

STEPHEN WILLIAM NICHOLSON

Applicant

v.

THE QUEEN

Respondent

RESPONSE TO APPLICANT'S WRITTEN CASE - SENTENCE

Date of document:	14 March 2017
Filed on behalf of:	Respondent
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Melbourne Vic. 3000	Ms E Shaw

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

1. The applicant was sentenced by Judge Parsons on indictments E13973880 and F13147832 on 16 November 2016 as follows:

Indictment E13973880	Offence	Maximum	Sentence	Cumulation
1.	Knowingly deal with proceeds of crime <i>Crimes Act 1958 s 194(2)</i>	Level 4 imprisonment – 15 years <i>Crimes Act 1958 s 194(2)</i>	2 months	1 month
2.	Obtain property by deception <i>Crimes Act 1958 s 81(1)</i>	Level 5 imprisonment – 10 years <i>Crimes Act 1958 s 81(1)</i>	1 month	-
3.	Knowingly deal with proceeds of crime <i>Crimes Act 1958 s 194(2)</i>	Level 4 imprisonment – 15 years <i>Crimes Act 1958 s 194(2)</i>	2 months	1 month

Indictment E13973880	Offence	Maximum	Sentence	Cumulation
4.	Obtain property by deception <i>Crimes Act 1958 s 81(1)</i>	Level 5 imprisonment – 10 years <i>Crimes Act 1958 s 81(1)</i>	1 month	-
5.	Knowingly deal with proceeds of crime <i>Crimes Act 1958 s 194(2)</i>	Level 4 imprisonment – 15 years <i>Crimes Act 1958 s 194(2)</i>	2 months	1 month
6.	Obtain property by deception <i>Crimes Act 1958 s 81(1)</i>	Level 5 imprisonment – 10 years <i>Crimes Act 1958 s 81(1)</i>	1 month	-
7.	Knowingly deal with proceeds of crime <i>Crimes Act 1958 s 194(2)</i>	Level 4 imprisonment – 15 years <i>Crimes Act 1958 s 194(2)</i>	2 months	1 month
8.	Obtain property by deception <i>Crimes Act 1958 s 81(1)</i>	Level 5 imprisonment – 10 years <i>Crimes Act 1958 s 81(1)</i>	1 month	-
9.	Knowingly deal with proceeds of crime <i>Crimes Act 1958 s 194(2)</i>	Level 4 imprisonment – 15 years <i>Crimes Act 1958 s 194(2)</i>	2 months	1 month
10.	Obtain property by deception <i>Crimes Act 1958 s 81(1)</i>	Level 5 imprisonment – 10 years <i>Crimes Act 1958 s 81(1)</i>	1 month	-
11.	Knowingly deal with proceeds of crime <i>Crimes Act 1958 s 194(2)</i>	Level 4 imprisonment – 15 years <i>Crimes Act 1958 s 194(2)</i>	2 months	1 month
12.	Obtain property by deception <i>Crimes Act 1958 s 81(1)</i>	Level 5 imprisonment – 10 years <i>Crimes Act 1958 s 81(1)</i>	1 month	-
13.	Knowingly deal with proceeds of crime <i>Crimes Act 1958 s 194(2)</i>	Level 4 imprisonment – 15 years <i>Crimes Act 1958 s 194(2)</i>	2 months	1 month
14.	Obtain property by deception <i>Crimes Act 1958 s 81(1)</i>	Level 5 imprisonment – 10 years <i>Crimes Act 1958 s 81(1)</i>	1 month	-
15.	Burglary <i>Crimes Act 1958 s 76(1)</i>	Level 5 imprisonment – 10 years <i>Crimes Act 1958 s 76(3)</i>	18 months	Base
16.	Theft <i>Crimes Act 1958 s74</i>	Level 5 imprisonment – 10 years <i>Crimes Act 1958 s74</i>	12 months	3 months

Indictment E13973880	Offence	Maximum	Sentence	Cumulation
17.	Theft <i>Crimes Act 1958 s74</i>	Level 5 imprisonment – 10 years <i>Crimes Act 1958 s74</i>	12 months	6 months
Summary Charge	Contravene condition of bail <i>Bail Act 1977 s 30A</i>	30 penalty units or 3 months imprisonment <i>Bail Act 1977 s 30A</i>	1 month	-
Total Effective Sentence Indictment E13973880:			2 years 10 months imprisonment	
Other relevant orders: Sentence imposed on E13973880 and F13147832 to be served cumulatively				

Indictment F13147832	Offence	Maximum	Sentence	Cumulation
1.	Burglary <i>Crimes Act 1958 s 76(1)</i>	Level 5 imprisonment – 10 years <i>Crimes Act 1958 s 76(3)</i>	18 months	Base
2.	Theft <i>Crimes Act 1958 s74</i>	Level 5 imprisonment – 10 years <i>Crimes Act 1958 s74</i>	12 months	3 months
Summary Charge	Commit indictable offence whilst on bail <i>Bail Act 1977 s 30B</i>	30 penalty units or 3 months imprisonment <i>Bail Act 1977 s 30B</i>	3 months	-
Total Effective Sentence Indictment F13147832:			1 year 9 months imprisonment	
Other relevant orders: Sentence imposed on E13973880 and F13147832 to be served cumulatively				

Total Effective Sentence (both indictments):	4 years 7 months imprisonment
Non-Parole Period:	3 years imprisonment
Pre-Sentence detention declaration pursuant to s 18(1) of the <i>Sentencing Act 1991</i>:	228 days
6AAA Statement: Total Effective Sentence 6 years; Non-Parole Period: 4 years	
Other relevant orders: -	

Part C: Summary of Relevant Facts

- The applicant's offending in relation to Indictment E13973880 is detailed in Exhibit 2.¹ The applicant's offending in relation to Indictment F13147832 is detailed in the Exhibit 1.²
- The sentencing judge summarised both sets of offending in paragraphs [4]-[16] of the Reasons for Sentence.

¹ See Summary of Prosecution Opening dated 8 March 2016

² See Summary of Prosecution Opening dated 4 January 2016

Plea history

Indictment F13147832

4. The applicant indicated an intention to plead at a committal mention in December 2015 and the matter proceeded by way of straight hand-up brief. The applicant was arraigned and pleaded guilty to the offending subject of Indictment F13147832 on 1 February 2016.

Indictment E13973880

5. The applicant indicated an intention to plead at a committal mention on 29 February 2016 and the matter proceeded by way of straight hand-up brief. It joined with the matters subject of Indictment F13147832 in the County Court on 9 March 2016 – the applicant was then arraigned and pleaded guilty to the offending subject of Indictment E13973880.

Part D: Grounds of Appeal

6. **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.**
- 6.1. Before addressing the ground in detail, the respondent seeks to record its submission in short compass – leave to appeal should be granted (ground of appeal is reasonably arguable) but ultimately the sentence (involving discretionary judgment) is not one that is infected with error.
- 6.2. The judge imposed a “total effective sentence” of 2 years 10 months imprisonment on Indictment E13973880. That indictment contained 7 charges of knowingly deal with proceeds of crime, 7 charges of obtain property by deception, 1 charge of burglary and 2 charges of theft (the applicant also pleaded guilty to 1 summary charge of contravening a condition of bail). The offences were committed between 6 July 2013 and 25 November 2014.

- 6.3. The circumstances of the offending the subject of Indictment E12973880 are set out in the Summary of Prosecution Opening dated 8 March 2016 and marked as Exhibit 2. The circumstances are summarised by the judge at [8]-[17] of the Reasons for Sentence.
- 6.4. The salient features include:
- using a jemmy to gain entry to an arcade of shops
 - in relation to the burglary committed at the Vodafone store, stealing 84 mobile phones, \$3200 in cash and other items (total value is \$42,837.95 – nil recovered)
 - after committing a theft at a locker pay station, the applicant used cleaning fluid in an attempt to destroy any forensic material that may have been accidentally deposited
 - in committing the theft at the locker pay station, the applicant caused \$10,833 in damage.
- 6.5. The judge imposed a “total effective sentence” of 1 year 9 months imprisonment on Indictment F13147832. That indictment contained 1 charge of burglary and 1 charge of theft (the applicant also pleaded guilty to 1 summary charge of committing an indictable offence on bail). The offences were committed on 14 August 2015.
- 6.6. The circumstances of the offending the subject of Indictment F1314782 are set out in the Summary of Prosecution Opening dated 4 January 2016 and marked as Exhibit 1. The circumstances are summarised by the judge at [4]-[6] of the Reasons for Sentence.
- 6.7. The salient features include:
- the offences were committed whilst subject to a community correction order imposed on 2 June 2015
 - the offences were committed whilst on bail for the offences the subject of indictment E12973880
 - the applicant carried a tool to gain entry to the dead-locked storage room
 - the applicant stole goods valued at \$112,645.70 (goods sold for \$1000)
 - the applicant had the wherewithal to splash bleach around in an attempt to destroy any forensic material that may have been deposited.

- 6.8. The judge ordered the “total effective sentence” of 2 years 10 months imprisonment imposed on Indictment E13973880 and the “total effective sentence” of 1 year 9 months imprisonment imposed on Indictment F13147832 to be served cumulatively – this produced an overall “total effective sentence” of 4 years 7 months imprisonment with a non-parole period of 3 years imprisonment fixed.
- 6.9. In his notice of appeal, the applicant complains that the overall sentence of 4 years 7 months imprisonment is manifestly excessive (whilst the ground does not allude to the non-parole period fixed, it is assumed that a similar complaint is made with respect thereto). However, the ground does not complain as to the fixing of any of the individual sentences (except as to the sentence imposed on the summary charge of committing an indictable offence on bail if a re-sentencing exercise was to occur).
- 6.10. An appeal against sentence is constrained by the principles of appellate review of discretionary decisions as set down by the High Court in *House v The Queen*.³ In short, a complaint that a sentence is manifestly excessive is very difficult to establish as the applicant must show the sentence was wholly outside the range of sentences available to the judge. In other words, the applicant must show that it was not “reasonably open” to the sentencing court to impose the sentence that it did – a stringent test indeed.⁴
- 6.11. The respondent accepts that the principle of totality still applies notwithstanding the legislative dictate contained in section 16(3C), Sentencing Act 1991 [presumption as to cumulation when offending occurs whilst an offender is subject to bail] – see, for example, *R v Mantini*.⁵ However, a judge must still have regard to the legislative dictate, particularly as the latter set of offending has been committed whilst subject to conditional release (not to commit any further offence).
- 6.12. In sentencing the applicant, the judge expressly referred to the principle of totality – see [51] of the Reasons for Sentence.

³ (1936) 55 CLR 499, at 505

⁴ See, for example, *Clarkson v R* (2011) 32 VR 361

⁵ [1998] 3 VR 340, at 348

6.13. In assessing the principal complaint, namely that the judge erred in ordering total cumulation of sentence as between the 2 indictments, it is necessary to say something first about the “total effective sentence” imposed in respect of each indictment. The relevant proposition can be simply expressed – if the “total effective sentence” for each indictment is fixed at the lower end of the available range, then there is more scope for an order as to total cumulation, and vice versa (less scope for an order for total cumulation if the “total effective sentence” is fixed at the higher end of the available range).

6.14. In terms of the gravity of the offending, the judge observed:⁶

There are no victim impact statements in the matter, but it is clear that various persons have been substantially inconvenienced as a result of your actions and may or may not have incurred losses depending on their insurance arrangements, but the significant thing is the amount - the value of the goods that you have taken is clearly very significant and of course the damage you have effected in carrying out those thefts is also significant.

...

These are all without doubt serious offences and it seems to me in the circumstances I have no alternative to the imposition of custodial sentences.

6.15. Unfortunately, the applicant has a very bad criminal record which spans from 1996 to 2015. The record includes numerous previous convictions for matters involving dishonesty. The applicant has received various court dispositions including terms of imprisonment and community-based orders.

6.16. The judge took into account the applicant’s difficult personal circumstances and other mitigating factors such as the plea of guilty and remorse – see [20]-[39] of the Reasons for Sentence.

6.17. Importantly, the judge expressly noted the decision of the High Court in *Bugmy v The Queen* and sought to moderate the sentence according to the considerations contained therein – see [41]-[42] of the Reasons for Sentence.

⁶ See Sentence Transcript, at 105[19], 110[46]

6.18. As to relevant sentencing purposes, the judge stated:⁷

Notwithstanding the question of rehabilitation is always of great significance bearing in mind if there are any significant prospects, of course I must also bear in mind the principles of general deterrence which I find to be of considerable importance in a case such as this, involving as it does planned thefts on commercial premises, and where property of considerable value is taken specific deterrence is clearly a very great significance given your very, very long list of prior convictions which are all obviously relevant.

I must also consider the question of the protection of members of the community from you and bear in mind the likelihood of your reoffending, which I find to be considerable in light of your prior convictions and your recent behaviour in failing to remain at Odyssey House, and the fact that of course you have continued to commit thefts of the kind for which you fall to be sentenced today.

6.19. In light of the above matters, the respondent submits that the “total effective sentence” imposed in respect of each indictment can only be described as very lenient – no doubt reflecting the applicant’s troubling personal circumstances. Accordingly, there was scope for the judge to order total cumulation in order to produce an overall sentence that is “just and appropriate” in all the circumstances.

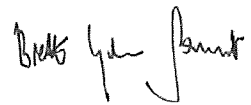
6.20. The judge in this case sought to deal with the applicant in a sympathetic manner, evidenced by the deferral of sentence (bailing of applicant to Odyssey House to address his addiction problems but without success) and his comments at the conclusion of sentence (“it is sad that it has come to this”).

6.21. Unfortunately for the applicant, the offending the subject of the charges of burglary and theft were extremely serious examples of such offences – but for the compelling mitigatory features, such individual sentences as imposed here would plainly be manifestly inadequate. Furthermore, the applicant’s previous record was particularly bad, aggravated by the many convictions for burglary and theft.

⁷ See Sentence Transcript, at 110[44]-[45]

- 6.22. Approaching the totality question by reference to the approach sanctioned by the High Court in *Mill v The Queen*,⁸ it cannot be said that the overall sentence is one that is manifestly excessive – given the offence gravity, bad criminal record, personal circumstances and taking into account all mitigatory factors, due proportion has not been exceeded.⁹
- 6.23. The respondent also notes that the two sets of offending were separated in time (some 9 months apart) and involved different victims – thus telling against for concurrency.
- 6.24. The judge in this matter was experienced in the sentencing of offenders with indigenous backgrounds – but here the offending did not involve opportunistic or street offending but rather serious offending involving planning (for example, use of tools and attempts made to destroy forensic evidence).

DATED: 14 March 2017



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B Sonnet
Counsel for the Respondent

⁸ (1988) 166 CLR 59

⁹ See also *Azzopardi v R* [2011] VSCA 372