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

Indictments: C1510274.B
C1510274.C
C1510274.A.1

IN THE MATTER OF

RODNEY PHILLIPS
V
THE QUEEN

APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE

WRITTEN CASE FOR THE APPLICANT

Date of document:	11 April 2017
Filed on behalf of:	The Applicant RODNEY PHILLIPS
Prepared by:	
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Introduction – Sentence and Maximum Penalty

1. The matter was initially listed for trial, to commence on 4 February 2017, with two accused men - Rodney Phillips and Sam Liszczak. After two days of pre-trial argument, the matter resolved, the accused were re-arraigned on Monday 6 February 2017 with both accused pleading guilty to three indictments covering 9 charges.

Charge	Offence	Maximum Penalty	Sentence	Cumulation
Indictment	**C1510274.B**			
1	Attempted Arson	10 years	6 months - (sentenced as a serious arson offender)	2 months
2	Attempted Arson	10 years	6 months (SAO)	2 months
3	Theft of motor vehicle	10 years	12 months	3 months

Indictment	**C1510274.C**			
2	Prohibited person possess firearm	10 years	12 months	No cumulation
Indictment	**C1510274.A.1**			
1	Criminal damage to property	10 years	18 months	8 months
2	Reckless conduct endangering serious injury	5 years	4 years	2 years
3	Recklessly causing injury	5 years	4 years	Base sentence
4	Arson	15 years	2 years	9 months
	Total effective sentence		8 years	
	Non-parole period		6 years and 2 months	
	Section 6AAA declaration		10 years with a non-parole period of 8 years and 2 months	

2. The co-accused - Sam Liszczak - faced identical charges (except the prohibited person possess firearm charge was listed as charge 1 on the indictment C1510274.C for Liszczak). Liszczak was sentenced to identical terms, except that he did not fall to be sentenced as a serious arson offender on charge 1 on the first indictment, and thus the 2 months cumulation was not ordered on that charge for Liszczak, with the result that Liszczak received a total effective sentence of 7 years and 10 months with a non-parole period of 6 years.

Summary of Relevant Facts

3. On 2 July 2015 Rodney Phillips was released from prison. He was 23 years old. On 4 July 2015 Sam Liszczak was released from prison. He had just turned 22 years old.

4. In the early morning of 5 July 2015, Phillips and Liszczak drove to addresses they mistakenly believed to be the homes of George Williams and Roberta Williams, and threw molotov cocktails at those houses. Little damage was done.

5. In the evening of 6 July 2015, Phillips and Liszczak stole a 2002 Ford Escape vehicle from outside a home in Endeavour Hills. They collected two female friends, with whom they had already spent some time that evening, and drove back to where Phillips was living in Pearcey Grove, Pascoe Vale, where they spent some time.

6. At some stage, the two men came into possession of a shotgun. In the early hours of 7 July 2015, they drove, in the stolen Ford Escape, this time to the correct house of George Williams, in Katandra Crescent Broadmeadows, where two shots were fired at the front fence of the property, causing damage to the letterbox and a hole in the front fence. A neighbour called "000" and reported the incident to police. As a result of this, and presumably the events of the previous morning, two marked police cars were sent to the address of Roberta Williams in Primrose Street Essendon.

7. Shortly thereafter, the stolen Ford Escape drove along Albion Street past Roberta Williams's house. One of the police cars decided to follow it. That police car contained two Constables - Wospil and Ashmole (the driver of that vehicle). A short pursuit ensued, with the Ford Escape eventually turning down Robinson Street, Essendon. Robinson Street was a no-through road. The Ford Escape turned into St Monica's Primary School at the end of that street. The police car parked partially across the driveway to the school, whereupon the Ford Escape performed a u-turn and exited the school grounds past the police car.

8. As the Ford Escape approached the police car, a shot was fired from the shotgun from inside that vehicle towards the police vehicle. Constable Ashmole ducked but was hit to the rear right hand side of his head and was injured. A total of 14 pellets lodged in

the rear right hand side of Constable Ashmole's head. Shotgun pellets also lodged in the driver's side headrest of the police vehicle.

9. The two accused drove back to Pearcey Grove, where they stayed for a short time. They then left that address in the Ford Escape and drove to Hossack Street in North Coburg where that vehicle was burnt and destroyed.

Grounds of Appeal and Argument

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.

Indictment C1510274.A.1

10. Charge 1 – criminal damage to property – firing a shot gun (twice) at George Williams's front fence and damaging the fence and letterbox[1] – sentence imposed: 18 months with 8 months cumulation.
    a. It is submitted that the individual sentence and the order for cumulation is manifestly excessive in circumstances where the property damage was minor. It was clearly a highly anti-social act, and an escalation from the events of the previous morning. However, it was not charged, nor alleged, that this act was directed at any person physically, or was intended to cause physical injury or danger to any person, or that it in fact placed any person at risk of physical injury.

11. Charges 2 and 3 – recklessly causing injury (base sentence) and reckless conduct endangering serious injury – sentences imposed: 4 years on each charge, with 2 years cumulation (RCESI).

[1] Summary of Prosecution Opening for Plea – [25] – "his letterbox had been damaged and there was a hole in his fence."

a. These sentences represent 80% of the maximum penalty for each offence. Two years (50%) cumulation results in 6 years between these two charges, which is 75% of the available combined maximum penalty for these two charges.
b. It is submitted that these individual sentences, and the orders for cumulation, are manifestly excessive in light of the fact that the two charges stem from one single act, the applicant pleaded guilty, he is still relatively young, and he was assessed as having some prospects of rehabilitation.
c. There were two victims – one for each offence – and some measure of cumulation was necessary, but it is submitted that 50% cumulation as between these two charges, resulting from the one single act, is manifestly excessive.

12. Charge 4 – Arson – burning of the stolen Ford Escape vehicle – sentence: 2 years with 9 months cumulation. This is argued at paragraph 13 below.

Indictment C1510274.B

13. Charge 3 – Theft of motor vehicle – sentence imposed: 12 months with 3 months cumulation.
    a. The arson and the theft of motor vehicle sentences will be argued together.
    b. For the theft of the motor vehicle and the burning of the same motor vehicle, the applicant was sentenced to 12 months and 2 years (respectively), with 3 months and 9 months of each sentence ordered to be served cumulatively.
    c. The vehicle was a 2002 Ford Escape. There was no evidence as to the value of the vehicle, but it was approximately 13 years old at the time of the offence.
    d. It is conceded that the value of the car is not the sole factor in determining the gravity of the offending, nor the sentence to be imposed. Offences of this nature cause significant inconvenience and imposition upon victims.
    e. Nevertheless, it is submitted that these sentences, and the orders for cumulation are manifestly excessive in all the circumstances.

Circumstances of the offence

14. In relation to charges 2 and 3 on Indictment C1510274.B, it is accepted that these are extremely serious examples of the offences. It was conceded by counsel for the defence that

they were either "top end" or "high end" instances of the offences.[2] There were numerous aggravating features associated with the offending, including that the two accused had both only been released from prison for a matter of days when the offending commenced, and the fact that – for the two most serious charges – the victims were police officers in the course of their duty. The applicant also has a troubling and relevant criminal history.

15. Nevertheless, it was accepted by the His Honour that it was not part of the initial endeavour to commit these offences[3] (the two most serious charges). They had not embarked on a plan to commit offences of violence against persons specifically. Their conduct of driving away from Roberta Williams's house suggested that they decided to abort their initial plan upon sighting the presence of police. They then attempted to get away from police. They drove down a 'dead end' street and the period of time in which these two offences occurred was a matter of seconds. The prosecution case for these two charges was put on the basis that there was an "agreement, arrangement or understanding" between the two accused to fire the shotgun. That agreement was short lived and spontaneous. His Honour accepted as much.[4]

Pleas of guilty

16. His Honour acknowledged the pleas of guilty,[5] that they avoided what would have been a significant and difficult trial,[6] that they avoided Constables Ashmole and Wospil having to relive their ordeals,[7] that they had utilitarian value, and that they represented an acknowledgement of responsibility for the offences.[8]

Youth

17. The applicant was 23 years old at the time of the offending and 25 years old at the time of sentencing. It is accepted that the principles applicable to the sentencing of youthful offenders are significantly reduced in the present case by virtue of the fact

[2] Plea hearing T 62/24 and 70/18 and Sentence – 14 March 2017 at [66]
[3] Plea hearing T 66/27-28
[4] Plea hearing T 72/20-23
[5] Sentence [110]
[6] Ibid
[7] Ibid
[8] Ibid [112]

that: (i) the applicant is towards the upper end of the age range where these principles apply; (ii) these are serious examples of the offences (charges 2 and 3), with numerous aggravating features, where deterrence, denunciation and protection of the community loom large as sentencing objectives; and (iii) the applicant has significant relevant criminal history. Nevertheless, it is submitted that youth remains a relevant factor in the sentencing exercise in the present case and must moderate, to some extent, the sentences imposed. His Honour acknowledged as much in the reasons for sentence.[9]

Prospects of rehabilitation

18. His Honour acknowledged:

> "But one of the great aims of the criminal law is to protect the community through rehabilitation, and this aim is all the more important when it comes to younger offenders. Thus, despite their poor records and despite the gravity of their crimes, I have sought to place some weight on their relative youth in sentencing."[10]

19. His Honour found the applicant's prospects of rehabilitation to be "guarded – and at best fair – on a scale of excellent, very good, good, reasonable, fair, guarded, poor and hopeless."[11]

Conclusion re: manifest excess

20. In light of these matters, it is submitted that the individual sentences – in particular the sentences of 4 years on each of the two most serious charges, with 2 years cumulation – demonstrates sentencing error. His Honour must have either given insufficient weight to the matters in mitigation, too much weight to the aggravating features, or the sentencing discretion miscarried in some other way, resulting in sentences that are manifestly excessive.

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[9] Sentence [115]
[10] Ibid
[11] Ibid [119]

<u>Ground 2:</u> **The learned sentencing judge erred by doubly punishing the applicant as between charges 2 and 3 on Indictment C1510274.A.1.**

21. The principle was stated by the High Court in *Pearce v The Queen* (1998) 194 CLR 610:

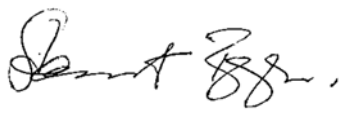
> To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just deserts.[12]

22. The court in *Pearce* further made clear that orders for cumulation or concurrency are secondary to the fixing of appropriate individual sentences.[13]

23. In the present case, the two charges under this ground flowed from the single act of firing the shotgun once. That act injured one victim and placed another in danger of serious injury – two consequences that provide the foundation for two separate charges. But the physical act is common to both charges, and the mental element is almost identical in both charges.

24. It is submitted that sentencing the applicant to 80% of the maximum penalty for each of these two charges constitutes double punishment.

25. It is submitted that the above grounds demonstrate error and that there is a reasonable prospect that the Court of Appeal would impose a less severe sentence.



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[12] *Pearce v The Queen* (1998) 194 CLR 610 [40] and further discussed at [41]-[49]
[13] Ibid [47]

11 April 2017