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

S APCR 2017 0233

PETER MADUL

Applicant

v.

THE QUEEN

Respondent

RESPONSE TO APPLICANT'S WRITTEN CASE

Date of document:	25 January 2018
Filed on behalf of:	Respondent
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Part A and B: Particulars of Conviction and Sentence, Relevant Statutory Provisions and Maximum Penalties

1. On 29 August 2017, Mr Peter Madul ("the applicant") was found guilty by jury verdict, at Melbourne County Court, for the offences outlined in the tables below.

2. After a plea hearing on 18 October 2017 before Judge O'Connell, he was sentenced on 19 October 2017 as follows:

Charges on Indictment G10942254.2	**Offence**	**Maximum**	**Sentence**	**Cumulation**
1.	Aggravated Burglary [S. 77(1) *Crimes Act 1958*]	Level 2 imprisonment (25 years maximum)	52 months imprisonment (aggregate with charges 2 and 3)	Base sentence

Charges on Indictment G10942254.2	Offence	Maximum	Sentence	Cumulation
2.	Attempted Armed Robbery [S. 321M *Crimes Act 1958*]	Level 3 imprisonment (20 years maximum)	52 months imprisonment (aggregate with charges 1 and 3)	---
3.	Theft [S. 74(1) *Crimes Act 1958*]	Level 5 imprisonment (10 years maximum)	52 months imprisonment (aggregate with charges 1 and 2)	---
4.	Aggravated Burglary [S. 77(1) *Crimes Act 1958*]	Level 2 imprisonment (25 years maximum)	33 months imprisonment (aggregate with charges 5 and 6)	12 months
5.	Theft [S. 74(1) *Crimes Act 1958*]	Level 5 imprisonment (10 years maximum)	33 months imprisonment (aggregate with charges 4 and 6)	---
6.	Theft [S. 74(1) *Crimes Act 1958*]	Level 5 imprisonment (10 years maximum)	33 months imprisonment (aggregate with charges 4 and 5)	---

Charges on indictment G10942254A	Offence	Maximum	Sentence	Cumulation
1.	Theft [S. 74(1) *Crimes Act 1958*]	Level 5 imprisonment (10 years maximum)	6 months imprisonment, aggregate with related summary charge 3.	2 months cumulative upon the aggregate sentence imposed on charges 1, 2 and 3 on

				indictment G10942254.2
Related summary charge 2.	Careless driving [S. 65(1) *Road Safety Act 1986*]	First offence: 12 penalty units Subsequent offence: 25 penalty units	Convicted and fined $300	Nil
Related summary charge 3.	Drive whilst disqualified [S. 30(1) *Road Safety Act 1986*]	First offence: 30 penalty units or 4 months imprisonment Subsequent offence: 240 penalty units or 2 years imprisonment.	6 months imprisonment, aggregate with charge 1.	---

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 the *Sentencing Act* 1991:	561 days
Other relevant orders: - Licence disqualification on charges 5 and 6 for a period of 18 months from 19/10/2017	

Part C: Summary of Relevant Facts

3. The applicant was born on 27 August 1995 and was 20 years of age when the offending was committed and 22 years of age as at the date of sentence.

4. On Tuesday 1 March 2016, shortly after 1am Mr. Xi Long Zhang and his wife Ms. Nanzhen He were asleep in their bedroom at 3 Sedgwick Court, Lynbrook. The applicant entered their house and woke Mr. Zhang and Ms. He by turning their bedroom light on and off a number of times.[1] **(Charge 1 – Aggravated Burglary – Person Present).** The applicant was armed with a sharp chopping knife

[1] Reasons for Sentence, *DPP v Madul* [2017] VCC, 19 October 2017 at [12].

approximately 20 centimetres in length which belonged to Mr Zhang and Ms He.[2] The applicant demanded Mr Zhang and Ms He give him their car key.[3]

5. At that point, Mr Zhang and Ms He's eighteen year old son, Bin Zhang, came out of his bedroom and saw the applicant standing in the doorway of his parents' bedroom.[4] As Bin approached the applicant moved towards him and Mr Zhang warned his son that the applicant had a knife. Bin then stepped back.[5] Mr Zhang, Ms He, Bin Zhang and the applicant had all moved to the kitchen area and the applicant demanded the keys again. They told the applicant that Mr Zhang's brother had taken the keys.[6] **(Charge 2 – Attempted Armed Robbery).** The applicant took 9 packets of Chinese cigarettes and had the knife in his hand as he left the house.[7] **(Charge 3 – Theft).** Shortly afterwards, at 1.49am Bin Zhang made a call to 000, approximately five or ten minutes after the applicant had left the house.[8]

6. A short time later the applicant entered a residence at 17 Sedgwick Court where Mr Sunil Vaidyanathan resided with his wife and two daughters.[9] The applicant entered their house by accessing the backyard through a side gate, he then proceeded into the garage through an unlocked door and into the house proper via another unlocked door.[10] Mr Vaidyanathan, his wife and two daughters were all asleep in the house at the time[11]. **(Charge 4 – Aggravated Burglary).**

7. The applicant took 2 sets of car keys from a hook in the hallway of the home and returned to the garage. The applicant opened the garage roller door using the key on the remote and reversed Mr Vaidayanathan's black Honda CRV registration ZHI 613 into the driveway.[12] The applicant left the

[2] Trial Transcript, 23 August 2017, T120 L26 – T121 L8.
[3] Trial Transcript, 23 August 2017, T 121 L17 – 30.
[4] Trial Transcript, 23 August 2017, T170 L8 – 15.
[5] Ibid T171 L12 – 30.
[6] Ibid T172 L8 – 23.
[7] Ibid T157 L21 – 29.
[8] Reasons for sentence at [16].
[9] Ibid at [17].
[10] Ibid.
[11] Trial Transcript, 22 August 2017, T82 L6 – 24.
[12] Reasons for Sentence at [18].

knife he had obtained from 3 Sedgwick Court on the passenger seat of that car[13], left the headlights on and the driver's side door opened.[14] **(Charge 5 – Theft).**

8. Mrs Vaidayanathan's Red Holden Barina registration 1GJ 3NK was parked on the nature strip outside 17 Sedgwick Court.[15] The applicant used the other set of keys to steal the car and leave the scene prior to Police arriving at approximately 2.25am. **(Charge 6 – Theft).**

Part D: Grounds of Appeal

9. **Ground 1: The verdicts on charge 1 -6 are unsafe and unsatisfactory.**

Particulars:

(i) The Prosecution case at trial was that an inference could be drawn that the person who entered the homes at 3 and 17 Sedgwick Court, Lynbrook was the applicant; and

(ii) The inference that the prosecution contended for was not available.

9.1 It is submitted the verdict of the jury was not unreasonable, and was supported by the evidence. The cumulative effect of the evidence, and the totality of the circumstances, allowed the jury to return a guilty verdict on each of the charges they were to consider. The evidence led before the jury did not 'oblige' them to come to a different conclusion.[16]

The relevant test:

9.2 In *R v. Klamo*[17] Maxwell P stated:

> A guilty verdict can only be said to have been "reasonably open" to the jury if there was no aspect of the evidence which obliged - as distinct from entitled - the jury to come to a different conclusion. In *Libke v The Queen*, Hayne J (with whom Gleeson CJ and Heydon J agreed) said in relation to the "unsafe and unsatisfactory" ground:

[13] Victoria Police forensic services obtained an impression of a fingerprint – a left thumb print – on the blade of the knife and preliminary reports indicated the thumbprint belonged to the applicant. (See Exhibit I and Trial Transcript, 25 August 2017 at T359 L15 – 21).
[14] Trial Transcript, 22 August 2017, T8 L21 – 27.
[15] Trial Transcript, 22 August 2017, T 80 L18 – 22.
[16] *Badem (Pseudonym) v. R* [2016] VSCA 200 at [40] – [47].
[17] (2008) 18 VR 644.

> …But the question for an appellate court is whether it was *open* to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury *must*, as distinct from *might*, have entertained a doubt about the appellant's guilt. It is not sufficient to show that there was material which might have been taken by the jury to be sufficient to preclude satisfaction of guilt to the requisite standard.

9.3 This process of reasoning for an appellate court is exemplified by the well-known statement of principle set down by Hayne J in *Libke v The Queen*:[18]

> It is clear that the evidence that was adduced at the trial did not all point to the appellant's guilt on this first count. But the question for an appellate court is whether it was open to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury must, as distinct from might, have entertained a doubt about the appellant's guilt. It is not sufficient to show that there was material which might have been taken by the jury to be sufficient to preclude satisfaction of guilt to the requisite standard. [emphasis in judgment]

The above statement in *Libke* has been consistently applied in Victoria.[19]

9.4 An argument that a jury may have reached a different conclusion is not to deny the soundness of the verdict as it only when a jury was bound to arrive at that different conclusion that any miscarriage of justice can be said to arise.

9.5 The above point was again emphasized by the High Court in the recent decision of *The Queen v Baden-Clay*:[20]

> It is fundamental to our system of criminal justice in relation to allegations of serious crimes tried by jury that the jury is "the constitutional tribunal for deciding issues of fact." Given the central place of the jury trial in the administration of criminal justice over the centuries, and the abiding importance of the role of the jury as representative of the community in that respect, the setting aside of a jury's verdict on the ground that it is "unreasonable" within the meaning of s 668E(1) of the Criminal Code is a serious step,

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[18] (2007) 230 CLR 559, at 596-7 [113] - Gleeson CJ and Heydon J agreeing in separate judgments.
[19] See, for example, *Spence (a Pseudonym) v The Queen* [2016] VSCA 265, at [33]*; Badem (a Pseudonym) v The Queen* [2016] VSCA 200, at [43].
[20] (2016) 258 CLR 308, at 329-330 [65]-[66].

> not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial….
>
> With those considerations in mind, a court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court "must always be whether the [appeal] court 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."

9.7 The issue in the trial was identity. The case on this issue was a circumstantial one and the prosecution relied upon the united force of the evidence as a whole to establish that the applicant was the offender who committed the acts giving rise to each of the counts on the indictment.

9.8 The prosecution relied on evidence of the householders from the first aggravated burglary and the description they gave of the offender.[21] The description was consistent with the appearance of the applicant, as accepted by counsel for the applicant during his closing address.[22] The prosecution further linked the applicant to the scene of each of the aggravated burglaries by the evidence of the his fingerprint, which was located on a knife taken from the scene of the first aggravated burglary and then located inside a car which was stolen from the scene of the second aggravated burglary, using keys stolen from within that premises.

9.8 Each counsel addressed the jury on the issue of identity[23] and the evidence relied upon by the prosecution to establish it. The learned trial judge carefully and accurately explained to the jury how they were to approach circumstantial evidence and the drawing of inferences.[24] No exception was taken during the trial and no complaint made by the applicant now that the jury were not properly directed.

9.9 It is submitted that the applicant's contention that the jury could not properly, on the evidence led in the trial, have convicted him of the offences with which he was charged must fail. The verdicts returned were reasonably open to the jury and there was no evidence that *obliged* the jury to reach a different conclusion. On the totality of the circumstantial evidence, touching on

[21] T119-123; T154-156 & T174.
[22] T504 L10-14.
[23] Prosecution T496-501; Defence T522-T526.
[24] T551-557.

the question of identity, the jury were able to properly conclude that the applicant was the person responsible for committing the offences they were to consider and that this was the only reasonable inference open from the cumulative effect of the evidence.

9.10 The applicant contends that there was an alternate theory, advanced by his counsel in his closing address, that the perpetrator of these offences was some other unidentified man and it was possible that the householders from the first aggravated burglary were describing some other man that was of similar appearance to the applicant. Further, that it is also possible that the applicant could have encountered the knife stolen from the first aggravated burglary, and in so doing deposited his fingerprint onto it, in the Honda motor vehicle stolen from the second aggravated burglary at a time after the commission of the second aggravated burglary but prior to police arrival at the scene, being a window of some ten to twenty minutes. This contention was the raised by the applicant's counsel for the jury's consideration during his final address to them.[25] There was no direct evidence to support the contention and by their verdicts the jury must have been satisfied that the inference sought to be relied on by the prosecution, that the applicant committed the various offences, was the only reasonable inference which can be drawn from the circumstances established by the evidence to the exclusion of all other hypotheses, including the contention advanced by the applicant's counsel in his address.

Conclusion

9.11 In order to establish the ground, the applicant must demonstrate that it was not open to the jury to be satisfied beyond reasonable doubt of his guilt on the charge on which he was convicted. It is not sufficient merely to show that there was material that might have led the jury to entertain a reasonable doubt about the applicant's guilt. Rather, the critical question is whether, on the evidence, that the jury must (as distinct from might) have entertained a doubt about the guilt of the applicant.

9.12 The jury were entitled, indeed required, to look at the evidence as a whole and consider whether the inference sought to be relied on by the Crown was supported by united force of that evidence to the exclusion of any competing innocent inference, reasonably open on the evidence. The jury were instructed that was their task and given guidance as to how to carry it out, carefully and

[25] For example at T526-7.

uncontroversially, and by their verdict they were so satisfied. There is nothing in the contentions of the applicant that leads to the conclusion that the evidence demanded an acquittal, as against merely left open the arguable possibility of one. An argument which, by their verdicts, the jury clearly rejected.

9.13 The convictions were not unsafe and were supported by the evidence.

DATED: 25 January 2018

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Jeremy McWilliams
Crown Prosecutor
Counsel for the Respondent