Ms Burgess, it was said, involved a high degree of premeditation, calculation and sophisticated use of surveillance techniques.

77 It was submitted that the impact of your offending on the victim was a particularly important sentencing consideration.

78 You have relevant prior convictions which demonstrate a propensity to commit family violence offences and repeatedly disobey court orders directed to preventing that sort of violence. Mr McConaghy also submitted that your offending is aggravated by the fact that you were on a CCO following your release from prison for family violence matters.

- 79 It was further submitted that you should be justly punished for the violence and degrading treatment you directed at Ms Burgess, and that such conduct requires strong denunciation. General deterrence required emphasis having regard to the prevalence of family violence in our community, and specific deterrence also needed emphasis to try and deter you from future criminal conduct of this kind.
- 80 I was referred to two decisions for comparative purposes: *Shrestha v The Queen*⁵ and *DPP v Fuiava*⁶. I was also provided with the Sentencing Advisory Council's Sentencing Snapshots for the offences of rape, recklessly causing injury and make threat to kill.
- 81 Finally, Mr McConaghy made application under the *Sex Offenders Registration Act 2004* ('SORA') pursuant to s 11(1) for an order that you comply with the reporting obligations under that Act.
- 82 He submitted I should be satisfied beyond reasonable doubt that you pose a risk to the sexual safety of one or more persons in the community. That was so because you had been convicted in 1999, and on this occasion, to two sexual offences against two female victims. He argued that the circumstances of the previous and current offending demonstrate that you are a continuing risk to women.

Defence submissions

- 83 In discussion on the plea hearing, you did say 'I am really sorry for my behaviour'. You said that you have been straight (abstinent from drugs) since you have been in custody and that you want to make the right decisions in the future. You believe drugs have destroyed your life and that if you were to overcome that problem then you would be unlikely to re-offend.
- 84 You opposed the application for registration pursuant to the *SORA*. You argued that your first prior conviction occurred 22 years ago when you were only 18 or so and drunk in a pub, and was not typical of your behaviour. You want to be able to have the opportunity to coach children at Auskick. You said that the problems you have had relate to relationships, not as a sex offender.

Consideration

- 85 In assessing all of these matters, I should say from the outset that your treatment of Ms Burgess was absolutely appalling. It was calculated to terrorise her and it succeeded. You gained her trust and formed an intimate relationship with her only to go on to degrade and demean her at the whim of your paranoid obsessions. The rape of Ms Burgess on 5 October 2017, together with the accompanying assaults and threat to kill her, was the ultimate expression of the kind of behaviour to which she was subject right throughout this relationship.
- 86 The rape is a serious example of the offence, committed as it was in an atmosphere that was initially trusting and intimate. You also used force and violence, albeit that the assaults and threat will be punished separately.
- 87 The lengths that you went to control and abuse your partner were pathologically unfeeling, particularly those that you carried out in knowing disregard of court orders that were meant to protect Ms Burgess from you. For that reason, the stalking charge to which you have pleaded guilty should also be regarded as a particularly serious example of that offence.
- 88 I assess your moral culpability, i.e. your moral blameworthiness for all of this offending, as being very high. I accept the prosecutor's submission that you must be justly punished for the physical and sexual violence that you directed at your partner and that such conduct requires strong denunciation.
- 89 You have relevant prior convictions which disclose a propensity to treat your intimate partners violently. Although you are not to be punished for those offences again, they illustrate the need for this sentence to teach you that the consequence for that kind of violence will be that you forfeit your liberty for a considerable period of time.
- 90 I also accept that because family violence is so prevalent, and because it undermines the personal and family relationships that society values so greatly, it is important that others who might be minded to commit family violence understand that they will be punished sternly.

⁵ [2017] VSCA 364.

⁶ [2018] VCC 76.

- 91 I have considered the comparative cases to which I was referred. I have also had regard to some other relevant recent decisions including *Forbes v The Queen*⁷, *Samuels v The Queen*⁸, *Bolton v The Queen*⁹, *DPP v Elfata*¹⁰ and *DPP v Macarthur*¹¹.
- 92 In your favour, you have pleaded guilty thereby saving the expense of a trial and avoiding the need for Ms Burgess to be further cross-examined. You appear to have some incipient insight into the harm you have caused, and seem to recognise that you have work to do in addressing your drug problem and your attitude to women. You have done some courses that assist in that respect, although there is much more that needs to be done.
- 93 You did say on the plea you were sorry for what you have done, however I do not place a great deal of weight on that assertion. There is no evidence that satisfies me you are genuinely remorseful for causing the damage you have to Ms Burgess. I am not confident of your prospects for rehabilitation, but I accept that there remains hope and bear steadily in mind that the sentence imposed must not be crushing.
- 94 In that context, given the number of offences, the principle of totality has important work to do in formulating a just and appropriate sentence.

Sex offender registration

- 95 On the question of the Crown's application to have you report under the SORA, I am guided by the Court of Appeal's decision in *Sayer v The Queen*¹² as to the operation of s 11(3), adopting the propositions set out in *Bowden v The Queen*¹³:
- (a) The inquiry whether to make a registration order involves a two-stage process.
 - (b) The first question is whether the court is satisfied beyond reasonable doubt that the person poses a risk to sexual safety as defined.

⁷ [2018] VSCA 341.

⁸ [2019] VSCA 14.

⁹ [2019] VSCA 21.

¹⁰ [2019] VSCA 63.

¹¹ [2019] VSCA 71.

¹² [2018] VSCA 177, ('*Sayer*').

¹³ (2013) 44 VR 229.

(c) For the court to be so satisfied, the risk must be real rather than fanciful.

(d) The evaluation of risk is directed to the risk upon the offender's release into the community, assessed by what is presently known.

(e) The second question, which only arises if the court is satisfied that the requisite risk exists, is whether the order should be made in all the relevant circumstances.

(f) The second stage involves balancing the identified risk, having regard to the purpose of the Act, with the restrictions imposed on the offender's right to enjoy freedom and autonomy of action.

(g) The balancing exercise involves considering the magnitude and nature of the risk, including the degree of likelihood of the risk eventuating and the gravity of the harm, to be balanced against the serious consequences for the offender.¹⁴

96 As was said in *Sayer*, the making of an order under s 11 is by no means automatic. The order cannot be made in respect of an offender, as is the case here, who has committed a class 3 or class 4 offence, unless there is no reasonable doubt that they pose or will pose on release, a real risk to the sexual safety of one or more persons in the community.

97 In effect, you contend that you are not a risk to the sexual safety of women because your problems have been confined to the relationships you have had over the years. The 1999 indecent assault conviction was an aberration and there is otherwise just this one sexual offence conviction.

98 I do not think I should take such a narrow view of the meaning of sexual safety. The conviction for two sexual offences within Schedule 3 or 4 of the Act renders an offender a 'serious sexual offender' for the purposes of the Act, but that only marks the beginning of the discretionary exercise.¹⁵

99 The expression 'sexual safety' is not defined in the Act. Trying to give the expression its ordinary meaning, it seems to me sexual safety connotes, in part, intimacy free of coercion and violence. It is a wide enough concept to encompass

¹⁴ Ibid n8 at [42].

¹⁵ See s 8(3) – the definition differs from the definition of that phrase in the *Sentencing Act 1991*.

the safety of women who could potentially form an intimate relationship with you and, in that context, soon find themselves subject to physical, psychological and potentially sexual abuse. That has been the fate of at least three women with whom you have formed relationships with, for which you have been criminally prosecuted. There is in my view a real risk that could happen again. On that basis, I am satisfied beyond reasonable doubt that you pose a real risk to the sexual safety of women.

100 The second stage of the test requires me to balance the serious consequences for an offender in having to submit to the registration regime. I accept that the requirements are onerous.¹⁶ Beyond those requirements, there is the stigma likely to attach to the status of a registered sex offender. However, I am satisfied that the nature of the risk you pose, the degree of likelihood of that risk being realised and the harm that would likely result, outweighs those consequences.

101 It follows that I will grant the Crown's application and order that you comply with the reporting obligations under the Act. Pursuant to s 34(1)(c)(ii) & (4), the period of reporting will be for the rest of your life.

Sentence

102 Taking all relevant matters into account you will be sentenced as follows:

103 On Charge 1, you were found not guilty.

104 On Charge 2, criminal damage, you will be convicted and sentenced to a term of imprisonment of 3 months.

105 On Charge 3, rape, you will be convicted and sentenced to a term of imprisonment of 6 years and 6 months.

106 On Charge 4, recklessly causing injury, you will be convicted and sentenced to a term of imprisonment of 15 months.

107 On Charge 5, make threat to kill, you will be convicted and sentenced to a term of imprisonment of 12 months.

¹⁶ See *Sayer* at [104].

- 108 On Charge 6, common assault, you will be convicted and sentenced to a term of imprisonment of 9 months.
- 109 On Charge 7, common assault, you will be convicted and sentenced to a term of imprisonment of 9 months.
- 110 On Charge 8, stalking, you will be convicted and sentenced to a term of imprisonment of 2 years and 6 months
- 111 On Charge 9, common assault, you will be convicted and sentenced to a term of imprisonment of 9 months.
- 112 On Charge 10, make threat to kill, you will be convicted and sentenced to a term of imprisonment of 12 months.
- 113 On Charge 11, make threat to kill, you will be convicted and sentenced to a term of imprisonment of 12 months.
- 114 On the two related summary offences, relating to contravening conditions of bail, you will be convicted and discharged.
- 115 I will direct that one month of the sentence imposed on Charge 2, five months of the sentence imposed on Charge 4, two months of the sentence imposed on Charge 5, two months of the sentence imposed on Charge 6, two months of the sentence imposed on Charge 7, 12 months of the sentence imposed on Charge 8, two months of the sentence imposed on Charge 9, two months of the sentence imposed on Charge 10 and two months of the sentence imposed on Charge 11 be served cumulatively upon the sentence imposed on Charge 3, rendering a total effective sentence of 9 years' imprisonment.
- 116 I will fix a non-parole period of 7 years' imprisonment.
- 117 I will declare pursuant to s 18 of the *Sentencing Act 1991*, that you have served 892 days of that sentence by way of pre-sentence detention. I will cause that declaration to be entered into the records of the court.
- 118 I will further declare pursuant to s 6AAA of the Act that but for your plea of guilty, I would have sentence you to a total effective sentence of 10 years and six months' imprisonment, with a non-parole period of 8 years' imprisonment.