SVENSON BARRISTERS

Criminal Law Update – 2021 in Review

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&

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Contents

Conviction Appeals

Date	Citation	Judge(s)	Summary
5 February 2021	Spurritt v The Queen [2021] VSCA 7	Beach, Kaye and Niall JJA	Appeal allowed. Verdicts of acquittal entered. Charges of indecent assault. Complex factual analysis. A number of issues that significantly affected the credibility and reliability of evidence of complainants and complaint witnesses. Crown accepted that if the COA upheld some of the grounds on the basis that the conviction of the applicant on the charges that were the subject of those grounds was not reasonably open to the jury, it would follow that there was a significant risk that, in considering the remaining charges, the jury might have used the tendency evidence in a manner which was not reasonably open to it (at [180]).
5 February 2021	Jamie Holyoake v The Queen [2021] VSCA 10	Kaye, McLeish and Niall JJA	Conviction and sentence appeal – application refused. Error in the prosecution's opening address. COA not persuaded that it could have resulted in any prejudice to the applicant's case. Error was not repeated or referred to again (at [18]).
9 February 2021	Lucciano (a pseudonym) v The Queen [2021] VSCA 12	McLeish, Niall and T Forrest JJA	Appeal allowed. Verdicts of acquittal entered. After being sued by the complainant in relation to historical child sex offending, the applicant gave evidence in that civil trial. Following the outcome of civil proceedings, the applicant was arrested and charged by police. He gave evidence at trial denying the alleged conduct.

			The COA accepted that had the applicant been aware that criminal charges were imminent, he would have had a persuasive argument to stay the civil proceedings. Such a principle is not novel – and there is a risk of prejudice in the defence of the criminal trial, as the civil proceeding would operate as a 'dress rehearsal' or 'test run' for the criminal trial (at [24]) Here, the risk of prejudice had come to pass such that the criminal trial was so unfair that there has been a substantial miscarriage of justice (at [25]). The COA accepted that there was presumptive prejudice (because he was locked into evidence given in the civil trial) and actual prejudice (transcript from the civil trial was used in preparing for the criminal trial). The COA expressed some "disquiet" at the apparently increasing frequency with which cases involving delays in the order of 40 to 60 years are coming before the Court (at [48]).
10 February 2021	Johnston v The Queen [2021] VSCA 11	Maxwell P, Beach and Niall JJA	Appeal allowed in part. Convictions on charges 5, 8 and 9 set aside – retrial directed. Convictions on other charges unaffected. G1: trial judge ruled two witnesses were unavailable because they were "mentally or physically unable" to give evidence. Decision made on written documents and reports only. Documentary material fell well short of establishing that witnesses were not available. G2: Course adopted by trail judge exemplary. Directions issues in a logical sequence in a question format. No issue with directions or format.

10 February 2021	Damian Webster (a pseudonym) v The Queen [2021] VSCA 14	Beach, McLeish and Niall JJA	Leave refused. Acquitted by jury on charges 2, 3 and 4. Convicted by jury on charges 1, 5, 6 and 7. No inconsistency in jury verdicts. COA emphasised that test is one of logic and reasonableness (relying on *Woods v The Queen* [2019] VSCA 259). No evidence of inconsistency present – on each of the charges on which the applicant was convicted, there was evidence that supported the complainant's account (at [44]).
16 February 2021	Matthews v The Queen [2021] VSCA 20	Kaye and Niall JJA	Leave granted. Appeal dismissed. Jury verdicts – guilty on criminal damage, aggravated burglary, intentionally causing injury (x2), recklessly causing injury (x2) and common assault. TES of 7 years' imprisonment with NPP of 4 years 10 months. G1: trial judge erred in failing to discharge the jury – 2 jurors discharged, trial proceeded with 10 jurors only. Principles from *Carson v The Queen* [2019] VSCA 317 applied. No errors found. Appeal against conviction of common assault refused. Appeal against sentence refused.
17 February 2021	Parker (a pseudonym) v The Queen [2021] VSCA 22	Beach, Emerton and Sifris JJA	Leave granted. Appeal allowed. Order for retrial. Child sex offending and incest charges. Unedited transcript from pre-recorded evidence accidentally given to the jury. Crown conceded that this, while plainly inadvertent, resulted in a substantial miscarriage of justice.

18 March 2021	Shahul Thasthahir v The Queen [2021] VSCA 62	Maxwell P, Niall and T Forrest JJA	Importing a commercial quantity of a border controlled substance. Applicant picked up luggage at the baggable carousel. Gave evidence that he was tired and picked up the incorrect cases by mistake – attendance at the airport the next day was explained as forgetting a piece of oversized luggage (at [4]). Court viewed the CCTV footage and found it was open to the jury to consider that the applicant took care with his baggage selection and independently formed the same conclusion (at [19]). Strong and compelling circumstantial case (at [20]) – capable of demonstrating BRD that the applicant knew the suitcases contained drugs (at [23]). No error of law in the trial judge's answers to the jury about whether it was incumbent on the prosecution to prove that the applicant collected all three suitcases filled with drugs (at [26]).
29 March 2021	Meade v The Queen [2021] VSCA 74	Beach, Kennedy and Whelan JJA	Application for leave to bring second appeal – Criminal Procedure Act 2009 s 326A – Murder conviction – Fresh and compelling evidence of alibi Not satisfied that the evidence, of a deceased fellow prisoner, is reliable.
16 April 2021	Nwagbo v The Queen [2021] VSCA 93; 288 A Crim R 516	Priest, Niall and T Forrest JJA	Appeal allowed. Retrial. Consideration of the role of the judge in an adversarial system (at [22]-[37]). Summary of principles at [38]). Examination of nearly 1,100 pages reveals difficult relations between the judge and defence counsel, a high level of judicial intervention, and, in our view, the very real possibility that the jury may have concluded that the judge took on the role of a party to the proceeding, filling in gaps in the

			prosecution case, and, at times, taking over cross-examination of the applicant or his expert witness (at [42]).
21 April 2021	Zhao v DPP (Cth) [2021] VSCA 101[1]	Kyrou and Kaye JJA	Crown conceded. Conviction quashed. Statutory construction – meaning of the phrase "deal with". First, it must be proven that the accused person dealt with the substance that is the subject of the charge. Accordingly, it is not possible for an accused to deal with the substance, where the conduct of the accused, relied on by the prosecution, occurred subsequent to the substitution of a different substance by the police. Secondly, the requisite dealing with the substance must be in connection with the importation of that substance. That requirement excludes conduct by an accused that is materially removed from the importation of the particular substance (at [14]). The trial was not conducted on the basis of the correct construction of the phrase 'deal with the substance' or 'import', and appropriate directions not given (at [19]).
23 April 2021	Mathieson v The Queen [2021] VSCA 102	Priest, Kyrou and T Forrest JJA	Appeal allowed. Retrial ordered. Combination of errors resulted in a miscarriage of justice. G1: later directions did not correct the earlier directions which had effectively deprived the applicants of their principal defence (at [37]). G2: problematic grounds about the reasonable hypothesis (at [43]). G3: the judge was wrong to instruct the jury simply to put aside those aspects of a "pivotal" witness's evidence that they disbelieved (at [55]).

[1] Subsequent application in Chen v The Queen [2021] VSCA 143 (26 May 2021).

			G4: charge failed adequately to put to the jury the case for the applicants in a fair and balanced manner (if at all) (at [63]).
4 May 2021	Ankur v The Queen [2021] VSCA 110; 96 MVR 1	Priest, Kaye and T Forrest JJA	Dangerous driving causing death. Applicant's explanation that before the accident he had engaged cruise control and it had stuck – Whether judge's direction to jury that applicant's expert evidence fell away upon rejection of applicant's explanation impermissibly reversed onus of proof Principles as the drawing of conclusions by a jury in a trial where an accused relies on a hypothesis consistent with innocence (*Davies v The Queen* [2019] VSCA 66, at [37]). Judges charge on this issue did not correctly conform with those principles (at [38]). *However*, with some reservation, viewed in the context of the directions which preceded it, Court was not persuaded that the impugned direction could reasonably have been understood by the jury to have reversed the onus of proof (at [51]). Principles in *McKell v The Queen* [2019] HCA 5 about a judge's broad discretion to comment on the facts of the case, and in *Mathieson v The Queen* [2021] VSCA 102 considered. Judge's charge failed to comply with principles in *McKell* (at [77]). There was a substantial miscarriage of justice – retrial.
4 May 2021	Clifton (a pseudonym) v The Queen [2021] VSCA 111	Priest, Kaye and T Forrest JJA	Comments made by the prosecutor should not have been made. However, given the proper directions given to the jury by the judge, there was no miscarriage of justice (at [41]-[45]).
11 May 2021	Bolton (a pseudonym) v The Queen [2021] VSCA 117	Niall JA	Application for leave to appeal against conviction was about eleven months out of time. Delay was inordinate and not adequately explained. Real interest in finality (at [37]).

26 May 2021	Chen v The Queen [2021] VSCA 143	Kyrou and Kaye JJA	See Zhao v DPP (Cth) [2021] VSCA 101 above. Leave to appeal granted – Appeal allowed – Convictions set aside – Judgments of acquittal entered.
3 June 2021	Bergman (a pseudonym) v The Queen [2021] VSCA 148; 289 A Crim R 503	Maxwell P, Kaye and McLeish JJA	Judge's directions clearly complied with the applicable statutory provisions as to consent and belief in consent (at [40]). Directions were exemplary (at [42]). The evident purpose of the statutory direction — to consider 'what the community would reasonably expect' — is to highlight the objective quality of the 'no reasonable belief' element of the offence of rape. The reference in the direction to the expectations of the community illuminates the idea of reasonableness as a general standard, to be distinguished from the subjective view of an accused person (at [42]). It is for the jury to so determine (at [43]). Leave granted on sentence appeal. Youth and disadvantaged upbringing. 6 years with NPP of 4 years, reduced to 4 years and 4 months with NPP of 2 years and 4 months.
16 June 2021	AK v The Queen [2021] VSCA 165	Maxwell P, T Forrest and Walker JJA	Murder conviction. Whether jury verdict unreasonable or cannot be supported having regard to the evidence – Whether open to jury to find intention to cause really serious injury Whether applicant intended to cause 'really serious injury' or 'serious injury' – Meaning of 'really serious injury' for jury to determine

			Jury was well-placed to determine this dispute ([22]-[23]). NO doubt as to the conviction.
2 July 2021	Kavanagh v The Queen [2021] VSCA 193	Maxwell P, McLeish and T Forrest JJA	Single complaint. Appellant convicted on one of four charges of rape – whether inconsistent verdicts. Leave granted, but appeal dismissed. *MacKenzie v The Queen* (1996) 190 CLR 348, applied – *R v Markuleski* (2001) 52 NSWLR 82, considered. Detailed analysis of these principles. It is a "significant step" to conclude that the reason for the jury's decision to acquit on one count is that they were so unable to accept the complainant's evidence on that count that the complainant's evidence was incapable of founding a conviction on another count (at [52]).
14 July 2021	Harris (a pseudonym) v The Queen [2021] VSCA 197	Priest, T Forrest and Emerton JJA	Trafficking in a drug of dependence and trafficking in a large commercial quantity of a drug of dependence (heroin). Convictions quashed and retrial ordered. A substantial miscarriage of justice was occasioned by the judge's failure adequately to identify for the jury's consideration the particular facts and circumstances that the prosecution relied upon to support inferences key to its case, and which they had to find proven in order to convict (at [48]). Consideration of the common law obligations of a judge in a criminal jury trial in *R v Thompson* (2008) 21 VR 135 and *R v AJS* (2005) 12 VR 563. Sections 65 and 66 of the JDA do little more than reflect the common law (at [66]).
19 July 2021	Derek Farrod (a pseudonym) v The Queen [2021] VSCA 199	Priest, Kyrou and Niall JJA	One charge of sexual penetration of a child under 16 years. Whether guilty verdict unsafe and unsatisfactory.

			Forensic decision made by counsel. The applicant was in possession of the evidence upon which he now seeks to rely to impugn the verdict but he made a forensic decision, following both extensive discussion in court and 'long conference' with his counsel, not to adduce it at the trial (at [44]). No basis to impugn the verdict.
30 July 2021	Ashby (a pseudonym) v The Queen [2021] VSCA 209	Priest, Beach and Emerton JJA	No miscarriage of justice. Conviction appeal refused. However, SORA order wrongly made – set aside. Criticisms of defence counsel at trial ([47]-[52]). But did not give rise to a miscarriage of justice.
5 August 2021	Hinch (a pseudonym) v The Queen [2021] VSCA 214	Priest, Beach and Emerton JJA	Conviction appeal. Complainant's evidence did not found a basis for digitally penetration of her by the applicant (at [32]). The hand gestures in the VARE, roughly contemporaneous with her answer, could not sensibly be interpreted by a reasonable tribunal of fact as signifying penetration (at [35]). Substituted conviction on sexual assault (at [39]).
20 August 2021	Hersi v The Queen [2021] VSCA 224	Kyrou, McLeish and Emerton JJA	Identity in issue. Logical path to verdict which did not involve speculation – Circumstantial evidence stronger for charges on which jury convicted. Pathway involved starting with charges 5 and 6, rather than charge 1 (as urged in submissions by the applicant) (at [61]).
23 August 2021	Bufton v The Queen [2021] VSCA 228; 97 MVR 190	Priest, Kyrou and McLeish JJA	Murder conviction – verdict not reasonable. Complex factual analysis.

			Sentence manifestly excessive – having regard to the appellant's relatively blameless life and is "crushing" (at [83]).
31 August 2021	Bolton (a pseudonym) v The Queen [2021] VSCA 237	Kyrou and Kennedy JJA	Inordinate delay in brining the appeal and failure to satisfactorily account for it (at [22]). Ground reasonably arguable and appropriate to grant leave (application not fully heard).
27 August 2021	Hutchison v The Queen [2021] VSCA 235; 97 MVR 240	Kyrou, Emerton and Sifris JJA	Following guilty pleas, applicant submitted that he should not have been convicted because there was impermissible double punishment between charge 1 (Recklessly exposing emergency worker to risk by driving) and charge 3 (Recklessly causing injury). Conduct giving rise to the two charges is not a single, inseparable act (at [55]).
16 September 2021	Goodfellow v The Queen [2021] VSCA 262v	Niall, Emerton and Sifris JJA	Appeal allowed. Convictions set aside. Four men, who had arrived in two vehicles, kicked in a front door, confronted the residents and stole various items. One dropped his grey hoodie while running away. What linked the applicant to the crime? A palm print found on the outside rear window of one of the cars, an empty medication bottle with his name (dispensed some days earlier), and the existence of the applicant's DNA (in mixed combination) on the grey hoodie. Must the jury have had a doubt? (per *Libke*) Court found that the case put the applicant in or near the car and in or near the hoodie – but does not time him to the night in question (at [67]).

20 October 2021	James Leslie Longley v The Queen [2021] VSCA 288	Priest, Kyrou and T Forrest JJA	Culpable driving causing death. Application refused. Delay of 7 months in filing appeal considered wholly unacceptable and explanation is highly unsatisfactory (at [10]).
16 November 2021	Henderson v The Queen [2021] VSCA 312v	Priest, Kyrou and T Forrest JJA	Sexual assault and sexual penetration of child under 12 – Prosecution case dependent on complainant's account – Whether complainant credible and reliable — Jury should have had a reasonable doubt about guilt – Appeal allowed "In our view — and making due allowance for her age — SW was an unsatisfactory witness, whose evidence lacked both credibility and reliability." (at [90]). Counsel should not accept a brief to prepare court documents if she or she cannot complete the work in a timely manner (at [12]). Explanations must be frank and thorough (at [13]). Judge's direction to the jury was impeccable. The proposed ground was without merit (at [32]-[33]).
13 December 2021	Cavanaugh (a pseudonym) v The Queen [2021] VSCA 347	Maxwell P, Kaye and Walker JJA	Appeal dismissed (Maxwell P and Walker JA). Kaye JA would have granted the appeal. Issues about delay in brining the appeal before the Court. Complex factual analysis as to whether the evidence supported the conviction. Applicant submitted that there were "compounding improbabilities" – rejected by majority. NB: defence counsel do not need to comply with *Browne v Dunn* to the extent that they need to establish the *non-existence* of evidence, not elicited by the prosecution (at [145] and [239]- [240]).

17 December 2021	Hollingsworth v The Queen [2021] VSCA 354	Niall and Kennedy JJA and Macaulay AJA	Family violence matter. Serious injuries to baby. Volatile family situation. Did the applicant cause the injuries? Medical expert considered that the nature and severity of the injuries could not be explained as having occurred by accident (at [33]). Pre-trial argument about previous family violence episodes. Applicant argued that it enlivened impermissible tendency reasoning. Discussion of the difference between context and tendency evidence (at [101]-[106]). Court accepted it was admitted as context evidence (at [107]). Prosecution should not be confined to presenting a distorted picture of family life (at [110]). Prosecutor has a duty to put forward evidence of an accused's defence – here, the accused blamed the mother (at [115]). Evidence was admissible and not excluded by the tendency rule because it was not led for a tendency purpose (at [131]). No doubt as the applicant's guilt.
17 December 2021	Henshaw (a pseudonym) v The Queen [2021] VSCA 356	Priest, Kyrou and Whelan JJA	Trial by judge alone. Appeal allowed. Verdict of acquittal entered. G1: Ms C's evidence was of real importance. It was admitted by agreement, however, trial judge did not accept the truth of certain statements – reasons were deeply flawed (at [41]). The judge should have accorded procedural fairness if minded to depart from what were essentially agreed facts (at [50]). Not open to the judge to reject Ms C's evidence about hearsay representations (at [58]).

			Whelan JA dissenting on the outcome – would have ordered a retrial.

Sentence Appeals

Date	Citation	Judge(s)	Summary
8 February 2021	James Cardona v The Queen [2021] VSCA 9	Maxwell P and Beach JA	Application refused. Reckless conduct endangering persons and theft of a motor vehicle. Police pursuit. TES of 15 months with NPP of 9 months. Not reasonably arguable. Extension of time refused.
8 February 2021	Dowlat Soliman v The Queen [2021] VSCA 8	Maxwell P and Beach JA	Application refused. TES of 20 months imprisonment, with recognisance after 5 months. One charge of obtaining financial advantage by deception from Services Australia. Misstated income on 123 occasions. Received $67,853 when entitled to only $2,555. Serious case of defrauding the Commonwealth – calculated with an element of greed. Such findings not challenged.
11 February 2021	Roma v The Queen [2021] VSCA 16	Ferguson CJ and Beach JA	Application refused. Rape (4 charges), sexual assault (2 charges), false imprisonment and making threat to kill. TES of 16 years with NPP of 12 years. Plea of not guilty. Prospects of rehabilitation conceded as "not very good" and found to be "poor". General and specific deterrence loomed large. Serious example of rape – applicant physically preyed upon a young women and subject her to hours of sexual abuse. Orders for cumulation cannot be considered in isolation. The TES must be focused on in light of all of the offending and personal circumstances (at [40]). Sentence and orders for cumulation not manifestly excessive.

11 February 2021	Sasa Dukic v The Queen [2021] VSCA 18	Ferguson CJ and Beach JA	Application refused. Trafficking in large commercial quantity of methylamphetamine. TES of 11 years and 10 months' imprisonment, with NPP of 8 years.
16 February 2021	Ngo v The Queen [2021] VSCA 21	Kaye and Niall JJA	Application refused. Conspiracies to traffick in a commercial quantity of controlled drugs (methamphetamine and heroin). Proceeds of crime charges. TES of 18 years and 8 months, with NPP of 12 years and 10 months. G1: applicant put in issue seven overt acts on plea. By doing so, sentencing judge entitled to conclude that it was a "qualified" plea. Less mitigatory weight to be attributed to the plea because of the unsuccessful contest (at [39]). Sentences not manifestly excessive. Restated principles from *Lieu v The Queen* [2016] VSCA 277 re large scale drug trafficking. Very serious offending with little mitigating circumstances. Significant weight to general deterrence.
23 February 2021	Liam Stanger v The Queen [2021] VSCA 25	Maxwell P, Kaye and T Forrest JJA	Leave granted on papers. Appeal dismissed. Intentionally causing bushfires. TES of 3 years' imprisonment with NPP of 2 years. Appellant suffered from childhood neurodevelopmental disorder, affecting his thought processes and diminishing his capacity to exercise appropriate judgment, make clam and rational choices and to process feelings of anger (at [37]). Substantial criminal history. Fires lit in a fire danger period – unsophisticated but purposive fire lighting behaviour. High level of danger associated with bushfires in Victoria and elsewhere in Australia. A person who deliberately lights such a fire much be well aware of the potential nature and extent of the harm (at [58]). Number of serious aspects of offending

			and premeditation. Current sentencing practices are only one of a number of factors (at [74]). Appeal dismissed.
25 February 2021	Kamal v The Queen [2021] VSCA 27	Ferguson CJ and McLeish JA	Application for extension of time refused. Guilty plea to one charge of blackmail. TES of 3 years with NPP of 2 years. Applicant knowingly made demands of victims for money in exchange for a missing phone which contained images of their dying daughter. The victims' daughter passed away and the applicant still made demands for money. Offending was "cruel and repellent" and demanded denunciation (at [61]). No error shown and not manifestly excessive.
25 February 2021	Navaratnam v The Queen [2021] VSCA 26; 95 MVR 191	Ferguson CJ and McLeish JA	Appeal dismissed. Appellant pleaded guilty to reckless conduct endangering life, and related PCA driving offence [0.256]. Appellant involved in major collision on the Western Ring Road. TES of 2 years with NPP of 12 months. COA considered that appellant's suicidal ideation arose from voluntary alcohol consumption. At [29], COA considered that • promise purpose of self-harm or death by suicide will form part of any factual matrix but does not, in and of itself, leave to a reduction in the objective seriousness of the offending • levels of recklessness may be reduced – depend on the nature and severity of the condition • intoxication appears to have led to the deterioration in the appellant's mental state. The appellant knew this would be the effect.

			• Rehabilitation is always a consideration but cannot "swamp" other considerations because of thoughts of suicide. Emphasised general observations in *Tedford v The Queen* [2020] VSCA 71 at [35], in the selfish disregard of the risks imposed on others to satisfied suicidal ends – principles of general deterrence must assume real weight.
10 March 2021	Noori v The Queen [2021] VSCA 46	Priest, Niall and T Forrest JJA	Bourke street – drove into the crowd – reckless no less serious than intentional – depends on circumstances Court rejected the contention that the applicant's crime was less serious because it was characterised as reckless, rather than intentional, murder. No mitigation flowed from that fact (at [49]). A similar conclusion was reached in *Aiton* (1993) 68 A Crim R 578 (Phillips CJ, Crockett and Vincent JJ). Should not be thought that a plea of guilty alone in al lcases will automatically result in something less than the maximum sentence being imposed (at [53]). The enormity of the applicant's crime, when considered against the limited mitigation to be found in his mental condition and guilty plea, well justified life imprisonment (at [59]).
11 March 2021	Natasha Kovacevic v The Queen [2021] VSCA 49	Kaye JA	Application for leave against sentenced determined by a single judge. Leave refused. Mother and child in custody (at [5]).
15 March 2021	Micah Packard (a pseudonym) v The Queen [2021] VSCA 56	Kaye JA	Application for leave against sentenced determined by a single judge. Leave refused.

			Issues of *forgiveness* – principles in *Hester* [2007] VSCA 298 considered. Judge properly took into account that the victim's forgiveness would motivate the applicant to rehabilitate (at [46]).
23 March 2021	Peter Thurlow v The Queen [2021] VSCA 71	Priest and Kaye JJA	Appellant offered to plead guilty at a very earl stage of two charges on which e was ultimately convicted. It was erroneous of the judge to treat the offer, that was ultimately accepted, as a court door offer (at [36]). *Renzalla* time issue – 'dead time' is not a mathematical exercise. Principle is based on fundamental considerations of fairness, as well as on the principle of totality (at [42]). Failure of the sentencing judge to take this into account was an error of law and resulted in an unfair and unjust sentence (at [43]).
29 March 2021	Jackson Balshaw v The Queen [2021] VSCA 78	Kaye and T Forrest JJA	Young person sentenced as an adult. Sentenced to 5 years imprisonment with NPP of 2 years and 10 months. Reliance on factors in *R v Mills* [1998] 4 VR 235. Sentencing judge in error not to conclude that a custodial sentence of no more than four years sufficient (at [63]). Re-sentenced to detention in a Youth Justice Centre for 3 years and 10 months.
7 April 2021	DPP v Beck [2021] VSCA 88 (7 April 2021)	Maxwell P, T Forrest and Emerton JJA	Crown appeal – Rape (x2) – standard sentence scheme – manifest inadequacy. 6 years on each charge is manifestly inadequate, as is the TEST of 6 years and 6 months (at [53]). Sentences fail to give adequate weight to the seriousness of the offending or to the need for specific deterrence and community protection.

			Prospects of rehabilitation described by the COA as "poor" (at [54]). Resentenced to TES of 9 years, with NPP of 6 years.
12 May 2021	Salazar v The Queen [2021] VSCA 125 Palmisano v The Queen [2021] VSCA 124	Maxwell P and McLeish JA	Parity. Attempting to possess a commercial quantity of a border controlled drug (cocaine). Crown concession that differential not reasonably open. *Roe v The Queen* [2021] VSCA 54 applied
13 May 2021	Butler (a pseudonym) v The Queen [2021] VSCA 129	Priest and T Forrest JJA	Two instances of offending – Wollongong NSW and Portland Victoria. No overlap between sentences – split in sentencing hearings across States. Impugned sentence is manifestly excessive (at [47]). Application of principle of totality (at [49]).
25 May 2021	Gayed v The Queen [2021] VSCA 141	Priest and T Forrest JJA	Trafficking in commercial quantity of 1,4-butanediol. 7 years imprisonment with NPP of 4 years and 6 months. G2: alleged a sentencing error in applying the principles outlined in Gregory v The Queen (2017) 268 A Crim R 1 in light of *DPP v Dalgliesh* (2017) 262 CLR 428. Consideration of the intersection of these two principles as explained in *Condo* [2019] VSCA 181, [20] (Maxwell P, T Forrest and Weinberg JJA), and as recognised in *Lytras* [2020] VSCA 150.
25 May 2021	Eustace v The Queen [2021] VSCA 142	Priest, Niall and T Forrest JJA	Murder – repeatedly stabbed wife with knife. 25 years' imprisonment with NPP of 20 years. Appeal allowed and resentenced to 21 years' imprisonment with NPP of 16 years. Consideration of *Dalgliesh*. Considering all matters, sentence is manifestly excessive (at [28]).

11 June 2021	DPP v Herrmann [2021] VSCA 160	Maxwell P, Kaye, Niall, T Forrest and Emerton JJA	Rape and murder of Aiia Maasarwe. Crown appeal refused. Sentence of 36 years' imprisonment with NPP of 30 years within the range reasonably open to the sentencing judge (at [8]). Moral culpability reduced because of two distinct, but closely related factors – profound childhood deprivation and trauma, and severe personality disorder (at [12]). Consideration and application of *Bugmy* principles (at [36]-[40]). Analysis of the general and specific approaches in *Bugmy*, considered in *Drake* (at [41]). More specific approach relates to a sentencing judge being satisfied, on the basis of expert evidence, about a nexus between the offending and childhood deprivation (at [42], quoting *DPP v Snow*)
18 June 2021	Worboyes v The Queen [2021] VSCA 169	Priest, Kaye and T Forrest JJA	*Sentencing discount in COVID-19 pandemic circumstances.*
18 June 2021	Schaeffer v The Queen [2021] VSCA 171	Priest, Kaye and T Forrest JJA	
18 June 2021	Chenhall v The Queen [2021] VSCA 175	Priest, Kaye and T Forrest JJA	
29 June 2021	DPP v Tullipan (a pseudonym) [2021] VSCA 191	Maxwell P, Priest and T Forrest JJA	Crown appeal. Incest – course of conduct charge. Extremely serious offending. TES of 9 years and 6 months with NPP of 6 years and 6 months Increased to 16 years imprisonment, with NPP of 11 years and 6 months.
23 July 2021	Kepkey v The Queen [2021] VSCA 202	Kyrou JA	Application for leave against sentenced determined by a single judge. Leave refused.

			Principles relating to family hardship as a sentencing consideration (caused by a result of incarceration) considered and explained (at [37]-[46]).
6 August 2021	Director of Public Prosecutions v Mehmet Kumas [2021] VSCA 215	Maxwell P, T Forrest and Walker JJA	Crown Appeal – Large commercial quantity of methylamphetamine and cocaine – 1.9 times LCQ threshold Appeal increased from 10 years with NPP 6 years to 14 years' imprisonment with NPP of 10 years. Both general and specific deterrence, and community protection, were significant sentencing considerations (at [4]).
30 September 2021	Director of Public Prosecutions v Currie; Director of Public Prosecutions v Daniels (a pseudonym) [2021] VSCA 272	Beach, McLeish and Walker JJA	1st issue: does construction of the CPA require the Director to sign an appeal personally (i.e., by hand)? 1st answer: leave to cross-examine the Director refused. A notice of appeal is valid if it bore the Director's signature, in handwriting or a signature affixed by some physical or electronic means (at [24] and onwards). 2nd issue: whether the Director had the necessary state of mind to commence the appeal? 2nd answer: this is not justiciable (at [65] and onwards). Director's appeal against Daniels' sentence dismissed. Appeal against Currie's sentence allowed, in part.
15 November 2021	Konidaris v The Queen [2021] VSCA 309	Emerton and Osborn JJA	Guilty pleas to burglary, and aggravated burglary charges. TES of 6 years and NPP of 4 years. Issues of the sentencing judge denying the appellant procedural fairness. Sentencing judge stepped outside the

			judicial role and acted as an adjudicator to obtain a previous report to fill a gap in the evidence on a matter of controversy (at [87]-[89]). Resentenced to TES of 5 years and NPP of 3 years.
30 November 2021	Thornton v The Queen [2021] VSCA 325	Kyrou and Kennedy JJA	Applicant convicted of intentionally causing serious injury to and rape of fellow prisoner. TES of 9 years and 6 months with NPP of 6 years and 9 months. Leave to appeal refused. Court accepted that delay was unexplained and substantial in prosecuting the matter. However, Court not persuaded that sentencing judge error nor that any different sentence would be imposed (at [15]).
17 December 2021	Director of Public Prosecutions v Bowen [2021] VSCA 355	Maxwell P, Priest, McLeish, T Forrest and Walker JJA	Crown Appeal. General importance about the application of the principle of totality in a particular class of case. Where the offending before the sentencing court breached the parole which the offender was undergoing at the time, resulting in a cancellation of parole and a return to custody. When the court comes to impose sentence for the breach offending, does the principle of totality require the court to take into account the entire period which the offender has served (or will have served) under the original sentence, or just the reclaimed period? (at [4]) The sentencing court must ask itself whether the combined effect of the original sentence and the proposed breach sentence is (dis)proportionate to the total criminality involved in the two sets of offences. Adopting this approach also removes the artificiality of comparing only part of the original sentence (the reclaimed period) with the full criminality involved in the prior offending (at [42]).

			The decisions in *McCartney* and *Waugh* should no longer be followed (at [45]).
22 December 2021	Director of Public Prosecutions v Conos [2021] VSCA 367	Maxwell P, Kaye and Sifris JJA	Crown Appeal - Sexual penetration of child under 16 – Grooming – Use of carriage service to groom and to transmit indecent communications – Three 15-year-old victims – Rolled-up charges. TES of 6 years and 6 months, with NPP of 4 years and 6 months. Appeal allowed. Resentenced to 10 years' imprisonment and NPP of 7 years. Individual orders and cumulation was manifestly inadequate – did not adequately reflect either the objective gravity of the offending or TC's very high moral culpability (at [72]).

Interlocutory Appeals

Date	Citation	Judge(s)	Summary
21 January 2021	Hurst (a pseudonym) v The Queen [2021] VSCA 3	Niall and Emerton JJA	Application to review refusal to certify refused. Applicant sought leave to cross-examine complainant about two comments on her Facebook page and one 'like' of another Facebook page – Trial judge refused leave.
18 March 2021	Bradley (a pseudonym) v The Queen [2021] VSCA 63; 63 VR 423	Maxwell P, McLeish and Sifris JJA	Application for review of certification refused. Issue where child complainants interviewed by police in presence of intermediary. Sensory aids were used during the interviews. Applicant contended that complainants' answers may have been influenced by what the intermediaries said or did, and the sensory toys. Court found that there was no basis for suggesting that the intermediaries had private conversations with the complainants (at [13]). Supported the trial judge's finding that there is nothing in the VAREs to indicate, or provide any evidentiary foundation to support any suggestion of deliberate attempts to influence the evidence of the complainants (at [12]).
16 April 2021	Snyder (a pseudonym) v The Queen [2021] VSCA 96	Priest, Kyrou and Kaye JJA	Complainant deceased — Whether complainant's statements to police and evidence in committal proceedings admissible. Application for leave to appeal against interlocutory ruling admitting such evidence was refused.
23 March 2021	Hooper v Director of Public Prosecutions (Vic) [2021] VSCA 68, 288 A Crim R 211	Kyrou, Kaye and Emerton JJA	OHS Act – Application for trial by judge alone Consideration of the phrase "interests of justice" in the context of s 420D of the CPA (at [33]-[48]) – has a wide connotation encompasses the interests of each party, the

			community's interests in the efficient and just resolution of criminal trials, and the public interests in the fair and efficient conduct and adjudication of criminal trials (at [41]). Issue of delay in the current pandemic is of significant relevance (at [45]). Judge erred in not taking into account the broader interest of justice (at [55]). Not apparent that a jury would enjoy any benefit over a judge in assessing the allegations against the concept of "objective community standards" (at [65]).
31 March 2021	Dural (a pseudonym) v The Queen [2021] VSCA 82	Maxwell P and Beach JA	Bias – Actual bias – Apprehended bias The self-represented litigant had legitimate complaint about a number of procedural issues. *However*, such complaints did not equal that the trial judge was bias or that there was an apprehension of bias (at [39]). Trial judge was correct in refusing to disqualify himself (at [44]).
4 June 2021	Ruiz (a pseudonym) v The Queen [2021] VSCA 154	Priest, Kyrou and T Forrest JJA	Applicant pleaded guilty to cultivating not less than a commercial quantity of cannabis. Application for a change of plea was refused. Trial judge refused certification (at [4]). Application to review the certification decision is incompetent (at [14]) because the was not a trial as per s 297 of the CPA (at [13]).
7 June 2021	Slater (a pseudonym) v The Queen [2021] VSCA 153; 63 VR 526	Priest and Sifris JJA	Hearsay evidence. Appeal allowed. Documents not admissible. Prosecution sought to rely on information from computer services retrieved by the FBI. The FBI provided these documents to Victoria Police. The issue was that the FBI agent purporting to give evidence about FBI processes did

			not personally carry out the process. His role was limited to directing or requesting the process be undertaken. The evidence is documentary hearsay – the documents were based on information given to the FBI agent by others (at [34]). The Crown did not rely on the business records exception (at [41]). No other exception to the hearsay rule available.
29 July 2021	Fleming (a pseudonym) v The Queen [2021] VSCA 206	Priest, Kyrou and Niall JJA	Indictment in pending trial contains charges of both murder and rape — Severance refused by trial judge. Appeal allowed. Consideration of "related offences" under clause 5(10 of Schedule 1 to the CPA ([58]-[60]). Not founded on the same facts (at [73]).
24 August 2021	Lindsey (a pseudonym) v The Queen [2021] VSCA 230	Maxwell P, Kyrou and Niall JJA	The Crown case is founded on two sets of recorded telephone conversations. The first set comprises conversations between the applicant and various individuals, including a fried. The second set comprises conversations to which the applicant was not a party (at [4]). The argument on admissibility centred on what is known as the 'co-conspirators rule'. The rule applies where evidence is sought to be led against an accused person, to prove his/her participation in an alleged conspiracy, of things done or said outside the accused's presence by other alleged co-conspirators. The rule applies equally to a case like the present, where a substantive offence is charged on the basis that the accused entered into an agreement with others to commit the offence (at [10]).
27 August 2021	Erickson (a pseudonym) v The Queen [2021] VSCA 234	Kyrou, Niall and Emerton JJA	Issue concerning tendency evidence – part of this included that the prosecution will seek to prove that the applicant

			took and retained indecent photographs of GC's anal or genital region. These photographs also form the subject of charge 8 (at [5]). The photographs on which the prosecution relies have been lost and no copies remain. The prosecution seeks to prove the contents of the photographs by calling two witnesses to describe what the photographs depict. The prosecution also relies on things said by the applicant in a record of interview with police, which the prosecution says amount to admissions that the applicant took the photos and that they are indecent. Thus, the tendency evidence comprises the combination of the evidence of two witnesses as to what the photographs depict and admissions by the applicant (at [6]). Real and substantial risk present. Tendency evidence not admissible.
23 September 2021	Thomas (a pseudonym) v Director of Public Prosecutions [2021] VSCA 269	Beach, Niall and Walker JJA	Murder – Trial judge refused to exclude hearsay evidence from the wife of the deceased. Trial judge should have certified the decision, *however*, the trial judge was correct to admit the evidence. Detailed consideration of the evidence and of application of s 137.
12 November 2021	Allison (a pseudonym) v The Queen [2021] VSCA 308	T Forrest and Walker JJA and Macaulay AJA	Permanent stay of proceedings – issue of duplicity between "access" and "possess" CAM. No impermissible duplicity (at [33]). The principal difference is that although both have as a physical element that the accused accessed the material, there is no intention attached to the physical element of access in the possession offence; whereas for the access offences, the Crown must prove that

			the accused intentionally accessed the material and was reckless as to whether it was child abuse material (at [42]). There was distinct and separate criminality involved in the applicant's intentional possession of the child abuse material and in his intentional accessing of that material (at [43]). With regard to the complexities of computer devices, "possession" has an additional step of "keeping" (at [45]).
29 November 2021	Director of Public Prosecutions v Myles (a pseudonym) [2021] VSCA 324	Priest, T Forrest and Walker JJA	Crown sought to lead evidence of admissions allegedly made by accused to his drug treatment order case manager at Corrections Victoria. Trial judge refused. Application for leave to appeal refused. (Useful) Analysis of s 90 – unfairness as to the use of admissions. Plainly, however, unfairness must necessarily be a highly fact-specific concept (at [27]). The focus must be upon the circumstances in which the admissions were made, and the way in which those circumstances render 'use' of the evidence at trial to be unfair (at [28]). Court will not interfere unless *House v The King* error identified – Crown could not do so (at [33]-[34]).

RCMPI Cases

Date	Citation	Judge(s)	Summary
15 January 2021	*Zirilli v The Queen* [2021] VSCA 2	McLeigh, Emerton and Weinberg JJA	s 317 application – no legitimate forensic purpose of request ("fishing expedition") and claim for PII made with respect to documents. Both the CCP's arguments were rejected. Orders made for the CCP to produce documents sought.
29 January 2021	Madafferi v The Queen [No 2] [2021] VSCA 4; 63 VR 143	Emerton, Weinberg and Osborn JJA	Costs issue following *Madafferi v The Queen* [2021] VSCA 1. The CCP ordered to pay the costs of the *amici curiae* (friends of the court) who appeared to assist the Court.
29 January 2021	*Zirilli v The Queen [No 2]* [2021] VSCA 5	MLeish, Emerton and Weinberg JJA	Costs issue following *Zirilli v The Queen* [2021] VSCA 2. The CCP ordered to pay the costs of the *amici curiae* (friends of the court) who appeared to assist the Court.
12 April 2021	*Higgs v The Queen* [2021] VSCA 90	Beach and Emerton JJA	Bail pending appeal. Exceptional circumstances required – not shown. Grounds of appeal are only "arguable". Application for bail refused.
16 April 2021	Mokbel v DPP (Cth) [2021] VSCA 94; 289 A Crim R 1	Maxwell P, Beach and Osborn JJA	Following the conviction being set aside – question of whether retrial should be had. Maxwell P: the appellant's trial was 'corrupted in a manner which debased fundamental premises of the criminal justice system' as another powerful consideration supporting the conclusion that the interests of justice do not require an order for retrial (at [21]). Beach and Osborn JJA: Not appropriate to order an acquittal. The decision and discretion rests with the properly constituted prosecutorial authorities (at [65]).

17 June 2021	*Visser v The Queen* [2021] HCASL 111	Gordon and Edelman JJ	Application for special leave to appeal refused (re Court of Appeal dismissing appeal against conviction).
18 June 2021	*Zirilli v The Queen* [2021] VSCA 174	Irving JR	s 317 application – objections made as to relevance and PII. Complex rulings made regarding production of documents. NB: Key principles summarised at paragraph 59. Emphasising that the approach is identifying materials that falls within the specific terms of the order and not assessing relevance.
9 September 2021	*Higgs v The Queen* [2021] HCASL 191	Keane and Gleeson JJ	Application for special leave refused (re the Court of Appeal's refusal to grant bail).
10 November 2021	*Zirilli v The Queen* [2021] VSCA 305	Irving AsJ	s 317 application – PII rulings in relation to parts of, or entire, documents.
1 December 2021	*Polimeni v The Queen* [2021] VSCA 329[2]	McCann JR	s 317 application – wholly contested. Application refused as there is no reasonable possibility that the documents sought would materially assist Polimeni on his appeal.
2 December 2021	*Madafferi v The Queen* [2021] VSCA 332	Emerton and Osborn JJA	Bail pending appeal. Exceptional circumstances required – not shown. Parole refused and cannot apply again until August 2022. Fresh evidence about Acquaro does not exculpate Madafferi or raise any doubts about guilt. Application for bail refused.
15 December 2021	*Arico v The Queen* [2021] VSCA 353	Pedley JR	s 317 application – partly contested. • some materials produced by consent • some materials objected because of a lack of legitimate forensic purpose and scope of the documents is broad and oppressive. Orders made only for partial documents subject to objection.

[2] Subsequent application for review of Judicial Registrar's decision. Refused: *Polimeni v The Queen* [2022] VSCA 20.

21 December 2021	*Mokbel v The Queen* [2021] VSCA 366	Beach JA	Mokbel sought documents from the CCP. The CCP resisted production and sought that *amici curiae* (friends of the court) be appointed to read any confidential materials – and not Mokbel's counsel. Application refused. Mokbel's counsel should be the contradictor and be permitted to review certain confidential materials (but not the subject material itself). Court granted the CCP permission to withdraw materials from the Court file and to consider whether redacted versions could be provided.
23 December 2021	*Barbaro v The Queen* [2021] VSCA 370	McCann JR	s 317 application – wholly contested (particular issue taken with the date range). Orders made for production of documents.

Judgments about the Particulars of Charges

Date	Citation	Judge(s)	Summary
26 April 2021	*Fazal v Beauchamp & Anor* [2021] VSCA 103; 289 A Crim R 149; 96 MVR 29	McLeish, Niall and Kennedy JJA	Charge: refusing to provide a breath sample for analysis under s 49(1)(e) of the *Road Safety Act 1986*. Section 8(1) of the CPA confers a broad power of amendment. An amendment to a charge-sheet may be made "at any time" and "in any manner" thought necessary. Further, the amendment permitted by s 8 is to the charge-sheet and not to a charge. Self-evidently, an amendment to a charge-sheet may involve amendment to an existing charge but would also allow the addition of a charge without any alteration to existing charges contained on the charge-sheet. The ability to add an additional charge is made explicit by the terms of s 8(3) which is predicated on an amendment that has the effect of charging a new offence. The CPA allows for multiple charges on the same charge-sheet (at [18]). No reason to confine s 8 to perfecting an invalid charge: *Kypri*. As a matter of ordinary language, a "new offence" is an offence that is not already contained on the charge-sheet (at [23]-[25]). On judicial review from County Court (conviction appeal from the Magistrates' Court). Leave to appeal from Supreme Court refused.
5 May 2021	*Director of Public Prosecutions v Fox* [2021] VSC 226; 63 VR 602; 96 MVR 83	Beale J	Charge: speeding more than 35km/h but less than 45km/h over the speed limit contrary to r 20(2) of the *Road Safety Road Rules 2017*.

			Appellant (DPP) argued that it was sufficient to particularise the road (Princes Freeway) and locality (Nar Nar Goon). The inclusion of "between Interchange Road and Snell Road" was surplusage. The time was not an essential element of the offence. Capitalisation was "confusing", and no such road existed but did not render the charge invalid and could be dealt with by amendment. Relying on *Foster* (school hours speeding case) and *Gigante* (PCA driving offence – court considered that place not an essential element or material but is an important particular to which appellant was entitled to as a matter of procedural fairness. No issue with amending charge to include the suburb). Respondent argued that date *and* time required under the CPA. Inclusion of the non-existent "Interchange Road" offending cl 1(b) of Schedule 1 and also cl 7 (reasonable clarity). *Foster* plainly wrong, and *Gigante* not concerned with particulars required. Relying on *Wells v Stillman*. HH held that the common law elucidates the meaning of particulars necessary under the CPA (applying *Baiada* – and analysing Ferguson and McLeish JJA's use of "affected"). Applying *Johnson v Miller* (1937) 59 CLR 467, Dixon J, date was sufficient. Applying *Foster* as a matter of comity, which was correctly decided. Failure to state the time did not render the charge invalid. Applying *Gigante* supports conclusion that capitalisation did not invalidate the charge, but it should be amended. *Wells* distinguishable. Decision quashed and remitted for determination in accordance with the law.
11 May 2021	*Kokas v Stanojlovic* [2021] VSCA 119; 289 A Crim R 223	Kyrou, Emerton and Kennedy JJA	Charge: probationary driver not displaying P plate contrary to r 55 of the *Road Safety (Drivers) Regulations 2009*.

			History: convicted in MCV. Appeal to CCV – dismissed on basis of honest and reasonable belief. Appeal to SCV allowed as honest and reasonable mistake of fact not relevant to proof of an offence. VSCA refused leave to appeal – remitted. CCV convicted and discharged respondent. Judicial review sought in SCV allowed by AsJ on basis that charge did not state the motor vehicle driven was "other than a motor cycle" which was an essential element of the offence. Issue: was this an essential element? Appellant accepted that regs 55(1)(a) and 55(1)(b) created two offences but argued that "other than a motor cycle" constituted a qualification or exception to the general principle of liability. Respondent adopted AsJ's reasons. Court considered *Chugg* (OHS case re statement of a general rule vs exception which operates outside the general rule). Emphasis on statutory construction – analogical reasoning of limited assistance but some principles applicable. Structure of the provision suggests two separate offences. Phrase "other than a motor cycle" is definitional of when an obligation will arise to display a P plate racing out from the front (at [50]). Vehicle is also an essential element (at [53]). Use of "other than" is not identify an exception to the obligation but provides a more convenient way of defining the obligation (at [56]). Regulations are highly prescriptive, and this construction fits the scheme (at [58]). DPP's appeal on behalf of informant dismissed.

19 May 2021	*Bant v Grant* [2021] VSC 276; 96 MVR 150	Richards J	Charge: speeding offence – not more than 35km/h over (alleged 127km/h) contrary to r 20(1) of the *Road Safety Road Rules 2017*. Amendment: prosecution sought and granted amendment in MCV – "Camperdown" replaced with "Allansford" and "Rowans Road" replaced with "Rowans Lane". Applicant/Bant argued that amendments charged a new and separate offence – same offence in law but not in fact (at [23]). No submissions about any injustice caused. Relying on *Glenister* (OHS matter in which Ginnane J held that some charge did not contain the essential elements of the offence), *Fazal*, and *Daly* (Croucher J on meaning of s 8(3) amendments). Prosecution/Grant said amendments permissible. Relying on *Gigante*. HH considered *Ciorra* (Redlich JA – not necessary to set out how speed limit determined); *Kirtley* (J Forrest J – charge not invalid simply because it did not also specify that speed limit applied to driver); *Foster* (Williams J – time not an essential ingredient). HH determined that (summary): • CPA did not preclude amendment (at [67]). The charge-sheet disclosed the nature of the offence sufficiently prior to amendment. Amendment did not create a new offence. inaccuracy was minor error (at [75]). • Time is not an essential element of this offence (at [51]).

			• Charge contained the particulars necessary to give reasonable information about the nature of the charge (at [63]). • Charge to be interpreted in the manner a reasonable defendant would understand it giving reasonable consideration to the words of the charge in their context (at [63]). • The date was sufficient. The vehicle's registration number was sufficient – colour, make, model, year *and* registration number not essential ingredients (at [61]). HH noted that his analysis is independent of *Fox*. However, after reading Beale J's analysis in *Fox*, notes that their analyses and conclusions accord with each other. Application dismissed.
10 March 2021	*Caleb Sheerin v Director of Public Prosecutions (on behalf of Clinton Goff)* [2021] VSCA 48; 288 A Crim R 162; 95 MVR 291	Maxwell P, Tate and Kennedy JJA	Charge: did not remain to give an oral fluid test for illicit drug detection within 3 hours per s 55E(2)(a) of the *Road Safety Act 1986* – charge contrary to s 49(1)(eb) of the RSA. Court held that the charge was correctly recorded (at [52]). Specific allegation of did "refuse to remain", was an essential element, and would be considered by a reasonable defendant to mean "requirement to remain" under s 55E as drafted (at [50]). Requirement was implied and had not (yet) terminated (at [51] and [54]). Reference to 3-hour time limit did not introduce any ambiguity (at [53]). Applying *Kypri* (refusal to a requirement to accompany a police officer for a breath test). Leave to appeal refused.
16 June 2021	*Nunn v Pezzimenti* [2021] VSC 313	Beale J	Charges: (1) PC-drugs in oral fluid (s 49(1)(bb) RSA); and, (2) fail to give sample of blood within 3 hours in accordance with s 55E (s 49(1)(i) RSA). [MCV granted amendment to insert

			name of drug – methylamphetamine – into charge 1, and minor amendment to 2] Plaintiff/Nunn said CPA altered law to require "greater specificity" in particulars of a valid charge: time, source of police officer's power to require tests and sample, name of drug (relying on *Southgate*), level of concentration. Charge 2 duplicitous. Amendment not permitted. HH applied *Fox* – time not required (at [25], per Dixon J in *Johnson v Miller* [1937]). Place identified sufficiently (at [26]). Source of power not required (at [27]). Charges invalid because name of drug not specified (at [30]). Concentration of drug not required (at [31]). Amendment permitted (at [36]-[39]). Application dismissed.
2 July 2021	*Director of Public Prosecutions v Fogarty* [2021] VSC 392; 63 VR 613; 96 MVR 465	Priest JA	Charge: (1) not comply within 3 hours to give breath sample under s 55(1) of the RSA (s 49(1)(e) RSA); (2) *???;* and, (3) not give breath sample under s 55(2A) of the RSA (s 49(1)(e) RSA) HH said essential factual element of s 49(1)(e) offence was a person "refuses" and "to comply with a requirement under s 55(1)". This was clear on charge 1. Particulars on charge 3 also sufficient. Magistrate erred in seeking extrinsic information (viewing other court files and charges) without informing the parties. HH quoted *Bell* – number of facts required to be established for proof of an offence, but not all of them are the essential elements of the offence – do not incorporate need to

			reference the breath analysing instrument or officer's authorisation (Charles JA 63-64 [23]). DPP's appeal allowed (given two forms of order – treated as an appeal under s 272 CPA).
23 September 2021	*Director of Public Prosecutions v Lamb* [2021] VSC 615	Beale J	Charges: 4x Victoria Police officer did without reasonable excuse disclose police Incident Fact Sheet information which it was not duty to disclose contrary to s 227 of the *Victoria Police Act*. ("not" in wrong place) HH considered that a reasonable accused striving conscientiously would have understood the allegations despite the error (at [33]). Not considering a narrow class of person (at [34]) not reading it in light of s 227 (at [35]). *Wells* clearly distinguishable because no particularisation of the police information at all (at [38]). Re amendments: • contrasted cl 1(a), "state the offence" and s 8(4)(a) and "sufficiently disclosed the nature of the offence" (at [41]) • cl 3(2) limited – refers only to cl 1(a) and not s 8(4)(a) (at [42]) • must have work to do (at [44]). • distinguished *Alwer v McLean* in this scenario as not concerned with amendment (cf. validity – at [45]) • relied on Nettle JA in *Kypri* for two scenarios re amendments (at [48]) ○ 1st: defective for failing to aver to essential element but sufficient information may be amended. If amended after limitation period, amendment acceptable and will defeat the limitation period.

			○ 2nd: defective charge – before limitation period expiry, true nature of offence conveyed in writing, e.g. police brief, amendment permitted • 3 preconditions to the exercise of power to amend (at [51]) • disagrees with Ginnane J in *Glenister* – insufficient regard to textual differences. Too restrictive and gives the word "sufficiently" no work to do. Effects a major erosion on amendment power – same framework in *Kypri*. Not in interests of justice (at [59]). • no suggestion of injustice to accused (at [68]) Application granted. Orders quashed. Remitted.
17 December 2021	*Beckingham v Browne* [2021] VSCA 362	Maxwell P, McLeish and Niall JJ	Leave to appeal granted. Appeal allowed. Dismissal of the charges restored. The Court split on the following issues: • Niall JA agreed with McLeish JA's interpretation of the IBAC Act. *However*, Niall JA agreed with Maxwell P as to the final orders (notices being invalid). • McLeish JA considered that the notices were valid and would have dismissed the appeal.

Other Court of Appeal Judgments

Date	Citation	Judge(s)	Summary
26 February 2021	Roberts v The Queen [2021] VSCA 28	Maxwell P, Niall and Emerton JJA	Bail – murder. Appeal dismissed. Consideration of examples of exceptional circumstances justifying bail (at [32]-[53]). Discussion about lengthy time on remand and delay.
19 March 2021	HA (a pseudonym) v The Queen [2021] VSCA 64	Maxwell P and Kaye JA	Bail – 67 charges – 15-year-old applicant – bail granted.
30 March 2021	Greene (a pseudonym) v Secretary to the Department of Justice and Community Safety [2021] VSCA 79	Priest and T Forrest JJA	Supervision order matter under the *Serious Offenders Act 2018*. Appeal against imposition of electronic monitoring conditions as to whereabouts and alcohol consumption. Appeal to be determined in light of the principles in *House v The King*. Decision to impose such conditions was *not* unreasonable or plainly unjust. The was a clear connection between the appellant's alcohol consumption and his offending risk. Alcohol was the "gateway" to offending (at [15] and [18]).
21 July 2021	HJ (a pseudonym) v IBAC [2021] VSCA 200	Beach, Kyrou and Kaye JJA	Test for determining when court will release party from undertaking given to court. The relevant principle is that a court may vary an undertaking if the party who gave it establishes by evidence that, in the circumstances that prevail at the time the variation is sought, the interests of justice require that the variation be made in order to avoid enforcement of the undertaking being unjust. The primary qualifying circumstance that may engage

			the principle is a change in facts since the undertaking was given. Other qualifying circumstances that may engage the principle include a change in the law, mistake and fraud (at [87]). *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 applied.

Other Judgments

Date	Citation	Judge(s)	Summary
8 June 2021	Grooters v Chief Commissioner of Police (Vic) [2021] VSC 329; 289 A Crim R 529	Niall JA	Whether s 464ZFAC of the Crimes Act 1958 empowers a senior police officer to authorise the taking of a DNA profile sample Plaintiff accepted that he satisfied the express criteria for the giving of an authorisation in respect of him, but contended that the senior police officer had a discretion to take into account the circumstances of the offending and that he suffers from a cognitive impairment that would make taking the sample distressing and something that he is not capable of understanding. The history of the provisions are set out from paragraphs 17 to 21 (including post-conviction samples). Niall JA's conclusions as to the public policy reasons and lawfulness of the scheme are at paragraphs 74 and 75. The *Charter* did not assist in the interpretation. Accepting that there might be some interference with privacy, the giving of an authorisation and taking of a DNA sample would be lawful because the interference was not unlawful or arbitrary (at [74]). Purposive consideration of the statutory scheme at [75]. The construction that a senior police officer should make inquiries into the impact of these processes on an offender before exercising the discretion should be rejected (at [81]).