38/08; [2008] VSCA 137

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v SARI

Maxwell P, Ashley JA and Lasry AJA

12 June, 7 August 2008

CRIMINAL LAW – ACCUSED PLEADED GUILTY TO SEVERAL OFFENCES INCLUDING RIOT, AGGRAVATED BURGLARY AND CRIMINAL DAMAGE – SENTENCING – DOUBLE PUNISHMENT ON RIOT AND CRIMINAL DAMAGE CHARGES – SENTENCE ON CRIMINAL DAMAGE CHARGE QUASHED – SELECTIVITY IN CHARGING – WHETHER ACCUSED SHOULD RECEIVE SOME CREDIT OR BENEFIT IN THE IMPOSITION OF SENTENCE – SENTENCING IN RIOT CASES – SOME OFFENDERS DEALT WITH IN THE MAGISTRATES' COURT – ALL RECEIVED SENTENCES WHICH DID NOT INVOLVE IMMEDIATE IMPRISONMENT – ACCUSED SENTENCED TO IMMEDIATE IMPRISONMENT – PRINCIPLE OF PARITY – WHETHER PRINCIPLE APPLIED IN THIS CASE – WHETHER SENTENCE OF IMPRISONMENT APPROPRIATE – FORENSIC SAMPLE ORDER – CIRCUMSTANCES OF MAKING SUCH AN ORDER - WHETHER SUCH ORDER AMENABLE TO REVIEW.

S. was one of several persons involved in protesting at an economic summit being a meeting of finance ministers and central bank governors. Over two days, S. and others invaded the Defence Force Recruiting Office and caused damage; traffic event controllers and police officers were assaulted and vehicles damaged. S. was later charged with 9 counts including riot, aggravated burglary, assaults, criminal damage and theft. In the County Court he was sentenced to an effective sentence of 28 months' imprisonment with a minimum term of 14 months before eligible for release on parole. The Judge made a forensic sample order pursuant to s464Z of the *Crimes Act* 1958. Subsequently, several of the offenders pleaded guilty to certain offences arising out of the disturbances in the Magistrates' Court and received wholly suspended sentences of imprisonment. Upon appeal—

HELD: Appeal allowed in part but (per Maxwell P and Ashley JA) total effective sentence and non-parole period imposed equal to that imposed by the County Court.
1. An offender is not to be punished twice for the same act. If offences on which an offender contain common elements it is wrong to punish the offender twice for the commission of elements that are common. The imposition on S. of a term of imprisonment on the riot charge and also the charge of criminal damage to the police van amounted to double punishment as he was being twice punished for substantially the same conduct. Accordingly, the conviction on the charge of criminal damage was quashed.

2. In sentencing in riot cases, the basic approach is that the offender is not sentenced for his individual acts considered in isolation. He is sentenced for having by deed or encouragement been one of the number engaged in a crime against the peace. Any participation whatever, irrespective of its precise form, in an unlawful or riotous assembly of this type derives its gravity from becoming one of those who, by weight of numbers, pursued a common and unlawful purpose. The law of this country has always leant heavily against those who, to attain such a purpose, use the threat that lies in the power of numbers. While this is the basic approach it is open to the sentencing judge at his/her discretion to take into account the actual conduct of an offender in the riot, by way of aggravation or mitigation. In S's case he was sentenced for his participation, which clearly included encouragement and leadership, aggravated by his particular conduct.
***R v McCormack* [1981] VicRp 11; [1981] VR 104; (1980) 2 A Crim R 405, applied.**

3. It was submitted by S. that as he was selected to be charged and others were not he was entitled to gain some credit or benefit in the imposition of sentence. In sentencing the court may have regard to the selective application of the law in relation to the decision to prosecute or not but is not bound to take account of that factor.

4. In relation to the question of parity, the principle is that equal justice requires that like should be treated alike but if there are relevant differences, due allowance should be made for them. In the case of co-offenders, different sentences may reflect different degrees of culpability or their different circumstances. S. was involved in a total of nine offences over two days; he assumed a leadership role, inciting and encouraging others was aggressively violent and was at the forefront in committing criminal damage to a vehicle and terrifying the occupants. On the other hand, the co-offenders who were dealt with in the Magistrates' Court claimed that their involvement in the riots was an isolated

event, spontaneous and out-of-character. In those circumstances, the sentencing disparity between the offenders was well justified.

5. Aggravated burglary is a forensic sample offence and upon conviction of a person for such an offence the court may make a forensic sample order under s464ZF of the *Crimes* Act 1958. Such orders are not part of a sentencing order and are therefore not amenable to challenge on appeal.

MAXWELL P:

1. I have had the considerable advantage of reading in draft the reasons for judgment of Ashley JA and Lasry AJA. I agree with Lasry AJA that the appellant's conviction on count 8 should be quashed. The sentencing discretion being thereby reopened, I would re-sentence the appellant as proposed by Ashley JA. My reasons are as follows.

2. Lasry AJA has rightly described these as 'very serious offences'. I agree with his Honour, and with the sentencing judge, that their seriousness is in no way mitigated by the appellant's philosophical objections to the G20 summit. Indeed, as the sentencing judge commented during the plea, the appellant's behaviour was in direct conflict with his political views. Terrifying innocent people who are simply performing the duties of their employment seems impossible to reconcile with a commitment to fighting injustice.

3. The invasion of the Defence Force Recruiting Centre (Courts 1 and 2) is especially troubling. Defence counsel on the plea said that the appellant and the others involved felt 'a particular need … to cause some disruption at that building'. So this was a deliberate targeting of particular premises – quite unconnected to the G20 summit – and it was evidently a deliberate decision to enter and 'cause some disruption', rather than (for example) to protest peacefully outside. In the circumstances, the concession made by the appellant's counsel on the appeal – that his client went 'looking for trouble' – was unavoidable.

4. Aggravated burglary is an offence carrying a maximum penalty of 25 years' imprisonment. Parliament has thus signified clearly its intention that aggravated burglary be treated very seriously.[1] Even allowing (as the judge did) for the short duration of the entry, the appellant's sentence of six months for this offence was extremely lenient. Importantly for present purposes, the appellant's violent behaviour on the Friday throws a quite different light on his involvement in the riots on Saturday, as compared with that of the co-offenders in those riots. By the time of the first riot, the appellant had not only been aggressively violent at the Defence Centre but had assaulted two event controllers and committed criminal damage in the attack on the City Wide van (counts 3, 4 and 5). Once again, as described by Lasry AJA, the appellant had been at the forefront in that incident, smashing the windscreen and terrifying the occupants of the vehicle.

5. While the earlier acts of violence cannot alter the objective gravity of the appellant's involvement in the subsequent riots, they do place him in a different sentencing position from the co-offenders sentenced in the Magistrates' Court. Whereas each of those co-offenders could justifiably claim that his/her involvement in the riots was an isolated event, spontaneous and out-of-character, the appellant's involvement could only be seen as the continuation of a spate of violence extending over two days. Having twice observed the effects of his own violent actions, the appellant elected to continue to 'look for trouble'. Worse still, as Lasry AJA notes, he assumed a leadership role, inciting and encouraging others. None of those sentenced in the Magistrates' Court played a like role.

6. For these reasons, together with what each of my colleagues has said on this subject, the sentencing disparity between the appellant and the co-offenders is well justified, in my view. Like Ashley JA, I am not persuaded that any reduction in the total effective sentence or the non-parole period is warranted.

ASHLEY JA:

7. A concession was made by counsel for the Crown that the appellant had been subjected to double punishment by his conviction on count 8 on the presentment, or else by the cumulation of part of the sentence imposed on count 8 on the sentence passed on count 7. Although I consider it likely that the learned sentencing judge intended such cumulation to yield the sentence which he considered was appropriate in respect of the conduct encompassed by counts 7 and 8 – conduct

subsumed within count 7 – the Crown's concession was rightly made. One consequence is, for reasons explained by Lasry AJA, that the appellant should be granted leave to appeal out of time against his conviction on count 8, and that such appeal should be allowed.

8. A second consequence is that the Court must think that a different sentence should have been passed – at least because the structure of the sentence must be different to that which was imposed.

What sentence should now be passed?

9. I am unable to agree with Lasry AJA that a lesser total effective sentence than that imposed below should now be imposed; or that any part of service of the sentence should be suspended rather than there being a period of potential parole. I consider that re-sentencing should yield a total effective sentence and a non-parole period equal to that imposed by the learned sentencing judge.

10. In my opinion, the sentence passed below was very lenient. Except for the two reasons following, of which the second is the more significant, I consider that a heavier sentence might have been passed.

11. First, the Crown did not press below for a particular finding as to an aggravating circumstance which, if made, would have rendered the appellant's serious offences even more serious. Although this Court was invited to make that finding, for several reasons I would decline to do so.

12. Second, other offenders have been sentenced; and an issue of parity arises.

The appellant's role. A submission not made below

13. As to the potentially aggravating circumstance which I mentioned at [11], counsel for the Crown submitted that we should find that the appellant went looking for violence, particularly on 18 November. No such submission was made at the plea hearing. So the possible inference to be drawn from the circumstance that the appellant and some others went to the scene of the offending on 18 November clad in white chemical suits, the appellant having participated in the invasion of the Defence Force establishment the previous day, was not investigated.

14. The fact that the appellant and others attended the scene of the confrontation on 18 November clad as they were, together with the appellant's violent conduct the day before and his violent conduct on 18 November, gives rise to a strong inference that he went looking for violence on 18 November; that he did not attend, as his counsel put it, merely looking for 'trouble'. But the Crown's failure to articulate that position on the plea raises the prospect, I think, that the entirety of the factual material which might go in support or rejection of that inference was not placed before the learned sentencing judge; and is not before this Court. For that reason, and because I think it is generally undesirable that the Crown should be permitted to rely upon an aggravating circumstance which was there to be pressed but which was not pressed below, I decline to draw the inference contended for.

Parity

15. I turn to the question of parity. It is addressed by Lasry AJA in his reasons for judgment at [81]–[86]. Consideration of parity requires that attention be paid to the circumstances of the offending and of the offenders. I begin by considering the circumstances of the appellant's offending.

16. I agree with what Lasry AJA has said in his reasons for judgment at [44]–[50] and [66]–[70] as to the nature and seriousness of the offences committed by the appellant.

17. Beyond that, the short point is that on two consecutive days the appellant, with others, engaged in violence on and adjacent to the streets of Melbourne – violence to property and violence to persons. He was party to an invasion of premises which had some connection with established authority – that is, the Defence Force Recruiting Office. He was then party to offences against another, albeit minor, 'face of authority' – that is, two traffic event controllers sitting in a motor vehicle. Then he was party to violence against the police in the course of two riots. None of the violence in which he participated was provoked. All of it was against 'authority', or against what,

it can safely be inferred, he perceived as 'authority'. His conduct was an expression of the kind of thinking which characterises the presence of police on the streets, in order to prevent the disruption of a meeting with the aims of which the offender does not agree, as a 'provocation'.

18. In my opinion, the appellant's criminality was very considerable. It did not involve just a violent incident between individuals, an affray, or even a riot between opposing groups of civilians. Bad as offending of those kinds may be, in my view this was worse. It involved gratuitous, repetitive and public violence inflicted against individuals who had actual or perceived authority.

19. Then consider the circumstances of the offending of the ten persons who faced charges in the Magistrates' Court in April 2008. All of them were charged with offences committed only on 18 November. Seven of the ten had been involved in one or other riot, but not both. Of the seven who were charged with offences arising out of the riot which was the subject of counts 7 and 9 on the presentment brought against the appellant, four faced charges only in respect of that riot. Of four persons sentenced to periods of imprisonment wholly suspended – the heaviest sentences imposed – only three faced charges arising out of both riots. In all, although three of those charged with offences in connection with both riots faced a charge in respect of the first of them which the appellant did not, the extent and seriousness of the appellant's offending – temporally, and in the number of incidents involved – well outstripped that of the offenders dealt with in the Magistrates' Court.

20. The magistrate considered that for the following reasons the appellant was 'in a different sentencing category' to the offenders who were before her. First, he had pleaded guilty to offences committed on four separate occasions. Second, 'it [was] reasonable to accept that those wearing "jumpsuits" were more prepared and more central to the organisation of offences and more morally culpable because of this'. Third, by contrast with the appellant, five of the accused before her had worn bandanas – a 'more ad hoc approach to the offending'; whilst the other five offenders had not been disguised at all. Fourth, the appellant had been remanded in custody after failing to answer his bail, whilst the persons before her had complied with their bail conditions. Fifth, it seemed that the plea material available to the appellant had been less powerful than material advanced on behalf of the present offenders. Sixth, the appellant had relevant prior convictions. Seventh, one of the offenders was a young offender, and others were youthful offenders.

21. Counsel for the appellant particularly contrasted the sentence imposed upon his client with the shorter and wholly suspended sentences imposed upon four of the offenders sentenced by the Magistrate – three of whom, as I have said, were sentenced in respect of the two riots. He pointed out that two of the three had been sentenced also in respect of a second offence committed during the course of the first riot.

22. Counsel also criticised some of the matters relied upon by the magistrate to justify the considerably disparate sentences which she imposed by contrast with sentence imposed upon the appellant. He particularly focussed upon the second, fifth and sixth matters which I identified at [20].

23. In my opinion the magistrate was right to conclude that matters bearing upon sentence to be imposed upon the offenders before her sharply contrasted with circumstances pertinent to sentence passed upon the appellant. There could be no argument about the first, fourth and seventh matters which she mentioned – of which the first was of cardinal importance. As to that matter, I refer to what I have said at [17]–[18].

24. Next, I think that the inferences expressed in the magistrate's second and third points of differentiation were permissible. Her Honour was there considering the appellant's role viewed from the standpoint of the defendants who were before her. In that context, she was not required to find a circumstance of differentiation, adverse to the appellant, to the criminal standard. Further, the second point of differentiation did not conflict with a finding made by the judge who sentenced the appellant.

25. The fifth and sixth points of differentiation identified by the magistrate involved matters of impression and degree about which minds might legitimately differ. It is arguable that her Honour attributed greater significance to the appellant's prior convictions than did the judge

who sentenced the appellant. But even if her conclusion about that matter was unsound – if not impermissible – I do not consider that it should weigh heavily in the balance on the parity issue.

26. Counsel for the appellant submitted that, in considering parity, there should be brought to account the circumstances that his client was the first person to plead guilty to offences arising out of the G20 incidents, that he was remorseful, that he was a worthwhile person with prospects of rehabilitation as illuminated by testimonials introduced before us without objection, and that sentence should reflect a component of mercy in recognition of what was said to be his client's unfortunate life history.

27. All in all, I do not consider that the marked disparity in the sentence imposed upon the appellant and the sentences imposed by the magistrate[2] should give rise to a justifiable sense of grievance on the part of the appellant. That is so because, first, the magistrate clearly articulated reasons why the sentences should be considerably different; and, at least in the main, those reasons were sound. It is so, second, because I am not persuaded that the circumstances which I mentioned at [26] reasonably called for a different outcome. I should say something more about the second of those matters.

28. It seems that the appellant did plead guilty before any other offender did so. That was deserving of commendation. But his plea was entered in circumstances where his offending had been captured on film; and after his bail had been cancelled.

29. Next, the appellant's acknowledgment that his conduct had been unacceptable was made by counsel on the plea. It was no prompt recantation. Nonetheless, such acknowledgment, together with the appellant's plea of guilty, did bespeak remorse. The question which arises is the relative significance of such remorse in the context of the parity debate. In that context, I do not perceive it as standing higher, or at least significantly higher, than remorse exhibited by offenders dealt with by the magistrate; and that directs attention back to the importance of the more extensive range of offences – in time and place – to which the appellant admitted his guilt.

30. I am not persuaded, either, that much was to be made of the additional testimonial material advanced before this Court; or that the appellant's life history called for the exercise of mercy beyond that which is reflected in any sentence.

31. In significant part, the testimonials vouchsafed the genuineness of the appellant's political convictions. But such convictions provide no excuse for what the appellant did on 17 and 18 November 2006.

32. It was said, concerning the appellant's life history, that his involvement in student protest in his country of birth, Turkey, led to him being imprisoned for some days in 1998 and then being branded as a terrorist, The rights and wrongs of what occurred are at least difficult to discern, notwithstanding that he was eventually received in Australia as a refugee.

33. What I have thus far written has been premised on the assumption that the sentences imposed by the magistrate were unremarkable. But for three reasons that is arguably not the case.

34. First, it may be that the sentences passed by the magistrate – at least upon the defendants who were sentenced to periods of imprisonment wholly suspended – should be characterised as inadequate. Having been informed that those persons have exercised their right of appeal, I simply observe that, on one view, *R v Pecora*[3] could have been called in aid by the Crown in this appeal.

35. Second, it may be that there was a fault in the conviction and sentencing of some defendants in the Magistrates' Court upon charges of riot and of causing injury or damage in the course of that riot. If there was a fault, it can be corrected when the foreshadowed appeals are heard. But even if there was a fault, its impact on the parity argument is speculative. It would be speculative to postulate, for instance, that any of the other offenders will succeed in their appeals to the point of receiving lesser sentences.

36. Third, the magistrate did not explain how the aggregate sentences were arrived at. In that connection, I refer to what I said in *R v Rout*; *DPP v Rout*.[4] In any event, quite apart from

the matter which I mentioned in the previous paragraph, that makes it difficult to compare the sentences imposed upon the appellant and the other offenders.

37. It is one thing to conclude that the sentence imposed upon the appellant below was not so disparate, by contrast with the custodial sentences imposed by the magistrate, as to offend the parity principle. But it would be another thing to create an even greater disparity on re-sentencing. Subject to the possible significance of the matters to which I have referred at [34]–[36], that would be the consequence if the appellant was now re-sentenced to a longer term of imprisonment. So, as I see it, the parity principle[5] stands in the way of imposing a heavier sentence.

Re-sentencing. The detail

38. I would re-sentence the appellant on counts 1 to 6 and on count 9 to the sentences imposed below. On count 7, I would sentence him to 12 months' imprisonment. I would make the same orders for cumulation as were made below except in respect of count 8, and I would fix the same non-parole period.

39. Two points only require mention. First, as I earlier observed, the order for cumulation in respect of counts 7 and 8 made below seems to me likely to have reflected his Honour's assessment of the appropriate sentence for the appellant's involvement in what has been called the brawler van riot. I do not disagree with that evaluation. Hence the sentence which I propose on count 7. Second, this seems to me to be a case in which the appellant ought to be under supervision in the event that he is released from prison before the term of his sentence has expired.

LASRY AJA:

40. On 14 February 2008 the appellant, who is aged 29 years, was presented before the County Court at Melbourne on charges of aggravated burglary (1 count), criminal damage (3 counts), common assault (2 counts), riot (2 counts) and theft (1 count). On arraignment the appellant pleaded guilty and acknowledged prior convictions with which I will deal subsequently. After hearing a plea in mitigation the sentencing judge imposed the following sentences:

Count 1 –	aggravated burglary – six months' imprisonment
Count 2 –	criminal damage – four months' imprisonment
Count 3 –	criminal damage to a City Wide Services utility – four months' imprisonment
Count 4 –	assaulting a female traffic event controller – six months' imprisonment
Count 5 –	assaulting a male traffic event controller – six months' imprisonment
Count 6 –	riot – nine months' imprisonment
Count 7 –	riot – ten months' imprisonment
Count 8 –	criminal damage to a police brawler van – four months' imprisonment
Count 9 –	theft of a log book – one month's imprisonment

41. The sentencing judge's orders for cumulation were as follows. The sentence on Count 7 was identified as the base sentence. His Honour ordered that four months of the sentence on Count 1, two months of the sentence on Count 3, two months of the sentence on Counts 4 and 5, six months of the sentence on Count 6, and two months of the sentence on Count 8 be served cumulatively on each other and on Count 7. That produced a total effective sentence of 28 months' imprisonment and his Honour fixed a minimum term of 14 months to be served before eligibility for release on parole. Pre-sentence detention was agreed at 215 days.

42. There are four grounds of appeal against sentence:

> 1. The imposition of a term of imprisonment on Count 8 or, alternatively, the order for cumulation in relation to Count 8, amounts to double punishment.
>
> 2. The extent of the orders for cumulation offends totality.
>
> 3. The total effective sentence and non-parole period are manifestly disparate with the sentences (subsequently) imposed on co-offenders who pleaded guilty in the Magistrates' Court to the equivalent of Counts 6-8 on the appellant's presentment.
>
> 4. The individual sentences, the total effective sentence and the non-parole period are manifestly excessive.

5. The learned sentencing judge erred in the exercise of his discretion by making a forensic sample order under s464ZF of the *Crimes Act* 1958 (Vic).

Circumstances of Offending

43. These offences were committed in connection with an economic summit being a meeting of finance ministers and central bank governors of the so-called Group of 20 countries being held in Melbourne between 17 and 19 November 2006. The main venue for the summit was the Grand Hyatt Hotel on the corner of Collins and Russell Streets in the Melbourne Central Business District. Legitimately, there were people who wished to protest at or near the meeting and large numbers did so peacefully. However, in some other respects, the demonstration got out of control. Certain areas of the Central Business District of Melbourne near where the meeting was to be held were blocked off to public access and, apart from endeavouring to keep the peace, the role of the police was to maintain those boundaries. This was the context of the confrontations between protestors and police.

44. The first two counts on the presentment against the appellant relating to aggravated burglary and criminal damage arose in relation to entry by protesters at the Defence Force Recruiting Office at 501 Swanston Street, Melbourne. At about 11.30 am on Friday, 17 November 2006, the appellant was one of about 20 protestors who went to that office. A solitary male protestor attracted the attention of an employee who opened the glass doors for him to find that he was suddenly joined by a number of protestors who appeared and entered the reception area at the centre.

45. Chairs and tables were overturned in the reception area and posters and displays were removed. Graffiti was also applied to the walls and adjoining staff work areas were entered. In opening the factual circumstances on behalf of the Director of Public Prosecutions before the sentencing judge, the trial prosecutor asserted that the 'invasion' lasted for about five minutes and that staff at the office feared for their safety. The appellant was identified as having been someone who was 'acting aggressively, growling and going nuts' in the lift foyer and throwing a display to the ground twice and smashing it.

46. Counts 3, 4 and 5 concerned allegations of damaging property being a motor vehicle and two counts of assault which occurred on the following morning, Saturday, 18 November 2006. The two people assaulted were employees for 'Citywide' as traffic event controllers and were using a utility vehicle for the purposes of transporting and erecting barriers at locations specified by police. At about 11.45 am they were in Collins Street, between Russell and Swanston Streets, and were in the process of erecting metal barriers. They were advised by police to leave the area and as they were doing so they were surrounded by a group of protestors. The appellant, wearing a white jump suit, grabbed a metal pole and struck the front windscreen of the vehicle twice, breaking the windscreen. The two occupants of the vehicle were very frightened and, as they endeavoured to get out of the vehicle, the appellant kicked the door of the vehicle shut and then smashed the passenger side mirror. He also grabbed one of the officers, a female, on the right arm, causing bruising. The appellant also menaced both of these people with a metal pole before being told to go by one of the occupants in the vehicle and then doing so.

47. Count 6, which is the first count of riot, concerns events which occurred between midday and 1.00 pm on Saturday, 18 November 2006, when a confrontation occurred with police in Collins Street. This occurred when the protestors confronted a dozen uniformed police behind water-filled barricades east of Russell Street. It appears that the barricades were pulled away from the police line, emptied of water and then used by the protestors. Objects were hurled at police, including glass bottles and other objects, as well as the barricades themselves once empty. Police were spat on. The circumstances clearly struck fear into members of the police force on the line, who were concerned that they might be killed or sustain serious injury. Injuries occurred, although the worst of them was a broken wrist. The confrontation ended after the Force Response Unit in full riot gear arrived and replaced the uniformed police. A video was compiled which showed what the appellant and other demonstrators had been doing. That in turn included ramming a large industrial bin and yellow barricade into the police line and throwing a milk crate at police.

48. Counts 7, 8 and 9 concerned a separate and subsequent riot at the corner of Exhibition Street and Flinders Lane. That also included criminal damage to a police brawler van and the

theft of a police log book from the vehicle. It was during this riot that police were targeted with objects being thrown both at them and at their vehicles. Those included glass bottles and rocks. The evidence indicated that members of the police force were struck with complete bottles and also showered with broken glass.

49. The video to which I have already referred, depicting the incidents and including the role of the appellant, was shown to the sentencing judge and provided to this Court. Each member of this Court has watched the video.

50. On the video, the appellant could be seen as part of a crowd throwing rocks at police and throwing a metal traffic sign which smashed the front passenger side window of the police van and also kicking at the door of the van. Others in the crowd were engaged in similar activities. It was submitted by counsel for the Director that the appellant's conduct involved a level of incitement or 'cheer leading'. I agree with that observation.

51. On 19 November 2006 the appellant was arrested by police and interviewed. During the course of that interview he agreed that he was in the vicinity of Russell Street on the previous day at what he described as a 'carnival'. He said he walked with the protestors during the G-20 demonstration and was with them for a couple of hours. He denied seeing a police brawler van whilst he was there although he said he had seen it on television. He denied participating in any damage to a police vehicle, saying he did not believe in violence. He was then confronted with a copy of the Herald Sun of that day and shown a photograph on page 3 of a male person holding a log book stolen from the van which he agreed looked like him, although he said he did not think it was him.

52. The appellant was charged with the offences on that day and later released on bail on 14 December 2006. However it appears that he breached his bail by failing to appear at a committal hearing on 31 August 2007. A warrant was issued for his arrest and that occurred in Sydney on 6 September 2007, and he was extradited to Melbourne and refused bail on 10 September 2007. I will later return to the circumstances of this breach.

Ground 1 - Double Punishment

53. The sentencing judge imposed a sentence of 10 months' imprisonment on Count 7, which was a count of riot. He imposed a sentence of 4 months' imprisonment on Count 8, which was a count of criminal damage concerning the police van which occurred during the riot. His Honour ordered that 2 months of that sentence be cumulative on Count 7, which he treated as the base sentence for the purpose of formulating a total effective sentence. The complaint in ground 1 is that the imposition of a term of imprisonment on the count of criminal damage, or alternatively the order for cumulation in relation to Count 8, amounts to double punishment. That, it is argued, is because the criminal damage to the police van, which was the subject of Count 8, was part of the conduct giving rise to the count of riot in Count 7, and his Honour sentenced the appellant on that basis.

54. In the course of opening, the prosecutor before the sentencing judge said:

> Police had formed a barricade there [near the intersection of Exhibition Street and Flinders Lane] by using water-filled barricades, a police sedan and a large brawler van. There was about 10 police at that intersection when protestors arrived and started hurling objects at police and the police vehicles. The objects thrown included glass bottles and rocks. The police under attack tried to shelter behind the brawler van, but protestors also went around the side and threw objects at them or simply lobbed them over the top of the brawler van. Police were struck by intact bottles and/or showered with broken glass. Some police were picking glass shards out of their skin for several days after the riot. Eventually, police reinforcements arrived and charged the protestors, who fled north up Exhibition Street. The riot lasted approximately 10 minutes. As indicated on the highlighted DVD, which Your Honour will see in a moment, Mr Sari participated in the riot at this intersection by performing acts of violence himself, including throwing rocks at the police as they retreated behind the van, and afterwards, going around the side of the van and throwing more rocks at the police at close range when the police were sheltering behind the van. Mr Sari threw a metal traffic sign, smashing the front passenger side window of the van and kicked the door of the van. He also reached into the cabin and stole the police log book.

55. In dealing with this incident in his reasons for sentence, the sentencing judge repeated

the summary given by the prosecutor, describing the formation of the barricade and the attempt by the 10 police to shelter behind a brawler van. He then said:

> You were active in this riot. The DVD shows you throwing objects at the police; smashing the front passenger window of the van with a metal traffic sign; kicking the van door; and reaching in the van and stealing a police log book.

56. The submission on behalf of the appellant was that the imposition of a term of imprisonment on Count 8, being the count of criminal damage to the police brawler van, amounted to double punishment as the appellant was being twice punished for substantially the same conduct. Alternatively, the appellant submitted that ordering any cumulation between Counts 7 and 8 offended the bar on double punishment.

57. After the appellant's submissions had gone a short distance before us, counsel for the Director of Public Prosecutions conceded that error had occurred in relation to the sentences imposed on Counts 7 and 8 and that ground 1 should succeed. The concession on the part of the Director of Public Prosecutions was based on a judgment of the High Court in *Pearce v R*.[6] Reliance is also placed on the judgment of this Court in *R v Orgill* where, in not dissimilar circumstances, Redlich JA (with whom Chernov and Vincent JJA agreed) observed:[7]

> As the joint judgment of McHugh, Hayne and Callinan JJ and the judgment of Gummow J in *Pearce v R* illustrates, to the extent that offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. That has been understood to mean that the offender is not to be punished twice for the same act. The joint judgment in *Pearce* cautioned against the use of 'excessive subtleties and refinements' in determining whether the same act is common to two offences and that the task should be approached with common sense.

58. Redlich JA then went on to conclude that, in relation to a count of stalking which embraced a period of some 14 days, other offences of burglary and theft were committed within that period and the sentencing judge had treated that conduct as part of the conduct which gave rise to the offence of stalking. Thus, he concluded, orders for cumulation in relation to those offences amounted to double punishment as the remarks of the sentencing judge had demonstrated that the conduct founding the burglary and theft charges was reflected in the sentence imposed on the count of stalking.

59. A question which arises as a result of the Crown's concession is whether it is appropriate for the conviction on Count 8 to stand with either an order for total concurrency on that count with the count of riot or the imposition of no penalty at all.[8] A conviction is, however, itself a punishment and Mr McArdle, on behalf of the Director, helpfully conceded that the appropriate course was for the relevant conviction to be quashed.

60. In *R v Ahmed*,[9] this Court determined in a drug case that the appellant was inappropriately dealt with because, having pleaded guilty to counts in two presentments, the appellant had been sentenced in circumstances where several of the counts duplicated each other. The result was described in the following terms by Buchanan JA:[10]

> Accordingly, in my opinion it was inappropriate to record convictions other than for counts 1 and 6 on the first presentment and count 2 on the second presentment. The error was not cured by making the sentences concurrent. In *Pearce v R* [1998] HCA 57; (1998) 156 ALR 684; (1998) 72 ALJR 1416; (1998) 103 A Crim R 372; (1998) 15 Leg Rep C1; (1998) 194 CLR 610 McHugh, Hayne and Callinan JJ said that it did matter that a single act was common to two offences even though an order was made that the sentences be served concurrently. Their Honours said:
>
> > To an offender, the only relevant question may be 'how long', and that may suggest that a sentencing judge or appellate court should have regard only to the total effective sentence that is to be or has been imposed on the offender. Such an approach is likely to mask error. A judge sentencing an offender for more than one offence must fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence, as well, of course, as questions of totality.
>
> In my view we should grant leave to appeal, hear the appeal instanter and allow it and quash the convictions on counts 2 to 5 in the first presentment and counts 1, 3 and 4 in the second presentment, notwithstanding that the applicant pleaded guilty to all the counts on both presentments. An appeal

> against conviction by an offender who has pleaded guilty will be entertained if it appears that upon the admitted facts the accused could not in law have been convicted of the offence charged or otherwise it appears that there has been a miscarriage of justice. In my view there has been a miscarriage of justice in this case. The applicant stood convicted of more offences than he had committed. That is apparent from the circumstances which emerged at the hearing of the plea. It is not necessary to investigate the events which induced the applicant to plead guilty.

61. In the course of submissions, Mr Carter of counsel who appeared in this Court for the appellant, made an oral application for leave to appeal against conviction out of time. In my opinion the statement of Buchanan JA applies precisely to this case and, likewise, the appellant should be granted leave to appeal against his conviction on Count 8. The appeal should be treated as being heard instanter and allowed and the conviction on Count 8 should be quashed. As the court indicated after adjourning to consider the matter, the Crown concession on the ground of appeal concerning double punishment was rightly made and should be accepted. It was therefore unnecessary to consider other grounds as the sentencing discretion was therefore re-opened. We then proceeded to hear submissions on the basis that it now fell to this Court to re-sentence the appellant.

Sentencing in Riot Cases

62. The offence of riot is a breach of the common law, as is the offence of affray. Pursuant to s320 of the *Crimes Act* 1958, the maximum penalty for riot is 10 years' imprisonment. The maximum penalty for affray is five years' imprisonment.

63. Riot involves an assembly of people intending to assist each other, by force if necessary, in pursuit of a common purpose.[11] In *R v McCormack*, the Court of Criminal Appeal noted that:[12]

> A riot, like an affray, involves both violence and public alarm. They involve public alarm because they are currently or potentially dangerous. The level of violence used and the scale of the affray or riot are factors relevant to sentence. A riot usually carries with it an inherent danger of injury to persons or property or both. There is a danger that members of the crowd will respond to what has been called 'the psychology of the crowd'. The danger is great when the crowd can be described as a mob threatening violence. With such a mob violence may suddenly erupt to a high level and may quickly be directed in new directions. In our opinion the present or potential danger of injury inherent in a particular riot is a consideration relevant to the sentence of any rioter.

64. The Court (per Young CJ, Kaye and McGarvie JJ), in dealing with the imposition of sentence in such cases said:[13]

> The basic approach is that the offender is not sentenced for his individual acts considered in isolation. He is sentenced for having by deed or encouragement been one of the number engaged in a crime against the peace. 'Any participation whatever, irrespective of its precise form, in an unlawful or riotous assembly of this type derives its gravity from becoming one of those who, by weight of numbers, pursued a common and unlawful purpose. The law of this country has always leant heavily against those who, to attain such a purpose, use the threat that lies in the power of numbers'. While this is the basic approach it is open to the sentencing judge at his discretion to take into account the actual conduct of an offender in the riot, by way of aggravation or mitigation.

65. That description of the sentencing approach in *McCormack* – with which, with respect, I would agree – means that it is appropriate for the appellant to be sentenced for his participation, which clearly included encouragement and leadership, aggravated by his particular conduct to which I have already referred.

The Nature of these Offences

66. Over the two days of these incidents, the appellant committed the offences of aggravated burglary, criminal damage, common assault, riot and theft.[14] I have earlier summarised what occurred but it is appropriate to add some further observations. As to the offences which occurred on Friday, 17 November 2006, which were Counts 1 and 2, it is obvious that the staff of the Defence Force Recruiting Office feared for their safety. The appellant was identified as being someone who, although one of about 20 protestors, was intent on causing damage rather than simply disruption. For my part, when legitimate public protest becomes little more than an opportunity for participants to inflict gratuitous damage on public or private property in no way connected with the target of the demonstration, the legitimacy of the participation of the particular individuals in such dissent

is destroyed and significant harm is done to the credibility of the broader protest. Indeed if such damage was inflicted on property that was connected with the target of the demonstration, that would have a similar effect.

67. I assume that overnight on Friday, 17 November 2006, there was no calm reflection by the appellant about what had occurred during the incidents in which he had been involved on that day.

68. On the Saturday the first group of incidents in which he participated were those represented by Counts 3, 4 and 5, concerning the damage to the City Wide vehicle and the assault of its occupants. These two people were doing no more than their duty as council officers and, while they sat in their vehicle, the appellant smashed the windscreen of the vehicle with a metal pole. They were, I am sure, terrified. The charges of assault on the two individuals arose from the grabbing of the arm of one of them, causing bruising, and the threatening behaviour towards the other with the metal pole.

69. The first of the two riots on the Saturday occurred in Collins Street. The incident was characterised by various objects being aimed or thrown at police, including by the appellant who rammed a large industrial bin and a yellow barricade at the police line and also threw a milk crate at police members.

70. The second riot occurred later in the day, on the corner of Exhibition Street and Flinders Lane. This was the more serious event, where significant damage was done to the police van. Whilst police members had retreated behind the van, the appellant and others were throwing rocks at police and damaging the vehicle. A log book was removed from the vehicle by the appellant, which constitutes the last offence on the presentment (theft). It is axiomatic to observe that this protest generally was aimed at the meeting of finance ministers and central bank governors of the countries comprising the so-called G-20. However the activities in which the appellant participated represented little more than a running street battle with members of the police, whose task it was to keep the peace. There is no suggestion, as I understand it, that police did other than their duty nor that they either provoked or escalated the violence which occurred.

71. There was an attempt by the participants to achieve anonymity during the events, either by the wearing of white jump suits (and the appellant was wearing such an outfit) or the use of bandanas over the face. For sentencing purposes it is relevant to consider whether, in the appellant's case, such preparation represented an intention to behave violently. On behalf of the appellant it was conceded that he and others who participated with him in these offences at least went to the demonstration 'to make trouble', though (it was said) the trouble intended to be made was as to challenging the restrictions by the police on entering the area where the G-20 meeting was being held, rather than the kind of criminal confrontation which actually occurred.

72. Counsel for the Director before the sentencing judge did not contend that there was any pre-meditated arrangement between the appellant and the others about riot or violence. However, before us counsel for the Director did submit that an inference could be drawn beyond reasonable doubt that the seriousness of the conduct is aggravated by the appellant's pre-meditation of violence, apparent from his attempts to disguise himself. In the circumstances, and consistent with *R v Storey*,[15] I think that the Director's submission must be rejected. The only evidentiary material before us was the transcript of the proceedings on the plea in the County Court and the video to which I have referred. I would need more evidence before I could reach the conclusion the Director contends for to the required standard.

73. However, the fact remains that these were very serious offences and the charge of riot was an apt description of what occurred. The seriousness of the offences is not reduced by the fact that protestors were expressing dissent and loudly voicing strongly held views. Such activity is entirely legitimate. The seriousness of the appellant's conduct is simply encapsulated by the generation of fear in those caught up in the events, coupled with gratuitous violence and damage. To his credit, he apparently now accepts that.

Selectivity

74. On behalf of the appellant reliance was placed on the reality of these kinds of situations

meaning that many who participate and commit similar or perhaps more culpable acts are not charged because it is simply impracticable for that to occur. In this case, the issue of this appellant being prosecuted for offences when others were not was said to be relevant on the issue of the sentence which should be imposed because, particularly in the case of Counts 1 and 2, he is being punished in the absence of a number of other offenders who were not charged. There is, it is therefore submitted, a measure of selectivity for which those charged should gain some credit or benefit in the imposition of sentence.

75. In the course of submissions, counsel for the Director referred us to the manner in which such an issue was dealt with in *R v Caird*. Sachs LJ noted that the submission based on selectivity failed to appreciate that such occasions are 'confused and tumultuous' and that each individual who takes active part by deed or encouragement 'is guilty of a really grave offence by being one of the number engaged in a crime against the peace.'[16] Sachs LJ noted that it was impracticable for a small number of police to make a large number of arrests when sought to be overwhelmed by a crowd. He further observed:

> If this plea were acceded to, it would reinforce that feeling which may undoubtedly exist that if an offender is but one of a number he is unlikely to be picked on, and even if he is so picked upon, can escape proper punishment because others were not arrested at the same time. Those who choose to take part in such unlawful occasions must do so at their peril.

76. In *Wright v McQualter*, Kerr J concluded that selective enforcement is 'a matter within police discretion and is hardly likely to raise a legal issue in the courts'.[17] As Kerr J suggested, there may be a number of factors involved in exercising the discretion whether or not to make arrests – for example, arrests may not be made by police for good reason, first among them being to avoid a reaction from the crowd that will escalate violence.

77. On the other hand, in these technological times it might be of some limited relevance if it could be demonstrated that individuals were prosecuted when others, equally involved and identifiable after the incident had concluded, were not. I do not understand that to be the basis of the submission here or, if it is, what evidence actually would support such a conclusion. Such a process would inevitably involve some speculation about the discretion exercised by police whether to prosecute or not.

78. Whether the argued selectivity of prosecution is a matter that a sentencing judge is required to take into account was dealt with in *McCormack*. The Court of Criminal Appeal stated that the sentencing court may have regard to the selective application of the law in relation to the decision whether to prosecute or not, but is not bound to take account of that factor. Referring to the sentencing judge in that case, the Court said:[18]

> He took into account the fact that it is a matter of public knowledge that several large scale riots have occurred in Melbourne in recent years for which no one was prosecuted. He commented that prosecution of those involved in this riot was a selective application of the law, and that he proposed to take that substantially into account in the applicants' favour. He was not bound to make that allowance.

79. Finally, we were informed by counsel for the Director that, apart from the appellant and the defendants before the Magistrates' Court, there may be as many as 20 more yet to be dealt with.

80. In my opinion, the argument about selectivity in the present case has significant limits, both in the factual basis for it and in the logic of the manner in which it might affect the sentence. With respect, the language of Sachs LJ in *Caird* is a little blunt but the logic remains valid for the appellant.

Parity

81. The appellant was sentenced on 7 March 2008. On 14 April 2008, 10 other defendants charged with offences arising out of the two riots on Saturday, 18 November 2006, were dealt with in the Melbourne Magistrates' Court. These relevant co-offenders were charged with offences corresponding to Counts 6 to 8 of the presentment filed against the appellant. Unlike the appellant, who was not similarly charged, they also pleaded guilty to the indictable offence of recklessly causing injury, which carries a maximum penalty of five years' imprisonment.

82. Of those defendants, four received prison sentences in relation to the two riots to which those counts refer. The sentences imposed were aggregate sentences and the heaviest sentences that were imposed by the Magistrate were those imposed on two of the defendants, being sentences of 9 months' imprisonment suspended for 18 months, coupled with financial penalties. None of the four defendants who received prison sentences was required to immediately serve any part of their sentence. This Court was provided with the reasons for sentence of the sentencing Magistrate, although we were not given a transcript of the plea hearing. A reading of those reasons suggests the sentencing Magistrate had read the reasons for the sentence of the County Court judge in this case.

83. The primary submission of counsel for the appellant was that in re-sentencing, the appellant should not be sentenced to anything greater than 9 months' imprisonment on a proper application of the parity principle. There is, it was submitted, no rational basis for the disparity. Indeed, it was submitted that there are factors which can be relied on by the appellant which were not available to those defendants. That was submitted to be 'at the heart of the appeal' in relation to parity.

84. In *Postiglione*, Dawson and Gaudron JJ said:[19]

> The parity principle upon which the argument in this Court was mainly based is an aspect of equal justice. Equal justice requires that like should be treated alike but that, if there are relevant differences, due allowance should be made for them. In the case of co-offenders, different sentences may reflect different degrees of culpability or their different circumstances. If so, the notion of equal justice is not violated. On some occasions, different sentences may indicate that one or other of them is infected with error. Ordinarily, correction of the error will result in there being a due proportion between the sentences and there will then be equal justice. However, the parity principle, as identified and expounded in *Lowe v The Queen*, recognises that equal justice requires that, as between co-offenders, there should not be a marked disparity which gives rise to a 'justifiable sense of grievance'. If there is, the sentence in issue should be reduced, notwithstanding that it is otherwise appropriate within the permissible range of sentencing options.

Later in the judgment their Honours noted:[20]

> ... as between co-offenders, different criminal histories and custodial patterns may be such as to justify a real difference in the time each will serve in prison. And, of course, it is necessary when applying the parity principle that like be compared with like.

85. In my opinion the principal difference between the appellant in this case and the four relevant defendants sentenced by the Magistrates' Court is that the appellant was involved in a total of nine offences. Importantly there were two groups of offences that he committed prior to either of the riots of which these other four defendants were also convicted. Two of those earlier offences were committed on a previous day. Those defendants were not involved in either the aggravated burglary or the damage and subsequent assault concerning the City Wide vehicle and its occupants. In my opinion that is a circumstance relevant in imposing sentence, not because it enables the double punishment of the appellant for particular offences but because it provides a context or background which is appropriate to take into account when considering the sentences which should be imposed.

86. A lesser difference, which nonetheless appears to have been significant to the Magistrate, was that none of those four defendants had any prior convictions. On the other hand, the appellant in this case admitted prior convictions in August 2003 for behaving in an offensive manner, failing to answer bail, refusing to state name and address, assaulting police, resisting arrest, and causing wilful damage; a prior conviction for theft in May 2004; and a further conviction for possession of cannabis, obviously in a small amount, in 2005. However, it must be said that the sentencing judge correctly treated those convictions as having little significance for the purposes of sentencing the appellant. The Magistrate sentencing those with whom she was concerned may not have understood his Honour's attitude to the effect of the appellant's prior convictions and may have sentenced them under a misapprehension about that issue.

87. It follows, as observed by the President in argument before us, that the sentencing judge must have regarded the conduct of the appellant as very serious since (on the view which the judge took) the sentence was not significantly lengthened by virtue of the appellant's prior convictions.

88. In my opinion a sentence imposed on the appellant which did not require immediate custody and for a significant period would have been a manifestly inadequate sentence. Given the longer period of time during which the appellant committed the offences, and his previous record, I do not believe the formulation of the sentence that I propose offends the principle of parity.

The Personal Circumstances of the Appellant including Remorse and Rehabilitation

89. The personal circumstances of the appellant and his background were submitted as justifying a merciful sentencing disposition. The appellant is 29 years of age and was born in Turkey. His parents still reside in that country as does his younger brother. In 1998, whilst a student at the Ankara University pursuing the degree of Bachelor of Statistics, he became involved in a student demonstration concerning a student entry to Parliamentary premises where banners were unfurled. As a result of that demonstration, he was arrested and detained in custody for some five days but charges were never proceeded with. Because of the threat of what he regarded as a false allegation lingering without resolution, he applied for a tourist visa to come to Australia in 2001. The appellant was later successful in obtaining a protection visa in this country on the basis of a well-founded fear of political persecution and later came to live in Victoria. He had obtained employment as a taxi driver but later moved to New South Wales before returning to Melbourne. In 2005 he enrolled at Monash University in a Bachelor of Commerce degree with a major in business statistics. However, the need for income required him to defer the course for a period of time so that he could work. He was granted Australian citizenship in late 2005 and, after one visit to Turkey to see his family, in early 2006 he resumed his course at Monash University.

90. The appellant is, it is accepted, a person of strong and committed political views and has participated in a number of protests concerning industrial relations laws and the defence of student unionism.

91. Without objection we were provided with some further testimonial material including a document dated 17 September 2006 from Mr Don Lucas who is an immigration law specialist and a former senior lawyer at Victoria Legal Aid. He had contact with the appellant in the course of providing professional services to him in connection with his protection visa. He describes the appellant as having leadership potential, demonstrated by his history in Turkey and his re-establishment in Australia, and says that he has natural skills which will enable him to make a contribution in this country. Mr Lucas recommended the appellant for participation in a program known as the 'Ancora Imparo' program for 2007. As we understand it, this program is designed to assist in the development of leadership for students with an appropriate aptitude for the role. The two other references refer to the genuineness of the appellant's political and social beliefs and his skills, particularly in leadership.

92. As was described to the sentencing judge, the appellant had some history of psychiatric difficulty in 2002, which led to him attending for the purpose of requesting treatment at the Northern Hospital and later at the Monash Medical Centre. He also obtained treatment in New South Wales. His condition at the time explained to some extent the offending which is recorded in the further presentment in August 2003. However, it seems clear that the appellant is to be sentenced on the basis that there was no mental illness being suffered at the date of offending or now, and those matters are simply part of the appellant's life history.

93. As to rehabilitation and remorse, the appellant is entitled to significant credit for his pleas of guilty, particularly in circumstances where he was the first of the participants charged with offences in relation to these matters to make such a plea. The evidence indicates that the appellant was genuinely remorseful and had publicly indicated that the tactics which he employed on both days in which he participated in the protest were unacceptable.

94. It was submitted on the appellant's behalf that as a result of these incidents he had been 'demonised' in the media and had been referred to as a 'black bearded Muslim schizophrenic'. He was suspended from Monash University and so from Melbourne he obtained work in Sydney and went to pursue it. However, the result was that he was in breach of his bail conditions by doing so and he was arrested in Sydney and extradited back to Melbourne. This explanation was not in contention either before the sentencing judge or before us.

Conclusion

95. Counsel for the appellant submitted that there were lesser appropriate options than immediate custody. Those options were submitted to include a wholly suspended sentence. I am afraid I cannot agree with that submission. The more practical submission on behalf of the appellant was that, having served 306 days, he has 'done enough' and should be immediately released. That submission was essentially based on a claimed lack of utility in him serving any further imprisonment. I am also unable to agree with that submission. As the President observed during argument, this is a case where general deterrence is significant because the actions of the appellant, as part of a riot, were deliberately highly publicised acts of violence against police. With respect, I agree and for that reason I would not impose a sentence that would result in the appellant's immediate release.

96. However, it is my opinion that some moderation of the original sentences is appropriate. Given the proposed verdict of acquittal on Count 8, the sentence which we impose should produce a result which gives the appellant a genuine reduction to take account of that outcome. I would also reduce the sentence on Count 7 to the highest sentence imposed by the learned sentencing Magistrate in the other matters in that Court to which we were referred. Finally, I accept the submission that it is appropriate for the appellant's sentence to be partly suspended, rather than to place him under the supervision of the Parole Board.

97. In all the circumstances I would re-sentence the appellant as follows:

Count 1 – six months' imprisonment
Count 2 – four months' imprisonment
Count 3 – three months' imprisonment
Count 4 – four months' imprisonment
Count 5 – four months' imprisonment
Count 6 – eight months' imprisonment
Count 7 – nine months' imprisonment
Count 9 – one month's imprisonment

98. I would order that three months of the sentence on Count 1, two months of the sentences on Counts 3, 4 and 5 and four months of the sentence on Count 6 be cumulative with the sentence on Count 7 and with each other. That would result in a total effective sentence of 22 months' imprisonment. I would order that 12 months of the sentence be immediately served and the remaining 10 months be suspended for a period of 12 months.

Forensic Sample Order

99. Ground 5 of the application was that:

The learned sentencing judge erred in the exercise of his discretion by making a forensic sample order under s464ZF of the *Crimes Act* (1958).

100. The relevant part of s464ZF is in the following terms:

> (1) In this section— ...
> *forensic sample offence* means any offence specified in Schedule 8.
>
> (2) If at any time on or after the commencement of section 25 of the *Crimes (Amendment)* Act 1997 a court finds a person guilty of—
>
> (a) a forensic sample offence; or
>
> (b) an offence of conspiracy to commit, incitement to commit or attempting to commit a forensic sample offence—
>
> a member of the police force, at any time following that finding but not later than 6 months after the final determination of an appeal against conviction or sentence or the expiration of any appeal period (whichever is the later), may apply to the court for an order directing the person to undergo a forensic procedure for the taking of a sample from any part of the body and the court may make an order accordingly.

101. Pursuant to clause 13 of Schedule 8, aggravated burglary contrary to s77 of the *Crimes Act* 1958 is a forensic sample offence. The sentencing judge was informed that the making of such an order was opposed but no submissions were made. Before us, it was submitted by counsel for the

Director that the making of the order by the sentencing judge was not reviewable in this Court. Reliance was placed on *R v Singleton*,[21] where a similar ground of appeal was sought to be relied on. In that case the ground relied upon was that the making of an order under s464ZF(2) was '… not justified'. The matter went no further than it being noted by Brooking JA that counsel then appearing for the applicant 'accepted … that no appeal lies against such an order under Part VI of the *Crimes Act* 1958'.

102. Counsel for the appellant before us indicated that he had not located any further authority on the point and did not wish to advance the argument beyond what was in his written submissions. Those written submissions do not deal with whether this Court is empowered to interfere with such an order on the hearing of an appeal against sentence.

103. In my opinion, *Singleton* does not decide the issue at all – it simply records a concession. No further submissions have been received from the appellant or the Director.

104. The remedies available when wishing to impugn the making of such an order were considered in significant detail by Gillard J in the Trial Division of this Court in *Lednar v Magistrates' Court*.[22] In that case, his Honour was dealing with an originating motion filed by three plaintiffs seeking relief by way of judicial review pursuant to Order 56 of the Rules of the Supreme Court. Orders had been sought in the Magistrates' Court, and orders under s464ZF had been made in closed court, which his Honour concluded was a breach of s125(1) of the *Magistrates' Court Act* 1989 (Vic) (which requires all proceedings to be conducted in open court except where otherwise provided by the Act or Rules). His Honour ordered that the orders made under s464ZF be, in each case, quashed.

105. In the course of a very thorough judgment, his Honour concluded that there was no appeal open to the plaintiffs under s92 of the *Magistrates Court Act* 1989 because applications under s464ZF are not criminal proceedings. An appeal to the County Court under s83 of the same Act was foreclosed for the same reason.

106. Section 464ZF itself now makes clear that the making of the orders is entirely dependent on the existence of convictions for relevant criminal offences:

> (6A) If leave to appeal against a conviction for a forensic sample offence is sought after the expiry of the appeal period in relation to the conviction, an order made by a court under subsection (2) before leave to appeal is sought, if not executed before that leave is sought, must not be executed unless—
>
> (a) leave to appeal against the conviction is refused; or
>
> (b) leave to appeal against the conviction is granted and the appeal is finally determined and the conviction for the forensic sample offence is upheld.
>
> (6B) If an order made by a court under subsection (2) has been executed after the expiration of the appeal period in relation to the conviction for the forensic sample offence and leave to appeal against the conviction is granted after the expiry of that period—
>
> (a) any sample and any related material and information taken may be retained by a member of the police force pending the final determination of the appeal against conviction; and
>
> (b) if, on appeal, the conviction for the forensic sample offence is quashed, the Chief Commissioner of Police must without delay destroy, or cause to be destroyed, any sample taken and any related material and information.
>
> (7) If on appeal a conviction for the forensic sample offence is quashed, an order made by a court under subsection (2) or (3) ceases to have effect.

These provisions were inserted in s 464ZF by the result of amendment in 2006, long after *Singleton* and *Lednar*. Since a conviction for a prescribed offence is a pre-requisite for the obtaining of the sample, these provisions ensure that if such conviction falls on appeal, so too does the order for the sample.

107. The question is whether the orders are amenable to review in an appeal against sentence. Clearly, as Gillard J concluded, such orders are amenable to common law judicial review but they are not part of a sentence. In my opinion, they are a consequence of conviction, which is a condition precedent to the making of an order. The application is made effectively by a police officer and for

the purpose of adding to a data base so that offenders can be identified by reference to their DNA profile. The making of the order is not a penalty or a sentence. Such a view is supported by s7 of the *Sentencing Act* 1991. The making of a forensic sample order is not there included amongst the options open to a court in sentencing a person found guilty of an offence.

108. I therefore consider that the submission of counsel for the Director is correct. Such orders are not part of a sentencing order and are therefore not amenable to challenge in this Court on an appeal against sentence.

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[1] See *DPP v Rongonui* [2007] VSCA 274, [22]; (2007) 17 VR 571; (2007) 179 A Crim R 114 (Maxwell P).
[2] Particularly upon Ms Bryx, Ms Dehm, Mr Jorm and Mr Caldwell.
[3] [1980] VicRp 47; [1980] VR 499, 503; (1979) 1 A Crim R 293 (Young CJ, Lush and Southwell JJ).
[4] [2008] VSCA 87, [102]–[109].
[5] As well as, to a lesser extent, the matter discussed at [17]–[18].
[6] [1998] HCA 57; (1998) 156 ALR 684; (1998) 72 ALJR 1416; (1998) 103 A Crim R 372; (1998) 15 Leg Rep C1; (1998) 194 CLR 610.
[7] [2007] VSCA 236, [17].
[8] See *R v Chin Poh Tan* [2005] VSCA 54; 152 A Crim R 397 where that course was followed.
[9] [2007] VSCA 270; (2007) 17 VR 454; (2007) 179 A Crim R 154.
[10] Ibid [19].
[11] See *Field v Metropolitan Police Receiver* [1907] 2 KB 853.
[12] [1981] VicRp 11; [1981] VR 104, 108; (1980) 2 A Crim R 405 (citations omitted).
[13] Ibid 108-9 (citations omitted).
[14] The maximum penalties for these offences are: aggravated burglary (25 years' imprisonment); riot (10 years' imprisonment); criminal damage (10 years' imprisonment); theft (10 years' imprisonment); and common assault (5 years' imprisonment).
[15] [1998] 1 VR 359; (1997) 89 A Crim R 519.
[16] *R v Caird* (1970) 54 Cr App R 499, 507.
[17] (1970) 17 FLR 305, 318 (Australian Capital Territory Supreme Court).
[18] [1981] VicRp 11; [1981] VR 104, 110; (1980) 2 A Crim R 405 (citations omitted).
[19] [1997] HCA 26; (1997) 189 CLR 295, 301; (1997) 145 ALR 408; (1997) 94 A Crim R 397; (1997) 71 ALJR 875; (1997) 15 Leg Rep C1.
[20] Ibid 303.
[21] [1999] VSCA 139.
[22] (2000) 117 A Crim R 396.

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