

STEPHEN WILLIAM NICHOLSON

v

DIRECTOR OF PUBLIC PROSECUTIONS

APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE

Amended Written Case for the Applicant

**Part A: Sentences imposed, maximum penalties and relevant statutory provisions**

1. The applicant was charged on two Indictments<sup>1</sup> with a total of 19 charges. He pleaded guilty to each of those charges, as well as to two summary offences that had been uplifted. After hearing a plea in mitigation,<sup>2</sup> which initially proceeded as a sentencing conversation in the County Koori Court,<sup>3</sup> his Honour Judge Parsons (**the sentencing judge**) imposed the following sentences on 16 November 2016:

Charge	Offence	Maximum Penalty	Sentence	Cumulation	Cumulation between Indictments
<i>Indictment No: E13973880</i>					
1	Knowingly deal with proceeds of crime	15 years	2 months	1 month	Sentences to be served cumulatively to the sentences imposed on Indictment No: F13147832
2	Obtain property by deception	10 years	1 month		
3	Knowingly deal with proceeds of crime	15 years	2 months	1 month	
4	Obtain property by deception	10 years	1 month		

<sup>1</sup> Indictment No: E13973880 and Indictment No: F13147832.

<sup>2</sup> The plea was listed before the County Court on 1 February 2016 (Indictment No: F13147832 filed), 9 March 2016 (Indictment No: E13973880 filed), 10 March 2016, 18 April 2016, 1 September 2016 and 7 November 2016.

<sup>3</sup> On 1 February 2016 and 9 March 2016.

5	Knowingly deal with proceeds of crime	15 years	2 months	1 month		
6	Obtain property by deception	10 years	1 month			
7	Knowingly deal with proceeds of crime	15 years	2 months	1 month		
8	Obtain property by deception	10 years	1 month			
9	Knowingly deal with proceeds of crime	15 years	2 months	1 month		
10	Obtain property by deception	10 years	1 month			
11	Knowingly deal with proceeds of crime	15 years	2 months	1 month		
12	Obtain property by deception	10 years	1 month			
13	Knowingly deal with proceeds of crime	15 years	2 months	1 month		
14	Obtain property by deception	10 years	1 month			
15	Burglary	10 years	18 months	Base		
16	Theft	10 years	12 months	3 months		
17	Theft	10 years	12 months	6 months		
S.O.	Contravening a conduct condition of bail	3 months / 30 p.u.	1 month			
<b>Total Effective Sentence (Indictment No: E13973880)</b>			2 years 10 months imprisonment			
<i>Indictment No: F13147832</i>						
1	Burglary	10 years	18 months	Base		Sentences to be served cumulatively to the sentences imposed on Indictment No: E13973880
2	Theft	10 years	12 months	3 months		
S.O.	Committing an indictable offence on bail	3 months / 30 p.u.	3 months			
<b>Total Effective Sentence (Indictment No: F13973880)</b>			1 year 9 months imprisonment			
<b>Total Effective Sentence</b>			4 years 7 months imprisonment			
<b>Non-Parole Period Fixed</b>			3 years imprisonment			
<b>Pre-Sentence Detention</b>			228 days			

<b>Ancillary Orders</b>	
<b>6AAA statement</b>	6 years imprisonment, with a non-parole period of 4 years

### **Part B: Summary of relevant facts**

2. The applicant's offending was detailed in two Prosecution Openings (Exhibits 1<sup>4</sup> and 2<sup>5</sup>). The matters pleaded in mitigation were outlined in two outlines of submissions (Exhibits A and E). The applicant relied on a psychological report authored by Dr Aaron Cunningham dated 26 February 2014 (Exhibit B). Letters from Odyssey House were also tendered during the course of the plea hearing (Exhibits C, D and F).

### **Part C: Grounds of Appeal**

**Ground 1:** The sentencing judge erred by ordering that the entirety of the 'total effective sentence' imposed in relation to the charges on Indictment No: E13973880 be served cumulatively to the entirety of the 'total effective sentence' imposed in relation to the charges on Indictment No: F13147832. That order:

- (a) Offended the principle of totality; and
- (b) Led to the imposition of an overall "total effective sentence" (4 years 7 months imprisonment) that is manifestly excessive.

3. The applicant had an appalling upbringing. He was physically abused. He was sexually abused. He saw his mother being violently assaulted. He has been diagnosed with a significant verbal learning disorder, which inhibits his ability to overcome his deprived background. He suffers from symptoms of depression. He also suffers from childhood sexual abuse trauma. His full scale IQ is 82.

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<sup>4</sup> Indictment No: F13147832.

<sup>5</sup> Indictment No: E13973880.

4. In *Bugmy v The Queen*,<sup>6</sup> the majority<sup>7</sup> recognised that “... the effects of profound childhood deprivation do not diminish with the passage of time or repeated offending...”.<sup>8</sup> The applicant’s background rendered him vulnerable to drug abuse. His offending, as well as the length of his criminal record (which is predominantly comprised of dishonesty and drug offending), is explained by longstanding drug abuse and instability in his life.
5. The applicant pleaded guilty to offences charged on two Indictments. He was on bail for the offences charged on one Indictment<sup>9</sup> when he committed the offences on the other.<sup>10</sup> Save for one exception (referred to at paragraph 7 below), the applicant could not (and does not) complain about the individual sentences imposed by the sentencing judge and the orders for cumulation made on certain individual charges.
6. The sentencing judge did, however, fall into error by ordering that the entirety of the ‘total effective sentence’ imposed in relation to the charges on one Indictment be served cumulatively to the entirety of the ‘total effective sentence’ imposed on the other. Notwithstanding section 16(3C) of the *Sentencing Act 1991* (Vic), that order constitutes sentencing error and resulted in an overall ‘total effective sentence’ that was manifestly excessive given:
  - a. The compressing effect of totality.
  - b. The applicant’s:
    - i. Background,<sup>11</sup> which the sentencing judge described as “systemic deprivation”,<sup>12</sup> and the nexus between the applicant’s background, drug abuse and offending.

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<sup>6</sup> (2013) 249 CLR 571.

<sup>7</sup> French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

<sup>8</sup> (2013) 249 CLR 571, 595.

<sup>9</sup> Indictment No: E13973880.

<sup>10</sup> Indictment No: F13147832.

<sup>11</sup> Brief outline of submissions (Exhibit A), [4]-[10]. See too: Recording (sentencing remarks), 16 November 2016, 31.22-32.02 Transcript (sentencing remarks), 16 November 2016, [33]-[34].

<sup>12</sup> Recording (sentencing remarks), 16 November 2016, 35.37-35.42 Transcript (sentencing remarks), 16 November 2016, [42].

- ii. Psychological presentation.<sup>13</sup>
  - iii. Guilty pleas.<sup>14</sup>
  - iv. Remorse.<sup>15</sup>
  - v. Family circumstances.<sup>16</sup>
- c. The principle of parsimony,<sup>17</sup> in regard to which it is noted that the prosecution had submitted that a combination sentence was within the sentencing range.<sup>18</sup>

7. If the applicant's appeal is allowed, a lower individual sentence to that imposed by the sentencing judge ought be imposed on the summary offence of committing an indictable offence on bail. The sentencing judge erred by imposed the maximum penalty available on that charge. A sentence less than the maximum penalty ought to have been imposed given applicant's guilty plea and the other mitigating circumstances that applied.<sup>19</sup>

**Dated:** 8 January 2017



**P J Smallwood**  
Counsel for the Applicant

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<sup>13</sup> Brief outline of submissions (Exhibit A), [11]-[14]. See too: Recording (sentencing remarks), 16 November 2016, 32.02-32.09 Transcript (sentencing remarks), 16 November 2016, [35].

<sup>14</sup> Ibid., [1]-[3].

<sup>15</sup> Recording (sentencing remarks), 16 November 2016, 25.30-25.35 Transcript (sentencing remarks), 16 November 2016, [22].

<sup>16</sup> Brief outline of submissions (Exhibit A), [15]-[16]. See too: Recording (sentencing remarks), 16 November 2016, 32.09-32.14 Transcript (sentencing remarks), 16 November 2016, [35].

<sup>17</sup> Sentencing Act 1991 (Vic), s 5(3).

<sup>18</sup> Recording (plea hearing), 1 September 2016, 2.57-3.02 Transcript (plea hearing), 1 September 2016, T83.22-T83.23.

<sup>19</sup> It is noted, for completeness, that the applicant has not sought to pursue this error under a separate ground of appeal as no order for cumulation was made in relation to the sentence imposed on that charge.