

DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

v

BRANDON OSBORN

Respondent

RESPONDENT'S WRITTEN CASE

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| Filed on behalf of: | The Respondent |
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Particulars of Sentence

1. On 1 September 2017, the Respondent was sentenced in the Supreme Court at Mildura on one charge of manslaughter, and one charge of possession of a firearm as a prohibited person.
2. The Respondent was sentenced to nine years' imprisonment on the charge of manslaughter, and to 12 months' imprisonment on the possession of a firearm charge. The sentencing judge ordered that two months of the possession of a firearm charge be served cumulatively upon the sentence on the manslaughter charge, resulting in a total effective sentence of nine years and two months' imprisonment. The sentencing judge fixed a non-parole period of six years.
3. The table in Part A of the Appellant's Written Case accurately reflects the sentence imposed on the Respondent.

Summary of Relevant Facts

4. The Respondent relies upon the sentencing judge's summary of the facts at paragraphs 5 to 35 of the Sentencing Remarks.¹

Grounds of Appeal

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

5. The sentencing judge sentenced the Respondent having regard to the following features of the case:
 - a. The Respondent had pleaded guilty. The sentencing judge accepted that the plea was relevant in the following ways:
 - i. First, the plea was made about five months prior to the scheduled commencement of the trial, in the context of the Respondent having previously offered, before committal, to plead guilty to manslaughter;²
 - ii. Secondly, the plea spared witnesses and the victim's family from the ordeal of a trial;³
 - iii. Thirdly, the plea demonstrated 'some acceptance of responsibility' by the Respondent, and 'a willingness to facilitate the course of justice'.⁴
 - b. The sentencing judge accepted that the Respondent had 'a level of genuine remorse';⁵
 - c. The sentencing judge found that the Respondent had 'reasonably good prospects of rehabilitation',⁶ and concluded that it was unlikely that the Respondent would re-offend;⁷
 - d. The Respondent had a limited criminal history, having pleaded guilty to one charge of recklessly cause injury, for which he was sentenced to a fine of \$2,500 without conviction;⁸ and

¹ [2017] VSC 535. Paragraph references in this Written Case are to the revised version of the sentencing transcript provided by the Court of Appeal Registry.

² Sentencing Remarks, [64].

³ Sentencing Remarks, [65].

⁴ Sentencing Remarks, [66].

⁵ Sentencing Remarks, [69].

⁶ Sentencing Remarks, [92].

⁷ Sentencing Remarks, [95].

⁸ Sentencing Remarks, [11].

- e. The Respondent pulled the trigger of the handgun not intending for it to discharge.⁹
6. Against those matters, the sentencing judge considered the following factors:
 - a. The sentencing judge considered this a ‘bad instance of manslaughter by unlawful and dangerous act’;¹⁰
 - b. The Respondent had shown an ‘appalling level of recklessness’,¹¹ and, as a consequence of his training and familiarity with guns, had been very well aware of the danger associated with loading the handgun in the kitchen, cocking it, pointing it at the victim and pulling the trigger;¹²
 - c. The Respondent was in a relationship of trust with the victim. His actions took place in the home they shared, and constituted an ‘appalling breach’ of trust;¹³
 - d. The Respondent’s culpability was ‘very high’.¹⁴
 7. Having considered all the mitigatory and aggravating features of this case, the sentencing judge imposed the sentences outlined above.
 8. For an appeal based on manifest inadequacy to succeed, the Crown must demonstrate that the sentence imposed was wholly outside the range reasonably open to the sentencing judge.¹⁵ In *R v Pham*, French CJ, Keane and Nettle JJ described the test as follows:

Appellate intervention on the ground of manifest excessiveness or inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle.¹⁶

9. This high burden is not met in this case, in which the Crown acknowledges that there were ‘some powerful and important mitigating features’.¹⁷

⁹ Sentencing Remarks, [56].

¹⁰ Sentencing Remarks, [102].

¹¹ Sentencing Remarks, [57].

¹² Sentencing Remarks, [58].

¹³ Sentencing Remarks, [59].

¹⁴ Sentencing Remarks, [59].

¹⁵ *DPP v Karazisis* (2010) 31 VR 634, 662-3 [127] (Ashley, Redlich and Weinberg JJA).

¹⁶ (2015) 256 CLR 550, [28].

¹⁷ Appellant’s Written Case, 2.31.

10. The Crown has not demonstrated that the impugned sentence differs from sentences that have been imposed in ‘comparable cases’. In *DPP v Torun*,¹⁸ Whelan and Beach JJA considered a number of manslaughter cases involving the discharge of firearms.¹⁹ Their Honours observed that ‘there does not seem to be any case where a sentence over 10 years was imposed in a circumstance where it was found that there had been no intention to harm the victim’.²⁰
11. In making that observation in *Torun*, Whelan and Beach JJA accepted that ‘comparison of specific fact situations is not helpful’. It may also be accepted that ‘current sentencing practices’ is just one of the matters to be taken into account in fixing an appropriate sentence.²¹ Nevertheless, the observation as to sentencing practices in *Torun* assists in outlining the range of sentences that was open to the sentencing judge in this case. A sentence of nine years’ imprisonment is at the upper end of the range for offences of unlawful and dangerous act manslaughter involving no intent to cause physical harm to the victim.

Ground Two: 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’

12. This ground misapprehends the sentencing judge’s statement in paragraph [56] of the Sentencing Remarks. His Honour’s reference to a ‘lower level of gravity of manslaughter’ simply reflects the uncontroversial proposition that an offender who pulls the trigger of a gun intending for it to discharge will, in general, be guilty of a more grave unlawful and dangerous act manslaughter than an offender who pulls the trigger of a gun, or otherwise handles it, not intending for it to discharge. As Whelan and Beach JJA observed by reference to authority in *Torun*, ‘the issue of whether the discharge of the firearm was intentional is significant’.²²

¹⁸ [2015] VSCA 15 (*Torun*).

¹⁹ Including *DPP v Phillips* [2009] VSCA 68; *R v Stratton* (2008) 20 VR 539. See also *R v Rapovski* [2016] VSC 706.

²⁰ [2015] VSCA 15, [58].

²¹ *Sentencing Act 1991* s 5(2)(b).

²² [2015] VSCA 15, [58].

13. In paragraph [56], his Honour was not making a finding that the objective gravity of the Respondent's offending was low. Indeed, his Honour, elsewhere in his Sentencing Remarks, recognised that this was a 'bad instance of manslaughter by unlawful and dangerous act'.²³

The residual discretion

14. Should this Court determine, contrary to the submissions above, that the sentences imposed on the Respondent were manifestly inadequate, the Court retains a residual discretion not to interfere. The burden is imposed on the Crown to negate any reason why the residual discretion should be exercised. That is to say, the Crown has the burden of negating any reason why this Court should exercise its discretion to decline to intervene.²⁴
15. With respect to the exercise of the residual discretion in this matter, the Respondent relies upon the Crown's failure, on the plea, to provide the sentencing judge with the required assistance. Particularly, counsel for the Crown did not sufficiently identify relevant 'comparable cases', and the underlying sentencing principles revealed by those cases.²⁵ No schedule or bundle of relevant 'comparable cases' was provided. Particularly, while counsel for the Crown referred to several cases, being *Sherna v The Queen*,²⁶ *Mocenigo v The Queen*²⁷ and *Torun*,²⁸ counsel did not refer to the series of manslaughter cases involving the discharge of firearms referred to by Whelan and Beach JJA in *Torun*.²⁹ Nor did counsel refer specifically to Whelan and Beach JJA's observations about sentencing outcomes in cases of unlawful and dangerous act manslaughter where the offender did not intend to cause harm to the victim.
16. Further, the primary purpose of Crown Appeals against sentence is to lay down principles for the governance and guidance of sentencing courts. That purpose can, in this particular case, be achieved to a very significant extent by an unequivocal statement

²³ Sentencing Remarks, [102].

²⁴ See *CMB v Attorney-General (NSW)* (2015) 256 CLR 346.

²⁵ See *DPP (Cth) v Masange* [2017] VSCA 204, [47]-[53].

²⁶ (2011) 32 VR 688.

²⁷ [2013] VSCA 231.

²⁸ [2016] VSC 706.


²⁹ *Torun* at [57]-[58]. Those cases include *DPP v Phillips* [2009] VSCA 68 and *R v Stratton* (2008) 20 VR 539.

by this Court that the sentences imposed were wrong, and why they were wrong, with the consequence that it is not necessary for this Court to proceed to impose different sentences upon the Respondent.³⁰

Disposition of the Appeal and Orders Sought

17. By reason of the matters set out above, this appeal ought to be dismissed.

18. The Respondent will apply for a certificate under s 15(1) of the *Appeal Costs Act 1998*.



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.....
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8 November 2017

³⁰ See generally *Green v The Queen* (2011) 244 CLR 462.