IN THE SUPREME COURT OF VICTORIA CASE NO:

COURT OF APPEAL

(CRIMINAL DIVISION)

SAM LISZCZAK

-v-

THE QUEEN

APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE

Written Case for the Applicant

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

1. The applicant pleaded guilty in the Supreme Court of Victoria at Melbourne to eight charges[1], across three indictments, committed on 5 and 7 July 2015. After hearing a plea in mitigation on 15 February 2017, the learned sentencing judge imposed the following sentences on 14 March 2017:

Charge	**Offence**	**Maximum Penalty**	**Sentence**	**Cumulation**
Indictment C1510274.B				
1	Attempted arson	10 years	5 months -	-
2	Attempted arson	10 years	6 months (serious arson offender)	2 months
3	Theft of motor vehicle	10 years	12 months	3 months

[1] Attempted arson (x2) contrary to ss 197(1) & (6) and 321M *Crimes Act* 1958; theft of motor vehicle contrary to s 74(1) *Crimes Act* 1958 (Vic); prohibited person possess firearm contrary to s 5(1) *Firearms Act* 1996; criminal damage contrary to s 197(1) *Crimes Act* 1958; reckless conduct endangering person (serious injury) contrary to s 23 *Crimes Act* 1958; recklessly cause injury contrary to s 18 *Crimes Act* 1958; and arson contrary to ss 197(1) & (6) *Crimes Act* 1958.

Indictment C1510274.C				
1.	Prohibited person possess firearm	10 years	12 months	-
Indictment C1510274.A.1				
1.	Criminal damage	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 (serious arson offender)	9 months

Total Effective Sentence	7 years and 10 months' imprisonment
Non-Parole Period Fixed	6 years' imprisonment
Pre-Sentence Detention	603 days
Ancillary Orders	Driver licence cancelled and disqualified for 2 years Disposal and forfeiture orders
6AAA statement	9 years and 10 months' imprisonment, with a non-parole period of 8 years

2. The applicant's co-offender, Rodney Phillips, pleaded guilty to identical charges across the same indictments (save for a different charge number on indictment C1510274.C) and was sentenced as follows:

Charge	**Offence**	**Maximum Penalty**	**Sentence**	**Cumulation**
Indictment C1510274.B				
1.	Attempted arson	10 years	6 months - (serious arson offender)	2 months

2.	Attempted arson	10 years	6 months (serious arson offender)	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	-
Indictment C1510274.A.1				
1.	Criminal damage	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 (serious arson offender)	9 months

Total Effective Sentence	8 years' imprisonment
Non-Parole Period Fixed	6 years and 2 months' imprisonment
Pre-Sentence Detention	603 days
Ancillary Orders	Driver licence cancelled and disqualified for 2 years Disposal and forfeiture orders
6AAA statement	10 years' imprisonment, with a non-parole period of 8 years and 2 months

Part B: Summary of relevant facts

3. The applicant's offending was detailed in the 'Summary of Prosecution Opening' dated 13 February 2017 (Exhibit 1).

4. In short, the applicant and Phillips embarked on a campaign to intimidate George Williams and Roberta Williams, the father and widow of murdered gangland figure Carl

Williams. Both the applicant and Phillips had been released from prison some days prior to the offending. Whilst in custody, the applicant had become friendly with Matthew Johnson, the man who killed Carl Williams at Barwon Prison in 2010.

5. After a failed attempt to cause damage to George and Roberta Williams' respective homes on 5 July 2015 using Molotov cocktails[2] at the wrong addresses, the pair returned on 7 July 2015 to George Williams' correct address in a stolen Ford Escape 4wd.[3] They had with them a shotgun.[4] Two shots were fired, damaging the letterbox and fence[5], and the pair drove off.

6. The matter was reported to police and two officers, Ashmole and Wopsil, were patrolling in the area in search of the Ford Escape. They sighted the car close to the home of Roberta Williams, the widow of Carl Williams. The officers followed the car, saw it parked in a primary school and drove in. As the applicant and Phillips were driving out to avoid capture, a shot was fired from the Ford Escape.[6] Constable Ashmole was hit in the head with pellets from the shotgun, some of which remain there.[7]

7. The applicant and Phillips then drove to an industrial area and set fire to the Ford Escape.[8] A police investigation identified the applicant and Phillips as suspects and they were both arrested, charged and remanded in custody on 21 July 2015. The matter resolved following pre-trial argument in the Supreme Court in January 2017.

8. During the course of the plea on 5 February 2017, there was discussion between the learned sentencing judge, counsel for the Director and counsel for the applicant in relation to the precise circumstances of the discharge of the shotgun into the police car.[9]

[2] Charges 1 and 2 on Indictment C1510274.B.
[3] Charge 3 on Indictment C1510274.B.
[4] Charge 2 on Indictment C1510274.C.
[5] Charge 1 on Indictment C1510274.A.1.
[6] Charge 2 on Indictment C1510274.A.1.
[7] Charge 3 on Indictment C1510274.A.1.
[8] Charge 4 on Indictment C1510274.A.1.
[9] Transcript of plea proceedings in the Supreme Court, 5 February 2017, p21-29.

9. The facts as agreed were that the Ford Escape did not slow or stop on the approach to the police car, or at the time of the shot being fired. Further, it was agreed the shot was fired into the police car from a distance of approximately 4.5 metres.

10. Counsel for the applicant detailed for the Court upon the plea the applicant's disrupted childhood and a history of incarceration from the age of 16.[10] The matters pleaded in mitigation on behalf of the applicant were his pleas of guilty, his youth, hardship of imprisonment, his prospect of rehabilitation and that he was likely to serve the entirety of the head sentence to be imposed.

11. The applicant was taken into state care from the age of eight and lived in approximately 17 foster homes or residential units from the ages of eight to 14 years. He had not received any secondary education. He had no contact with his mother following his removal from her care but had contact with his father in later years. At the time of the plea, his father was suffering from cancer.

12. The applicant is supported by his father's family, whom he developed a relationship with after he turned 18. He had contact with them when he was released into the community in July 2015 and they remain supportive. A number of character references were tendered (Exhibits 6, 7, 8, 9 and 10).

13. The applicant's criminal history records court appearances commencing at the age of 13. By the age of 16 he had received his first term of incarceration in a youth justice centre. He was first held in custody at Barwon Prison at the age of 18 and has been subject to various management and lockdown regimes throughout his time in adult custody.

14. The applicant was aged 22 at the time of the offending and 23 at the date of sentence. Aside from a period of weeks in July 2015, he had spent most of the previous five years in custody. The applicant has never been granted parole as an adult. His only grant of parole was youth parole.

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[10] Transcript of plea proceedings in the Supreme Court, 5 February 2017, p33-41.
Note at p35, line 4 of the transcript, counsel for the applicant is recorded as saying that the applicant is 'illiterate'. This is reflected in the sentencing remarks, *R v Liszczak & Phillips* [2017] VSC 103 at [76]. The transcription is not accurate. Counsel for the applicant in fact said 'he's literate' however it was recorded incorrectly.

15. The pleas of guilty in this matter came following pre-trial argument in the Supreme Court, the applicant having originally been charged with attempted murder. A contested committal was held in June 2016. The trial in the Supreme Court was listed for a number of weeks and would have involved both police and civilian witnesses.

Part C: Grounds of Appeal

<u>Ground 1:</u> **The learned sentencing judge erred in doubly punishing the applicant in respect of charges 2 (reckless conduct endangering person) and 3 (recklessly cause injury) on Indictment C1510274.A.1**

16. The law in Victoria prohibits an offender from being punished twice for the same act or omission.[11] The common law position with respect to double punishment as regards sentencing is that 'persons found guilty of two offences must not be punished twice for an act which is common to the two offences.'[12]

17. With respect to the reckless conduct endangering person charge (charge 2) and the recklessly cause injury charge (charge 3), the act common to both offences is the discharge of the shotgun, by either the applicant or Phillips, into the police car. As such, it is submitted that the principles relating to double punishment have application in this case.

18. Although the specific legal elements differ between reckless conduct endangering persons and recklessly causing injury, there is the common factor of the discharge of the firearm in this case. The substantive act of unlawful violence constituting charge 3 is also the unlawful act that endangers serious injury that is the essence of charge 2. Further, the mental element for both offences is recklessness. Whilst the distinguishing features of the two offences (separate victims and that injury occurs only on charge 3) provide a basis for some cumulation, it is submitted that the learned sentencing judge failed to limit such cumulation in order to avoid double punishment.

[11] *Interpretation of Legislation Act* 1984, s 51.
[12] *Lecornu v The Queen* [2012] VSCA 137 at [12] per Maxwell P, restating the principles in *Pearce v The Queen* (1998) 194 CLR 610.

19. The issue of cumulation or concurrency, with respect to two offences arising from the same conduct, is clearly matter for the sentencing court's discretion. However, it is submitted that in this case, the sentences imposed of 80 per cent of the maximum penalty for both charges and an order for 50 per cent cumulation (2 years) on charge 2, amounts to double punishment.

20. It is submitted that specific error in contravention of the principle set out in *Pearce v The Queen*[13] arises as the learned sentencing judge failed to avoid double punishment arising out of the commonality of the offending. It is submitted that, in the circumstances, it was not open to the learned sentencing judge to impose the length of sentence or cumulation on charge 2.

Ground 2: **The individual sentences on charges 1, 2 and 3 on Indictment C1510274.A.1, orders for cumulation on charges 1 and 2 on Indictment C1510274.A.1, total effective sentence and non-parole period fixed are each manifestly excessive.**

Particulars:

(a) **The learned sentencing judge gave too much weight to the circumstances in which the damage arose in respect of charge 1.**

(b) **The learned sentencing judge gave too much weight to the circumstances of the offences and insufficient weight to the maximum penalties, in respect of charges 2 and 3; and the risk appreciated by the applicant in respect of charge 2.**

(c) **The learned sentencing judge gave insufficient weight to the factors in mitigation and the principle of totality.**

Charge 1 on Indictment C1510274.A.1

21. Although the manner in which the property damage arose was serious, in that it was carried out with a firearm, the level of damage caused was relatively minor. And there was no endangerment of any person or an intention to do so. In all the circumstances, it is submitted that the individual sentence and the order for cumulation with respect to charge 1 on Indictment C1510274.A.1 is manifestly excessive.

[13] *Pearce v The Queen* (1998) 194 CLR 610.

Charges 2 & 3 on Indictment C1510274.A.1

22. It was conceded upon the plea by counsel for the applicant that the offending for these two charges falls at the top end.[14] The use of a firearm at close range makes it necessarily so. However, the agreed facts were that the Ford Escape did not slow or stop in order to fire the shot at the police car, that the shot occurred in circumstances where the applicant and Phillips were trying to evade police, the cars were at an angle to each other and that the incident occurred over the course of seconds. It was not the case that the applicant and Phillips followed, chased or specifically targeted the two victims. Charges 2 and 3 arose spontaneously, albeit as an extension of their conduct at the Williams' home.

23. It is submitted with respect to charge 2 that the learned sentencing judge placed too much weight on the applicant's appreciation of risk when his Honour found that the applicant 'must have foreseen that an appreciable risk of serious injury to the passenger was a highly probable consequence of their conduct'.[15]

24. The maximum penalty for both charges 2 and 3 on Indictment C1510274.A.1 is five years. Footnote 12 on page 12 of his Honour's sentencing remarks, states as follows:

> According to Sentencing Snapshots published by the Sentencing Advisory Council, between 2006-07 and 2014-15, the highest sentence imposed on a single count of recklessly causing injury was three years' imprisonment. (*See Sentencing Trends for Causing Injury Recklessly in the Higher Courts of Victoria 2006-07 to 2010-11, Sentencing Snapshot 127; Sentencing Trends for Causing Injury Recklessly in the Higher Courts of Victoria 2008-09 to 2012-13, Sentencing Snapshot 159; and Sentencing Trends for Causing Injury Recklessly in the Higher Courts of Victoria 2010-11 to 2014-15, Sentencing Snapshot 190*.) The Sentencing Advisory Council has not published *Sentencing Snapshots* for the offence of reckless conduct endangering serious injury. However, according to the Council's *SACStat Higher Courts*, between July 2010 and June 2015, it seems that there may have been one sentence of four-and-a-half years' imprisonment on a count of reckless conduct endangering serious injury. I have been unable to find that sentence.

[14] Transcript of plea proceedings in the Supreme Court, 5 February 2017, p29.
[15] *R v Liszczak & Phillips* [2017] VSC 103 at [69].

25. In circumstances where current sentencing practises do not reflect sentences imposed within 80 per cent of the statutory maximum, the sentences imposed on charges 2 and 3 are unusual, even when categorised at top end. Having regard to all of the circumstances and aggravating features, it is submitted that the individual sentences and order for cumulation are excessive. This is particularly so given the commonality in conduct between the two charges and the fact that the applicant pleaded guilty.

Factors in mitigation

26. Although the pleas were not entered at an early stage, it was submitted on behalf of the applicant upon the plea that they had significant utilitarian benefit in all the circumstances.[16] The learned sentencing judge accepted that the pleas had utilitarian value and found that they were the most significant mitigating factor for the applicant.[17]

27. The applicant had turned 22 one month prior to the offending and was aged 23 at the time of sentence. His Honour stated in his sentencing remarks that '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.'[18] However, only 'some weight' was placed on the applicant's relative youth in sentencing.[19]

28. It is submitted that although the applicant had admitted a significant criminal history and the offending was serious, the learned sentencing judge erred in not attributing greater weight to the applicant's youth and the need to place emphasis on rehabilitation consistent with the principles set out in *Mills*[20]. The applicant's prospects of rehabilitation were found to be 'guarded' but it was noted that he has some work history and family support.[21]

29. Having regard to the sentences imposed on charges 1, 2, and 3 on Indictment C1510274.A.1, and his Honour's remark that he expected that the sentences were to be the highest ever fixed for offences of this nature[22], it is submitted that the learned

[16] Transcript of plea proceedings in the Supreme Court, 5 February 2017, p53, line 17.
[17] *R v Liszczak & Phillips* [2017] VSC 103 at [112].
[18] Ibid at [115].
[19] Ibid at [112].
[20] *Mills* [1998] 4 VR 235 at [241].
[21] *R v Liszczak & Phillips* [2017] VSC 103 at [118].
[22] Ibid at [67].

sentencing judge failed to give sufficient weight to the pleas of guilty, the applicant's youth and his prospects of rehabilitation.

Totality

30. It is further submitted that the sentences and order for cumulation on charges 1 and 2 on Indictment C1510274.A.1 offend the principle of totality. This is particularly so with respect to charges 2 and 3. The submissions made with respect to Ground 1 above are relied upon.

31. It is submitted that, in this case, the sentences imposed are manifestly excessive.

Conclusion

32. It is submitted that there are errors in the sentences first imposed and different sentences should be imposed.[23]

Emily Clark
Counsel for the Applicant
21 April 2017

[23] *Criminal Procedure Act 2009*, s 281(1).