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

S APCR 2016

DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

and

ALEXANDER JOHN SEMAAN

Respondent

APPELLANT'S WRITTEN CASE

Date of document:	2 December 2016
Filed on behalf of:	Appellant
Prepared by:	Solicitor's code: 7539
JOHN CAIN	Telephone: (03) 9603 7666
Solicitor for Public Prosecutions	Direct: (03) 9603 2508
565 Lonsdale Street	Email:
Melbourne Vic. 3000	mathew.thompson@opp.vic.gov.au
	Reference: 1406345
	M. Thompson

Part A: Sentence, Relevant Statutory Provisions and Maximum Penalties

1. On 6 September 2016 the Respondent was found guilty of Murder after a trial in the Supreme Court at Melbourne. A plea hearing took place over 24 and 28 October 2016 and the respondent was sentenced on 4 November 2016 as set out in the table below:

Charges on Indictment	**Offence**	**Statutory provision**	**Maximum**	**Sentence**	**Cumulation**
1.	Murder [Contrary to Common Law]	s.3 of the *Crimes Act 1958*	Life imprisonment	22 years imprisonment	Base
Summary Charge	Breach of Parole	s78A(1) of the *Corrections Act 1986*	3 months imprisonment	2 months' imprisonment	2 months

Total Effective Sentence:	22 years and two months imprisonment
Non-Parole Period:	18 years
Pre-sentence detention:	187 days

Other relevant orders:

- Disposal Order

Part B: Summary of Relevant Facts

2. The learned sentencing judge summarised the facts of the offending at paras [3] – [17] of his Honour's sentencing remarks. Those facts are relied on by the Appellant as a summary of the relevant facts.

Part C: Grounds of Appeal

Ground 1 - The sentence imposed was manifestly inadequate.

Particulars

In fixing the sentence set out above in this Notice of Appeal, the sentencing Judge –

(a) Failed to give sufficient weight to the objective gravity of the offending;

(b) failed to give sufficient weight to the seriousness of the offence;

(c) failed to give sufficient weight to the protection of the community;

(d) failed to adequately characterise this offence as a serious example of the offence of murder;

(e) failed to give sufficient weight to the principles of general deterrence, punishment, and denunciation;

(f) failed to give sufficient weight to the consequences of the offence;

(g) failed to have sufficient regard to the maximum penalties prescribed for the offence;

(h) failed to give sufficient weight to the absence of remorse;

(i) failed to give sufficient weight to the poor prospects of rehabilitation;

(j) failed to adequately give appropriate weight to the prior history of offending of the respondent, his status as a parolee and that he should not have been in possession of a firearm

(k) failed to give appropriate weight to the protection of the community;

(l) gave excessive weight to factors in mitigation; and

(m) failed to regard the respondent's post offence conduct as a significant aggravating feature that was relevant to moral culpability.

3. The sentence imposed on the charge of murder is manifestly inadequate in all the circumstances of this offending and is outside the range of sentences available for this offending.

4. It is submitted that this offending was properly characterised by the prosecution as serious. It involved a cold blooded shooting in circumstances that could correctly be described as a thrill kill. It was deliberate and was at least to some extent pre-meditated. Whilst the pre-meditation was not of lengthy duration it could not be said that it was a crime committed in a fit of passion or that there was any provocation, aggression or confrontation by the deceased.

5. Even though the prosecutor after being pressed by the sentencing judge characterised this offending as mid-range[1] there were significant aggravating features and an absence of mitigating matters. Taking a firearm and pointing it at someone's head and then discharging it deliberately is definitely a serious example of murder. This is particularly so when one considers that a firearm was used and the killing did not occur in the heat of the moment.

6. There were few mitigating factors. The respondent was not entitled to a reduction for a plea of guilty. The respondent was not remorseful. He had, as the sentencing judge correctly found poor prospects of rehabilitation. He committed this offence whilst on parole and had breached his parole on a number of occasions previously. He had a number of relevant prior convictions including for violence.

7. The main matter put on the plea in mitigation was the respondent's use of ice and it was said that he was psychotic. The learned sentencing judge rightly rejected that the applicant was psychotic and found that the applicant's drug use was not a mitigating factor[2].

8. His Honour found that this was a mid-range murder. If His Honour meant by this that it was not a worst case scenario or at the upper end of seriousness, an example of which is *R v Hudson*[3] and not at the lower end, an example being *R v Sebalj*[4], then this statement is unobjectionable. However, even accepting that it could be described as mid-range His Honour was required to instinctively synthesise all relevant factors to arrive at an appropriate sentence. The short hand 'mid-range example' is no doubt useful as a descriptor but it should not be overlooked that mid-range can describe a range of murders that result in a wide range of sentences depending on the

---

[1] Plea transcript 105
[2] Sentencing remarks [24 and [27]
[3] [2008] VSC 389
[4] [2006] VSCA 106

individual features of the case.

9. The learned sentencing judge was referred to a number of cases by both defence and prosecution. His Honour, in his sentencing remarks, referred to two of these put forward by defence[5]. His Honour referred to *Sebalj*, as at the bottom end of the range of cases put forward by defence as having significant dissimilarities in that *Sebalj* had no prior criminal history and was remorseful. *Sebalj* was also psychotic at the time of his offending. Thus there is little comparability with the present case. In contrast *R v Pyke*[6] received a sentence of imprisonment of 23 years with a non-parole period of 18 years after a plea of guilty. His Honour considered that Pyke's actions were more pre-meditated than the respondent. Presumably this was because he took a weapon to the deceased's house. On the other hand Pyke apparently held a belief that the deceased had been involved in bashing him. Otherwise it involved a shooting and so has some aspects similar to the respondent's crime. Importantly Pyke's pleaded guilty to his offending whilst this respondent was not eligible to receive such a benefit.

10. The prosecution in written submissions at the plea argued that this case was more akin to *R v Hudson* and *R v Westbrook* than *Pyke* and *Sebalj*. It pointed out that the offending was not merely momentary, was a serious example of murder with no remorse, there were no prospects of rehabilitation and the offender had high moral culpability. His Honour indicated, perhaps understandably, that he did not consider Hudson to be of much assistance, although it was at least a pointer towards the seriousness that the prosecution attached to this offending. However Pyke and Westbrook were of some assistance. As stated above Pyke's received a sentence of a similar order to the respondent's sentence in this case. Westbrook's total effective sentence was of a similar order although his sentence was less at 19 years but this was for a reckless murder. In both these cases there was plea of guilty. The prosecution's written submission emphasised that the sentence in *Pyke* was imposed after a plea of guilty. Pyke had significant additional mitigating features including having been the victim of a previous crime and having been in a demoralised state at the time of the offending, as well as cooperation and remorse.

11. Although some assistance can be gained from these cases there are few cases where the offending relates to a senseless murder where the offender has significant prior history. His Honour in his sentencing remarks when he referred to comparable cases put forward by defence

[5] Sentencing remarks [42] and [43]
[6] [2006] VSCA 265

noted that at the top end of the range was Pyke although he pointed out that Pyke's offending was more pre-meditated on the one hand but he pleaded guilty and further mitigating factors on the other. It is submitted that Pyke did not fix the outer bounds within which His Honour was required to sentence. Further the sentence Pyke received on a plea of guilty is at least some indication that the sentence imposed in this case after a trial is inadequate and, the Crown submits, manifestly so. Indeed the mitigatory factors present in Pyke were significantly greater than in this case.

12. Although it is difficult to find truly comparable cases, one the writer has come across is *R v Willis*[7] which was a killing involving a shooting in the back of the head with a loaded cut back rifle after which the victim's car was ransacked in search of valuables and drugs and the body disposed of. His Honour accepted in this case that Willis was drug affected. A sentence of 24 years with a non-parole period of 20 occurred after a trial. Again there is not a complete similarity. This respondent was not involved in disposing of the body. However Willis had never been to prison before and had no prior history of violence.

13. Another way of testing the adequacy of this sentence is to look at the sort of sentence the respondent would have received had he pleaded guilty. To some extent this is artificial because such a plea would have brought into play a number of factors such as remorse and there may not have been the same aggravating features. The SAC report on Guilty Pleas in the Higher Courts[8] indicates that the average discount for pleas of guilty on sentences of more than 10 years is 17.7[9] percent which is significantly less than the average discount applicable to lesser sentences. However, using say 15 percent, this would mean that after a plea of guilty this respondent would have been sentenced to a sentence in the order of 18 years and 8 months. A greater discount would produce an even lesser sentence. It is submitted that for a murder of this order such a sentence would also be manifestly inadequate.

14. The respondent was on parole at the time of the commission of the crime of murder. He had prior convictions for violence which included in one instance the use of a firearm. His prospect of rehabilitation was, as His Honour found, poor. It is submitted that these circumstances distinguish this case from other cases. Further there were no Verdins issues, there was an absence of remorse and the offending involved the use of a firearm which the respondent was not entitled

[7] [2015] VSC 410
[8] August 2015
[9] Ibid at p 68, Figure 16

to possess. In such circumstances matters of mitigation are necessarily of less significance. In any event there was little by way of mitigation put forward. It was suggested that his relapse into drug use was mitigatory but His Honour rejected this.

15. It is submitted that, even accepting that this was a mid-range example of murder as His Honour found, the sentence should have been significantly higher and the sentence imposed is manifestly inadequate.

16. In addition to the above the following is submitted in relation to this ground and ground 2. There was discussion in the plea as to whether the respondent's post offence conduct in actively engaging his sister Hanna Semann and Megan Beljulji to support his false crime theory and to bring pressure on the main witness to change his account amounted to aggravating circumstances. It was plainly submitted by the prosecution that these actions increased the seriousness of the offending and was thus an aggravating feature of the offending[10]. The prosecution referred to the case of *R v Scholes*[11]. His Honour referred defence counsel to this case, suggesting that the defence's argument would be that this conduct could have been the subject of a separate charge[12]. Defence counsel adopted His Honour's suggestion. At this point there remained a dispute between the parties as to use of the post offence conduct. No one thereafter returned to it and His Honour does not resolve the dispute in His sentencing remarks.

17. It is submitted that this should have been treated as an aggravating feature. In the respondent's case it was bound up in his defence to the extent that he claimed that an unknown intruder was involved and ultimately must have killed the deceased. This is therefore not a circumstance where another offence relating to his post offence conduct should have been charged. Had it been charged separately a guilty verdict on any attempt to pervert charge would necessarily have meant a guilty verdict on the murder charge. Further murder is a more serious offence than attempting to pervert the course of justice. It may have been different if murder was not a more serious offence. Indeed this has been recognised as one of impediments to taking other conduct into account referred to in *Scholes*[13], referring to *R v Medcraft*[14]. In the end it is submitted that it is a matter of fairness and degree whether the other offending should have been charged and whether, if not, it amounts to an aggravating feature. The approach taken by the prosecution in

---

[10] Prosecution submissions paragraph 8(k)(l) and (m)
[11] [1998] VSCA 17
[12] Transcript 51.25 – 52.24
[13] *Scholes* at [24]
[14] (1992) 60 A. Crim R 181

not charging a separate charge was fair to the accused given his defence but this meant that it could be taken into account as an aggravating feature. Thus it is submitted that His Honour should have found that the post offence conduct was an aggravating feature relevant to his moral culpability. Indeed the approach in *Scholes* has recently been endorsed by the Court of Appeal in *DPP v Weston*[15]. His Honour ultimately found that the applicant had no remorse. So much was obvious, but his post offence conduct of proclaiming his innocence, of actively taking false steps to falsify a crime scene, of enlisting his sister and Beljulji all increased his moral culpability and otherwise aggravated the offending. Since perverting the course of justice is not a more serious offence than murder, even if technically there could have been a charge, it is submitted that there is no impediment to taking the conduct into account as an aggravating feature.

18. His Honour's failure to deal with the post offence conduct as an aggravating feature is an additional matter that points to the imposition of a sentence that is manifestly inadequate.

Ground 2 : The learned sentencing judge erred in failing to find that the post offence conduct of the respondent, in inventing an account, taking steps to falsify the crime scene to promote this account and enlisting the assistance of others to further this and pressure the main witness to change his statement, amounted to an aggravating feature that impacted on moral culpability.

19. As stated and argued under Ground 1 it is submitted that His Honour ought to have found that the post offence conduct of the respondent was an aggravating feature. In the applicant's submission the post offence conduct in this case did aggravate the offending. It had direct bearing on the moral culpability of the respondent.

20. Had the learned sentencing judge made the finding that the post offence conduct was an aggravating feature it is submitted that he would have been obliged to impose a significantly greater sentence. His Honour's failure to make this finding means that he had to put to one side a significant matter bearing on the moral culpability of the offender. Putting this behaviour to one side could only have had a significant influence on the sentence imposed. It is akin to putting aside post offence behaviour such as the disposal of the body which the authorities clearly consider an aggravating feature.

---

[15] [2016] VSCA 243, published 10 October 2016 close to the end of the plea hearing. This case refers to *Scholes* and to *DPP v England* (1999)2 VR 258

21. His Honour's failure to make this finding provides an additional explanation for the sentence imposed and therefore for its manifest inadequacy.

DATED: **2 December 2016**

.....

Brendan Kissane QC
Counsel for the Appellant