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| IN THE COUNTY COURT OF VICTORIAAT MelbourneCRIMINAL DIVISION | RevisedNot RestrictedSuitable for Publication |

Case No. CR-19-00017

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| DIRECTOR OF PUBLIC PROSECUTIONS |  |
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| v |  |
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| JAL MYAKER |  |

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| JUDGE: | HIS HONOUR JUDGE RYAN  |
| WHERE HELD: | Melbourne |
| DATE OF HEARING: | 27 March 2019 |
| DATE OF SENTENCE: | 12 April 2019 |
| CASE MAY BE CITED AS: | DPP v Myaker |
| MEDIUM NEUTRAL CITATION: | [2019] VCC 522 |  |

**REASONS FOR** **SENTENCE**

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Subject: CRIMINAL LAW

Catchwords: Sentence – Causing serious injury recklessly – Affray – Commit indictable offence whilst on bail – Plea of guilty.

Legislation Cited: *Sentencing Act 1991*

Cases Cited: *Hussein v R* [2010] VSCA 257; *The Queen v Evans* [2003] VSCA 223

Sentence: Aggregate sentence of 2 years and 6 months imprisonment with a non-parole period of 15 months imprisonment; 261 days pre-sentence detention; 6AAA declaration: 5 years imprisonment with a non-parole period of 3 years imprisonment.

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| APPEARANCES: | Counsel | Solicitors |
| For the DPP | Ms D. Dickson (Sentence)Ms T. Saville (Plea) | Office of Public Prosecutions |
|  |  |  |
| For the Accused | Mr M. Brennan | Emma Turnbull Lawyers |

HIS HONOUR:

# Jal Myaker, on 27 March 2019, you pleaded guilty to an indictment containing two charges, being: Charge 1, causing serious injury recklessly; and Charge 2, affray, together with a related summary offence of committing an indictable offence whilst on bail.

# You are a 20 year old man without prior conviction.

# Tendered as Exhibit A on the plea and read aloud in court, was the Summary of Prosecution Opening.

# In summary, on 13 July 2018, at about 3.35pm, the principal victim in this matter was walking in a westerly direction along a residential street in Richmond returning home from a local supermarket with his two children when he noticed a vehicle driving down the street in an easterly direction at an excessive speed. The complainant told his two children (aged five and seven years) to go and wait at their front door.

# A neighbour, Mr Clarke, was also in the street and observed the vehicle. The victim observed the vehicle, in which you were a passenger, drive into the Ministry of Housing flats, drive around the roundabout, and exit those flats and travel in an easterly direction along the street where the victim was standing.

# The victim decided to record the vehicle’s progress on his mobile phone for the purposes of making a complaint to the council. The vehicle in which you were a passenger passed the victim, performed a three-point turn, and returned back to where the victim was standing.

# You and your co-accused got out of your vehicle and approached your victim and asked him why he was filming the vehicle. You struck your victim to the top of his head and caused him to lose balance and fall to the pavement. You, together with your co-accused, continued to hit the victim to the head whilst he was lying in a defensive position on the ground attempting to protect his head with his hands. You and your co-accused repeatedly struck the victim to his head – you armed with a tin can and your co-accused armed with a sharp object.

# At some time during the course of this unprovoked attack, which was witnessed by the victim’s young children, you stopped striking the victim to his head and kicked him repeatedly about the body.

# During the course of this wanton act of violence, the victim begged for you to stop. He even apologised to you in an attempt to get you to stop, however, you did not. During the course of your attack on your innocent victim, he heard one of his children say, “Are you going to die daddy? Please don’t die daddy”.

# After you had completed your attack upon your victim, you got back into your vehicle and drove in an easterly direction along the street towards the Ministry of Housing flats in which you then lived.

# The attack was observed by a number of witnesses, one of whom has filed a Victim Impact Statement as a result of observing your wanton act of violence.

# The victim was conveyed to the St Vincent’s Hospital by ambulance, where he was observed to have sustained the following injuries:

# (i) a 4 centimetre open wound to the crown of the scalp;

# (ii) an open wound to the right cheek;

# (iii) an open wound to the lower jaw, being a 6-8 centimetre deep u-shape injury with a flap of skin detached;

# (iv) an open wound to the upper lip;

# (v) bruising and swelling to the forehead and nose;

# (vi) multiple open injuries to both hands;

# (vii) a graze to the right flank; and

# (viii) facial nerve injury, being a droop of the right lower lip and ongoing numbness to the chin.

# As a result of the assault upon your innocent victim, he required plastic surgery under general anaesthesia and repairs to his lacerations.

# The car in which you were a passenger and which was driven by your 17 year old co-accused was owned by your brother. The car was unregistered and uninsured. Police approached your brother in respect to the motor vehicle driven at the time of your offending, and your brother informed police that you were living with your co-accused and provided the police with your co-accused’s mobile telephone number.

# The police, armed with this information, ascertained your address and that of your co-offender. On 25 July 2018, you were arrested and interviewed under caution.

# During the course of the record of interview, you told the police that there was nothing you could tell them about the incident, and that you had simply heard about it. (See Q&A 110 and 111)

# When shown video footage of the assault and your brother’s motor vehicle, you identified your brother’s car and admitted that you had borrowed it from your brother. You identified yourself in the footage of the assault, but claimed that you had no memory of the assault.

# On the day of your offending you had worked as a concreter. You told police that you were wearing your work clothes at the time that you were recorded on the video footage. You denied any recollection of the event.

# Tendered as Exhibit B were the Victim Impact Statements of your principal victim and that of a neighbour who, on becoming aware of the assault, took care of the principal victim’s two children and took them into her house. One of the children asked this neighbour if, “daddy was going to die”.

# The Victim Impact Statement of the principal victim was read to the court by his wife and it was evident that she has been adversely affected by your conduct as well. The principal victim claims that his life has been forever changed by the trauma that he has suffered, and that his sense of safety within the community has been shattered. He is haunted by the recollection of one of his children crying in fear “daddy are you going to die?” He is often tearful. He feels that he has failed as a father, which provokes in him overwhelming fear, anger and guilt. He has been diagnosed with Post-Traumatic Stress Disorder.

# Your victim consults a psychologist to deal with the PTSD and anxiety that he suffers as a result of the attack. He describes himself as not being the same person that he once was. He has a permanent scar on his face and nerve damage to the chin and lower lip. This nerve damage was described by his wife as being to the lower right side of the complainant’s face, and that this area was permanently numb. The complainant has grown facial hair from time to time in order to hide the scarring that he bears as a result of your attack upon him.

# The second Victim Impact Statement is of the principal victim’s neighbour who took care of his children, removing them from the scene of the assault into her house. Put briefly, your conduct has impacted on her emotional and physical wellbeing, as well as her values. She blames herself for not acting quickly enough to shepherd the children away from the scene. She questions whether she did enough to care for the two children. She relives often the incident when one of the children asked whether his father was going to die, and her answer to that question, and whether that was of help or a hindrance to the child on the day.

# As to her personal beliefs prior to this assault, she was abhorrent of racism. However, because of your conduct, she cannot stop herself from looking at some young people of African descent differently to how she used to. She hates feeling this way and wishes she could stop it. As she lives alone, she no longer feels safe in her own home and loses sleep over the thought of how your victim, his children, and wife are progressing physically and psychologically. She is hyper vigilant to noise at night, thinking that persons are in her backyard and potentially a threat to her. As at 7 January of this year, she still thinks about the assault.

# In short, by your wanton act of violence, you have profoundly affected a family and others.

# The maximum penalty for causing serious injury recklessly is 15 years’ imprisonment, whilst the maximum penalty for affray is five years’ imprisonment. In respect of the related summary offence of committing an indictable offence on bail, the maximum penalty is three months’ imprisonment or 30 penalty units.

# You were arrested on 25 July 2018 and remanded in custody, and have remained in custody since that time. Accordingly, as at the date of your plea, being 27 March 2019, you had spent 254 days by way of pre-sentence detention.

# While in custody you have undertaken a number of courses as is evidenced by Exhibit 4 on the plea. At the end of the plea leave was given for further certificates in respect to your study in prison and a letter from you to be provided to the court prior to sentencing. They become part of Exhibit 4. In your letter to the court you express regret and remorse for your actions. Further you apologise to your victim. Additionally you recount your experiences in prison, both positive and negative and your hopes for the future.

# Mr Brennan, solicitor, who appeared on your behalf, conceded that your offending is serious in nature and that it was aggravated generally by:

# (a) the use of weapons;

# (b) that the offending occurred in company; and

# (c) the offending occurred in public and in front of the complainant’s children.

# Each of these concessions was properly made.

# In respect of your personal background, you were born in Sudan on 20 May 1998. You migrated to Australia in 2002, initially arriving in Sydney. This process commenced with your father moving from Sudan to Cairo and establishing a base within the Sudanese community in that city, before bringing your family to Cairo. As a family, you migrated from Cairo to Australia.

# You are one of the five surviving children of your parents. In 2004, your family home burnt down and, in the following year, one of your brothers died in your presence. Your family attributes your brother’s death to smoke inhalation arising out of the fire of 2004.

# You completed your secondary education in 2015 at the Catholic Regional College in Melton. Extraordinarily, in that year, you were struck by lightning on two occasions during the one incident and were hospitalised as a result of it. You suffered severe burns to the entry point and exit point of the lightning strikes and still require ongoing medical treatment by way of lotions and ointments to care for your scarring, a result of those burns.

# This event occurred on 13 October 2015 and, for some period thereafter, you suffered from multiple seizures and were ultimately, in 2016, diagnosed with epilepsy – no doubt a consequence of the lightning strike – and you were prescribed the drug, Epilim. (See Exhibit 3)

# Tendered as Exhibit 2 was a report prepared by Ms Sizenko, provisional psychologist, under the supervision of Ms Pamela Matthews, psychologist. You were examined at the Metropolitan Remand Centre on 26 February 2019.

# Apart from the death of your sibling in 2005, you appear to have had a happy family life and were never exposed to domestic violence, sexual abuse, child abuse or substance abuse whilst you remained at home.

# In 2016, you commenced a Diploma in Architecture at Swinburne University. This course of study initially progressed in the normal way, by attending lectures and the like. However, you moved from Melbourne to Adelaide, where you remained until January 2018. Whilst in Adelaide, you completed your diploma in September 2017, and were accepted to commence a Degree in Architecture at the Royal Melbourne Institute of Technology University in the second half of 2018.

# I was informed that you were effectively given some credit for your diploma, which meant that you were not required to commence your course of study in the first semester of 2018.

# On return to Melbourne, you commenced working as a warehouseman until May 2018. This employment was on a casual but full-time basis with you working approximately 40 hours per week. Additionally, you did some mechanical work on a part-time basis.

# Appearing within the report of Ms Sizenko, at page 4 under the heading of “Employment”, she asserts that you instructed her that you started a mechanical apprenticeship in 2015 and had completed three years of that apprenticeship, before taking a break to go to Adelaide in 2017. This simply cannot be right on the basis of the matters put to me by Mr Brennan.

# Whilst in Adelaide, you worked for a fundraising organisation, as well as working as a warehouseman and labourer.

# While in Melbourne in May 2018, you ceased working as a warehouseman and commenced working as a labourer to a concreter, and were working in that capacity on the day of your offending.

# You have been in one relationship, that is an ongoing relationship with your girlfriend of some six years, a young woman whom you met at school. She is studying business management at the Royal Melbourne Institute of Technology University.

# In respect to your abuse of both legal and illicit substances, you first tried alcohol at the age of 18. However, alcohol did not become a problem for you until you commenced to live in East Richmond with your co-accused, when alcohol consumption became a daily habit.

# You reported to the psychologist that you would drink four to six beers daily. Alternatively, you and your co-accused would drink a bottle of spirits over several days.

# You started smoking cannabis in late 2015 and, despite having adverse reactions to it, persisted in this abuse until, at the time of your offending, you were using two grams a day on average. In addition, you were abusing Xanax in combination with alcohol. You admitted to Ms Sizenko that you had tried MDMA and Valium, each on one occasion.

# Accordingly, knowing that you suffered from epilepsy as a result of the lightning strikes, and having been prescribed Epilim, you abused cannabis, alcohol and Benzodiazepines upon your return to Melbourne in January 2018.

# Ms Sizenko had you perform a number of psychometric tests, and there were marked differences in your performance from test to test. As an example, in respect to the assessment of your perceptual reasoning, your result was 120, that placed you in the 91st percentile – meaning that you are in the superior range, “suggesting the ability to understand and respond and to organise information in one’s head through images being a major strength.” Thereafter, in the main, your various scores could be described as average.

#  A risk assessment was applied to you, and you fell within the medium category for risk with an, “estimated risk of recidivism rates at this level being 12 per cent over five years”.

# You suffer from a generalised anxiety disorder, which Ms Sizenko opined would make your, “time in custody quite onerous particularly in a social context”. You reported to Ms Sizenko that you were responding well to your interaction with prison psychologists, and that they were assisting you in managing your anxiety symptoms.

# Whilst in prison, you were assaulted on 30 October last year. You were assaulted in your cell in Swallow Unit and suffered a blowout fracture of the floor of the left orbit and consequent bruising, as well as having double vision for a period of time which, as at the time of your plea, had resolved.

# Tendered as Exhibit 5 on the plea was your prison medical record and, whilst it was recommended that you return to the Eye and Ear Hospital for further assessment and potential surgery, two scheduled visits were cancelled for reasons which are not apparent from the records.

# You come from a loving family and, despite the injuries that you suffered, and continue to suffer, as a result of the lightning strikes in 2015, you have achieved a pass at VCE, successfully completed a Diploma in Architecture at the Swinburne University, and have been admitted to study architecture at the Royal Melbourne Institute of Technology University. You are a young man of some capacity.

# However, in the period commencing January 2018, over a period of time you entered into the world of drug abuse, combined with alcohol abuse. This could – and I emphasise the word could - result in loss of memory from time to time. Whilst you claimed in your record of interview that you did not recall the incident, I do not accept this.

# The movement of the motor vehicle in which you were a passenger and your conduct which constitutes these offences, militates accepting your answers in the record of interview as to your lack of memory. In any event, nothing turns on your alleged lack of memory.

# Mr Brennan, on your behalf submitted that, as a result of the contents of the psychological report (Exhibit 2), limbs 5 and 6 of *Verdins* were enlivened. I accept that your time in custody will be made more onerous as a result of your generalised anxiety disorder. However, there is no evidence before me that your mental health would deteriorate as a result of being incarcerated.

# It is to be noted that your co-offender, who was aged 17 at the time of the offending, was sentenced to a nine months’ Youth Attendance Order at the Melbourne Children’s Court. Mr Brennan, whilst accepting that “true” parity did not apply, as your co-offender was a child who was dealt with in the Children’s Court under the regime that applies in that jurisdiction, and that you are an adult being dealt with pursuant to the provisions of the *Sentencing Act* 1991, urged that I take into account the sentence imposed upon your co-offender, which I do.

# In the course of argument, Mr Brennan referred me to *Hussein v R* [2010] VSCA 257, in respect to the issue of parity between co-offenders where one is an adult and another is dealt within the Children’s Court. Within this authority is a reference to the judgement of Vincent JA in *The Queen v Evans* [2003] VSCA 223 where his Honour opined at paragraphs [41] to [44]:

“…the parity principle can have only limited application in the case of an adult offender where a younger offender has been dealt with according to different principles and practices…

 …An elaborate system has been developed to deal with the problem of offending by children and young persons in our community with a separate court, separate detention facilities, supervision systems and so forth. Whilst broadly speaking normal sentencing principles can be said to remain applicable when dealing with youthful offenders, as a matter of law and practice it is recognised that the respective weight to be given to relevant factors will vary.

 …These considerations can and do lead to dispositions which would be regarded as entirely inappropriate in the case of older and presumably more mature individuals.”

# Your co-offender was a child at the time of the offending and was dealt with in The Children's Court. You are a young offender, however you are but two months short of your 21st birthday.

# Your age when combined with the gravity of your offending is such that, in my view, a Youth Justice Centre Order is not an appropriate disposition in your case. I do not find you to be particularly impressionable or immature.

# Further you have spent many months within the adult prison system. It is to be noted that you have been the subject of an assault while in prison, however, on the other hand you are gaining assistance from the prison psychologists to deal with your anxiety. (See Exhibits 2 and 4)

# You are a young man with some capacity. You come from a loving family. You pleaded guilty at your committal and no witnesses were called. You are entitled to the benefit of your plea, being that it is of utilitarian value and that it is some evidence of your remorse. The contents of your letter to the court demonstrates insight into your offending and remorse on your behalf. Should you refrain from the abuse of alcohol and illicit drugs, as well as various medications not prescribed to you, then your prospects for rehabilitation are good.

# However, your offending is a very serious example of offending of its' kind. For no reason other than that you were being filmed, you set upon your innocent victim in the street in broad daylight in the presence of his children, who were aged nine and seven respectively, as well as in the presence of other witnesses.

# In company, whilst armed, you struck your victim about the head. You terrorised him to the extent that he apologised to you in an effort to get you to stop, despite the fact that he had done nothing that would even warrant a sideways glance from a reasonable person. You continued the assault on your helpless victim by kicking him whilst he was on the ground. You then left the scene.

# Your victim is profoundly psychologically affected by this assault and suffers permanent nerve damage and scarring to his face. His wife is plainly traumatised by the event, and I am prepared to find that each of his children are likewise traumatised by what they saw happen to their father. In addition, you traumatised an onlooker.

# In my view, you are an appropriate vehicle for the application of the principle of general deterrence. Charges 1 and 2 on the indictment were committed whilst you were on bail, accordingly, specific deterrence has application to you, although its application is limited.

# Would you please stand.

# By this sentence, I must punish you, publicly denounce your conduct, and deter you and others from committing these kinds of crimes. I must also look to your rehabilitation.

# Taking into account the circumstances of the offences and their effects, your personal circumstances and antecedents, endeavouring to produce a sentence which reflects and promotes the purposes of sentencing in a manner appropriate to you and your offending, you are to be sentenced to a term of imprisonment.

# In my view, in the circumstances of this case, it is appropriate to impose an aggregate sentence. Your offending is based on a common narrative that justifies joinder and has a common foundation, namely the assault on your victim. I sentence you to an aggregate of two and a half years imprisonment and I order that you serve 15 months imprisonment before you will become eligible for parole.

# I declare that you have spent 261 days by way of pre-sentence detention not including today. Pursuant to s.6AAA of the *Sentencing Act* 1991 I declare that but for your plea of guilty, I would have sentenced you to five years' imprisonment with a non-parole period of three years. You may be seated.

# Are there any other matters?

# MS DICKSON: No, Your Honour.

# MR BRENNAN: No, Your Honour.

# HIS HONOUR: Remove the prisoner. I will stand down to quarter to one for the next one.

# - - -