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

S APCR 2017 0061

RODNEY PHILLIPS

Applicant

and

THE QUEEN

Respondent

RESPONSE TO APPLICANT'S WRITTEN CASE

Date of document:	23 June 2017
Filed on behalf of:	Respondent
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1. The respondent certifies that this Written Case is in a form suitable for publication on the internet.

Part A and B: Particulars of Conviction and Sentence, Relevant Statutory Provisions and Maximum Penalties

2. The applicant was convicted by plea of guilty on 3 February 2017 and re-arraigned on charge 2 of C1510274.A.1 on 15 February 2017. The applicant was sentenced on 14 March 2017.

Charge on Indictment	Offence	Maximum	Sentence	Cumulation
Indictment C1510274.A.1				
1.	Criminal Damage [s 197(1) of the *Crimes Act 1958*]	10 years' imprisonment [s197(1) of the *Crimes Act 1958*]	18 months' imprisonment	8 months

Charge on Indictment	Offence	Maximum	Sentence	Cumulation
2.	Reckless Conduct Endangering Serious Injury [s23 of the *Crimes Act 1958*]	5 years' imprisonment [s23 of the *Crimes Act 1958*]	4 years' imprisonment	2 years
3.	Causing Injury Recklessly [s18 *Crimes Act 1958*]	5 years' imprisonment [s18 *Crimes Act 1958*]	4 years' imprisonment	Base
4.	Arson [s197(1) and (6) *Crimes Act 1958*]	15 years' imprisonment [s197(7) *Crimes Act 1958*]	2 years' imprisonment Serious arson offender	9 months
Indictment C1510274.B				
1.	Attempted Arson [s197(1) and (6) and s321M *Crimes Act 1958*]	10 years' imprisonment [s321P *Crimes Act 1958*]	6 months' imprisonment Serious arson offender	2 months
2.	Attempted Arson [s197(1) and (6) and s321M *Crimes Act 1958*]	10 years' imprisonment [s321P *Crimes Act 1958*]	6 months' imprisonment Serious arson offender	2 months
3.	Theft [s74(1) *Crimes Act 1958*]	10 years' imprisonment [s74(1) *Crimes Act 1958*]	12 months' imprisonment	3 months
Indictment C1510274.C				
2.	Prohibited Person Possess Firearm [s5(1) *Firearms Act 1996*]	1200 penalty units or 10 years imprisonment [s5(1) *Firearms Act 1996*]	12 months' imprisonment	Nil

Total Effective Sentence:	8 years' imprisonment
Non-Parole Period:	6 years and 2 months
Pre-Sentence detention declaration pursuant to s 18(1) of the *Sentencing Act 1991*:	603 days
6AAA Statement: 10 years imprisonment with a non-parole period of 8 years and 2 months	
Other relevant orders: Licence cancelled and disqualified from driving for period of 2 years; Disposal Order and Forfeiture Order granted.	

Part C: Summary of Relevant Facts

3. The Respondent relies on the summary of relevant facts as outlined in the Summary of Prosecution Opening dated 13 February 2017 tendered and marked Exhibit 1.

Part D: Grounds of Appeal

4. **Ground 1 – The individual sentences imposed on each of –**

- **Charges 1, 2, 3 and 4 on Indictment C1510274.A.1**
- **Charge 3 on Indictment C1510274.B**

and the orders for cumulation as between those sentences are manifestly excessive, resulting in a head sentence and non-parole period that are also manifestly excessive.

4.1. Charge 1 on Indictment C1510274.A.1 and the order for cumulation in relation to charge 1 was, it is submitted, plainly within range. Although the property damage to the fence and letterbox was of a low order this is not the only matter relevant in assessing the seriousness of the offending. The damage occurred because of the use of a firearm. It is conceded in this applicant's written case that it was a highly anti-social act and was an escalation of events the previous day. Further, in discussion about the seriousness of the offending with the learned trial judge counsel for this applicant conceded that it was a step up[1] in terms of offending. Whilst it was damage to property, the surrounding circumstances indicated that the purpose in damaging the property was to intimidate. Indeed during the plea in relation to the co-offender Liszczak His Honour referred to the return to George Williams' place being more serious than the Molotov cocktails because it involved a firearm. His Honour went on to say that although the damage was fairly minor it was a spectacular way to cause damage. Counsel for Liszczak agreed that the involvement of the firearm made this charge more serious[2]. As stated above counsel for this

[1] Plea transcript 67.23
[2] Plea transcript 32.7 – 32.15

applicant did not seek to distance himself from this discussion but rather adopted this analysis.

4.2. Once it is seen that the charge of criminal damage was not at the lower end of the range and was more serious than the other offences of attempted arson relating to the Molotov cocktails, then the sentence imposed was plainly open to His Honour. Further, His Honour found that the offence showed persistence and determination to send a message to George Williams, that the use of the gun has a sinister overtone and was a more frightening and dangerous way to cause property damage[3]. These findings are not challenged in this applicant's written case and it is not suggested that they were irrelevant in assessing the seriousness of the offending. There was also no suggestion in the plea or in His Honour's sentencing remarks that this offending was directed to cause physical harm or danger or injury to any person and so such matters were not impermissibly used as aggravating.

4.3. The maximum penalty for criminal damage is ten years and it was plainly separate offending that required cumulation. Cumulation of eight months fell well within range.

4.4. Charge 4 of Arson on indictment C1510274.A1 and charge 3 of Theft of a Motor Vehicle on indictment C1510274.B relate to the stolen car that was subsequently torched. It is submitted on behalf of this applicant that these sentences of 2 years with 9 month cumulation on the arson and 1 year with 3 months cumulation on the theft are manifestly excessive. With respect it is difficult to see why this is so. The cumulation on the theft of car was modest. Once it is accepted that there should be cumulation, and it was clearly separate offending, then three months is well within range. A sentence of 10 percent of the maximum is also not excessive. This offender was not before a court for the first time. He had substantial prior convictions including a relevant prior for theft of a motor vehicle. He also had a prior conviction for arson and so fell to be sentenced as a serious arson offender in relation to this charge. During the discussion on the plea His Honour expressed the view that the

[3] Sentencing remarks [64]

destruction of the car added to this applicant's overall criminality[4]. It is difficult to see anything wrong with this view. The sentence and cumulation on the arson was plainly open to His Honour.

4.5. Charge 3 on Indictment C1510274.A1 of recklessly causing injury was the base sentence. His Honour found that this offence and charge 2 of reckless conduct endangering serious injury were so serious that absent mitigating factors he would have imposed the maximum penalty in each case[5]. In doing so he was approaching the case in the way approved in *R v Kilic* where the High Court stated that it was preferable in appropriate cases for a sentencing judge to state that the offence is so grave as to attract the maximum penalty[6], rather than use terminology like 'worst case'. Seen in this light a sentence of 80 percent of the maximum, subject to the matters in mitigation discussed below, must be within range.

4.6. His Honour during the plea evinced an intention to characterise this offending in this way. It was described as 'top end'. Counsel for Liszczak volunteered this description[7]. Counsel for this applicant ultimately appeared to agree with this description[8].

4.7. The offending was indeed offending that absent mitigating matters was capable of attracting the maximum penalty. It firstly involved the deliberate use of a firearm against police officers acting in the course of their duties. It was objectively grave offending. Bearing in mind that the injury offence was one of causing injury rather than serious injury it can readily be seen that in terms of the damage caused it was in this regard also 'top end' offending for this offence. The victim in relation to charge 3 suffered in the way described by His Honour in his sentencing remarks. He received fourteen shotgun pellets to the head with only three removed and the remainder likely to be there permanently. He was off work for six months and still has ongoing headaches and other problems. It must therefore be seen to be at the

[4] Plea transcript 73.24
[5] Sentencing remarks [67]
[6] (2016) 339ALR 229 at [19] and [20]
[7] Plea transcript 29.7
[8] Plea transcript 62.2 – 62.29

upper end of ‘injury’. For comparison purposes the next level of serious injury is one that is ‘substantial and protracted’. This injury it is submitted should be seen to be just below serious and therefore at the ‘top end’ of injury. Given the offending itself and the injury sustained were, at the level they were His Honour was not in error in finding that this offending was capable of attracting the maximum for this offence.

4.8. The same analysis can be completed for charge 2. There was no dissent from the use of the expression ‘top end’ to describe this offending. The degree of endangerment of serious injury through the use of a shotgun must be seen to be at the upper level. The likelihood of serious injury was high. The victim took evasive action. His Honour was again correct to find that absent mitigating factors the offending was such as to warrant the maximum penalty.

4.9. It was necessary for His Honour to cumulate between charges 3 and 2. They represented separate offending. There were separate victims. Whilst minds can differ about the amount of cumulation, the two years ordered here was will within the range. It must be remembered that although it arose out of the one action charge 2 was also offending of a grave nature. The nature of the further offending even when it arises out of the same action is relevant in determining the level of cumulation. Thus there was considerable internal logic in His Honour’s order for cumulation. Further, the cumulation on all the remaining charges amounted to a further two years. His Honour was then required to ensure that the overall sentence did not offend against the principle of totality. Here the level of cumulation on all sentences becomes relevant. If any adjustment was required the level of cumulation finally imposed indicates that His Honour had scope to adjust both charge 3 and the other charges to ensure that the principle of totality was not offended.

4.10. Although His Honour accepted that the agreement, arrangement or understanding must have been short lived, it was plainly in place at the time of the shooting. Although a longer period of planning may mean that the offence is more grave, this does not mean that His Honour was not able to find that this offending deserved the maximum penalty. It may be the case that more grave conduct can be conceived of

but the cases do not indicate that the maximum penalty is reserved only for the worst imaginable offending. Offending may be grave for different reasons and the absence of one potentially aggravating factor does not necessarily take the offending out of this category.

4.11. In terms of factors in mitigation they were limited in this case to the plea of guilty, relative youth and prospects of rehabilitation. Of these the plea of guilty carried the most weight with relative youth giving way because of the seriousness of the offending and prospects of rehabilitation being at the lower end of the scale, particularly given the prior history of this applicant. One year's discount for these matters of mitigation seems reasonable in the circumstances.

4.12. In conclusion it is submitted that the sentences imposed were not manifestly excessive.

5. **Ground 2 – The learned sentencing judge erred by doubly punishing the applicant as between charges 2 and 3 on Indictment C1510274.A.1.**

5.1. Charges 2 and 3 do not overlap in the way that occurred in *Pearce v The Queen*[9]. In that case the two charges each contained an element of causing injury to the same victim. Here the elements of the two offences are different but more importantly there were two victims.

5.2. The principle in *Pearce v The Queen* was applied in the Court of Appeal decision of *R v Craig Bradley*[10]. That case involved a charge of reckless conduct endangering life and intentionally causing injury. However that case can also be distinguished because the two charges involved the same action on the same victim.

5.3. Here charges 2 and 3 constitute separate criminal acts against each of the victims of those charges. It may be that the two offenders engaged in a single action, the discharging of the firearm but this has then resulted in separate acts against each

[9] (1998) 194 CLR 610
[10] [2010] VSCA 70

victim. Vincent JA set the issue out in this way in *R v Bekhazi*[11] using the example of the detonation of a bomb in a shopping centre:

> "The detonation of a bomb in a shopping centre may, from the perspective of a particular perpetrator, involve a single action. However, as far as the law is concerned, the individual has committed a separate criminal act against each of his victims. Through the actor's engagement in the one activity, he has breached what the law sensibly regards as quite distinct and identifiable obligations to the community and to each of those encompassed by the offence concerned and for which he is separately accountable. The one action may involve the commission of a number of such breaches and offences, each of which is regarded as involving a separate act. So viewed, the same conduct or act, although I would prefer to employ the term action, may attract criminal responsibility as murder, attempted murder, or one of a number of other lesser offences according to the consequences for the respective victims or potential victims."[12]

Winneke P with specific reference to section 51 of the Interpretation of Legislation Act 1984 (Vic) stated that, although the charges of culpable driving and reckless conduct endangering life arose out of the same course of driving, they were not offences constituted by the same acts or omissions resulting in harm to the same person. Winneke P, who agreed with Vincent JA gave a similar example. His Honour said:

> "So far as I am aware, it has never been doubted that, if the act of detonating a bomb kills or injures multiple victims, the accused can be charged with and punished for as many offences as there are victims. Likewise, if a course of driving a motor vehicle causes the death of one person and endangers the life of another, the fact of the death of one victim and the endangerment of the life of the other must be part of the relevant "acts or omissions" constituting the separate "laws" because the consequences cannot be divorced from the separate obligation owed by the accused to the separate victims. In the eyes of the criminal law, it is the existence of the separate obligations owed to the several victims of the one criminal act which, in part, defines the acts or omissions constituting the different offences arising from that act."[13]

Charles JA agreed with the President and Vincent JA. None of this means as Winneke P recognised[14], that totality of the punishment to be inflicted can be ignored.

5.4. *Bekhazi* has been referred to more recently in *Lecornu v The Queen and the Secretary to the Department of Justice*[15] where Maxwell P surveyed the law relating

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[11] (2001) 3 VR 321
[12] At [23]
[13] At [14]
[14] At [15]
[15] [2012] VSCA 137

to double punishment. Nothing in that case supports the proposition that His Honour was not entitled to treat the two offences as separate criminal acts.

5.5. Another scenario slightly different from *Bekhazi* and this case is where there is more than one charge of culpable driving relating to one action of driving but resulting in multiple victims. Typically in such a case the sentence on each culpable driving charge will be the same. It will not be the case that each charge receives a diminishing sentence to avoid any prospect of double punishment. Each is equally serious. It would not be appropriate to give a high sentence on one charge and then a much lower sentence in relation to the next charge in which there is also a death because the only part remaining is that there has been another victim.

5.6. Numerous examples can be found where the same sentence is imposed in relation to multiple charges arising out of one incident. So for example in *R v Towle*[16] the same sentence was imposed in relation to each of the five deaths caused by the driving. Another example is *R v Guariglia*[17] where two deaths resulted in sentences of six years with 50 percent cumulated in relation to the second. There are many more examples. Some recent ones include *Nei Lima De Costa Junior v R*[18], *DPP v Trueman*[19], *R v Ioane*[20], *R v Franklin*[21]. In each case the same sentence was imposed on the culpable driving charges.

5.7. Here there were two victims and to each of those victims this applicant owed a separate duty. In relation to charge 3 this duty was to not recklessly cause injury. In relation to charge 2 it involved a duty not to place the victim in danger of serious injury. Viewed in this way they were separate criminal acts for which the applicant was required to be punished. Of course there needed to be a measure of concurrency and this was appropriately reflected in the sentence. However there was no double punishment by imposing the same sentence in relation to each charge.

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[16] (2009) 54 MVR 543
[17] (2001) 33 MVR 543
[18] (2016) FLR 307 153
[19] (2017) 79 MVR 364
[20] [2006] VSCA 84
[21] [2009] VSCA 77

5.8. Further, the marking of the second victim by ordering cumulation of 50 percent is an entirely logical way of proceeding. In other words, instinctively it is sound. The seriousness of the offending required significant cumulation and 50 percent is not out of the range available. Of course it is necessary to consider totality as the authorities make clear. Here there were other charges at play all of which need to be considered in determining whether the total sentence imposed offended the totality principle. In the end however it is submitted that taking all of the offending into account the individual sentences and orders for cumulation were appropriate.

DATED: 23 June 2017

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Brendan Kissane QC

Counsel for the Respondent