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

S APCR 2017 0003

DWAYNE MICHAEL BYRNE

v

DIRECTOR OF PUBLIC PROSECUTIONS

APPLICATION FOR LEAVE TO APPEAL AGAINST CONVICTION

Amended Written Case for the Applicant

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

1. Following a trial before the Supreme Court of Victoria sitting at Melbourne, the applicant was on 22 June 2016 found guilty of attempted murder. He pleaded guilty to one charge of being a prohibited person in possession of a firearm. That charge, to which the applicant pleaded guilty, was not related to the charge of attempted murder. After hearing a plea in mitigation, the trial judge imposed the following sentences on 28 September 2016:

Charge	**Offence**	**Maximum Penalty**	**Sentence**	**Cumulation**
1	Attempted murder	25 years	12 years	
Indictment No: F10515641B				
1	Being a prohibited person in possession of a firearm	10 years	9 months	
Total Effective Sentence			12 years imprisonment	
Non-Parole Period Fixed			9 years imprisonment	
Pre-Sentence Detention			595 days	
Ancillary Orders			Disposal order; Firearms forfeiture order	

2. Pursuant to section 6AAA of the *Sentencing Act 1991* (Vic), the trial judge stated that but for the applicant's plea of guilty a sentence of 12 months imprisonment would have been imposed on the firearm charge.[1]

3. This application relates to the jury's verdict on the charge of attempted murder.

Part B: Summary of relevant facts

4. On 7 February 2015, Steen Locke (**Locke**) went to a jetty in St Kilda with Rochelle Jerard (**Jerard**).[2] They were sitting side by side.[3] Locke heard a male and a female arguing.[4] As the male walked past, he said to Locke something along the lines of: "What the fuck are you looking at?"[5] Locke said, "Nothing mate".[6] Within a few seconds, Locke:[7]

> *... felt a few blows to the back of my – or to the back of me, to the back of my head and body. I just – I didn't really know what was going on. I thought that I was being punched and I put my arm up to sort of, you know, block defend myself and I managed to grab onto the railing and got to my feet and still really didn't know what was going on and then I felt a blow on my side over here and looked down and there was a handle of a knife lodged in the side me and the person run off down the jetty and, yeah, then I realised that I'd been stabbed.*

5. Although he was unsure, Locke guessed that the time between the verbal exchange and the time when the offender ran off down the pier "... would probably have only been a minute...".[8] When the offender and the female he had been with ran away, Locke was "... on his feet and ... making his way towards the end of the jetty almost as if he's going to chase them but he can't because he's realised there's a knife in his back".[9] Jerard called

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[1] *R v Byrne* [2016] VSC 580, [39].
[2] ~~T72.11-T72.22~~ T82.14-T82.27 (9 June 2016).
[3] ~~T73.3~~ T83.8 (9 June 2016).
[4] ~~T73.10-T74.1~~ T83.15-T84.9 (9 June 2016).
[5] ~~T74.2-T74.4~~ T84.10-T84.13 (9 June 2016). Jerard's evidence was that the man said, "What are you looking at?": ~~T119.26-T119.28~~ T26.6-T26.8 (19 May 2016). Jerard's pre-recorded evidence was played to the jury on 10 June 2016: T109.29.
[6] ~~T74.4-T74.5~~ T85.15-T85.17 (9 June 2016).
[7] ~~T75.6-T75.16~~ T85.18-T85.29 (9 June 2016).
[8] ~~T76.3-T76.11~~ T86.19-T86.27 (9 June 2016).
[9] ~~T121.4-T121.11~~ T27.14-T27.21 (19 May 2016).

'000'.[10] When police arrived, Locke provided some information about what occurred.[11] Soon after when paramedics arrived, Locke was on his hands and knees.[12] He was fully conscious.[13] The knife, which was very shallow into the wound from which it protruded, fell out onto the ground.[14] Six wounds were observed, two of which were serious in the sense that they raised concerns about bleeding.[15] The external bleeding was controlled.[16] Locke was transported by ambulance to the Alfred Hospital.[17]

6. As a result of the attack, Locke sustained six penetrating wounds: one to his left back, one to the back of his head and neck, one to his left shoulder, one to his left chest wall, one to his right armpit and one to his right shoulder.[18] Two injuries – the penetrating chest injury and the injury to Locke's head – were considered likely to cause threat to life.[19] The wounds to his right armpit and right shoulder were superficial.[20] The other wounds were considered likely to cause scarring but were expected to heal.[21] His injuries, once properly treated, ceased to be life-threatening.[22]

7. The applicant denied that he was the offender.

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[10] ~~T108.25~~ T14.6 (19 May 2016).
[11] ~~T181.1-T181.26~~ T171.5-T172.2 (10 June 2016); ~~T186.1-T186.12~~ T176.6-T176.17 (10 June 2016).
[12] ~~T170.30~~ T160.31-T161.3 (10 June 2016).
[13] ~~T171.11-T171.12~~ T161.14-T161.15 (10 June 2016); ~~T177.10-T177.17~~ T167.23-T167.30 (10 June 2016); ~~T203.29-T204.7~~ T196.17-T196.26 (14 June 2016).
[14] ~~T171.25-T172.4~~ T161.29-T162.9 (10 June 2016).
[15] ~~T176.28-T176.30~~ T167.10-T167.12 (10 June 2016).
[16] ~~T177.18-T177.28~~ T167.31-T168.11 (10 June 2016).
[17] ~~T172.21-T172.25~~ T162.26-T162.30 (10 June 2016).
[18] ~~T199.16-T199.19~~ T191.25-T191.28 (14 June 2016).
[19] ~~T201.23-T202.10~~ T194.6-T194.25 (14 June 2016).
[20] ~~T201.20-T201.26~~ T195.5-T195.12 (14 June 2016).
[21] ~~T202.11-T202.19~~ T194.26-T195.4 (14 June 2016).
[22] ~~T206.1-T206.4~~ T198.24-T198.28 (14 June 2016).

Part C: Grounds of Appeal

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

Overview

8. The applicant was charged with attempted murder and, in the alternative, intentionally causing serious injury.

9. Shortly before the prosecution closed its case, the applicant foreshadowed an application that there was no case to answer[23] in respect of the charge of attempted murder.[24] That application was subsequently made[25] and refused.[26]

10. The trial judge erred in refusing that application. The charge of attempted murder should have been taken away from the jury. Further or alternatively, it was not open to the jury to convict the applicant of attempted murder as it was not open to the jury to conclude that the inference of intent to kill was the only reasonable inference open on the evidence.

General Principles

11. The principles relating to this ground of appeal are well established:

    a. The threshold for success is high because of the deference properly given to jury findings. This deference is based both on the principle of finality of verdicts and on the advantage that the jury has in seeing and hearing the witnesses.

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[23] *Criminal Procedure Act 2009* (Vic), s 226(a).
[24] ~~T315.1-T315.13~~ T311.1-T311.15 (15 June 2016).
[25] ~~T334.1-T352.10~~ T331.1-350.23 (15 June 2016).
[26] *DPP v Byrne (No 3)* [2016] VSC 346.

b. As the majority[27] in *M v The Queen*[28] (***M***) put it:[29]

> *It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence. In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.*

c. *M* continues to provide authoritative guidance.[30]

Submissions

12. It was for the prosecution to prove – beyond reasonable doubt – that the applicant was the attacker, and that he intended to kill Locke. As Mason CJ, Dawson and Toohey JJ observed in *Knight v The Queen* (***Knight***):[31]

> *... the intention which must accompany the inchoate crime of attempt is an intention to commit the complete offence. It follows that an accused is not guilty of attempted murder unless he intends to kill. An intention to cause grievous bodily harm may constitute the malice aforethought required for murder where death ensues, but for there to be attempted murder there must be an intention to cause the death which is an essential element of the completed crime of murder.*

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[27] Mason CJ, Deane, Dawson and Toohey JJ.
[28] (1994) 181 CLR 487.
[29] Ibid., 494-495.
[30] *R v Nguyen* (2010) 242 CLR 491; *SKA v The Queen* (2011) 243 CLR 400.
[31] (1992) 175 CLR 495, 501 (citations omitted).

13. In this case, the jury – acting reasonably – could not have rejected as a rational inference the possibility that the offender acted without an intent to kill.[32] Put another way, it was not possible to exclude, as not being reasonably open on the evidence, the hypothesis or inference that the offender did not act with intent to kill.[33] There was insufficient evidence to support an ~~interference~~ inference of intent to kill, and the jury could not have excluded competing hypotheses consistent with innocence.[34] As was the situation in *Knight*:[35]

> *This case is not concerned with the problem of proof of the facts from which an inference is to be drawn; it is concerned simply with the question whether a reasonable jury ... could have returned a verdict of guilty or, to put it another way, whether a reasonable jury could have been satisfied beyond a reasonable doubt that the inference of intent to kill was the only reasonable inference open on that evidence. ...*

14. The verdict of the jury on the charge of attempted murder is unreasonable or cannot be supported having regard to the evidence given:

    a. There was no direct evidence of intent (such as, for example, threatening or menacing statements attributed to the offender during the course of the offending).

    b. The evidence, taken at its highest, fell short of proof of the requisite intent for a charge of attempted murder (being intent to kill):

        i. There was no motive to kill.

        ii. The applicant and Locke were not known to each other.

        iii. Locke did not personally know the offender. Axiomatically, there had been no history of animosity between Locke and the offender.

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[32] Ibid., 503.
[33] Ibid., 504.
[34] Ibid., 509.
[35] Ibid., 510 (citation omitted).

iv. The offending was committed within a very brief timespan. It was not prolonged.

v. Locke was conscious when the offender ran away.

vi. Locke appears to have been on his feet when the offender ran away.

vii. The circumstances suggest that the attack lacked premeditation.[36]

c. The jury could not have been satisfied that the offender had an intent to kill unless it engaged in impermissible speculation.

d. It was not possible to exclude the hypothesis or inference that the offender acted with an intent to cause serious injury (or even an intent to cause really serious injury) but not an intent to kill. The inference that the offender intended to cause serious injury (or really serious injury), but did not form an intent to kill, could not be rationally excluded. As the applicant submitted in making his no case application:[37]

> *... the alternative hypothesis that [there] is a state of mind short of intent to kill is so patently reasonable given the circumstances where we don't have words uttered that demonstrate intent, we don't have previous animosity or a motive to kill, we don't have a sustained attack on the sense of staying in the presence of the victim and continuing the attack, the victim's on his feet it would seem when the offender flees, ... the alternative hypothesis that an intention to cause really serious injury or serious injury or something short of intent to kill is so patently reasonable on the facts of this case that it couldn't possibly be excluded by a jury.*

[36] It is noted that, in sentencing the applicant, the trial judge concluded that the offending was not premeditated: *R v Byrne* [2016] VSC 580, [12].

[37] ~~T337.4-T337.16~~ T334.12-T334.25 (15 June 2016).

e. The injuries sustained by Locke and the circumstances of the attack upon him do not bespeak of themselves an intent to kill. They do not foreclose the possibility that the offender was acting with some lesser intent.

15. In rejecting the applicant's no case submission, the trial judge said (amongst other things):[38]

> *The evidence in this case, from which the assailant's intention can be drawn, ... , when taken at its highest, is capable of rationally supporting a finding that the assailant intended to kill Mr Locke. That the jury might conclude on the same evidence that the assailant's intention was to cause serious injury demonstrates that the issue is a matter for the jury to decide. ...*

16. That the offender acted with an intent to cause serious injury was a rational inference not excluded by the evidence. The verdict on the charge of attempted murder was unreasonable.

Orders Sought

17. The conviction on the charge of attempted murder must be set aside.[39] A judgment of conviction on the alternative charge of intentionally causing serious injury ought be entered.[40]

Date: ~~4 January 2017~~ 4 September 2017

P. J. Smallwood
Counsel for the Applicant

[38] *DPP v Byrne (No 3)* [2016] VSC 346, [26].
[39] *Criminal Procedure Act 2009*, s 276(1).
[40] Ibid., s 277(1)(c).