

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

DIMI SOVOLOS

v

THE QUEEN

APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE

WRITTEN CASE FOR THE APPLICANT

PARTICULARS OF SENTENCE

Charge on Indictment C1510249	Offence	Maximum	Sentence	Cumulation
1	Aggravated burglary	25 years	7 years	Base sentence
2	Reckless conduct endangering life	10 years	5 years	2 years
3	Intentionally causing injury	10 years	1 year	3 months
Total Effective Sentence:	9 years and 3 months			
Non-Parole Period:	Directed that the accused be eligible for parole on 1 May 2022 on all terms of imprisonment.			
PSD declared:	Nil			
Other orders:	Directed that the sentence be served cumulatively upon sentences imposed on 17 May 2017.			

SUMMARY OF RELEVANT FACTS

1. The applicant was found guilty of charges of aggravated burglary, reckless conduct endangering life, and intentionally causing injury following a jury trial before His

Honour Judge Stuart in the County Court at Melbourne. Two co-accused were acquitted.

2. The charges related to a 'home invasion' incident at Malvern East on 19 March 2015. The prosecution alleged that the three co-accused (the applicant, Richard De Luca and Milad Khaia) attended at a residence occupied by Paul and Mary Sawan in the early hours of the morning, armed and disguised.
3. The intruders entered the rear yard of the residence at 4:30 AM and walked towards the rear of the house, which was occupied by Paul and Mary Sawan and their two adult sons. Paul Sawan was downstairs and became aware of the intruders outside. He moved towards the rear entrance of the building and observed three men, including one (alleged to be the applicant) armed with a .22 long arm firearm which was pointed at him. The other two men, one of them holding a machete, moved into the house. Sawan attempted to prevent their entry, but was forced back inside into a living area.
4. The machete was swung towards Sawan's head, and he was struck to the head and body by the first two intruders. He also heard shots being fired (allegedly by the applicant). His wife, Mary Sawan, had come downstairs and intervened by removing the balaclava worn by one of the assailants. The second assailant lunged at her, and as he did so she also removed his black balaclava. In the course of the struggle, the second assailant dropped a backpack.
5. While the first two men were physically involved with the Sawans, the third man (alleged to be the applicant) was standing outside with the firearm. He discharged the firearm a number of times during the incident, producing five bullet holes in a glass door and depositing cartridge casings, four of which were subsequently recovered outside the residence. A further two casings were recovered inside. As all three departed, one or more of the offenders was observed trying to pick up items that had been dropped, including the backpack.
6. DNA evidence located on items dropped inside and outside of the house implicated the three accused, who were arrested and charged. The prosecution also relied on description evidence (in the applicant's case, this was limited to the observation that the third man was taller and skinnier than the other two intruders) and the later

finding of a .22 calibre cartridge casing, matching those found after the aggravated burglary, at a property occupied by the applicant.

Ground 1 – the head sentences and total effective sentence are manifestly excessive.

PARTICULARS:

- a) Too much weight was given to the escalation in the applicant's criminality represented by his subsequent convictions.**
- b) Insufficient weight was given to mitigating factors.**
- c) Insufficient weight was given to considerations of totality.**

7. The applicant's counsel conceded that his offending the subject of the indictment was serious.
8. His antecedents were objectively bad. He had previously been imprisoned. His previous convictions (from eight adult court appearances) included a number of charges for driving offences, possession of weapons, and drug possession offences. Additionally, he had subsequent convictions for drug trafficking and dishonesty offences. However, he had no convictions for offences of violence, or (as an adult) for burglary or aggravated burglary.
9. It was put on the plea that he had a limited history of unskilled employment up to the age of 23, at which time he lost control of his methamphetamine dependency.
10. The applicant's counsel tendered a psychological report and a neuropsychological report. The psychological report, by Dr Aaron Cunningham, noted a significant substance abuse history, with attempts by the applicant at rehabilitation and a lack of insight into the causes of his drug relapses. He did not present with a significant mental illness but experienced 'adjustment difficulties in the community' and would likely require psychological support or monitoring on release.
11. The neuropsychological report, by Dr Evrim March, detailed a history of head injury, in addition to long-term substance abuse. He was found to be at the lower end of the average range of intelligence, with a significant deficit in processing speed. The report concluded that he had a brain injury of mild severity and

multifactorial in origin; however, this was not likely to explain his offending behaviour.

12. The applicant's counsel also relied on the following additional factors in mitigation:
 - a) The applicant had experienced unusually onerous conditions as a remand prisoner, due to the residual restrictions on prisoners at the Metropolitan Remand Centre following the June 2015 riots.
 - b) The applicant had familial support available to him on his release.
 - c) Considerations of totality applied to the sentence to be imposed on the trial indictment, as the applicant had been remanded on other matters and would not be entitled to a declaration of pre-sentence detention under s 18 of the *Sentencing Act* 1991. Relevant to those considerations was the additional delay in the trial proceedings, due to the discharge of a number of juries (which could not be attributed to the applicant or his counsel) and the disclosure of new issues subsequent the commencement of the trial. In the context of serious charges, the stress of the delay was submitted to have added to the punitive and deterrent effects of the applicant's custody.
13. In the sentencing remarks, the Learned Sentencing Judge distinguished between the applicant's prior and subsequent convictions. He remarked that the offending the subject of the indictment represented a 'grave escalation' in the applicant's criminality, and observed that special deterrence was a very significant factor in the sentencing discretion because of the applicant's history and readiness to use a firearm.
14. The applicant does not dispute the characterisation of the aggravated burglary as a 'grave escalation' in his criminality. However, having regard to the restrictions on the use of subsequent convictions, he submits that too much weight was given to the perception of an escalation in his criminal behaviour, informed as it was by other offences for which the applicant had been separately punished. The applicant's previous convictions were generally for drug and driving offences, and were of more limited relevance and gravity. The Learned Sentencing Judge was entitled to have regard to the applicant's subsequent convictions in the restricted manner set out in *Bellizia v The Queen* [2016] VSCA 21, and whilst the sentencing

remarks do not disclose overt error it is submitted that the sentences imposed for the aggravated burglary enterprise indicate that too much weight was given to subsequent convictions.

15. The term of imprisonment imposed by the Learned Sentencing Judge for the offence of aggravated burglary can be described as long by comparison to current sentencing practices. The applicant's counsel noted the observations of this Court in *Hogarth* and *Meyers* in relation to current sentencing practices for 'more serious forms' of aggravated burglary, and provided a table of comparators.
16. It is noted that this Court's *dicta* in *Hogarth* and *Meyers* relate particularly to confrontational or 'grievance-driven' aggravated burglaries. The applicant's offence was not of this kind.
17. Aggregate sentencing statistics maintained by the Sentencing Advisory Council for the period July 2010 to June 2015 indicate that sentences equal to or greater than that imposed on the applicant (that is, 7 years or more) were only 0.1% of sentences imposed in the higher courts.
18. In submitting that the head sentence for aggravated burglary is excessive, the applicant notes particularly the following cases. Each involves a plea of not guilty, and the presence of a firearm.

a) *DPP v Salih* [2016] VSCA 107

Offending, in company, upon strangers – mother and three young sons. The offenders were disguised, armed with a firearm, and waited until the woman's husband had left the house.

Director's appeal on the grounds that the sentence imposed at first instance was manifestly inadequate. Appeal allowed. Disproportionate weight given to delay and rehabilitation. Re-sentenced to 3 years' imprisonment on the aggravated burglary charge.

b) *Perri v The Queen* [2016] VSCA 89

Joint criminal enterprise upon victims known to the appellant, motive to steal large sum of money. The offenders were disguised, armed with a .22 calibre pistol with a silencer. Appeal allowed on disparity ground and on improper use

of the s 6AAA declaration in relation to the co-offender. Re-sentenced to 5 years' and 6 months' imprisonment.

c) *Destanovic & Tangaloo v The Queen* [2015] VSCA 113

Home invasion, in company, armed with a handgun. Substantial delay. No prior convictions in relation to *Tangaloo*. Described as extremely serious offending of a most brutal kind. Sentenced to 4 years' imprisonment on the aggravated burglary (total effective sentence of 8 years' imprisonment). (Appeal against conviction in relation to *Destanovic* was allowed)

d) *Kheir v The Queen* [2014] VSCA 200

Offending in company, armed with a shotgun. Appellant sentenced on the basis that his involvement was protracted. Relevant prior convictions. Sentenced to 6 years' imprisonment on the aggravated burglary (total effective sentence 9 years' and 6 months' imprisonment). Application for leave to appeal refused.

e) *Miller v The Queen* [2012] VSCA 270

Offending in company, armed with two pistols, and with intent to assault the victim. Retribution for belief that the victim had stolen the appellant's car. Victim's partner and young child were also present. Offending out of character and appellant considered to have excellent rehabilitation prospects. Sentenced to 5 years' imprisonment on the aggravated burglary (total effective sentence of 7 years' and 3 months' imprisonment). Appeal dismissed.

f) *Ahmed v The Queen* [2012] VSCA 200

Offending in company, armed with a baseball bat, rifle and a knife. Use of baseball bat upon victims inside the premises. Significant prior convictions. Sentenced to 5 years' 3 months' imprisonment on the aggravated burglary (total effective sentence of 8 years' 6 months' imprisonment). Application for leave to appeal refused.

19. The applicant also notes the following cases in which the accused pleaded guilty: *Trajanovski & Kelmendi v The Queen* [2017] VSCA 81; *Pilgrim v The Queen* [2014] VSCA 191.

20. Having regard to these cases, it is submitted that the sentence imposed is wholly outside the range that was available in a reasonable exercise of the sentencing discretion.
21. In all the circumstances, it is submitted that the sentencing discretion has miscarried, that the sentence should be quashed and the applicant re-sentenced according to law.

Ground 2 – the Learned Sentencing Judge misapplied the totality principle, in that the orders for cumulation and the total period which the applicant is required to spend in custody are disproportionate.

22. In relation to the trial matter, a total sentence of 9 years and 3 months was imposed.
23. That sentence was ordered to be served wholly cumulatively upon a sentence imposed by the same judge the previous day. That sentence related to, firstly, the hearing of an appeal against a sentence imposed in the Magistrates' Court; and secondly, the contravention of a Community Corrections Order which had earlier been made by the County Court. In those matters, the Learned Trial Judge had allowed the appeal in part, imposed a 'straight' sentence of 21 months for both matters, and declared 558 days of pre-sentence detention (all of which was referable to the appeal proceedings).
24. Therefore, the global sentence was 11 years.
25. The Learned Sentencing Judge noted the potential for double punishment when dealing with aggravated burglary and an offence or offences committed as part of the same enterprise. However, it is submitted that the total sentence of 9 years' and 3 months' imprisonment produced by the head sentences and orders for cumulation was disproportionate to the applicant's overall criminality, viewed in light of his personal circumstances and the mitigatory matters available to him.
26. In sentencing the applicant for the trial matter, the Learned Sentencing Judge adopted a course that was conformable to s 15 of the *Sentencing Act* 1991 and did not make any order for concurrency. However, it is noted that that in sentencing for the appeal and contravention matters, the Learned Sentencing Judge had stated that he had considered the need to apply the totality principle. He further stated that

he considered that the Magistrates' Court sentence (30 months, with a non-parole period of 20 months) to be wholly appropriate *per se*, and that he would have imposed the same sentences but for the need to apply the totality principle. He therefore effectively allowed 9 months' concurrency as between the appeal/breach and trial sentences.

27. Additionally, the applicant had spent approximately 5 months in custody on another subsequent to the commission of the aggravated burglary offence.
28. Although the Learned Sentencing Judge stated that he took considerations of totality into account, it is submitted that the orders for cumulation (as between the appeal and trial sentences, and as between the charges on the trial indictment) produce a total term of imprisonment which infringes the totality principle, and is disproportionate to the total criminality involved.
29. In all the circumstances, it is submitted that the sentencing discretion has miscarried, that the sentence should be quashed and the applicant re-sentenced according to law.



Signed the legal practitioner on behalf of Appellant
Dr Michael FitzGerald

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APPLICANT'S LIST OF AUTHORITIES AND MATERIAL RELIED UPON

- Part A –

DPP v Meyers (2014) 44 VR 486

- Part B –

DPP v Salih [2016] VSCA 107

Bellizia v The Queen [2016] VSCA 21

Perri v The Queen [2016] VSCA 89

Destanovic & Tangaloa v The Queen [2015] VSCA 113

Kheir v The Queen [2014] VSCA 200

Miller v The Queen [2012] VSCA 270

Ahmed v The Queen [2012] VSCA 200

Trajanovski & Kelmendi v The Queen [2017] VSCA 81

Pilgrim v The Queen [2014] VSCA 191

- Material relied upon

N/A