

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

No. of 2017

Peter Madul

v

The Director of Public Prosecutions (Vic)

**APPLICATION FOR LEAVE TO APPEAL AGAINST
CONVICTION**

WRITTEN CASE FOR THE APPLICANT

1. The Applicant was convicted by jury verdict of charges of Aggravated Burglary (x 2), Attempted Armed Robbery and Theft (x 3).
2. The convictions followed a Trial before His Honour Judge O'Connell in the County Court at Melbourne that commenced on 22nd August, 2017 and concluded with the jury verdict on 28th August, 2017.
3. The Applicant was subsequently sentenced on 19th October, 2017 to a total effective sentence of imprisonment of 5 years and 6 months imprisonment with a minimum term of 3 years and 3 months.
4. No application for Leave to Appeal the sentence imposed is made.

5. The Applicant was therefore sentenced for offences of Aggravated Burglary, Attempted Armed Robbery and Theft where the statutory maximum penalties are:
 - a. Aggravated Burglary – 25 years imprisonment
 - b. Attempted Armed Robbery – 20 years imprisonment
 - c. Theft – 10 years imprisonment

Factual basis for conviction and sentencing:

6. On Tuesday 1st March, 2016 at about 1.30 am an unknown male entered a home at 3 Sedgwick Drive in Lynbrook. The person who entered the premises was a stranger to the occupants, Xi Long Zhang [Xi Long], Nanzhen He [He] (a couple) and their son, Bin Zhang [Bin].
7. Xi Long and He were asleep in their bed in the master bedroom when the lights were turned on and off a number of times. They woke to find an unknown dark skinned male standing at the bedroom door. He was armed with a knife which he brandished, demanding the keys to the car.
8. Bin, who had been in his room playing computer games, heard someone say “give me the fucking keys”. He left his room and walked towards his parent’s bedroom.
9. The unknown male left the bedroom. The group comprising the unknown male, Xi Long, He and Bin went into the kitchen. No lights were on. Another demand was made for the car keys and Xi Long said that they were with his brother.

10. The unknown male then left the home through glass doors, dropping a carton of Chinese brand cigarettes that had been taken from the home as he left. He took with him the knife, which had been taken from a knife block in the kitchen.
11. Shortly after the unknown male left, Bin contacted the police via a 000 call made from his mobile phone. The time was 1.49 am.
12. As the family then looked around the home, it was discovered that, along with the knife, a number of cartons of Chinese brand cigarettes had also been taken. A bottle of wine had been opened and (by necessary inference) the unknown male had drunk from the bottle before leaving the bottle behind.
13. At a time between 1.49 am and about 2.25 am, either an unknown person, or unknown people entered 17 Sedgwick Drive, Lynbrook. Sunil Vaidyanathan and his family were all asleep at that time.
14. The person, or the people, who entered 17 Sedgwick Court took the keys to 2 cars from a hook in the hallway. The keys were for a Honda that was parked in the garage, and a Holden Barina that was parked adjacent to the nature strip outside 17 Sedgwick Drive.
15. Thereafter, the Honda car was taken from the garage. The garage, which was part of the house, had a roller shutter door that was opened, and the Honda was driven down the driveway, before being abandoned.
16. A Holden Barina that had been parked adjacent to the nature strip, was then taken by the unknown person or people who had earlier taken the keys.
17. At about 2.25 am, Sunil Vaidyanathan was awoken by police knocking on the front door. The Honda car had apparently been seen by police on the driveway, and that had created a level of suspicion.

Upon inspection, the knife that had earlier been taken from 3 Sedgwick Drive was found on the front passenger seat.

18. Upon forensic examination, the left thumbprint of the Applicant was located on the blade of the kitchen knife.
19. The Applicant was arrested on 7th April, 2016 and charged with the offences at 3 and 17 Sedgwick Drive in Lynbrook.

Sentence imposed and other orders:

Charge on Indictment	Offence	Maximum	Sentence	Cumulation
1	Aggravated Burglary	25 years [s.77 (1) of Crimes Act 1958]	52 months imprisonment – ment	Aggregate on 1,2 & 3
2	Attempted Armed Robbery	20 years [s.321M of Crimes Act 1958]	52 months imprisonment – ment	"
3	Theft	10 years [s. 74 (1) of Crimes Act 1958]	52 months imprisonment – ment	"
4	Aggravated Burglary	25 years [s.77 (1) of Crimes Act 1958]	33 months imprisonment – ment	Aggregate on 4, 5 & 6, 12 months cumulative
5	Theft	10 years [s. 74 (1) of	33 months imprisonment –	"

		Crimes Act 1958]	- ment	
6	Theft	10 years [s. 74 (1) of Crimes Act 1958]	33 months imprisonment – ment	"

Total Effective Sentence	5 years and 6 months imprisonment
Non-Parole Period	3 years and 3 months
Pre-Sentence detention declaration pursuant to s.18(1) of Sentencing Act 1991	561 days
Section 6AAA Statement	Not applicable
Other relevant orders	Note that a term of imprisonment of 6 months was imposed on a separate Indictment, with 2 months ordered to be served cumulatively – making the TES of 66 months imposed

GROUNDS OF APPEAL

Ground 1 – Unsafe and Unsatisfactory Verdict

20. It is submitted that the verdicts of guilty returned in relation to the 6 charges on Indictment were unsafe and unsatisfactory.
21. In this regard, the principles to be applied were set out by Maxwell P in *R v Klamo*.

"The approach required of appellate courts in considering the 'unsafe and unsatisfactory' ground involves the following steps:

1. The court of criminal appeal must ask itself whether, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.
2. In considering that question, the appeal court must bear in mind that the jury has the primary responsibility of determining guilt or innocence and has had the benefit of seeing and hearing the witnesses.
3. In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced.
4. 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."

See *R v Klamo* [2008] VSCA 75, para [38]; (2008) 18 VR 644 at 653 – 654

22. Brief statement of the Prosecution case at Trial:

It is submitted that, in accordance with the Prosecution Opening filed and served pursuant to section 182 *Criminal Procedure Act* 2009, the way that the Trial was opened to the jury by the Prosecutor and based upon the entirety of the evidence adduced in the Prosecution case:

- (i) In relation to charges 1, 2 and 3, verdicts of guilty could only be returned by the jury if the jury was satisfied beyond reasonable doubt that it was the Applicant himself who entered 3 Sedgwick Drive, Lynbrook, and did the things alleged.

- (ii) It was the prosecution case that the Applicant then left 3 Sedgwick Drive, Lynbrook, taking with him the knife from the kitchen [the knife].
- (iii) In relation to charges 4, 5 and 6, verdicts of guilty could only be returned by the jury if the jury was satisfied beyond reasonable doubt that it was the Applicant himself who entered 17 Sedgwick Drive, Lynbrook, and did the things alleged.
- (iv) It was the prosecution case that the Applicant who left the knife in the Honda car in the driveway.
- (v) In this regard, the Prosecution case at Trial was not that the Accused was a person who waited outside in Sedgwick Drive as the offences were committed, later entering the Honda car and touching the knife after the offending was complete.
- (vi) That is to say, the Prosecution case specifically did not include an alternative pathway to conviction by way of section 324 *Crimes Act* 1958 – namely that the Applicant could be found guilty if the jury were satisfied that, for example, he kept a look out while others committed the offences.
- (vii) The prosecution case was therefore put on the basis that an inference could be drawn that it was the Applicant himself who entered both 3 Sedgwick Drive and 17 Sedgwick Drive in Lynbrook and committed the offences alleged. It was said that this inference could be drawn from the circumstances of the case, principally that:
 - 1. It was the Applicant's left thumbprint on the knife;
and
 - 2. The descriptions given as to the physical appearance of the person observed in 3 Sedgwick Drive, Lynbrook.

23. Brief statement of the Defence case at Trial:

The Applicant said nothing in his recorded interview with police, and no evidence was called in the Defence case at Trial.

24. The inference that the Prosecution submitted could be drawn from the evidence adduced at Trial was not available, based upon the following:

25. Regarding the purported similarities in appearance of the person in 3 Sedgwick Drive, Lynbrook and the Applicant:

- (i) The evidence of Sunil Vaidyanathan did not advance the case at all as to who was the person or people who entered his home.
- (ii) The evidence of Xi Long was that the intruder was "black and tall" (T 118.1); "above 170 cm's, black, with very short hair, curly" (T 122.6 to 122.22).
- (iii) The evidence of He as to the appearance of the intruder was that "his hair was very short, black hair" (T153.9) and "very short, curly hair" (T 160.6).
- (iv) The evidence of Bin Zhang was that the intruder was "Pretty tall but not very strong build" (T169.15), that he was "Black" and had "short hair" (T169.21 to T169.25). Later, that he was "Tall, thin and not strong" (T174.17).
- (v) The evidence of Tony Lavars (the Informant) was that the Applicant, upon his arrest, was "6 foot plus" (T412.9), that he had a "distinctive haircut" (T413.120). Photographs of the Appearance of the Applicant were tendered at T413.26 as exhibit 2. They depict a tall, strongly built African male with a distinctive haircut.

26. Regarding the evidence of the finding of the thumb print of the Applicant on the knife:

- (i) Bin made the 000 call at 1.49 am on 1st March, 2016.
- (ii) The knife was first seen by police on the front passenger seat of the Honda at some time from 2.05 am, being the time of the arrival of Police from Narre Warren (Beard T228.14) and about 2.35 am, being the time of arrival of Beard (T229.26). In other words, the knife was in the Honda for about ten or twenty minutes before it was first seen by Police.
- (iii) There was no direct evidence as to how the knife came to be in the Honda.
- (iv) The knife, when photographed in situ, was on the outside edge of the front passenger seat, with the sharpened blade edge facing upward (refer photographs 4, 5 and 6 under Tab 4 of the jury folder). The thumbprint of the Applicant was found on the sharpened edge of the blade, diagonally across the blade in an orientation from the hilt of the knife toward the tip (Fisher T367.19 and the cardboard prop knife tendered as Exhibit 1 at Trial – T368.4).

27. In those circumstances, it was submitted at Trial that an inference that was open was that the Applicant touched the knife when he was in the Honda at a time after the entry into 3 and 17 Sedgwick Drive, Lynbrook had been completed by another person or people. In other words, that another person or people entered the homes while the Applicant waited outside, later entering the Honda and moving the knife.

28. This alternative was available, bearing in mind in particular that:

- (i) The knife was found on the outer edge of the front passenger seat of the Honda.

- (ii) That the thumbprint of the Applicant was found on the blade of the knife, not on the handle.
 - (iii) Fingerprints of another unidentified person, or of other unidentified people, were found on the cigarette carton dropped by the intruder in 3 Sedgwick Drive, Lynbrook, and on the wine bottle that, by inference, was handled by the intruder (refer evidence of Carson and Fisher in total).
 - (iv) That the intruder into 3 Sedgwick Drive did not wear gloves (Beard T232.14).
 - (v) That a DNA swab had been taken from the lip of the wine bottle but that the swab had been lost and that no effort had been made to retest the wine bottle (thereby denying the Applicant the opportunity of obtaining exculpatory evidence).
29. Taking into account all of the circumstances outlined, it is submitted that the inference that the Prosecution contended for simply could not be drawn.
30. In consequence, there is a reasonable possibility that a miscarriage of justice has occurred. The verdicts of guilty should be set aside and verdicts of not guilty should be entered.

Dated this 13th day of November, 2017



Adrian Lewin
Legal Practitioner for the Applicant