

THE QUEEN

Respondent

- v -

DIMI SOVOLOS

Applicant

RESPONSE TO APPLICANT'S WRITTEN CASE

Date of document:	22 August 2017
Filed on behalf of:	Respondent
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1. **Part A: Particulars of Conviction and Sentence, Relevant Statutory Provisions and Maximum Penalties**

1.1. On 3 March 2017 the applicant was found guilty following trial before His Honour Judge Stuart in the County Court in Melbourne. On 18 May 2017 the applicant was sentenced as follows:

Charge	Offence	Maximum	Sentence	Cumulation
1.	Aggravated burglary s.77(1) <i>Crimes Act</i> 1958	25 years s.77(2) <i>Crimes Act</i> 1958	7 years imprisonment	Base
2.	Reckless Conduct Endanger Life s.22 <i>Crimes Act</i> 1958	10 years s.22 <i>Crimes Act</i> 1958	5 years imprisonment	2 years
3.	Intentionally Cause Injury s.18 <i>Crimes Act</i> 1958	10 years imprisonment s.18 <i>Crimes Act</i> 1958	4 years imprisonment	3 months

Total Effective Sentence:	9 years 3 months imprisonment
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Non-Parole Period:	7 years 6 months. Eligible for parole on 1 May 2022 ¹
Pre-Sentence detention declaration pursuant to s 18(1) of the <i>Sentencing Act 1991</i>:	N/A
6AAA Statement: N/A	
Other relevant orders: Disposal order; Forfeiture order	

2. **Part B: Summary of Relevant Facts**

2.1. The Reasons for Sentence at paragraphs 2 to 25 provide a summary of the offences. The submissions below expand upon the evidence necessary to consider in respect to the Ground of Appeal.

3. **Part C: Grounds of Appeal**

Ground 1 – The verdicts of guilty are unreasonable and unsupported by the evidence

PARTICULARS:

- a) **On the whole of the evidence, it was not open to the jury to be satisfied beyond reasonable doubt of the applicant’s guilt.**
- b) **On the whole of the evidence, it was not open to the jury to entertain a doubt in relation to the two co-accused, but not entertain such a doubt in relation to the applicant.**
- c) **The verdicts are unsafe, by reason of the Learned Trial Judge having given a forensic disadvantage direction favourable to the two co-accused.**

3.1. The question for the Court of Appeal is “whether it 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.”² It is not enough to succeed on such a ground to establish that it was open to the jury to acquit, our put another way that they might had have a doubt. He must establish that on the evidence the jury must have had a reasonable doubt.³

The evidence establishing guilt

3.2. The evidence establishing the Applicant’s guilt was the evidence which proved that he was one of the offenders at the scene. This was:

¹ See Reasons for Sentence, *DPP v Dimi Sovolos* [2017] VCC [57]-[59]

² *M v The Queen* (1994) 181 CLR 487 at 493 (footnote omitted)

³ See, for example, *Libke v R* (2007) 230 CLR 599, 596-597 [113]

- 3.2.1. DNA from a single contributor found on a clown mask left by the offenders at the scene.⁴ This DNA profile matched that of the Applicant with a likelihood ratio of 100 billion. That is, the DNA evidence was 100 billion times more likely if the Applicant was a contributor rather than some other person.⁵ It is noted that the description of the third man, alleged to be the Applicant, was that he was wearing a black balaclava with white around the eyes, not a clown mask⁶. Only two balaclavas were found at the scene, inside the house. A reasonable explanation for the mask being found outside was that it had been worn under the balaclava of the third man, had fallen off when the balaclava was removed, and been left behind as the offenders left the scene.⁷
- 3.2.2. A bloodstain on a backpack left at the scene by the offenders produced a DNA profile with three contributors. Of the five people compared to that bloodstain the other two accused and Mrs Sawan were excluded as contributors. There was a likelihood ratio of 100 billion if Mr Sawan was a contributor, and 1.8 million if the Applicant was a contributor.
- 3.2.3. A used .22 cartridge casing was found at an address frequented by the Applicant. This cartridge casing had markings on it matching other used casings found at the scene of the offences.⁸ The presence of these cartridge casings at both places provided another link between the Applicant and the scene of these offences.
- 3.2.4. The description of the offender who stood in the doorway was that he was tall, the tallest of the three offenders.⁹ Mr Sawan said that this offender was around 6 foot tall.¹⁰ Mrs Sawan had described him as very skinny.¹¹ The Applicant was 193 cm tall,¹² although his father described him as having a solid build, not skinny.¹³

⁴ Transcript 85

⁵ Transcript 384-387

⁶ Transcript 56

⁷ Transcript 704-706

⁸ Transcript 513, 565-566

⁹ Transcript 56

¹⁰ Transcript 156

¹¹ Transcript 123

¹² Transcript 604

¹³ Transcript 670

3.2.5. Telephone contact between the Applicant and De Luca was also relied upon to show a link between the two men, both of whom had DNA profiles matching DNA left on items found at the scene.¹⁴

3.3. It was clearly open to the jury, as it is to this honourable Court, to conclude that this evidence establishes beyond reasonable doubt that the Applicant was present at the scene and thus was one of the offenders.

3.4. The strength of this evidence is illustrated by comparison to some the evidence implicating the other two offenders. In particular, each of the balaclavas found at the scene, which had been pulled from the heads of the two offenders inside the house, had mixed DNA profiles on them.

- The black balaclava which was Exhibit 7 in the trial was tested in two areas. There was a bloodstain above the eye area which was single source, matching De Luca's DNA with a 100 billion likelihood ratio, but the testing of the area around the mouth of the balacalava produced a mixed profile of two contributors, of which De Luca was one. The contributor to the other profile was not known.¹⁵
- The black balaclava with white and yellow stripes, Exhibit 6 in the trial, was swabbed for DNA around the mouth. The testing produced a mixed profile of three contributors one of which matched Khaia with a likelihood ratio of 100 billion.

3.5. Thus, whilst the evidence supported only the Applicant as a contributor to the DNA on the clown mask, there was evidence of DNA of others on the balaclavas. This founded the possibility that they had been worn by someone other than the accused, and that it was any of these other people who were the offenders.

3.6. Furthermore, unlike the case against the Applicant,¹⁶ there was evidence which tended to exculpate Khaia and De Luca.

¹⁴ Transcript 606

¹⁵ Transcript 395 - 397

¹⁶ Compare Applicant's Written Case [19]

- 3.7. First, Mrs Sawan said that she scratched one of the offenders on the neck.¹⁷ Her fingers were tested for DNA, producing a mixed profile of two contributors. Khaia and De Luca and the Applicant were all excluded as contributors to the other profile. This was of little moment in respect to the Applicant as only the other two offenders, who went inside and who had been wearing the balaclavas found in the house, were touched by Mrs Sawan in any way.
- 3.8. It was, however, of considerable exculpatory significance in respect to the other accused, Khaia in particular, as it clearly raised the inference that some other person than Khaia or De Luca was scratched or touched by Mrs Sawan.
- 3.9. Secondly, the descriptions given and photofits produced by Mrs Sawan of the two offenders who entered the house were very different to Khaia and De Luca. In respect to Man 1, who on the prosecution case was Khaia, Mrs Sawan said that this person was male, aged in his early 20s, approx. 162-165 cm tall, possibly Arabic, Turkish or Middle Eastern appearance, medium build, with small, narrow almond shaped eyes, short spiky brown hair, pale smooth clear skin. His face not overly big with square jawline, his nose was not big or bumpy.¹⁸ This can be compared to the evidence from Khaia's sister about his broken nose.¹⁹ Furthermore, the photofit image (Exhibit 11) and the photographs of Khaia (Exhibit 37) can be compared by the court with the degree of dissimilarity being notable.
- 3.10. Similarly, the description of Male 2's hair by Mrs Sawan as black and short and curly²⁰ and the image produced of Male 2,²¹ is quite inconsistent with the very short clipped hair seen in the photograph of De Luca taken in February 2015,²² and his mother's evidence that his hair was similarly short approximately a week before the offences occurred.²³

¹⁷ Transcript 111 – the prosecution case was that this was Khaia

¹⁸ Transcript 36-38, 359-360

¹⁹ Transcript 630

²⁰ Transcript 54, 374

²¹ Exhibit 12

²² Transcript 663, 666, Exhibit DL3

²³ Transcript 666

No Inconsistency in Verdicts

- 3.11. There is an obvious reasonable and logical explanation for the conviction of the Applicant and the acquittal of the co-accused.²⁴ As noted above, there were significant differences between the evidence against the Applicant and the two co-accused. The verdicts demonstrate that the jury heeded the separate trial directions they were given and considered the case against each accused independently.
- 3.12. The jury did not need to be satisfied beyond reasonable doubt of the guilt of that Khaia and De Luca order to find the Applicant guilty. Whilst the prosecution case was that the presence of DNA matching each man on the backpack, together with the telephone contact between the Applicant and De Luca²⁵ supported the view that all three were the offenders, the case against the Applicant was founded upon more evidence than that.
- 3.13. It was well open to the jury to conclude that the Applicant was one of the offenders, but have a doubt about the identity of the other two men, with reference to the matters set out at paragraphs 3.4, and 3.7-3.9 above. When considering the case against the Applicant the jury were entitled to think that De Luca and Khaia were probably or possibly the other two offenders,²⁶ despite not coming to that finding beyond reasonable doubt when considering the case against those two men.
- 3.14. It was also open to the jury to find the Applicant guilty even if they concluded that Khaia and De Luca were not the other offenders. As noted above, there were mixed DNA profiles found in the swabs taken from around the mouth areas of both the balaclavas removed from the offenders who entered the house. This was in contrast to the single source DNA profile found on the clown mask found at the scene.

²⁴ Cf, for example, *McKenzie v R* (1996) 190 CLR. 348, 367-368

²⁵ As noted by the Applicant the jury were directed that this evidence was only admissible against the Applicant and De Luca – See Transcript 605

²⁶ *Jury Directions Act 2015* (Vic) s61

Forensic Disadvantage Warning

3.15. As has been set out above, there was a quantity of evidence which De Luca and Khaia could rely upon to persuade the jury to have a doubt about their guilt. The forensic disadvantage direction given by reason may have assisted them, but it was by no means the only difference between the cases against those two men and the Applicant.

DATED: 22 August 2017



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