

IN THE COUNTY COURT OF VICTORIA

Revised
Not Restricted
Suitable for Publication

AT MELBOURNE
CRIMINAL JURISDICTION

CR 16-00664

DIRECTOR OF PUBLIC PROSECUTIONS

v

DIMI SOVOLOS

JUDGE: HIS HONOUR JUDGE STUART
WHERE HELD: Melbourne
DATE OF HEARING:
DATE OF SENTENCE: 18 May 2017
CASE MAY BE CITED AS: DPP v Sovolos
MEDIUM NEUTRAL CITATION: [2017] VCC

EX-TEMPORE REASONS FOR SENTENCE

Subject:
Catchwords:
Legislation Cited:
Cases Cited:
Sentence:

| <u>APPEARANCES:</u> | <u>Counsel</u> | <u>Solicitors</u> |
|---|----------------|-------------------|
| For the Director of Public Prosecutions | Mr D. Porceddu | |
| For the Accused | Ms E. Murphy | |

HIS HONOUR:

- 1 Dimi Sovolos, you have been found guilty by a jury of 12 of aggravated burglary, reckless conduct endangering life and intentionally causing injury. The maximum penalty Parliament has set for these offences is 25 years, 10 years and 10 years respectively.
- 2 The circumstances surrounding this offending are as follows. At about 4.30 in the morning, you and two others arrived at premises 38 Boston Avenue, East Malvern. You entered the rear yard via a walkway around the side of the house and walked towards the rear of that premises. Inside the house were the Sarwan family, being Paul and his wife Mary and their two children Michael and Marcus.
- 3 The mother and father ran a business which required them to get up early in the morning and so it was that Paul Sarwan, as was his habit, went downstairs alone at about 4.30 in the morning in order, among other things, to open the rear door to let the dogs out. Michael Sarwan was sleeping on the couch in the front downstairs area.
- 4 Having opened the rear door, approximately ten minutes later Paul Sarwan saw a flash of light outside the dining room window. As he looked through the window he could see two people. At that point one of the men was carrying a machete which was approximately 80 centimetres long and the other a screwdriver approximately 40 centimetres long. That screwdriver was left behind at the address after you and your other two offenders left.
- 5 Realising that something was about to happen, Paul Sarwan ran to the back room in order to prevent the men he had observed from entering the house. As he got to the back door he saw that there were in fact three men standing in the doorway and one, you, was pointing a point 22 calibre long arm at him.
- 6 Paul Sarwan began yelling at the men to get out and to leave his family alone,

however the other offenders started to advance on him and he was forced back into the living room area towards the right side of the premises. One of the men, armed with the machete, started to swing it towards his head and he then started wrestling with this male. During the course of this wrestling he heard shots being fired. Paul Sarwan called out to his son Michael, who had been sleeping on the couch downstairs, to call the police. Michael Sarwan then came to his father's aid. It was during the scuffle that the screwdriver fell to the ground.

7 At approximately 4.20 am Mary Sarwan heard a loud banging which she described as sounding like a table falling over. She immediately went downstairs and, as she approached the back room, she was shot at by you, Mr Sovolos, from where you were then standing outside the back door. Her evidence was that you deliberately pointed your gun in her direction and fired.

8 Undeterred by this and undeterred by the scene which confronted her, Mary Sarwan went to the aid of her husband, who by that stage had been pushed backwards over a couch in the back room. The other two men each had something in their hands and were striking her husband to the head, face and body. Mrs Sarwan jumped on one of the men and pulled off his balaclava which was black with the eyes and mouth area cut open.

9 When, as a result of her intervention, that male backed away, a second male tried to intervene. That second male lunged across the rear dining table but, in an extraordinary manoeuvre, Mary Sarwan grabbed the balaclava that second male was wearing and also pulled it off his head. At around that time a further shot was fired by you.

10 The second male had a backpack, which he dropped in the course of the scuffle between himself and the first male and Mr and Mrs Sarwan. That backpack contained a number of items, some of which spilt out in the area near the rear door where entry had been gained. It included a torch and plastic ties fashioned in such a way as to be used as handcuffs. During the course of the trial that

- item was variously described, but most accurately as a 'burglar's kit'.
- 11 Due to the efforts of Mrs Sarwan, who is a woman of very short stature, and Mr Sarwan, the two men who had come into their premises were repelled.
- 12 You had remained outside that back door in the main, coming in only briefly towards the end of this altercation. Whilst you were outside, you fired no less than five shots through the window of one of the back doors into the premises. In total no less than seven shots were fired from the rifle by you. An eighth shot was fired from a handgun by one of the offenders whilst in the premises.
- 13 Any one of those shots could have hit members of the Sarwan family and it is fortunate indeed that that did not occur. In what became Exhibit 16 on the trial there is a plan which shows where various items were found by the police including fired cartridge cases as well as damage to the various parts of the building and furnishings as a result of shots fired and other items.
- 14 Each of the three of you were wearing some form of disguise on your head, you wearing a black balaclava. It is not easy to gauge the level of terror that you and the other two offenders caused to this family but some indication of how it affected Mrs Sarwan at the time is revealed in the 000 phone call she made.
- 15 Mr Sawan received a number of injuries which were, in the main, superficial. His injuries are set out in paragraph 61 of the summary prosecution opening for trial. They included lacerations to his upper forehead and temple, bruising and other associated injuries.
- 16 In the victim impact statement that became Exhibit P1 on the plea, Mrs Sarwan wrote:
- "March 19th 2015 Thursday morning what should have been a normal day for me and my family turned my life upside down. Three masked males entered my home armed with guns and weapons and were shooting hitting and destroying my home and my family. They shot and bullets bounced off floors walls and all I now keep thinking of is the what ifs. What if they shot one of us or all of us and what if my son who was upstairs sleeping, had to

come down and see his family dead what if they were coming back for more, why? Why?

What did they want? What if we did something to them that we would live to regret? To be honest how one of us didn't die on that morning is a miracle.

"Every single day I have to live with what happened in my home which should be where I feel I can relax feel safe but not anymore!!!!

Since the day this has happened I have had trouble sleeping, I have taken extreme measures to secure my home, I have become very paranoid when I see unfamiliar cars or people in the street coming home or leaving home".

17 Such are the consequences of your actions, together with your other two associates, on that morning.

18 The Court of Appeal in *Hogarth v The Queen* [2012] VSCA 302 dealt with the gravity of such offending. Their Honours in the joint judgment of President Maxwell, Neave JA and Coghlan AJA stated at paragraphs 58 and 59 and following:

"We do not consider that current sentencing for confrontational aggravated burglary reflects the objective seriousness of this form of the offence. The clustering of sentences around a median of two years shows how far current sentencing has departed from the parameters set by the maximum penalty of 25 years.

"It cannot have been Parliament's intention that, with a few isolated exceptions, sentencing for the full range of such offences should be bounded by an upper limit of six (or at most seven) years' imprisonment. As the Court said in *Director of Public Prosecutions v C P D*: The discretion which a sentencing judge has in dealing with a particular offender is a vital part of the administration of criminal justice. But sentencing judges may not disregard the will of Parliament as expressed in the fixing of the maximum penalty."

19 Earlier at paragraph 34 their Honours said:

"The Director's submission stated - correctly - that the offence of aggravated burglary has been viewed by the courts as an extremely serious offence. The submission set out the following judicial statements:

- Aggravated burglary is an extremely serious offence which would normally attract a substantial sentence of imprisonment.
- This court has on a number of occasions stated that the premeditated nocturnal invasion with criminal intent of a person's home will always be regarded as extremely serious. Where, as here, that invasion has been effected for the achieved purpose of raping the occupant, it is, in my mind, unthinkable that the imposition of condign punishment would not follow.

- The community views offending of this kind as extremely serious and expects the courts to impose sentence accordingly".

20 And so it is that members of our community in their own homes are entitled to feel safe and not subjected to intrusion by a number of men disguised, armed and indeed armed with on this occasion no less than two firearms, who are prepared to utilise those weapons, and in the end did.

21 In *DPP v Meyers* [2014] VSCA 314 in a joint judgment, President Maxwell and Redlich and Osborn JJA considered this offence of aggravated burglary in Hogarth's case. In paragraphs 47 to 49 their Honours wrote:

"Determining the sentence to be imposed for any particular offence of aggravated burglary will in large part depend on a careful assessment of the (relative) seriousness of the offence. There was argument on the appeal about how the gravity of this particular instance of aggravated burglary should be assessed.

"In our view, the following considerations will ordinarily be relevant to such an assessment:

- the offender's intent at the point of entry (whether to steal or commit assault or cause damage);
- the mode of entry (eg, by forcing a door or breaking a window);
- whether the offender was carrying a weapon;
- whether the offender was alone or in company;
- the time of day at which the burglary took place;
- what the offender knew or believed about who would be inside and/or about where the person(s) would be; and
- whether the offender was someone of whom the victim was particularly frightened.

"The particular purpose which the offender has in mind at the point of entry is a significant feature going to the gravity of the offence. Of course, the intent on entry is conceptually distinct from what occurs after entry, but the offender's conduct once inside the premises will usually enable inferences to be drawn about the intent on entry".

22 Here the aggravated burglary alleged was one with an intent to commit an offence involving an assault to a person therein.

23 The aggravating features that this offending disclosed are as follows. There

were no less than three of you. Each of you were disguised to hide your identity. The offending occurred in the early hours of the morning where the expectation would be that the family would be home. All were armed with weapons which were brandished. Two, including yourself, were armed with firearms, you standing guard at the rear door with a .22 rifle. The weapons themselves included a machete and a jemmy bar. Taken to this premises was a burglar's kit which had within it plastic ties fashioned to be used as handcuffs if need be. Thus this is an aggravated burglary of a most grave kind.

- 24 Their Honours in Meyers' case provided further assistance to sentencing judges in relation to how the sentence should be constructed or upon which base the sentence should be made or arrived at. In paragraphs 70 to 71 their Honours state:

"It is often difficult to separate the bases of punishment in a case like this, where a number of offences are committed within the ambit of a single incident or enterprise. The position is further complicated where one of the offences is aggravated burglary. This particular type of incident or enterprise has given rise to a recurring complaint in sentencing appeals, to the effect that the offender has been doubly punished by the sentence for aggravated burglary and the sentences for the offences committed inside the premises.

"In accordance with the principles stated in *Pearce v The Queen*, care must be taken in fixing the sentence for aggravated burglary to ensure that the offender is not doubly punished for offences committed after entry into the house. Apart from supporting an inference as to what it was that he intended to do, the seriousness of what took place after the entry cannot affect the sentence on the aggravated burglary charge. The offence of aggravated burglary is complete upon entry. The sentence on that charge cannot involve any element of punishment for what happens after entry".

- 25 Here the prosecution case was that the acts of all three were pursuant to a joint-criminal enterprise and thus entry for the purposes of the aggravated burglary is achieved upon the entry of the first two. You are not to be punished for what occurred after entry in relation to the aggravated burglary, you are to be punished for what occurred after by the sentences that I impose on Charges 2 and 3, which are the charges of reckless conduct endangering life, particularised in the indictment as conduct, being the discharging of a loaded firearm towards Paul Sarwan and Mary Sarwan that placed Paul Sarwan and

- Mary Sarwan in danger of death, and a third charge of intentionally causing injury to Paul Sarwan.
- 26 Thus I have only used what occurred after that initial entry in relation to the offending for which I must sentence you on Charge 1 as providing evidence as to the intent at the time of entry. That intent, as I have said on a number of occasions, was to assault.
- 27 As to the Charge 2, reckless conduct endangering life, this is a grave example of such an offence. That no fewer than eight shots were fired from two loaded firearms, and in particular seven of the first eight shots were fired by you, five from outside the premises into the premises and the other two fired by you within the premises towards three members of the Sarwan family is as Mr Sarwan said in part of a victim impact statement, "What if they shot one of us or all of us?"
- 28 Thus in sentencing you on Charge 1 of aggravated burglary I must and will ensure that there is no double punishment and ensure that in total the sentences that I impose on those three charges are appropriate.
- 29 It is necessary to consider your prior criminal history. Your first of nine appearances as at the Heidelberg Magistrates' Court on 19 November 2007. You were charged with relatively minor offences: hinder police, drunk in a public place and failing to answer bail. You were dealt with by way of an adjourned bond without conviction. What, however, follows in the other eight appearances, totalling nine court appearances, involved you being dealt with for no less than 61 offences: four involving dangerous driving, one involving reckless conduct endangering serious injury, two relating to being in possession of a prohibited or controlled weapon and one possession of cartridge ammunition.
- 30 You have been sentenced to be imprisoned on no less than four occasions: the first, three months' gaol, which was to be served by way of an intensive

corrections order which was breached the second, you were sentenced on 2 February 2012 to 83 days' imprisonment the third, on 30 July 2014 at six months' imprisonment and fourth, in a hearing that was before His Honour Judge Maidment on 8 September 2015, 216 days' imprisonment and a two-year community correction order.

31 Whilst His Honour dealt with you for offences after the commission of these offences for which I must sentence you today, they relate to offending which occurred earlier between 12 November 2013 and 11 February 2014 when you were arrested. On that occasion when you were arrested you were found in possession of another firearm, an unregistered category A or B longarm. Thus it was not the first time that you had access to such a weapon; you had access to such a weapon when you were arrested in February 2014 and you had and used the rifle when you committed these offences a little over 13 months later in March 2015.

32 Looking to your prior criminal history, the offending before me represents a grave escalation in the level of criminality that you were prepared to engage in.

33 In order to put in context another aspect of this matter it is necessary first to revisit what occurred yesterday, when I sentenced you in relation to a breach of the community corrections order imposed by Judge Maidment and sentenced you to one month's imprisonment, and an appeal from sentencing orders made in the Magistrates' Court, for which I sentenced you to a further period of 20 months' imprisonment, totalling one year, nine months.

34 The offending before His Honour Judge Maidment occurred between 12 November 2013 and 11 February 2014. The offending for which I must sentence you occurred on 19 March 2015. You were arrested on 21 April 2015 and it was upon the search of the premises at which you were staying that a casing linking you to the aggravated burglary was discovered. You were released from custody on 17 September 2015 and then committed the offences

which were the subject of the appeal before me yesterday between 6 October 2015 and 6 November 2015.

35 In sentencing you yesterday, I observed that, though that matter was a complete rehearing, the sentence imposed by the learned magistrate of 30 months with a minimum of 20 months before eligibility for parole was entirely appropriate. Indeed, I considered it to be a sentence which showed some leniency. Nevertheless in order to ensure that the sentence in total that I imposed yesterday and today are appropriate, I reduced that sentence to a sentence of 20 months' imprisonment and declare a pre-sentence detention of 558 days. I observe here that in relation to the sentences on the trial offences there is no pre-sentence detention available to you.

36 I did not set a minimum term, which I would ordinarily have done for a sentence of 20 months' imprisonment, for it would be entirely a wasted exercise, me having to reset a new minimum today. But I wish to make it plain that I have taken into account the need to ensure not only that the sentences that I impose today are in total appropriate but the sentences that I have imposed yesterday and today as being in total appropriate.

37 Another aspect to this matter is that I decided to sentence you yesterday on the breach of the community corrections order and the appeal matters so that it would be clear that the sentences that I have imposed today will be cumulative upon the sentences that I imposed yesterday.

38 I turn from those matters to your personal background. At the time of this aggravated burglary you were 26 years of age and you are now 28 years old. You have spent much of previous few years in custody. You come from a law-abiding family who has provided you with a stable home environment. That family is a close family you having an elder sister and a younger sister. You went to Balwyn High School to Year 10 and completed your education, completing Year 11 at Templestowe College.

39 Your parents separated in your mid-teens. You worked with your father and then obtained work as a fork-lift driver involved in concreting as well as labouring. Since the age of 23 you have not worked. Despite all that has happened and all that your parents have had to deal with because of your criminal conduct, each of them is wholly supportive of you, as are your sisters, and your father is ready to provide you with work upon your eventual release.

40 I have read the heart-felt letters written by both your mother and father, which became part of Exhibit DS3, and of your sisters. It is plain that you are loved and you can expect the benefit of their solid support in the future. Whatever else you have done in the community, you have not in any way been violent in the family context, indeed the opposite.

41 Your father writes of you in this way:

"As a young teenager, Dimi growing up was always very protective of his two sisters and his mother of course.

In many ways he is the big brother that always displayed traits of guidance, care and protection towards the female members of the family.

There was never once violence displayed throughout the entire family's upbringing by myself or anyone else in the family. So from that it can be gathered that Dimi obviously had a good role model as far as that was concerned".

42 Later your father writes:

"The Dimi I see now is a man, who has come to the realisation that he has made mistakes, and is remorseful for them. Dimi and I have spoken in depth of his plans when he is released from custody, and I am proud, and so relieved to know he plans to work in my business, with me, and save for a home, and live a life without drama, lawlessness and illegality. Dimi has also spoken of working with young people who are in a situation now, where he was ten years ago, to help them on the right path.

A father could be no more proud than I am today for the changed man that I see each week".

43 Your mother writes among other things:

"Dimi of today is and will continue to be an integral part of our lives, he knows that now, and both Dimi and his family are happy that Dimi is indeed not the same person that left my home in 2015. I have son back.

Please consider the fact that the Dimi you are now looking at is not the same person of the past, Dimi is a wonderful son, he wants to be a wonderful uncle, brother, grandson and son, I can only hope you understand in my explanation that in our decision".

44 Similar words are written by your sisters.

45 In addition, a psychological and a neuropsychological report were provided to me, which became Exhibits DS1 and DS2 respectively. The psychological report of Aaron Cunningham was, as Mr Porceddu submitted, unremarkable. The neuropsychological report of Dr Evrim March was unremarkable, but also it filled in some aspects of your background including your polysubstance abuse.

46 In it she writes on that topic:

"Mr Sovolos denied any heavy alcohol use. He started drinking around age 16, but following drug use around age 19, he has been drinking only rarely. He reported past use of a number of drugs. He reported that he wanted to stop substance use following release to community, and his strategy would be staying away from other users. He denied any substance use whilst in prison.

- As to cannabis: Since age 19, daily with brief periods of abstinence. Last use 5 years ago.
- Methamphetamine (ice) since age 19 to 20 until recently. Daily use. It results in him keeping awake and gives him 'energy'; no longer feels anxious or edgy. Can feel paranoid and restless but not aggressive.
- MDMA/ecstasy: Social use, 'rarely'. Last use, five years ago.
- Cocaine: 'Tried, not a lot...' Last use with ice, 2015.
- Prescription medication: Xanax (1-2 pills) with ice. Once a week".

47 In Dr March's psychological report he writes in the opinion section:

"Against these strengths, he displays a clinically significant decline in speed of processing (borderline to low average range) from premorbid functioning, and mild inefficient verbal memory for new unstructured information when his learning was interfered".

48 A little later she continues:

"Overall, against a background of long-standing polysubstance use, and a number of mild concussions (one with brief loss of consciousness), Mr

Sovolos' cognitive profile is consistent with brain injury of mild severity that is multifactorial in origin".

49 Still later:

"From a cognitive perspective, he has a range of intact cognitive abilities, and importantly, he does not display any distractibility or cognitive impulsivity.

"Mr Sovolos' brain injury is of mild severity that is multifactorial in origin, i.e., mild concussions and polysubstance use. Speed of processing in this area of function that is highly sensitive to most types of insult to the brain, and in his case, it is difficult to tease out the differential impact of concussions versus polysubstance use".

50 Then finally for my purposes Dr March writes:

"Mr Sovolos' cognitive status and brain functioning, given the mild severity, does not explain his offending behaviour. At this stage, he has a number of intact cognitive abilities, including those that are critical to behavioural self-monitoring. From a cognitive perspective, he is able to inhibit his behaviour, monitor his responses and think flexibly. His slow processing speed will result in him taking longer in complex tasks (e.g., filling out a detailed form), and his mildly inefficient memory for unstructured information may result in him needing repetition and prompting (e.g., shopping lists). However, his memory is good when the information is meaningful (e.g., has a context such as a story-format)".

51 Thus whatever your difficulties are, they in no way contributed to or explain your offending in question. Fortunately it appears you have the capacity to make good of your life, in particular with the assistance of your family.

52 If, when you are released, you return to your use of narcotics, your prospects of rehabilitation are bleak if not non-existent. If you take a different path, as discussed in particular with your father, then you have some prospects of rehabilitation, but that is entirely in your hands.

53 General deterrence, deterring others from similar offending, is the principal sentencing factor in this matter. It must be made known that offending of this kind will attract heavy penalties. With your history of criminal conduct and with this offending and your readiness to use, in particular, the rifle in question to fire multiple shots into a home, specific deterrence, deterring you, is also a very significant matter. Just punishment also must be taken into account, as well as the denunciation of your grave offending. All in all there is a need for condign

- punishment.
- 54 I have reflected, as I have indicated, much on the sentences that I passed yesterday and the sentences that I am to pass today. Taking all these matters into account I sentence you as follows. Stand.
- 55 On the charge of aggravated burglary I sentence you to be imprisoned for seven years. On the charge of reckless conduct endangering life I sentence you to be imprisoned for a period of five years. I direct that two years of that sentence be served cumulatively upon the base sentence of seven years on Charge 1. On the third charge of intentionally causing injury I sentence you to be imprisoned for a period of one year and I direct that three months of that sentence be served cumulatively upon the other sentences on Charges 1 and 2, producing a total effective sentence on the indictment charges of nine years and three months.
- 56 There is no pre-sentence detention to be declared.
- 57 In terms of your parole period I direct that you be eligible for release on parole on 1 May 2022. That period will of course be reduced by the pre-sentence detention of 558 days, as it will on the head sentences. Take a seat.
- 58 In all this produces, from the sentences that I have imposed yesterday and the sentences that I impose today, which are cumulative upon the sentences imposed yesterday, a total effective sentence of 11 years' imprisonment. And I have set a date of 1 May 2022, which represents a non-parole period of seven and a half years. That period will be reduced by the 558 days, as will the head sentence of 11 years, for pre-sentence detention.
- 59 As I state, my aim is to ensure that you have eligibility for parole in some seven and a half years. That date is 1 May 2022. If I have not achieved that result, then I will certainly revisit the matter. When I use that date of 1 May 2022 I was factoring in the 558 days.⁶⁰
- 60 Are there any other matters that are required?

61 MS BURNETT: Your Honour, there are applications for disposal and forfeiture. In respect to the forensic sample I understand it will be automatically retained.

62 HIS HONOUR: Sorry, in respect of - - -

63 MS BURNETT: It will be automatic retention of the sample that was taken, so there's no application in respect of that.

64 HIS HONOUR: Yes. Have you got those orders there?

65 MS BURNETT: Yes, I do, Your Honour. I'll hand those up.

66 HIS HONOUR: I've got a funny feeling there are orders from yesterday or have they been dealt with? There are orders from yesterday which I'll sign in chambers.

67 MS BURNETT: Thank you, Your Honour.

68 HIS HONOUR: Is there anything you wish to say, Ms Murphy, about those orders?

69 MS MURPHY: No, Your Honour, they're not opposed. Just for the purposes of Your Honour's revision I just note that Dr Evrim March is a woman.

70 HIS HONOUR: Thank you. I was actually wondering about that when I was saying it, but, anyway, I bet the wrong way. That will be corrected. Is there anything else arising from any of my sentencing remarks that need correcting? I do ask all to ensure that what I intend to achieve with the minimum term will in fact achieve that purpose.

71 MS MURPHY: Your Honour, I apologise, I might just raise it, and it's not an important matter, but there's a lingering issue of where yesterday fits in in terms of pre-sentence detention not including the day on which sentence is passed. Just in terms of the arithmetic of Your Honour's sentence, I'm unsure how that one day will fit into that calculation.

72 HIS HONOUR: It doesn't.

73 MS MURPHY: It's not of great moment in terms of the length of the sentence.

74 HIS HONOUR: No. No, it doesn't, but every day is important. It doesn't. I think in terms of what I've endeavoured to achieve, I knew that there was this one-day hiatus, but it's something that I can't avoid.

75 MS MURPHY: Yes.

76 HIS HONOUR: Yes, unless there's anything else.

77 MS BURNETT: No, Your Honour.

78 HIS HONOUR: Remove Mr Sovolos, please. Those are the orders, Mr Brown. There's still the breach, so I will stand down until court is ready.

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