



## Summary of Judgment

### BRENDAN DAVIES v THE QUEEN

[2019] VSCA 66

28 March 2019

The Court of Appeal (Justice Kaye, Justice McLeish and Justice T Forrest) today dismissed an appeal by Brendan Davies against his conviction on five charges of arson but allowed his appeal against the sentence imposed on those charges.

Following a three month trial in the County Court, the applicant was convicted of intentionally setting fire to and damaging a police station, a church, a church presbytery, a child care centre and a bakery between 20 January and 3 February 2011. He was sentenced to a total effective sentence of 14 years and 6 months' imprisonment, with a non-parole period of 12 years and 3 months. The applicant represented himself at the trial and also on the application for leave to appeal.

At trial, the prosecution relied, principally, on seven pieces of evidence to establish the guilt of the applicant, being CCTV recordings, data from a tracking device that had been fitted to the applicant's vehicle, visual observation of the movements of the applicant by the State Surveillance Unit, forensic evidence, the generally similar way in which each fire was commenced, evidence of motive demonstrated by the content of three YouTube videos that were alleged to be connected to the applicant, and coincidence reasoning.

The applicant appealed on a number of detailed grounds relating to admissibility of evidence, the judge's directions to the jury, the jury's verdicts, alleged judicial bias and disadvantage arising out of the applicant's self-represented state.

The application for leave to appeal against conviction was refused on all grounds, with one exception. The Court of Appeal granted leave in relation to an aspect of a ground of appeal alleging that evidence admitted at trial, that purported to establish the time at which the fire at the police station occurred, had been wrongly admitted. The Court found that this evidence amounted to hearsay evidence and, as such, was inadmissible. However, the Court noted that, having carefully reviewed the evidence in the trial, the prosecution still had a strong case against the applicant in respect of the police station fire, even in the absence of the wrongly admitted evidence. Accordingly, the Court held that the erroneous admission of the evidence did not result in a substantial miscarriage of justice in respect of the charge relating to the police station fire, or any of the other charges, and ultimately dismissed the appeal on this point.

The applicant also appealed against the sentence imposed by the trial judge on the grounds that it was manifestly excessive and that the sentencing judge had erred in applying incorrect pre-sentence detention. The applicant alleged a number of specific errors under the ground of manifest excess, and the Court of Appeal found that two such errors had been made out. Firstly, the Court found that the sentencing judge ought to have concluded that the applicant's subjective culpability for the offending was, to a moderate degree, mitigated because of the causal connection between the applicant's congenital psychological condition

and the offending. Secondly, the Court held that, as a result of the assurances given by the trial judge to the applicant in the course of sentencing submissions, his Honour ought to have, but did not, take into account as a mitigating factor the substantial delay between the applicant's arrest and conviction and sentence. As a consequence of these specific errors, it fell to the Court of Appeal to resentence the applicant. The Court reduced the terms of imprisonment in respect of the bakery and child care centre fires, and imposed a new total effective sentence of 12 years and 3 months' imprisonment with a non-parole period of 10 years and 3 months. The Court emphasised that it was exercising the sentencing discretion anew, and the fact that the sentences imposed by the Court of Appeal on re-sentencing were less than those imposed by the sentencing judge does not have the corollary that the sentences imposed by the sentencing judge were manifestly excessive.

The Court also found that the pre-sentence detention declared was incorrect, due to an arithmetical error in the pre-sentence detention provided by the prosecution to the judge. To that extent, the applicant succeeded on this ground and, in re-sentencing the applicant, the Court made a fresh declaration of pre-sentence detention.

---

**NOTE:** This summary is necessarily incomplete. It is not intended as a substitute for the Court's reasons or to be used in any later consideration of the Court's reasons. The only authoritative pronouncement of the Court's reasons and conclusions is that contained in the published reasons for judgment.