

DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

and

BRANDON OSBORN

Respondent

APPELLANT'S REVISED WRITTEN CASE

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Filed on behalf of:	Appellant
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Part A: Sentence, Relevant Statutory Provisions and Maximum Penalties

1. On 26 May 2017, the Respondent was convicted at the Supreme Court at Melbourne following a plea of guilty of the below offences and was sentenced at the Supreme Court at Mildura on 1 September 2017 as follows –

Charge on Indictment	Offence	Maximum	Sentence	Cumulation
1	Prohibited person possessing a firearm [Pursuant to sec 5(1) <i>Firearms Act 1996</i>]	10 years imprisonment	1 year imprisonment	2 months cumulative on Charge 2
2	Manslaughter [Pursuant to Common Law]	20 years imprisonment	9 years imprisonment	Base sentence

Total Effective Sentence:	9 years 2 months imprisonment
Non-Parole Period:	6 years imprisonment

Pre-Sentence detention declaration pursuant to s 18(1) of the <i>Sentencing Act 1991</i>:	489 days (including the day of sentence)
Sec 6AAA <i>Sentencing Act</i> statement: 11 years imprisonment with a non-parole period of 8 years imprisonment	
Other relevant orders/matters: <ul style="list-style-type: none"> • Disposal order • Forfeiture order 	

1. **Part B: Summary of Relevant Facts**

1.1. The Appellant relies upon the Summary of Prosecution Opening dated 21 July 2017.

1.2. The facts were also summarised by the Sentencing Judge.¹

2. **Part C: Grounds of Appeal**

Ground 1: The individual sentences imposed, the total effective sentence and the non-parole period are each manifestly inadequate.

Particulars: In imposing the individual terms of imprisonment, in making the order with respect to cumulation and in fixing the non-parole period, the Sentencing Judge:

- a) **failed to properly reflect the nature and gravity of the offending and the culpability of the offender;**
- b) **failed to have sufficient regard to the maximum penalties;**
- c) **failed to give sufficient weight to the sentencing principles of just punishment, denunciation, general deterrence and specific deterrence;**
- d) **failed to give any, or sufficient, weight to protection of the community;**
- e) **failed to give sufficient weight to the impact of the offending upon the**

¹ *DPP v. Osborn* [2017] VSC 535 (“Reasons for Sentence”), at [2] – [33].

victims;

f) failed to give sufficient weight to current sentencing practices;

g) gave excessive weight to the factors in mitigation.

Manifest inadequacy - The relevant test and ultimate submission:

2.1. To succeed on this ground, the Appellant must demonstrate the length of the sentence imposed is such that it may be inferred there was some misapplication of principle in the sentencing of the Respondent, even though where and how is not apparent from the statement of the Sentencing Judge's reasons.²

2.2. It is submitted the sentence imposed on the Respondent was manifestly inadequate in all the circumstances of this case.³ It was not reasonably open to the Sentencing Judge to have reached the sentencing conclusions His Honour did, if proper weight had been given to all the relevant circumstances of the offending and the offender.⁴ This produced a manifestly inadequate sentence.

Particular (a) - Gravity of the offending and culpability of the offender:

2.3. The Sentencing Judge failed to give sufficient weight to the gravity of the offending in this case and the culpability of the offender. Greater weight should have been given to these matters.

2.4. The following matters were relevant in assessing the gravity of the offending and the Respondent's culpability:

2.4.1. The offending occurred in the victim's home, which she shared with the Respondent⁵, where she should have been safe;

² *Wong v The Queen* (2001) 207 CLR 584 at [58]; *Hili v The Queen*; *Jones v The Queen* (2010) 242 CLR 520 at [58]-[59]; [75]-[76].

³ *R v. MacNeil-Brown* (2008) 20 VR 677, 680.

⁴ *DPP v. Karazisis and Ors* (2010) 31 VR 634, at [127].

⁵ Reasons for Sentence, at [2].

2.4.2. The Respondent was a prohibited person, at the time of the offending, who was in possession of an illegally purchased firearm.⁶ This was a serious offence. Other matters specifically relevant to assessing charge 1 included:

- The firearm was unlawful and illegally obtained;
- The firearm was unregistered and had the serial number ‘pin punched’ such that it could not be read;
- The Respondent not only had the firearm, but he also had ammunition for that specific firearm;
- The firearm had not been stored in a safe manner in the house;

2.4.3. The conduct of the Respondent demonstrated an ‘appalling level of recklessness’;⁷

2.4.4. The Respondent was a person who had considerable experience with firearms and had completed at least two safety courses.⁸ He had significant knowledge about the dangers firearms presented. This substantially increases his moral culpability;

2.4.5. On two separate occasions, the Respondent placed the firearm at both his head and the victim’s head, after looking inside the barrel, knowing there was one bullet in the chamber, and pulled the trigger.⁹ The ‘dangerous act’ could therefore not be viewed as isolated or spontaneous. It was deliberately repeated twice in quick succession, endangering both himself and the deceased. Such conduct, by a person with significant firearms experience and safety training, demonstrates a high level of culpability given that firearms do not always operate as intended. Depressing the trigger, with a live round in the chamber, had an inherent risk of injury being sustained by a person at whom the firearm was directed;

2.4.6. The events that led to Ms Belej being fatally shot occurred in the context of a domestic disagreement. The Respondent entered the kitchen, loaded the firearm

⁶ Reasons for Sentence, at [3] & [18].

⁷ Reasons for Sentence, at [57].

⁸ Reasons for Sentence, at [15] – [19].

⁹ Reasons for Sentence, at [27] – [28]

in front of Ms Belej, pointed the firearm at his head and depressed the trigger and repeated the act when placing the firearm at Ms Belej's head. His moral culpability ought be viewed as high.¹⁰

2.4.7. Placing a gun to the victim's head¹¹, in any circumstance, was an act of violence;¹²

2.4.8. The acts of the Respondent leading to the trigger being pressed were conscious, deliberate and voluntary acts;

2.4.9. His Honour found:

As a consequence of his training and familiarity with guns Mr Osborn was very well aware of the danger associated with loading the handgun in the kitchen of the Cardross home, cocking it, pointing it at Ms Belej and pulling the trigger. These are aggravating factors in relation to the offence.¹³

2.4.10. The Respondent was in a relationship of trust with Ms Belej and his conduct was an 'appalling breach of that trust'¹⁴;

2.4.11. The Respondent's culpability was very high.¹⁵

2.5. The charge of manslaughter was a very serious example of a serious offence. The objective gravity was high given the firearm was not discharged due to negligence or pure accident. Nor was the gun was discharged unexpectedly by means other than the deliberate pulling of the trigger, but rather as a result of a deliberate act of depressing the trigger knowing the gun was partially loaded.

Particular (b) – maximum penalty:

2.6. The maximum penalty, taken with other relevant factors, provides a yardstick against

¹⁰ *Kalala v R* [2017] VSCA 223, at [55]-[63].

¹¹ Reasons for Sentence, at [2].

¹² Reasons for Sentence, at [59].

¹³ Reasons for Sentence, at [58].

¹⁴ Reasons for Sentence, at [59].

¹⁵ Reasons for Sentence, at [59].

which a sentence is to be considered.¹⁶ A Sentencing Judge must pay careful attention to the maximum penalties as they have been prescribed by parliament and allow comparison between the worst possible case and the case currently before the Sentencing Judge.¹⁷

2.7. Manslaughter has a maximum penalty of 20 years imprisonment and the offence of prohibited person possessing a firearm had a maximum penalty of 10 years imprisonment.

2.8. The maximum penalties prescribed for the offences on the indictment, reflected the seriousness with which Parliament considers that conduct.

2.9. After reciting the maximum penalty for manslaughter, the Sentencing Judge stated:

Manslaughter involves the loss of human life and is manifestly a serious offence.¹⁸

2.10. A sentence of less than 50% of the available maximum penalty, for the offence of manslaughter was manifestly inadequate in all the circumstances of this case, especially considering the high culpability of the Respondent.

2.11. The offence of being a prohibited person possessing a firearm had a maximum penalty of 10 years imprisonment. A sentence of 12 months imprisonment was manifestly inadequate taking into account the gravity of this offence and the culpability of the Respondent.

Particular (c) – Just punishment / denunciation and deterrence:

2.12. Insufficient weight was given to the need to deter other people from committing offences of the same or similar character. General deterrence is a significant sentencing consideration in offences of this kind, and needed to be given significant weight in arriving at an appropriate sentence.

2.13. The Sentencing Judge also gave insufficient weight to the need to ensure the Respondent was specifically deterred, adequately punished for the offences and his

¹⁶ *Markarian v The Queen* (2006) 228 CLR 357 at [30] - [31].

¹⁷ *Markarian v The Queen* (2006) 228 CLR 357 at [30] - [31].

¹⁸ *Reasons for Sentence*, at [53].

conduct was appropriately denounced.

2.14. Specific deterrence was important as the Respondent had a relevant prior for assault: whilst this was his only prior it also occurred in circumstances where the Respondent was responding to conflict. Such deterrence was necessary as while Patrick Newton found that the Respondent was a ‘limited risk of violent recidivism’, he found the ‘most likely risk scenario would of impulsive intimate-partner violence under circumstances of stress and intoxication.’¹⁹

2.15. General deterrence was important given the prevalence of intimate partner violence generally, and the need to ensure those who contemplate committing such offences are appropriately deterred.

2.16. The Sentencing Judge was referred²⁰ to a passage from the decision of *Lupoli*.²¹ In that passage White J stated:

Making every allowance that can be made for the respondent's general good character and law-abiding life of hard work and provision for his family, the sentence must reflect the gravity of what he did, not only to punish him adequately for what he did but also to deter others from doing likewise. Spouses, both husbands and wives, have to be protected from this kind of violence. The bringing of a loaded gun or any gun or weapon into a domestic quarrel, especially where there has been a history of past violence, must be deplored and deterred as strongly as possible. The punishment and deterrent aspects of sentencing weigh heavily in the scales in this case. They outweigh factors personal to the respondent.²²

2.17. Such matters were given insufficient weight.

2.18. The failure to give such matters adequate weight, it is submitted, is further demonstrated by the modest cumulation of two months between charge 1 and charge 2 which was manifestly inadequate.

Particular (d) - Protection of the community:

¹⁹ Patrick Newton’s report, 24/7/17 at p.8.

²⁰ Prosecution Response to Defence Plea Submissions, 3 August 2017 at [12].

²¹ (1984) 15 A Crim R 183.

²² (1984) 15 A Crim R 183 at 190.

2.19. The Sentencing Judge failed to give any, or sufficient, weight to the protection of the community. It is submitted protection of the community was an important sentencing consideration despite the Respondent's limited criminal history.

2.20. Community protection was important for the following reasons:

2.20.1. The offending took place in the Respondent's home in the setting of a domestic relationship;

2.20.2. The Respondent has a long history of lawfully owning and possessing guns;²³

2.20.3. After an intervention order was made against the Respondent on 19 February 2014 he became a prohibited person. He was not licenced or permitted to possess or use firearms;²⁴

2.20.4. The Respondent had completed at least two firearm safety courses;²⁵

2.20.5. The handgun which killed Ms Belej had been purchased by the Respondent using cash. The handgun's serial number had been 'pin punched' such that it was unidentifiable. Accordingly the gun could not be registered and was possessed by an unlicensed person who was a prohibited person.²⁶ The Respondent's stated intention in acquiring the gun was to sell it and make a profit.²⁷ With his knowledge of firearms, and the regulation of firearms by the authorities, he was seeking to profit by selling a firearm which could not legally be registered;

2.20.6. As outlined above, the Respondent engaged in the 'dangerous act' which ultimately killed Ms Belej on two occasions in close proximity to each other. In the first instance by pointing the gun at his head and pulling the trigger, and secondly by pointing the gun at Ms Belej and pulling the trigger which discharged the bullet. On both occasions the Respondent specifically checked the chamber of the handgun and has specific knowledge there was a bullet in the handgun.

2.21. For a combination of these reasons, it is submitted protection of the community

²³ Reasons for Sentence, at [15] – [19].

²⁴ Reasons for Sentence, at [18].

²⁵ Reasons for Sentence, at [19].

²⁶ Reasons for Sentence, at [20] – [21].

²⁷ Reasons for Sentence, at [21].

assumed importance and should have been given appropriate weight.

2.22. The Sentencing Judge found:

The length of the sentence required to give appropriate weight to general deterrence, just punishment and denunciation result in a sentence of more than sufficient severity to protect the community. No additional component is required for community protection.²⁸

2.23. It is submitted that His Honour gave insufficient weight to community protection by reaching this conclusion. Community protection was a matter that, in the circumstances of this case, need specific emphasis beyond that give to other matters such as general deterrence, just punishment and denunciation.

2.24. While of limited relevance, it should be noted the Respondent had a prior for violence, having pleaded guilty to a charge of recklessly causing injury for which he was fined \$2000 without conviction.²⁹

Particular (e) - The impact on the victims:

2.25. The impact on the victim's family and friends, as set out in the 22 victim impact statements which were tendered, was not given sufficient weight by the Sentencing Judge. His Honour referred to these statements in some detail³⁰, but the sentence imposed discloses that insufficient weight was given to these statements.

2.26. The impact of the Respondent's reckless offending on those who knew and loved the deceased has been devastating as demonstrated by the content of the victim impact statements.

Particular (f) – current sentencing practice:

2.27. The Sentencing Judge had regard to current sentencing practices.³¹

2.28. His Honour had regard to the Sentencing Snapshot for manslaughter in the period 2011-12 to 2015-16. The Sentencing Judge confirmed that the snapshot

²⁸ Reasons for Sentence, at [96].

²⁹ Reasons for Sentence, at [11].

³⁰ Reasons for Sentence, at [43] – [52].

³¹ Reasons for Sentence, at [100] – [102].

demonstrated that sentences for manslaughter ranged from less than two years to in excess of 12 years with non parole periods of less than one year to something in excess of 9 years.³²

2.29. The Sentencing Judge was referred to *Sherna v. R*³³, *Mocenigo v. R*³⁴ and *DPP v. Torun*.³⁵

2.30. Given this was a serious example of a serious offence, and the Respondent's culpability was high, the sentence imposed on the charge of manslaughter was out of keeping with current sentencing practice.

Particular (g) – excessive weight given to matters in mitigation:

2.31. It is submitted excessive weight was given to the matters properly raised in mitigation. It is acknowledged there were some powerful and important mitigating features to be taken into account in favour of the Respondent.³⁶

2.32. Nonetheless, these factors in combination did not justify the sentence imposed, when balanced against competing sentencing considerations.

2.33. The Sentencing Judge was referred³⁷ to a passage from the decision of *Lupoli*³⁸, which has been relied on above in relation to particular (c). In that passage White J referred to the need for deterrence, denunciation and just punishment. White J then stated:

The punishment and deterrent aspects of sentencing weigh heavily in the scales in this case. They outweigh factors personal to the respondent.³⁹

2.34. These observations were equally applicable to the Respondent. The sentence imposed demonstrates that excessive weight must have been given to the matters in mitigation in the circumstances of this case.

³² Reasons for Sentence, at [100].

³³ [2011] VSCA 242.

³⁴ [2013] VSCA 231.

³⁵ [2015] VSCA 15.

³⁶ Reasons for Sentence, at [60] – [92].

³⁷ Prosecution Response to Defence Plea Submissions, 3 August 2017 at [12].

³⁸ (1984) 15 A Crim R 183.

³⁹ (1984) 15 A Crim R 183 at 190.

3. Ground 2: The Sentencing Judge erred in finding that because the Respondent pulled the trigger of the handgun not intending for it to discharge this ‘tends towards a lower level of gravity of manslaughter’.

3.1. The Sentencing Judge erred by finding:

For the prosecution it was submitted this was a serious example of manslaughter. I accept that Mr Osborn pulled the trigger of the handgun not intending for it to discharge. That factor tends toward a lower level of gravity of manslaughter.⁴⁰

3.2. His Honour found the offending demonstrated ‘an appalling level of recklessness’⁴¹ and was ‘a bad instance of manslaughter by unlawful and dangerous act’⁴², an appropriate finding it is submitted. It is hard to reconcile this finding with a conclusion the offending was at the lower level of gravity for manslaughter, which by its very nature is an offence of unintentional killing.

3.3. The Sentencing Judge was referred⁴³ to a decision of *R v. Pashalay*⁴⁴ where a husband shot his wife in the family home. The firearm discharged after the offender confronted his wife, initially beating her with a belt, before later confronting her with a loaded firearm, as he suspected she had been unfaithful to him. The gun had been placed against the deceased stomach and the offender told police he lost control and the gun went off without any intention on his part to kill or do really serious injury.⁴⁵ Winneke P stated:

At the end of the day, it cannot be denied that the crime to which the applicant pleaded guilty was a very serious example of a serious crime. In the course of a domestic dispute, and in order to assert his domination, the applicant chose to select a weapon of destruction, to load it and to wield it against his wife, in circumstances where he must have realised the dangerous nature of the threat which he was posing to her.⁴⁶

⁴⁰ Reasons for Sentence, at [56].

⁴¹ Reasons for Sentence, at [57].

⁴² Reasons for Sentence, at [102].

⁴³ Prosecution Response to Defence Plea Submissions, 3 August 2017 at [12].

⁴⁴ [1998] VSCA 18.

⁴⁵ [1998] VSCA 18 at p.2.

⁴⁶ [1998] VSCA 18 at p.6.

3.4. His Honour, it is submitted, erred in classifying the conduct of the Respondent in this case as ‘toward a lower level of gravity of manslaughter’. If the learned sentencing judge had properly characterised the gravity of this offending a different sentence must have been be imposed on the charge of manslaughter.

3.5. The Sentencing Judge, to use the words of Winneke P, should have found this was a ‘very serious example of a serious crime.’

4. **Part D - Residual discretion and conclusion:**

4.1. The Appellant submits that by virtue of the general error, and the specific error, the sentencing discretion should be re-exercised afresh.

4.2. The Appellant also submits that there is no reason why the residual discretion, not to intervene, should be exercised against the Appellant.

DATED: 3 November 2017

A handwritten signature in blue ink, appearing to read 'John Gullaci', is written over a light blue rectangular background.

Mr J Gullaci
Counsel for the Appellant