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

DIMI SOVOLOS

v

THE QUEEN

APPLICATION FOR LEAVE TO APPEAL AGAINST CONVICTION

WRITTEN CASE FOR THE APPLICANT

PARTICULARS OF SENTENCE

Charge on Indictment	**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 stood trial together with two co-accused before His Honour Judge Stuart in the County Court at Melbourne. He was charged with aggravated burglary, reckless conduct endangering life, and intentionally causing injury.

2. The charges arose from 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. It was not in dispute that the 'home invasion' occurred, or that Paul Sawan had suffered a range of injuries. However, each of the accused denied that he was a participant in the enterprise, and challenged the evidence adduced to prove his identity as one of the participants.

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.[1] Paul Sawan was downstairs and became aware of one of the intruders smashing a window. 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. Another (alleged to be Khaia) was armed with a machete.[2] Sawan attempted to prevent their entry, but was forced back into the house.[3]

4. The machete was swung towards Sawan's head, and he was struck to the head and body by two of the intruders (alleged to be Khaia and De Luca).[4] He also heard shots being fired (allegedly by the applicant).[5] His wife, Mary Sawan, had woken and intervened by removing the striped balaclava worn by one of the assailants.[6] She observed his facial features. The second assailant lunged at her, and as he did so she also removed his black balaclava and observed his facial features.[7] In the course of the struggle, the second assailant dropped a backpack. Inter alia, the backpack was later found to contain an 'ice' pipe.[8]

5. While two of the intruders 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

[1] Summary of Prosecution Opening for Trial, 28 August 2016, [43]-[44].
[2] Summary of Prosecution Opening for Trial, 28 August 2016, [45]-[46].
[3] Summary of Prosecution Opening for Trial, 28 August 2016, [46]-[47].
[4] Summary of Prosecution Opening for Trial, 28 August 2016, [48], [50]-[51].
[5] Summary of Prosecution Opening for Trial, 28 August 2016, [48].
[6] Summary of Prosecution Opening for Trial, 28 August 2016, [52]-[53].
[7] Summary of Prosecution Opening for Trial, 28 August 2016, [54], [56].
[8] Summary of Prosecution Opening for Trial, 28 August 2016, [54]-[55].

glass door and depositing cartridge casings, four of which were subsequently recovered outside the residence. A further two casings were recovered inside.[9] As all three departed, one or more of the offenders were observed trying to pick up items that had been dropped.[10]

6. The first two men, for convenience designated 'Male 1' and 'Male 2', had therefore been unmasked and observed by an eyewitness. The principal evidence, in the case of Khaia and De Luca, was as follows:

    a. Their DNA was found in the striped balaclava (Khaia) and black balaclava (De Luca) that had been removed by Mary Sawan from the heads of the two intruders who assaulted Paul Sawan. De Luca was the sole contributor to the DNA profile obtained from around the mouth of the black balaclava. Khaia was one of three contributors to the DNA profile obtained from the striped balaclava, the other two being unidentified.[11]

    b. Their DNA was found on the 'ice' pipe that was inside the backpack dropped and left behind by the intruders. De Luca was the major contributor, and Khaia a minor contributor, to the DNA profile obtained from this item. A third contributor was not identified.[12]

    c. The descriptions provided by Mary Sawan corresponded, it was submitted, to Khaia and De Luca. 'Male 1' (alleged to be Khaia) was described as having short dark brown hair. He was the shortest of the intruders, clean shaven, and of either Arabic or Albanian appearance. 'Male 2' (alleged to be De Luca) was described as having curly black hair. He was skinny, of olive complexion, and about 5 feet 11 inches in height.[13]

7. However, the prosecution also relied on the totality of the evidence against all of the accused to prove its case against each of them. In relation to the applicant, that evidence included the description of the third man, 'Male 3', as the tallest of the three intruders; evidence of telephone contact between the applicant and De Luca

[9] Summary of Prosecution Opening for Trial, 28 August 2016, [65]-[66]; Trial Transcript, 17.02.17, pp. 480:29–486:19, 490:3–509:1.
[10] Summary of Prosecution Opening for Trial, 28 August 2016, [59]; Trial Transcript, 13.02.17, pp.55:27-31; 14.02.17, pp. 123:16–17, 146:6–7, 148:2–11.
[11] Trial Transcript, 16.02.17, pp. 393:24–397:13, 413:5–25.
[12] Trial Transcript, 16.02.17, pp. 393:24–397:13, 413:5–25.
[13] Trial Transcript, 13.02.17, pp. 36:10–38:2, 51:3–5, 54:7–55:6.

in the hours prior to the offence; and the seizure of a .22 calibre cartridge casing, matching those located after the aggravated burglary, at a property occupied by the applicant a month later.[14]

8. Additionally, there were two items of evidence that implicated the applicant by way of DNA comparison. Firstly, the applicant was a contributor to a mixed DNA profile, obtained from the outside of the backpack that was left behind after the aggravated burglary (Paul Sawan was also a contributor, along with an unidentified person).[15] Secondly, a clown mask was located outside the house after the aggravated burglary, and the applicant's DNA was found inside it.[16]

9. The applicant did not give evidence, but called as a witness his father, Jim Sovolos, who gave evidence that he was of a solid build at the time of the alleged offences, whereas Mary Sawan had described the third man as 'very skinny'.

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.

10. The evidence relevant to this ground of appeal is set out in the attached schedule.

11. It is submitted that in the circumstances of the trial, it was not open to the jury to be satisfied that there was no reasonable hypothesis consistent with the innocence

[14] Summary of Prosecution Opening for Trial, 28 August 2016, [4]-[7].
[15] Summary of Prosecution Opening for Trial, 28 August 2016, [26]-[28]; Trial Transcript, 16.02.17, pp. 390:5–393:21.
[16] Summary of Prosecution Opening for Trial, 28 August 2016, [23]-[25]; Trial Transcript, 16.02.17, pp. 383:20–387:27.

of the accused. The jury, having considered the evidence against the two co-accused and concluded that it was not satisfied beyond reasonable doubt of their guilt, must have entertained a doubt in relation to the applicant's guilt. The verdicts of guilty are therefore unreasonable and should be set aside, notwithstanding the stringency of this ground of appeal, and the regard due to 'the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial': *Gant v The Queen* [2017] VSCA 104, [101]-[103]; *R v Baden-Clay* [2016] HCA 35, [65]-[66]. It is submitted that in relation to the disputed evidence in the applicant's case, that advantage is not substantial.

12. In the consideration of this ground of appeal, it is to be borne in mind that all of the evidence relied on by the prosecution in the trial (with the exception of telephone records, said to be admissible against the applicant and De Luca only) was said to be admissible against each of the accused. The accused were charged jointly, and the charge was put on the basis that it was a joint enterprise. In particular, the prosecution case was that the later finding of a .22 calibre casing at premises occupied by the applicant was a fact admissible against each of the accused. Similarly, the presence of the applicant's DNA on a backpack left behind by the offenders was relied on against all of the accused, inasmuch as its contents were consistent with an aggravated burglary enterprise, and included an 'ice' pipe which yielded the DNA of De Luca and Khaia.[17]

13. In those circumstances, it is submitted that the jury's verdicts, finding one accused guilty and two accused not guilty, are *prima facie* inconsistent and invite special scrutiny.

14. The applicant submits under cover of this ground that the evidence was insufficient to support his conviction of the charged offences, and that therefore the convictions were against the weight of the evidence and are unsafe. He further submits that the jury's verdicts of guilty cannot stand together with the acquittals of the co-accused, and that it was not open to the jury to reach the conclusion that the applicant was guilty beyond reasonable doubt by the paths of reasoning that remained open after the acquittals of the co-accused. Finally, and having regard to the *prima facie* inconsistency of the jury's verdicts, he submits that the giving of a forensic

[17] Summary of Prosecution Opening for Trial, 28 August 2016, [4]-[7].

disadvantage direction in favour of the co-accused strongly suggests a compromise in the performance of the jury's function, such as to make his conviction unsafe.

15. The prosecution case was a circumstantial one and the jury was invited to infer the guilt of each of the accused from nearly all of the evidence (the exception being call charge records, which demonstrated contact between De Luca and the applicant in the hours before the offence). It followed that items of evidence which were of primary relevance to one or other accused were said to 'fit together' with other items of evidence, making them admissible generally. Overall, the case rested on a relatively limited number of points.

16. However, it can be deduced from the acquittal of the co-accused that the jury rejected or gave little weight to certain items of evidence.

17. In most cases, there was no logical basis for the jury to give greater weight to the same or similar evidence insofar as it related to the applicant. Where the jury's rejection of an item or class of evidence can be deduced from its verdicts in the case of a co-accused, this is submitted to be relevant to the conclusion that it was not reasonably open to the jury be satisfied beyond reasonable doubt of the applicant's guilt on the whole of the evidence.

18. The acquittals call attention to those items of evidence which were primarily relevant to the applicant. However, this evidence is limited, and it is too remote and too fragile to support a conviction.

    a) Firstly, a .22 calibre cartridge casing was located by police a month after the offence at premises occupied by the applicant in Donvale.[18] There was expert evidence that this casing was fired from the same firearm as casings found inside and outside the residence which was invaded on 19 March 2015.[19] The prosecution's submission went further than this, and invited the jury to infer that the casing found at the Donvale address was the 'missing casing' from the Malvern East aggravated burglary, and had been retained by the applicant as a memento. That inference was inherently fragile.

        i) The expert evidence could go no further than establishing that the casing was from a cartridge that had been fired from the same firearm

[18] Evidence of D/S/C Nicholas Troake, trial transcript, 20 February 2017, p.565.
[19] Evidence of L/S/C Alan Pringle, trial transcript, 17 February 2017, pp.509–514.

as was used in the aggravated burglary. It could not establish when the cartridge was fired, or in particular that it had been loaded in the firearm on 19 March 2015.

ii) In relation to the theory that there was a 'missing casing' at the Malvern East address, there were alternative explanations to account for the failure of investigators to find an equal number of casings and bullets. As two .22 calibre weapons were discharged during the offence, it was not certain that the 'missing casing' had been fired from the longarm as opposed to the pistol. There was also limited evidence to account for the removal of a casing from the address.

iii) A period exceeding four weeks had elapsed between the commission of the offence and the seizure of the casing. In terms of recent possession reasoning, that period was significant.

iv) The matching casing was not found in isolation. It was found with other firearm ammunition (in various locations around the house) which was not related to the same weapon, or to the aggravated burglary.

v) The connection between the applicant and the casing at the time of seizure also presented a difficulty for recent possession reasoning. The casing was found in a common area of the Donvale premises, under a coffee table in a lounge room. It was not stored in a way consistent with its retention by the applicant. Although there was evidence that the applicant stayed and kept his belongings in the lounge room, he only stayed at the address for two or three nights each week. The evidence was that a significant number of people, 'maybe over ten people', would come and go from the address. The lounge room was frequented by visitors to the house and was an area in which alcohol and cannabis were consumed, and in which guests slept.[20] It was untidy.

vi) There was no fingerprint or DNA evidence to connect the applicant to the casing found at Donvale.

[20] Agreed statement of Anthony Prassinos, trial transcript, 23 February 2017, pp.642–645.

b) Secondly, the applicant's DNA was located on a backpack that was dropped in the course of the offence, and on a clown mask that was found outside the house occupied by the Sawans.[21] The backpack was the only item that was observed to be used in the commission of the offence and left behind by the offenders, from which the applicant's DNA was obtained. The backpack contained an item (an 'ice pipe') which yielded the DNA of both De Luca and Khaia, and it was carried by one of the offenders whose balaclava was removed, and contained a single source DNA profile matching De Luca.[22]

    i) The finding of DNA on the clown mask could only be given minimal weight, as there was no observation of the mask being used in connection with the offence by any of the offenders, all of whom wore balaclavas. Two of those balaclavas were removed, and contained the DNA of the co-accused, who were nonetheless acquitted. On the contrary, the evidence could only support the conclusion that the clown mask had been brought to the house by the intruders, not that it had been worn.

    ii) The finding of DNA on the backpack could not logically have been approached by the jury differently from the other DNA evidence in the case.

    iii) Additionally, the backpack was carried by 'Male 2', alleged to be De Luca. There was conflicting evidence in relation to whether 'Male 3' attempted or had the opportunity to make physical contact with the bag at the time of the offending; Paul Sawan gave evidence that he saw 'Male 2' and 'Male 3' trying to pick up items off the ground, but made those observations after a serious assault during which he had been struck repeatedly to the head.[23] Additionally, those observations were made under conditions of high activity and movement in an enclosed space. Mary Sawan's evidence was that it was 'Male 2', not

[21] Evidence of Alexandra Salerno, trial transcript, 16 February 2017, pp.383–387 and pp.390–393.
[22] Evidence of Alexandra Salerno, trial transcript, 16 February 2017, pp.390–397 and p.413.
[23] Evidence of Paul Sawan, trial transcript, 14 February 2017, pp.146–148.

'Male 3', who had tried to pick up items off the floor, and that 'Male 3' was in the rear doorway of the house when this occurred. [24]

c) Thirdly, there were call charge records which demonstrated that the applicant was in contact with De Luca in the hours before the commission of the offence.[25] As the jury were not satisfied of De Luca's guilt, it followed that they could not logically use this evidence to infer that the accused was guilty.

d) Fourthly, there was description evidence. In the applicant's case, that evidence was less detailed than in the case of the co-accused, who were alleged to be 'Male 1'and 'Male 2'. The description evidence in relation to 'Male 3', who remained disguised at all relevant times, went no further than a description in general terms of his height, relative to the co-offenders, and build.[26] The applicant called evidence from his father that his build was inconsistent with Mary Sawan's description in her police statement that 'Male 3' was 'very skinny'.[27] The jury having acquitted the co-accused, the evidence of relative heights was of minimal weight. Overall, this evidence could not have provided cogent support for a finding of guilt.

19. The only evidence which was capable of distinguishing the applicant's case from that of the co-accused was the finding of the .22 calibre casing at a property of which he was a sometime occupant. All of the other evidence was equally directly relevant to more than one accused, or was in a class of evidence within which there was no logical basis for differentiation in weight. It would have been unreasonable to regard the evidence of the casing as being in any way stronger than other evidence which was primarily relevant to the co-accused (such as the DNA profiles obtained from the balaclavas worn by 'Male 1' and 'Male 2'). It is submitted that having regard to the matters set out above, the evidence of the casing was lacking in cogency and probative weight. It was not reasonably open to be satisfied, on the basis of this evidence in the context of the whole of the evidence, that the applicant was guilty of the charged offences. To put it another way, when this evidence was

[24] Evidence of Mary Sawan, trial transcript, 13 February 2017, p. 55 and 14 February 2017, p.123.
[25] Evidence of D/S/C Julia Doyle, trial transcript, 31 January 2017, p.4.
[26] Evidence of Mary Sawan, trial transcript, 13 February 2017, p.56 and 14 February 2017, p.123; evidence of Paul Sawan, trial transcript, 14 February 2017, pp.156–157.
[27] Evidence of Jim Sovolos, trial transcript, 23 February 2017, pp.670–671.

taken into account in all the circumstances of the case, the jury must still have had a reasonable doubt.

20. It is further submitted as a particular of this ground that the verdicts are inconsistent on the application of the principles set out by the High Court in *MacKenzie v The Queen* (1996) 190 CLR 348. As noted above, in this case nearly the whole of the evidence was said to be admissible as against each accused. Some items of evidence were of equally direct relevance to more than one accused (such as the call charge records, as between the applicant and De Luca, or the 'ice' pipe, as between Khaia and De Luca). Additionally, there were classes of evidence within which there was little or no logical basis for differentiation in weight as between the accused (for instance, the DNA evidence and the description evidence). It can be deduced from the acquittal of the two co-accused that the jury was not satisfied beyond reasonable doubt by certain items of evidence. In the circumstances, the existence of a reasonable doubt in relation to the two co-accused necessitated the existence of such a doubt in relation to the applicant.

21. In support of the submission that the verdicts were inconsistent, the applicant relies on his other submissions under cover of this ground, as set out above.

22. It is further submitted as a particular of this ground that the jury's verdicts suggest that its performance of its functions in the applicant's case was compromised by the giving of a forensic disadvantage direction in favour of the two co-accused. That direction related to the failure of the police investigators to conduct identification parades, or photographic identification processes, with the witness Mary Sawan. When she first spoke to police, Mary Sawan had provided verbal descriptions of the two men whom she had unmasked, which were in broad terms consistent with the physical appearance of De Luca and Khaia. However, she then took part in a photofit exercise, the results of which were two images that were dissimilar to De Luca and Khaia.[28] She had expressed to police her dissatisfaction with these images, and they were not relied on by the informant in the brief of evidence prepared for the accused's committal proceedings. The fact that a photofit exercise had been conducted was not disclosed by the informant and evidence of it did not emerge until the trial commenced before a different judge. Following the

[28] Exhibit 11; Exhibit 12.

unsatisfactory photofit process, the police did not attempt any form of visual or picture identification after the arrest of the co-accused. The effect of the evidence was that a forensic disadvantage warning was given to the jury in relation to De Luca and Khaia. Such a warning did not arise in the case of the applicant, whose face had not been observed by Mary Sawan and whose photofit image had merely depicted a black balaclava.[29]

23. The Learned Trial Judge had earlier made comments in the running on the importance of identification parades.[30] Those comments followed the playing to the jury of the recorded evidence of the informant, and at the same time the judge had commented adversely on the informant's failure to discharge her obligation to disclose the photofit images, and the fact that a photofit exercise had been conducted. In the course of the charge, the Learned Trial Judge reminded the jury of those comments and explained that he was now giving 'a judicial warning, given with the full weight of my judicial authority'. The warning required the jury to take into account the forensic disadvantage which the co-accused had suffered because of the failure of the police to offer them the opportunity to participate in an identification parade, or conduct a picture identification process.

24. Although the circumstances in the cases of De Luca and Khaia justified the giving of the forensic disadvantage direction, the inconsistent verdicts returned by the jury strongly suggest that the direction had unexpected consequences, which infected its deliberations on the applicant. It is submitted that the verdicts invite scrutiny, and that the forensic advantage direction confirms the suspicion that the verdicts are unsafe.

25. The giving of the direction in such strong terms inadvertently singled out the applicant (notwithstanding that the prosecution case was that nearly all of its evidence was admissible against each of the accused). It appears from the verdicts that the jury may have understood that the applicant was at an advantage relative to the co-accused, and given greater weight to the same evidence insofar as it related to him. While there was a logical basis for giving the description evidence less weight than it would otherwise have had in the case of Khaia ('Male 1') or De Luca ('Male 2'), there was no logical basis for giving greater weight to the

[29] Exhibit 13.
[30] Trial Transcript, 23.02.17, pp. 658:2–659:11.

description of ‘Male 3’ than to the more detailed descriptions. Likewise, there was no logical basis for giving greater weight to the DNA profile obtained from the unused clown mask than to those obtained from the balaclavas used by the offenders.

26. Additionally, the directions favourable to the co-accused were closely tied to evidence of police misconduct. There was a strong suggestion that the police investigation of the co-accused was unfair, and that the effects of this unfairness carried over into the trial. This view of the investigation brought into play both an antipathy towards the informant, and a sympathy for the co-accused. The jury direction was also apt to produce the impression that there was a substantial additional hurdle for the prosecution to overcome in the case of the co-accused, which was not present in the applicant’s case. It is submitted that this combination of factors would have produced conditions in which a compromise of the jury’s verdicts was likely to come about.

27. Generally it is submitted that the giving of the forensic disadvantage direction informs the response to the question whether the verdicts in the applicant’s case were unsafe.

28. In the circumstances it is submitted that the verdicts of guilty are unreasonable and unsupported by the evidence. The applicant’s convictions should be quashed and this Court should enter a judgment of acquittal of all charges.

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 –

  N/A

- Part B –

  Gant v The Queen [2017] VSCA 104
  R v Baden-Clay [2016] HCA 35
  MacKenzie v The Queen (1996) 190 CLR 348

- Material relied upon

  N/A