IN THE SUPREME COURT OF VICTORIA
COURT OF APPEAL
(CRIMINAL DIVISION)

IN THE MATTER OF an Application
for Leave to Appeal Against Sentence
by Damian Honeysett

Between:

DAMIAN HONEYSETT **Applicant**

and

THE QUEEN

Respondent

APPLICANT'S WRITTEN CASE – SENTENCE

Date of document:	23 August 2017
Filed on behalf of:	The Accused
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PARTICULARS OF SENTENCE, RELEVANT STATUTORY PROVISIONS AND MAXIMUM PENALTIES

PLEA

1. On 25 July 2017, the applicant pleaded guilty before Judge Lawson in the Koori Court Division of the County Court to armed robbery[1] and theft.[2]

2. On 28 July 2017 the applicant was sentenced as follows:

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[1] Section 75A(1) of the *Crimes Act 1958*.
[2] Section 74 of the *Crimes Act 1958*.

Charge on Indictment	**Offence**	**Maximum**	**Sentence**	**Cumulation**
1.	Armed Robbery	25y	4y 6m	Base
2.	Theft	10y	1y	6m
Total Effective Sentence		5 y		
Non-parole period		3 y		
Pre sentence detention declared:		154 days		
s. 6AAA statement:		6 y, 6m; 4 y 6m NPP.		
Other relevant Orders:		Compensation of $1052.35 to Dan Murphy's		

SUMMARY OF RELEVANT EVIDENCE

3. The applicant accepts the facts relevant to sentence are properly set out in the summary of prosecution opening marked as Exhibit A on the plea.

4. The relevant facts will therefore be stated succinctly here.

5. On 24 February 2017 at around 9:15am, the applicant's co-accused Halit Dogan stole a Ford Falcon sedan registration UOQ460 from a Woolworths/Caltex service station at 469 – 472 Nepean Highway, Chelsea. The incident was captured on CCTV (exhibit 1).

6. Later in the day, at 2pm the applicant and another co-accused Thomas Coumvoulidis attended a shop at 57 Hamilton Place, Mount Waverley where Coumvoulidis stole a pair of sunglasses. Again, the incident was captured on CCTV footage (exhibit 2).

7. The pair are captured on CCTV footage walking past an optometrist at 51 Hamilton Place, Mount Waverley (exhibit 5), an ANZ bank at 43 Hamilton Place (Exhibit 10). They enter and exit a Best Value Hardware store at 37 Hamilton Place, also captured on CCTV footage (Exhibit 7).

8. They then walk through a car park towards an IGA supermarket at 2:03pm captured on CCTV footage.

9. As the applicant walked towards the IGA, the stolen Ford Falcon approached and they got in, heading north towards Stephenson's Road.

10. It was alleged that the co-accused changed his clothes in the car. The offender did not change his clothes but put on a cap, sunglasses and a bandana over the lower part of his face.

11. At 2:24pm, the stolen Ford Falcon stopped outside the Dan Murphy's store on Kingsway, Glen Waverley. The co-accused, Coumvoulidis was armed with a meat cleaver and was carrying a grocery bag. He remained outside the shop, keeping guard. The applicant got out of the car and ran into the Dan Murphy's, armed with a knife.

12. The applicant ran up to a customer who was about to pay at the register and pushed him.

13. He then pointed the knife at a Dan Murphy's employee named Jessica Gerardi and made a demand for money. Gerardi screamed, panicked and stepped back from the register.

14. Another employee, Natalie Meehan, heard the scream, approached the register and said she would get the applicant the money.

15. The applicant continued to wave the knife around, demanding money, telling the customer to stay back. He told Meehan to hurry.

16. Meehan removed the cash draw and the applicant grabbed it and ran from the store. Both the applicant and Coumvoulidis then ran to the stolen ford and the car drove off in a northerly direction.

17. The incident lasted 52 seconds and the applicant and his co-accused stole $1052.35.

18. Police found the stolen Ford outside 157 Rosebud Parade, Rosebud. At 11:10am, police arrested the applicant and Dogan at 151 Rosebud Parade, Rosebud.

19. The applicant denied involvement in the armed robbery when he was interviewed. Dogan admitted stealing the Ford but made no comment in relation to the armed robbery.

20. On 10 March 2017, Coumvoulidis was arrested and interviewed. He denied the offending and is pleading not guilty to the charges that were subsequently laid. [3]

[3] His trial is listed on 12 June 2018.

21. The applicant was brought before the Magistrates' Court at Melbourne for a filing hearing on 27 February 2017. He pleaded guilty at committal case conference on 22 May 2017 and the matter proceeded by way of straight hand up brief.

22. The plea proceeded in the County Koori Court on 25 July 2017 and the applicant was sentenced on 28 July 2017.

GROUNDS OF APPEAL AND SUBMISSIONS

Ground 1: The individual sentences, the total effective sentence, and the orders for cumulation are manifestly excessive, particularly in view of the following matters:

a) **The applicant's young age (24);**
b) **The applicant's tragic personal history;**
c) **The applicant's aboriginality;**
d) **The applicant's exemplary involvement in the Koori Court process; and**
e) **The applicant's evident remorse both through his early plea and his engagement with the Elders during the sentencing conversation.**

Submissions on the plea:

23. On the plea, submissions were made as to the applicant's tragic and disadvantaged childhood;

24. His personal circumstances can be summarized as follows;
    a. The applicant was born on 2 February 1993 and he is currently 24 years old. He was 23 at the time of the offending.
    b. He is the middle child with an older sister, Bianca, and a younger brother, Beau.
    c. The applicant was raised initially by his mother and father, but both parents suffered from significant drug problems. Mr Honeysett (snr) was in and out of gaol throughout the applicant' s life. He passed away in 2009 from a brain aneurism. The applicant's mother died of a heroin overdose in 1997 when he was four years old.
    d. He was then placed in foster care briefly before living with this grandmother, Barbara in Reservoir.
    e. He also lived with his father and step-mother from time to time.
    f. The applicant attended Reservoir Primary School and Collingwood Secondary College until the end of year 8. He is unable to read or write.
    g. The applicant's father was a drug user and dealer. There was rarely enough food to eat and the applicant struggled at school.

h. When he was 14 the applicant witnessed his father collapse following the aneurism. His father never regained consciousness and the applicant says that this was the moment when his life 'really went off the rails.'
i. Since the age of 16, the applicant has been in and out of custody and has never maintained consistent employment.
j. He began using cannabis at the age of 13 and at 15 began using amphetamines.

25. The learned sentencing judge, in her sentencing remarks, indicated that she 'gave full weight' to the applicant's dysfunctional personal history.

26. It was submitted that the background circumstances of emotional hardship, deprivation, dysfunction and disadvantage are relevant in four ways, and stated in *DPP v Terrick; DPP v Marks; DPP v Stewart* [2009] VSCA 220:
    a. as explanatory and causative of his offending[4]; and
    b. as explanatory and connected to his drug use[5]; and
    c. as requiring a moderation of general and specific deterrence and denunciation[6]; and
    d. as requiring a focus on the need for rehabilitation in order to effectively protect the community in the future.

27. It is conceded that the Applicant's prior convictions are both numerous and concerning. In 2013 he pleaded guilty to armed robbery and was sentenced to two years imprisonment with a non-parole period of twelve months. In November 2011 he pleaded guilty to another armed robbery in the County Court and was sentenced to two years and nine months at a Youth Justice Centre. He has a further conviction for armed robbery and attempted armed robbery in May 2011 in the Childrens' Court.

28. However, it was submitted that despite the passage of time and the applicant's prior convictions, the relevance of his tragic and deprived history remains relevant to the sentencing task, as was confirmed in *Bugmy v The Queen.*[7].

29. It is difficult to quantify precisely the degree to which any particular matter in his personal history influenced the actions of the applicant. Nonetheless, it is submitted the nature of his upbringing, together with his subsequent and related drug addiction should be given substantial weight.

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[4] *DPP v Terrick; DPP v Marks; DPP v Stewart* [2009] VSCA 220.
[5] Op cit, [46] and [53].
[6] Op cit, [46] and [47].
[7] *Bugmy v The Queen* [2013] HCA 37, [44].

30. The story of the applicant's childhood and adolescence add a context to the offending that is relevant to the assessment of his moral culpability. [8] Further, the link between the applicant's disadvantaged past and his aboriginality was submitted to be relevant to the sentencing task.

31. Finally, the following parallels between Mr Bugmy's early life experiences and Mr Honeysett were identified:
    a. both grew up in households where drug and alcohol abuse were common;
    b. both have had limited formal educations;
    c. both began abusing illicit drugs at 13 years old;
    d. both experienced crime both as a victim and a witness throughout early childhood; and
    e. both had regular interactions with the criminal justice system from childhood onwards.

32. It was ultimately submitted that there is a link between social disadvantage and drug abuse; the applicant's drug abuse can be seen as a 'reflection of the environment in which he was raised' and, as such, ought to be seen as a mitigatory factor:

    "To do so, he said, is to acknowledge the endemic presence of alcohol in Aboriginal communities and "the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stress on them, reinforcing their resort to alcohol and compounding its worst effects."[9]

33. A report of psychologist Michael Crewdson[10] was relied upon as well as a report of Carla Lechner[11] from one of the applicant's prior matters.
    a. Both reports comment upon the impact of Mr Honeysett's dysfunctional history.
    b. Ms Lechner opines that the Accused has a mild intellectual disability;[12]
    c. Mr Crewdson diagnoses the Accused with a persistent depressive disorder;[13] and
    d. Both reports express concern about the risk of institutionalisation.[14]

34. In imposing sentence, the sentencing judge accepted that:[15]
    a. the applicant's level of intellectual functioning was disadvantaged;
    b. that his childhood was difficult and impoverished;

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[8] op cit at [40].
[9] Report of Michael Crewdson, dated 20 July 2017, page 18.
[10] Report of Michael Crewdson, dated 20 July 2017.
[11] Report of Carla Lechner, dated 15 March 2013.
[12] ibid page 4.
[13] Report of Michael Crewdson, dated 20 July 2017, page 16.
[14] Crewdson at page 18; Lechner at page 5, [5].
[15] Footnotes with page references to be provided when the transcript is available.

c. that he has spent most of his life going in and out of custody and was at risk of institutionalisation;
d. that his plea of guilty was early, has some utilitarian benefit and is evidence of some remorse; and
e. that the Accused has demonstrated a desire to change.

35. In relation to the gravity of the offending, the sentencing judge found that:
    a. this is a serious example of a serious offence;
    b. the Accused's actions were terrifying for the victims;
    c. there was little comparison in gravity between charge 1 and charge 2.

Participation in the Sentencing Conversation:

36. The County Koori Court was created as a Division of the County Court by the *County Court Amendment (Koori Court) Act* 2008 (the Amendment).

37. Section 1 of the Amendment states that the Amendment has:

    '[an] objective of ensuring greater participation of the Aboriginal community in the sentencing process of the County Court through the role to be played in that process by the Aboriginal elder or respected person and others.'

38. The County Koori Court was the first sentencing court for Aboriginal offenders in a higher jurisdiction in Australia.

39. The procedure is the County Koori Court is different to the County Court. This difference in procedure is at the heart of the purpose of the Court.

40. In a document produced by the Koori Court entitled 'Information for Legal Practitioners'[16] the question, *Why have a Koori Court* is answered as follows:

    - Koori people are over-represented within the criminal justice system, more so than any other cultural group;
    - Numerous reports, such as the Royal Commission into Aboriginal Deaths in Custody and the Bringing Them Home Report, have recommended that the legal system be modified to

[16] The County Court, The Victorian Aboriginal Justice Agreement, access 24 August 2017, https://www.countycourt.vic.gov.au/county-koori-court.

make it less culturally alienating and more tailored to the needs of the Aboriginal offenders and their community; and

- The Victorian Aboriginal Justice Agreement is an agreement developed between the State Government and the Victorian Koori community. One of the recommendations was for the establishment of a Koori Court.

41. Further, the objectives of the County Koori Court are listed as:

- to encourage participation of the accused in the Court process;
- to encourage the accused to address their offending behaviour;
- to support the accused in the completion of their sentence; and
- to involve the community in the Court process.

42. An accused person is arraigned in the usual way and a plea of guilty is entered.

43. The Court then stands down and reconfigures for the sentencing conversation as follows:
    a. the presiding judge and counsel do not wear robes;
    b. the judge re-enters the Courtroom with the elders;
    c. the judge, the elders, counsel for the prosecution and defence, the accused, the Koori Court Officer and any supporting family members of the accused sit around the bar table, at one level; and
    d. all participants then discuss the offending and legal representatives are encouraged to use plain English.

44. During the sentencing conversation, the accused is encouraged to talk about their past, the reasons for their conduct and to explore what services or programs might be of assistance to them. The Elders speak to the accused on behalf of the aboriginal community.

45. The case is then adjourned for a formal sentence in the usual way.

46. In this case, the applicant actively, appropriately and enthusiastically participated in the process.

47. He was confronted directly by the Elders and he respectfully engaged with them. He made suggestions about the type of support that would benefit him in the community and expressed genuine remorse for his offending behaviour.

48. The elders vigorously reprimanded the applicant and he bore their disappointment and chastisement with openness and dignity. He made no excuses for his conduct but instead, took full responsibility for his behaviour.

49. In her sentencing remarks, Her Honour noted that the sentencing conversation had been 'challenging' and noted that:
    a. the applicant was genuine;
    b. it was 'obvious you were truly sorry'; and
    c. he had an 'evolving sense of motivation'.

50. Through his admirable engagement in the Count Koori Court process, the applicant displayed insight, maturity and contrition: these factors are relevant to an assessment of his prospects for rehabilitation, specific deterrence and protection of the community.

51. If the matter to proceeded through the usual channels, rather than through the Koori Court, it would have been easier for the applicant. He was asked why he chose the Koori Court process and he replied words to the effect of 'I wanted to explain myself'.

52. The County Koori Court experience is confronting and challenging for all offenders. For the Court to be able to observe the way an accused person interacts with those challenges offers an insight into that accused and an opportunity to effect real and substantial rehabilitation.

53. The success of the Koori Court relies on offenders actively engaging in the process. For those who do, their efforts ought to be recognised so as to achieve the very objectives of the Koori Court.

54. It is submitted that her Honour failed to give sufficient weight to the applicant's engagement in the process and failed to moderate the principles of specific deterrence and protection of the community and give appropriate weight to rehabilitation, accordingly.

<u>Ground 2</u>: The learned sentencing judge erred in ordering six months' cumulation on charge 2 in all the circumstances.

55. The facts giving rise to charge 2 are set out at [9]-[11] and [16] above. The allegations are essentially of use of the stolen motor vehicle as a passenger. The cumulation of six months for this offence is not justified having regard to the factual circumstances of the case and the principle of totality.

56. Leave is sought to file an amended written case when transcript is available of the plea proceedings.

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A J Beech

Counsel for the Applicant