IN THE SUPREME COURT OF VICTORIA S APCR 2017 0183
COURT OF APPEAL
(CRIMINAL DIVISION)

THE QUEEN

Respondent

and

DAMIAN HONEYSETT

Applicant

RESPONSE TO APPLICANT'S WRITTEN CASE

Date of document:	27 October 2017
Filed on behalf of:	Respondent
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Part A and B: Particulars of Conviction and Sentence, Relevant Statutory Provisions and Maximum Penalties

1. The applicant was convicted by plea of guilty on 25 July 2017 and sentenced by Her Honour Judge Lawson on 28 July 2017.

Charge on Indictment	Offence	Maximum	Sentence	Cumulation
1.	Armed Robbery [s.75A(1) *Crimes Act* 1958]	25 years [s.75A(2) *Crimes Act* 1958]	54 months	Base
2.	Theft [s.74 *Crimes Act* 1958]	10 years [s.74 *Crimes Act* 1958]	1 year	6 months
Total Effective Sentence:	5 years			
Non-Parole Period:	3 years			

<table>
<tr><th>Charge on Indictment</th><th>Offence</th><th>Maximum</th><th>Sentence</th><th>Cumulation</th></tr>
<tr><td colspan="2">Pre-Sentence detention declaration pursuant to s 18(1) of the Sentencing Act 1991:</td><td colspan="3">154 days</td></tr>
<tr><td colspan="5">6AAA Statement: The learned sentencing judge stated that the sentence she would have imposed if the applicant had been convicted of this offence after a trial would have been 6 years 6 months imprisonment, with the applicant becoming eligible for parole after serving 4 years 6 months of that sentence.</td></tr>
<tr><td colspan="5">Other relevant orders: Order that applicant pay $1,052.35 compensation to Dan Murphy’s</td></tr>
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Part C: Summary of Relevant Facts

2. The Crown relies on the Summary of Prosecution Opening tendered at the plea hearing (Exhibit A).

Part D: Grounds of Appeal

3. **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.**

   3.1. The ground of manifest excess can only succeed where the sentence imposed was wholly outside the range of sentencing options available. It is respectfully submitted that it cannot be said in the present case that “something has gone obviously, plainly or badly wrong in the exercise of the sentencing discretion.” [1]

   3.2. The sentencing judge noted the applicant’s young age[2] and gave his dysfunctional personal history ‘full weight,’ the effects of which Her Honour recognised ‘do not

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[1] *Ayol v The Queen* [2014] VSCA 151, [30] (Maxwell P) citing *Clarkson v the Queen* (2011) 32 VR 361, 384 [89] (Maxwell ACJ, Nettle, Neave, Redlich and Harper JJA); *Young v The Queen* [2016] VSCA 149, [128] (Ashley, Whelan and Kaye JJA)

[2] Sentencing remarks at [41]

diminish over time.'[3]

3.3. Her Honour further recognised the importance of the applicant's aboriginality and his need to connect to his culture.[4] The matter was heard in the Koori Court and to suggest that the sentencing judge placed insufficient weight on this factor would be to ignore all the circumstances of the hearing. Her Honour stated "I will have regard to your participation in this process and your expressed willingness to undertake rehabilitation in terms of fixing the non-parole period."[5]

3.4. There is no dispute that the applicant engaged in the Koori Court process and engaged with the elders, expressing remorse for his conduct, as is apparent from the plea transcript and recognised by the sentencing judge in her sentencing remarks.[6] Her Honour stated that the applicant was genuine, was obviously truly sorry and had an evolving sense of motivation.[7] It must be remembered that the difference in procedure is the core purpose of the County Koori Court and it remains the role of the judge to pass sentence.

3.5. It was submitted by counsel for the applicant on the plea that *DPP v Terrick; DPP v Marks; DPP v Stewart* and *Bugmy v The Queen* both apply in the present circumstances as indeed they do. It should be noted however that the majority in *Bugmy* observed that "An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender."[8]

3.6. Having taken the applicant's background into consideration, the sentencing judge was bound to consider protection of the community, particularly in light of the

[3] Sentencing remarks at [25]-[34], [43]
[4] Sentencing remarks at [34]
[5] T52 at lines 21-24
[6] T20-46; Sentencing remarks at [31], [34]-[35]
[7] Sentencing remarks at [6]-[7]
[8] *Bugmy v R* (2013) 249 CLR 571; (2013) ALR 192

applicant's significant relevant prior convictions. Her Honour further noted the applicant's prospects of rehabilitation as 'somewhat guarded' but nevertheless 'moderated the need to emphasise both general and specific deterrence and there is a slight reduction in moral culpability.'[9]

3.7. It is submitted that the sentencing judge balanced all relevant considerations to arrive at a sentence that was within the range and as such, this ground ought to be dismissed.

4. **Ground 2: The sentencing judge erred in ordering six months' cumulation charge 2 in all the circumstances.**

4.1. The sentencing judge imposed a sentence of 12 months on charge 2 and ordered that 6 months be served cumulatively on the sentence imposed on charge 1. Charge 2 related to the theft of a motor vehicle used in the commission of the armed robbery the subject of charge 1. The applicant was a passenger in the vehicle.

4.2. The 6 months cumulation of the sentence imposed on charge 2 was modest in all the circumstances. Had a lesser period of cumulation been ordered, it is submitted that the sentence would not have been reduced to such a degree that resentencing is now warranted and as such this ground ought to be dismissed.

DATED: 27 October 2017

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Counsel for the Respondent

[9] Sentencing remarks at [43]