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

S APCR 2017 0003

DWAYNE MICHAEL BYRNE

Applicant

v.

THE QUEEN

Respondent

RESPONSE TO APPLICANT'S WRITTEN CASE

Date of document:	2 March 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. On 12 November 2015, the Applicant was arraigned and entered a plea of guilty to one charge of being a prohibited person in possession of a firearm pursuant to Indictment F10515641-B.[1]

2. The jury returned a verdict of guilty on charge 1 of Indictment F10515641-A on 22 June 2016.

3. The Applicant was sentenced in relation to both indictments on 28 September 2016 as follows:

[1] This was in relation to a pen pistol found during a search of his home. There was no suggestion the applicant was in possession of the pen pistol at the time of committing the attempted murder.

Charge on Indictment F10515641 -A	Offence	Maximum	Sentence	Cumulation
1.	Attempted Murder [s 321M of the *Crimes Act 1958* and Common Law]	25 years [ss 3 and 321P of the *Crimes Act 1958*] [s 16 of the *Crimes Act 1958*]	12 years	Base
Charge on Indictment F10515641 -B	**Offence**	**Maximum**	**Sentence**	**Cumulation**
1.	Prohibited person possess firearm [s5(1) *Firearms Act 1996*]	10 years [s5(1) *Firearms Act 1996*]	9 months	Nil
Total Effective Sentence:		12 years		
Non-Parole Period:		9 years		
Pre-Sentence detention declaration pursuant to s 18(1) of the *Sentencing Act 1991*:		595 days		
6AAA Statement: (In relation to indictment F10515641 only) 12 months imprisonment.				
Other relevant orders: Disposal Order. Forfeiture Order.				

Part C: Summary of Relevant Facts

The Applicant

4. Dwayne Michael Byrne (the Applicant) was born on 3 December 1992. At the time the offences were committed he was aged 22. At the time of sentence, he was aged 23 years.

The victim

5. Steen Locke ('Locke') was aged 24 years at the time of the offence.

The offending

6. On the evening of 7 February 2015, Locke had been out in the St Kilda area socialising with

friends. He had consumed some drinks but was not intoxicated.[2]

7. Later in the evening, some of the group left and only Locke and Rochelle Jerard ('Jerard') remained. They decided to head to the beach. After going to Locke's home nearby to change, they took a portable music speaker and some pre-mixed cans to Brooks Jetty in St Kilda. This was around 11pm.[3]

8. Jerard and Locke sat about half way up the Brooks Jetty pier. They were chatting, drinking and listening to music.[4] They sat on the city side edge of the pier, looking out over the water towards the city lights, their chests resting against the railing and their backs to the thoroughfare of the pier.[5]

9. A couple was walking along on the pier. This was later found, by reason of the jury verdict, to be the Applicant and his then girlfriend Kaisha Mitchell ('Mitchell'). They were apparently arguing.[6] Locke initially turned around and then turned back.[7] Very shortly after this, Locke turned around again, to see if Mitchell was alright.[8] The Applicant said "What the fuck are you looking at?"[9] The Applicant was at this stage a few metres from Locke and Jerard.[10]

10. Locke responded "Nothing mate"[11], and Jerard smiled, before Locke turned back around. Locke's back was then to the Applicant and Mitchell on the pier. Within a few seconds, Locke felt blows to the back of his head and body. He thought he was being punched. He grabbed the railing of the pier to get to his feet to attempt to block and defend himself. He felt a blow to his side and looked down to see the handle of a knife lodged in him.[12]

11. The Applicant and Mitchell then ran back down the pier, towards to St Kilda.

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[2] T 81.
[3] T 82.
[4] T 82 - 83.
[5] T 83.
[6] T 83.
[7] T 84.
[8] T 85.
[9] T 84.
[10] T 84.
[11] T 85.
[12] T 85.

Locke sustained six stab wounds, to the back of his head, right shoulder, right arm pit, left chest wall and two to the left shoulder. The chest and head injuries alone were considered to be life threatening.[13]

Part D: Grounds of Appeal

12. **Ground 1 – The verdict of the jury on the charge of attempted murder is unreasonable or cannot be supported having regard to the evidence.**

i) Ultimate submission:

12.1. It is submitted the verdict of the jury was not unreasonable, and was supported by the evidence. The cumulative effect of the evidence, and the totality of the circumstances, allowed the jury to return a guilty verdict on charge 1. The evidence led before the jury did not 'oblige' them to come to a different conclusion.[14]

ii) The relevant test:

12.2. In *R v. Klamo*[15] Maxwell P stated:

> A guilty verdict can only be said to have been "reasonably open" to the jury if there was no aspect of the evidence which obliged — as distinct from entitled — the jury to come to a different conclusion. In *Libke v R* , Hayne J (with whom Gleeson CJ and Heydon J agreed) said in relation to the "unsafe and unsatisfactory" ground:
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> > ... But the question for an appellate court is whether it was *open* to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury *must*, as distinct from *might*, have entertained a doubt about the appellant's guilt. It is not sufficient to show that there was material which might have been taken by the jury to be sufficient to preclude satisfaction of guilt to the requisite standard.

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[13] T 161 - 163.
[14] *Badem (a Pseudonym) v. R* [2016] VSCA 200 at [40] – [47].
[15] (2008) 18 VR 644.

iii) The Applicant's complaint:

12.3. In the written case filed on behalf of the Applicant, two arguments are advanced under the single ground of appeal. The arguments are:

a) The Trial Judge erred in refusing the no case submission;[16] and

b) It was not open to the jury to conclude that the inference of intent to kill was the only reasonably inference open on the evidence.[17]

12.4. As has been stated by this Court previously, the rejection of the no case submission is really a part of a general ground alleging the verdict was unreasonable or cannot be supported by the evidence. In *DPP v. Vibro-pile (Aust) Pty Ltd*[18] the Court of Appeal stated:

> Vibro-Pile advances two grounds of appeal against conviction. The first is that the trial judge should have upheld its no case submission and directed verdicts of not guilty on charges 3 and 4. It is common ground, however, that on an appeal against conviction, the question is not whether the judge's ruling on the no case submission was correct but whether the verdicts are unsafe and unsatisfactory. As the latter question is raised — expressly — by the second ground of appeal, the two grounds may be considered together.

12.5. In *Samuels-Orunmwense v. R*[19] Priest JA stated:

> ... the issue for the court is not whether the judge should have upheld the applicant's submission of no case to answer, but rather whether, on all of the evidence, it was open to the jury to find the applicant guilty.[20]

12.6. The two contentions advanced by the Applicant in this case can be considered together. The ultimate question is 'whether the verdicts are unsafe and unsatisfactory.'

iv) Intention, attempted murder and inferential reasoning:

12.7. The prosecution, on a charge of attempted murder, have to prove beyond reasonable doubt that an accused acted with an intent to kill, in order to secure a conviction for this charge.[21]

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[16] Applicant's Written Case, at [10].
[17] Applicant's Written Case, at [10].
[18] [2016] VSCA 55.
[19] [2015] VSCA 152.
[20] [2015] VSCA 152 at [52].

12.8. Nothing short of proving such an intention is sufficient, as outlined by the Applicant. It is submitted, for the reasons set out below, the jury verdict was reasonably open as there was no part of the evidence which obliged the jury to come to a different conclusion.

12.9. In *Mannella v. R*[22] Warren CJ stated:

> Proof of guilt by circumstantial evidence is not unacceptable or suspect of itself. However, where the prosecution case relies in large part on inferences drawn from circumstantial evidence, it is usually necessary for the trial judge to direct the jury that, first, to find the accused guilty, his or her guilt must not only be a reasonable inference, it must be the only reasonable inference which can be drawn from the circumstances established by the evidence, and, secondly, that if the jury considers that there is any reasonable explanation of those circumstances which is consistent with the innocence of the accused, they must find him or her not guilty. These two requirements do not describe a separate standard of proof, they simply convey the meaning of "beyond reasonable doubt' in cases involved circumstantial evidence.

12.10. On the totality of the circumstantial evidence, touching on the question of intent, the jury was able to properly conclude that the Applicant intended to kill and that this was the only reasonable inference open from the cumulative effect of the evidence.

v) Evidence supporting a finding the Applicant had an intent to kill:

12.11. The key pieces of evidence supporting the prosecution case, that the Applicant had an intent to kill, are set out below.

12.12. First, the Applicant was angry and agitated at the time of the assault. He had just been arguing with his girlfriend and reacted angrily when the victim looked at him by saying "What the fuck are you looking at." While it could not be argued there was any previous animosity between the parties, or a motive for the attack, the Applicant appeared to feel aggrieved after the victim looked at him on the pier.

12.13. Second, the victim, after looking away, had his back to the Applicant and was seated immediately prior to the attack. The Applicant initiated a cowardly attack on a person who was both vulnerable, defenceless and not expecting a physical confrontation.

12.14. Third, a knife was in the Applicant's possession in the lead up to the assault. The prosecution could not say why the Applicant was carrying the knife, but the Applicant

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[21] *Knight v. R* (1992) 175 CLR 495 at 501.
[22] [2010] VSCA 357.

made a deliberate, conscious and voluntary decision to use the knife in the attack on a person who was not facing him, and in a vulnerable position.

12.15. Fourth, the Applicant stabbed the victim on six separate occasions. True it was that the attack was committed over a very brief timespan, however this was an extremely violent and frenzied attack, albeit committed in a short period of time.

12.16. Fifth, the location and extent of the wounds inflicted by the knife. There were six separate and distinct stab wounds. These wounds could not be described as mere nicks or grazes, they were penetrations into the victims body. The wounds were clustered around the victims upper body and head.

12.17. Sixth, the injuries sustained by the victim bespeak an intent to kill. The victim sustained injuries which included:

- A stab wound to the side of the chest that pierced the lung;
- An injury to the back of the head caused by a stab wound.

12.18. The combined effect of the evidence, allowed a jury to infer the Applicant intended to kill the victim, and exclude any other inference as not reasonably open.

vi) No direct evidence of threat to kill:

12.19. In this case the prosecution did not have any direct evidence of intention, which in and of itself is not unusual in crimes of violence. When violent assaults are committed, it is common for the intent of an offender to be proved by circumstantial evidence and not by previous declarations of intent.

12.20. A statement from the Applicant directed either to the victim or his companion, that he was going to, or intended, to kill the victim would have advanced the prosecution case on the question of intent. However, such an assertion, if it had occurred, would not have been definitive. The defence would likely have argued such a statement, in the heat of the moment, did not reflect his true intentions but was merely a figure of speech, a product of an angry outburst.

12.21. An absence, of such a statement of intent, did not preclude a finding the Applicant intended to kill.

vii) Motive, prior animosity and premeditation:

12.22. The Applicant and the victim were not known to each other prior to the events on the pier. Accordingly, there was no history of animosity or motive to kill. Once again, such evidence, while helpful if it existed, was not crucial to the prosecution case in proving the Applicant intended to kill, when he stabbed the victim.

12.23. Further, evidence of animosity or motive, may not have resolved the question, either in isolation or in combination, of whether the Applicant had an intent to kill at the critical time, as opposed to an intent to seriously injure.

12.24. The absence of premeditation, as found by the Trial Judge during sentencing, was also not determinative. A spur of the moment decision to kill, while on the pier, would have sufficed to establish the required intent for attempted murder.

viii) Status of the victim when the Applicant left the scene:

12.25. In asserting that the evidence fell short of proving an intent to kill, the Applicant relies on the following:

- The victim was conscious when the offender ran away;
- The victim was on his feet when the offender ran away.

12.26. It is submitted neither of these matters are relevant to the question of intent. Just because the Applicant botched his attempt to murder the victim, did not mean he did not have an intent to kill, when he committed the act. As the Trial Judge stated during the no case submission:

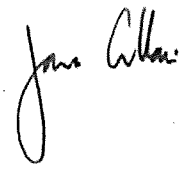
> ... if you intend to kill and you don't do a proper job of it, the victim is likely to end up with serious injury, but the intention is the question at this stage rather than the consequence.[23]

[23] T 336.

ix) Excluding other inferences as not reasonably open:

12.27. The question of intent was a question for the jury as the Trial Judge ruled in the no case submission. The evidence and what to make of it was a matter for the jury to determine. It was open to the jury to conclude that the only reasonable inference from the cumulative effect of the evidence was that the Applicant intended to kill the victim when he stabbed a defenceless and vulnerable victim six times to the head and upper body.

12.28. The conviction was not unsafe and was supported by the evidence.



DATED: 2 March 2017

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