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

S APCR 2016 0116

THE DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

-v-

ALEX JOHN SEMAAN

Respondent

RESPONSE TO APPLICANT'S WRITTEN CASE

Date of Document: 7 February 2016
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Part One – Introduction

1. On the 6th September 2016, the respondent was convicted by jury verdict of murder. Defence Plea submissions were filed and the plea hearing was conducted on the 24th and 28th October 2016[1] and sentenced on the 4th November 2016, as set out in the Table contained within paragraph 1 of the applicant's written case.

Part Two – Summary of Relevant Facts

2. The respondent agrees with the contents of paragraph 2 of the applicant's Written Case insofar as a summary of the facts is found in Reasons for Sentence of the

[1] See Plea Transcript "PT" and Defence Plea submissions attached ;

sentencing Judge[2].Reference however also should be made to the Summary of Prosecution Opening for the trial.[3]

3. The personal background and circumstances of the respondent are set out in the various plea exhibits, defence Plea hearing submissions[4] and the Reasons for Sentence[5].

Part Three – Appeal against Sentence

Ground One

The Crown case on Appeal for ground 1 is that the sentence imposed was manifestly inadequate. The Crown relies upon particulars (a) – (m) therein although we note particular (c) is largely repeated at particular (k);

4. In essence, the complaint before this court is one of 'weight' in that the sentencing judge failed to give greater emphasis to certain matters – which are set out in the particulars of the Notice/grounds of Appeal – and has somehow overweighed the matters in mitigation to produce a manifestly inadequate sentence.

5. As this Court has repeatedly made clear, whether a sentence is manifestly inadequate or excessive, requires that any appellant demonstrate that the sentence was clearly not open to be imposed or was manifestly outside the range of sentences reasonably open to a sentencing judge[6].

6. Basic and cardinal principles that underpin the discharge of the sentencing discretion – general and specific deterrence, just punishment, denunciation[7] and rehabilitation[8] – as they were considered relevant to the respondent were considered.

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[2] See Reasons for Sentence "RS" DPP v Semaan [2016] VCC 667

[3] See Summary of Prosecution Opening

[4] PT commencing at p.17 ln 2;

[5] See RS paras [30] – [40]

[6] *DPP v Terrick* (2009) 24 VR 457 at [5]. The phrases 'manifest excess' and 'manifest inadequacy' have consistently resisted definition because they are conclusions. See *Dinsdale v The Queen* (2000) 202 CLR 312 at [6].

[7] RS at [44]

[8] RS par [38]-[41] "I regard your prospects of rehabilitation as poor, for several reasons" The judge then goes onto identify the stated reasons;

7. Further as with the ground of manifest excess, the ground of manifest inadequacy is a stringent one, difficult to make good. Error of this kind will not be established unless the appellate court is persuaded that the sentence was 'wholly outside the range of sentencing options available' to the sentencing judge. Put another way, it must be shown that it was not reasonably open to the learned sentencing judge to come to the sentencing conclusion which he/she did if proper weight had been given to all the relevant circumstances of the offending and the offender.[9]

Response to particulars (a) (b) (d) (e)

8. The sentencing remarks are comprehensive. Not only did the sentencing judge carefully consider all relevant matters, he properly assessed the gravity of the offending. His Honour gave detailed consideration to the object gravity of the offending indicating he appreciated the seriousness of the offending in terms of its nature and gravity.[10]

9. The judge assessed carefully the circumstances associated with the offending[11]. He noted that:

   a) you said to Kanaan "I want to kill everybody"[12]all these events are said to have occurred in the family home;

   b) you got up from your seat and walked out of the bungalow, gun in hand. Michael Bekhazi, a friend of yours, was sitting or squatting in the courtyard.....you put the gun to the back of his head as Kanaan looked on in disbelief. Kanaan tried to reason with you.....You moved away from Bekhazi to the back gate where you could see a neighbor putting out her bins. You pointed the gun at her. Again ,Kanaan tried to reason with you.[13] You turned around and walked back to Bekhazi....pointed the gun at his forehead....you fired and Bekhazi collapsed to the ground fatally wounded.[14]

   c) you retreated to your bungalow...you continued to behave in a threatening manner[15].....Megan joined you in the bungalow, where the two of you remained

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[9] DPP v Karazasis (2010) 31 VR 634 par [127]

[10] RS [20]
[11] See RS at [4]-[18].
[12] See RS par [4]
[13] See RS par [5]
[14] See RS par [6]
[15] RS par [10]

for several hours, despite pleas from family and police negotiators for you to surrender yourself[16]....on the phone (to police) you claimed to have been asleep and not to know anything about the shooting...eventually police entered the bungalow and arrested you[17]

d) in a series of recorded prison telephone calls...you maintained your innocence...and I find that you sought to take advantage of that fact...the mostly self-serving content of these calls....the story morphed....that an unknown intruder entered your bungalow when you were drug affected and vulnerable, that during your struggle with the intruder he fired two shot, one in the bathroom and one in the lounge room.....that you passed out...and that the intruder must have shot Bekhazi in the courtyard...[18];

e) reference was made to defence assertions:

- that Kannan must have been party to the unsuccessful robbery;
- bullet damage in the bungalow would vindicated the accused;
- instructing solicitors to inform the informant of the armed intruder and request a re-examination of the crime scene;
- the discovery of a bullet damaged painting consistent with information given to police passed on by Megan;
- in March 2016 getting solicitors to request a further crime scene re-examination in relation to bullet damage in the shed...this was relied upon as further incriminating conduct;
- the judge noting the verdict by the jury clearly rejected the story of an armed intruder murdering Bekhazi. "No doubt your desperate attempts to bolster that story by arguing that investigators had missed bullet damage backfired[19];

10. The judge correctly stated:

(a) all murders are offences of the utmost seriousness; and

(b) that he was required to make an assessment of where this murder fell on the 'spectrum of seriousness for murder'.[20]

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[16] See RS par [11]
[17] See RS par [11]
[18] See RS par [13]
[19] See RS par [18]
[20] See RS par [20]

11. After a careful analysis and hearing submissions on the issue from both parties during the plea hearing the judge found "I regard your offence as a mid-range example of the offence of murder".[21]

The Crown in its Written Case states "even though the Prosecutor after being pressed by the sentencing judge characterized this offending as mid-range"[22] . The transcript reveals a distinct lack of 'pressing' on the point but rather a request for precision or exactitude from the Crown as to its submission on classification. The judge was entitled to clarity and was correct in seeking it.[23]

12. The 'mid-range' classification by the judge in any event was undoubtedly correct. This offending was:

(a) one of limited planning and premeditation;

(b) not an attack on government authorities police or society as such;

(c) not an example of multiple murders;

(d) not a contract killing or gangland style murder;

(e) not a vigilante killing;

(f) not an example of a thrill kill or sadistic killing. Reference is made to par 8(g) of the Crown Plea submissions but no such submission was made during the plea by the Prosecutor and by reason of accepting, during the plea hearing, this offending was best described as 'mid-range'- inferentially this written submission was abandoned;[24]

(g) not an example of relationship/domestic killing;

(h) not a killing at a public place where ordinary members of the public are endangered; nor was it a remote location;

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[21] See RS par [28]

[22] See par 5 of Crown Written Case;

[23] See PT at p.107 Ln 22 where the following exchange occurred

"His Honour: The prosecution submit that this is a serious example of murder?

Mr Hutton: Yes"

His Honour: By that do you mean that it falls into – are you submitting that this falls into the upper range of murders. Mr Hutton: I would certainly say mid to upper, Your Honour, yes.

His Honour: Well which is it? Mr Hutton: Some years ago I had a similar discussion with Justice Croucher who split it into 5 categories as opposed to three. I'd say mid category, Your Honour"

[24] See Crown Plea Written Submissions "CPWS" par 8(g) where the submission was made (since abandons) this was a serious example of murder;

(i) not an example of 'particularly callous or brutal murder' absent torture, degradation or the victim being made to suffer a particularly painful death e.g. no defilement or mutilation or body disposal.

13. The 'absence' of matters listed in par 14 (b) – (i) clearly did not 'go towards mitigation'. However the absence of these factors, is vital to any proper assessment of the gravity of the 'instant' offending.

14. The various cases the judge was taken to by both parties was relevant but of limited value. As much is acknowledged by the Crown whereat par 11 "Although some assistance can be gained from these cases there are few examples where the offending relates to a senseless murder where the offender has significant prior history" and again at par 12 of its Written Case "it is difficult to find truly comparable cases".

15. The judge engaged in detailed discussion with defence Counsel on the issue of pre-meditation:

(a) the judge said in response to a defence submission there was no premeditation in relation to the death of Michael Bekhazi that he could not accept that there was no premeditation but he agreed there was "no substantial planning in this case but he's in the bungalow.....walks back to Bekhazi, puts the trigger to his forehead, pulls the trigger. Now a murder committed in a moment of passion conjures up quite a different scenario to what I've just described."[25]The judge going on to say he did not accept the submission it was a spur of the moment decision;

(b) on the 28th October the Crown was invited to address the issue as to whether it was a serious example of murder.[26] The Prosecutor made no submission on the issue of planning and premeditation and must be taken to accept the end result of the exchange between judge and defence counsel.

(c) in the Crown Written Case submission is made "at least to some extent re-meditated. Whilst the pre-meditation was not of lengthy duration it could not be said that it was a crime committed in a fit of passion etc.....[27] Accordingly, no

[25] See PT p.36ln 17 – p.38 ln 11;
[26] See PT p.107 ln 22 ff
[27] See par [4] of Crown Written Case;

issue seems to have been taken by the Crown concerning the judge's finding in this regard.

Response to particulars (f) and (g)

16. The judge identified the maximum penalty for murder.[28] Further the consequences of the offence were canvassed by the judge.[29] Victim Impact statements were read out and tendered during the plea hearing.[30] Further, both the particulars are not the subject of any further submission in the Crown Written Case.

Response to particulars (h)

17. The accused proceeded to trial and was found guilty way jury verdict. No remorse submission was made or would have been proper.

18. The agreed "absence of remorse" is a matter that cannot go in aggravation of the sentence. The Crown submission the judge failed to give sufficient weight to the absence of remorse is difficult to comprehend.

19. The absence of remorse cannot be a circumstance of aggravation see (*Shoukan* 15/2/1996 CA Vic at 3; *Duncan* [1998] 3 VR 208 at 215 per Callaway JA; *Mune* [2011] VSCA 231 at [12]).

20. In *Raimondi* (1999) 106 A Crim R 288; [1998] VSCA 101, Tadgell JA noted: "Strictly speaking, a lack of remorse, or a perceived lack of remorse, is not something to be held against a person who is undergoing sentence. Rather, of course, a lack of remorse should mean no more than that he does not receive the benefit to which prima facie a remorseful attitude should entitle him".

21. In any event the sentencing judge made a finding of no remorse and identified same as the second reason why he found the accused's prospects of rehabilitation as poor.[31] Accordingly, in the circumstances the judge gave proper consideration and appropriate weight to the absence of remorse.

Response to particular (i)

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[28] See RS par 1
[29] See RS par [18] – [20]
[30] See PT p.11 and 12
[31] See RS par 40

22. The judge found the respondent to have poor prospects for rehabilitation by reason of[32]:
    (a) the significant criminal history of the accused;
    (b) that he had previously been granted parole in relation to a sentence from Judge Cullity and same had been cancelled several times;
    (c) that he was on parole when the murder was committed;
    (d) absence of remorse;
    (e) the psychological report for Mr Leardi expressed the opinion to the effect that Semaan's longevity of mental health and substance abuse issues, combined with a lack of current motivation to address these issues means that his prognosis for recovery is poor.

23. The judge's finding in this regard was undoubtedly correct[33] and the detailed analysis undertaken reflects due and proper weight being given to same during the sentencing process.

Response to particular (j)

24. A careful and critical analysis was undertaken regarding the respondent's prior criminal history.[34] In the Crown written plea submissions reference was made to the "significant prior convictions' 'several unsuccessful attempts at parole' and "his prospects for rehabilitation are zero to poor".[35] The sentencing judge in reality made these very findings (see par [37] – [40] of the [RS]).

25. During the plea hearing discussion ensued concerning the 'prior' relating the 'nightclub shooting incident'[36]. The judge properly was concerned to establish whether the respondent admitted to firing off a shot.[37] The question was addressed and instructions put the respondent was not responsible for firing a shot.[38] Further the Crown in response agreed there was no evidence concerning this prior matter that Semaan had brandished a gun and shot it.[39]

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[32] See RS paras [38] – [41]
[33] See PT p.50 ln 15-20 Defence Counsel more or less agrees with the proposition Semaan's prospects for rehabilitation are poor.
[34] See RS par [37] – [39]
[35] See CPWS par 13
[36] See PT p.19 ln 20 ff
[37] See PT p.21 ln 28-29
[38] See PT p.27 ln 5-8;
[39] See PT p.109 ln 19-26

Response to particular (l)

26. The sentencing judge made no finding that there were any factors in mitigation. It is submitted the judge accordingly gave no weight to any such matters as the Crown alleges and the Crown submission is entirely misconceived.

27. The sentencing judge stated the only matter the defence had submitted went in mitigation was "the fact you were ice (drug) affected" and referred the Court to the Redenbach case.[40] This submission was rejected.[41]

28. Further, albeit the Crown had submitted the accused's drug induced state amounts to circumstances of aggravation[42] the Prosecutor retreated from this position when he was challenged by the judge. The Prosecutor stated twice he accepts that positon,[43] and conceded the point. The judge stated in his reasons this submission was rejected.[44]

Response to particulars (c) and (k)

29. The Crown identified "protection of the community' as a relevant sentencing consideration in paragraph 15 of its written plea submissions. Thereafter the issue was not mentioned during the plea hearing by either party nor the judge. It is submitted it is implicit within the sentence this issue was not ignored. Further, the Crown makes no submission on the point in its written case submissions only raising same as a particular of the ground of appeal.

Response to particular (m)

30. This matter it is submitted purports to identify a ground of specific error as opposed to the sentence being 'manifestly inadequate and will be dealt with in submissions relating to Ground 2 of the Appeal.

Ground 2

The Crown asserts the judge fell into error in failing to find the 'post offence conduct' amounted to an aggravating feature.

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[40] See RS par [26]
[41] See RS par [27]
[42] See PT p.108 ln 15 ff
[43] See PT p.109 ln 10 – 26;
[44] See RS par 25;

31. The respondent submits/agrees the issue was canvassed during the plea hearing.[45]

32. In its written plea submissions, the only matter that was specifically said to go in aggravation[46] was the circumstances where the accused is forewarned of the effect of the drug on him - the accused's drug induced state amounts to a circumstance of aggravation rather than mitigation. This submission has already been addressed above.

33. The "false robber story and efforts concerning the crime scene" were dealt with by the Crown in its written submissions by referring the Court to R v Scholes as relevant to an assessment of moral culpability.[47] It is submitted His Honour did precisely that when assessing the gravity of the offending and Semaan's culpability when he made findings[48]. The judge stated on the specific issue of moral culpability the submission by defence the accused at the time of offending suffered from a drug induced psychosis that reduced his moral culpability was rejected.[49]

34. The judge raised with defence counsel the question as to if the post offence conduct (i.e. implicitly amounting to an attempt to pervert the course of justice) could constitute an aggravating factor. Defence Counsel distinguishes Scholes case on the basis there was no reason why he (the accused) could not have been charged.[50] No further submissions on the point were made by the Prosecutor on the plea hearing.

35. The Crown, if it have wished to pursue this particular 'sentencing aggravation' issue, should have referred the judge to the principle in De Simoni[51]. In its current submissions in the Written Case again no reference is made to the De Simoni principle.

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[45] See p.51 ln 28 – p.52 ln 27
[46] See CPWS par 8(c);
[47] See CPWS par 8(l) and (m);
[48] See RS par [13]-[17] "You knew the calls were being recorded by the authorities and I find you sought to take advantage of that fact....and again having analyzed the post offence conduct stated "By its verdict the jury clearly rejected your story about an armed intruder.....no doubt your desperate attempts to bolter that story by arguing that investigators had missed bullet damage backfired."[48]

The judge stated on the specific issue of moral culpability the submission by defence the accused at the time of offending suffered from a drug induced psychosis that reduced his moral culpability was rejected
[49] See RS par [23]-[27];
[50] See PT p. 52 ln 1-27;
[51] R v De Simoni (1981) 147 CLR 383; (1981) 35 ALR 265; (1981) 55 ALJR 469; (1981) 5 A Crim R 329; [1981] HCA 31;R v Charbaji [2016]NSWC 1867; R v Carmody [2016]ATSC 382; R v Manevski [2016]

36. In *The Queen v De Simoni* (1981) 147 CLR 383 at 389, Gibbs CJ said: "the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted ..."

37. Two principles thus emerge – a judge in imposing sentence is entitled to consider all of the conduct of the accused, including that which would aggravate the offence AND but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.

38. In Scholes Tadgell J stated "If, therefore, the respondent's post-accident conduct would have warranted a conviction for the common law offence, I should be prepared to say the rule exemplified by R v Newman & Turnbull ought to apply."[52] The point of distinction with the Scholes decision is that – in Scholes the post-accident conduct would not have warranted a conviction for the offence of attempting to pervert the course of justice. Here, both co-accused were indictment on just that offence and convicted of it on a narrative the Semaan was the driving force behind it.

39. Likewise in **Weston**, this Court did no more than apply the Scholes line of authority that where the post-offence conduct was sufficiently proximate to the offending the same was properly to be regarded as part of the relevant circumstances.[53] Again in Scholes, Justice Tadgell identified the post offence conduct would not have warranted a charge of attempt to pervert.

40. The High Court reiterated in *Nguyen v The Queen* (2016) 90 ALJR 595 at [29] that "the *De Simoni* principle is an aspect of the fundamental principle that no one should be punished for an offence of which the person has not been convicted". That is, the sentencer is not generally entitled to take into account circumstances that could have been alleged as independent additional offences.

NSWSC 1465; R v Wran [2016] NSWSC 1015; R v Postolovski [2016] SASCFC 69; Nguyen v R [2016] HCA 17; Hui v R [2015] VSCA 314; Rodriguez v DPP [2013] VSCA 216; Smith v R [2014] VSCA 268; Bonacci v R [2012] VSCA 170.

[52] See R v Scholes [1998] VSCA 17 p.19 par [24]

[53] See R v Weston [2015] VSCA 243 par [32]

41. In *Newman & Turnbull* [1997] 1 VR 146 the Court of Appeal addressed a case where the offenders pleaded guilty to a single count of aggravated burglary, but were punished additionally for an assault committed while in the burgled premises, and which had been the object of the burglary. Winneke P, with the concurrence of Hayne JA and Crockett AJA applied the *De Simoni* principle and found that the sentencing judge had erred in treating this assault as a circumstance of the offence of burglary. Significantly, it was stated it was no objection that this was a less serious offence than the offence charged, or that it was not an offence of which the offender had been acquitted. Winneke P stated at 151:

"Although it has been said that the application of the principle sometimes requires a sentencing judge to adopt an artificial and, at times, quite unrealistic view of the facts (cf. *R. v Wyllie* [1989] V.R. 21 at 32), it seems to me that, in a case like the present, the matter is very much in the hands of the Crown. If it desires the judge to have the flexibility, in imposing sentence, of dealing with the offender for aggravating circumstances which in themselves amount to a discrete and serious offence, then it is within the Crown's capacity to shape its presentment accordingly."

42. President Winneke went on to say about the Newman judgment in the case of: R v Cincotta [1997] VicSC 484 15/10/1997 CA Vic at 11:

"... I fully appreciate the caution which must be exercised by the Director of Public Prosecutions to ensure that the entire criminal conduct of an accused person is captured within the four corners of the presentment so that the entirety of the criminal conduct can be punished. But it should be remembered that the decision in the case of *R v Newman and Turnbull* was but a particular example of the principles expressed in *De Simoni v The Queen* (1981) 147 CLR 383 that a person should not be punished for an offence for which he has neither been charged nor convicted.

43. It is submitted the learned sentencing judge gave due consideration to all of the matters submitted by the prosecution to advance its position on sentencing, whilst balancing those aspects with all other sentencing considerations.

Part Four – Disposition of Application and Orders Sought

44. In the premises it is submitted the appeal against sentence should be dismissed.
45. Leave to file a Written Case of 13 pages.
46. An indemnity certificate pursuant to s.15 of the *Appeal Costs Act 1998.*

Part Five – Transcript Required

47. Transcript has been provided.

7th February 2017

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Counsel for the Respondent