

IN THE CHILDREN'S COURT OF VICTORIA

AT MELBOURNE

CRIMINAL DIVISION

Court Reference: H12739353

DPP

v

SI (a child)

JUDGE: HER HONOUR, JUDGE CHAMBERS

DATE OF HEARING: 1 March, 2018

DATE OF JUDGEMENT: 14 March, 2018

CASE MAY BE CITED AS: DPP v SI (a child)

MEDIUM NEUTRAL CITATION: [2018] VChC 3

REASONS FOR SENTENCE

Catchwords: Accused charged with reckless conduct endangering life, reckless conduct endangering persons, assault on an emergency worker and unlicensed driving – lack of prior convictions – autism spectrum disorder – sentencing principles under the *Children, Youth and Families Act 2005* – term of a youth supervision order under s387 of the Act.

APPEARANCES:

Counsel

Solicitors

For the Applicant:

Mr Mark Gibson SC

John Cain for the OPP

For the Respondent:

Ms Danielle McKeown

Danielle Keogh for VLA

Mr Raphael de Vietri

HER HONOUR:

1. SI, you have pleaded guilty to two charges of reckless conduct endangering life, two charges of reckless conduct endangering persons, one charge of assaulting an emergency worker and one charge of unlicensed driving. All of these charges arise out of your conduct on 30 September last year when you drove into the Melbourne CBD in your father's car. At that time, you were 15 years of age and were living with your father, sister and brother in [location removed].

Circumstances of the offending

2. A prosecution opening was tendered in the plea. The facts it discloses are not disputed. I will therefore provide a brief summary of the facts.
3. On Saturday, 30 September last year, you drove your father's [vehicle] from your home towards the Melbourne CBD, leaving the house at 7.24am. Shortly before this you had accessed the "Fed-Cam – Federation Square" website and then dressed yourself in dark military style clothing. You had with you BBQ matches, a kitchen knife and a bicycle pump. You then left your home. Unlicensed to drive, you drove for thirty minutes from your home into the Melbourne CBD using City Link.
4. Just before exiting at the Punt Road exit, you were seen to be driving erratically. Other motorists on City Link describe you veering across laneways, cutting other cars off, and narrowly avoiding hitting other cars and side barriers. This manner of driving gives rise to the charge of reckless conduct endangering persons (charge 12).
5. You entered the Melbourne CBD at 7.52am. Saturday 30 September was Grand Final day; a day on which many people go into the city before the football final is played in the afternoon. Over the course of the next five minutes, you continued to drive in an erratic and reckless manner, endangering members of the public. CCTV footage captures much of your driving that day, which I have had an opportunity to view.
6. Turning left from Russell Street into Collins Street, you drove on the tram tracks before taking a sharp left-hand turn into Swanston Street; mounting the kerb and footpath as you do so. A man had been walking along that footpath and, seeing your car, had to run out of harm's way to avoid being hit by your car. You mount the kerb and footpath at the very point he had been walking moments earlier. If he had not taken this action, a collision may have occurred placing the man at real risk of serious injury. This is the conduct that gives rise to the other charge of reckless conduct endangering persons (charge 4).
7. You continued to drive in an erratic manner; driving between the kerb and the tram tracks, swerving through a gap between two trams, travelling on the wrong side of the road on Swanston Street as you drive towards Flinders Street intersection. You accelerated south along Swanston Street, through the intersection with Flinders Lane, before travelling at

speed through a red traffic light at the intersection of Flinders Street, narrowly missing other cars that were travelling through the intersection.

8. Veering to miss other traffic, you mounted the footpath on the corner of Flinders Street, outside Federation Square. In doing so, you drove towards an unknown woman and a man, Mr C, who were both standing on the footpath. Each of them had to move quickly out of the way to avoid being hit by you and potentially being pinned against the wall of the nearby Information Centre. This conduct gives rise to the charge of reckless conduct endangering life; the charge relates to both the unidentified woman and to Mr C (charge 5).
9. Immediately after this, you reversed at speed into the middle of the intersection before driving along Flinders Street, then performing a U turn to accelerate again towards the intersection of Swanston and Flinders Street, where you stopped in the middle of the intersection. You narrowly avoided hitting a tram. After passing the tram, you turned right into Swanston Street, driving along the tram tracks until stopping near the intersection of Flinders Lane. You then reversed at high speed towards the path on the west side, which is the wrong side of Flinders Street. The car quickly swerved in a circular motion close to the kerb of Swanston Street. This action caused the left back wheel of your car to mount the footpath.
10. A pedestrian, Mr H was straddling his bike on the pavement near the kerb. You narrowly missed hitting him when the rear wheel of your car mounted the footpath. Another cyclist, Mr G, who was riding north along Swanston Street also had to jump out of the way to avoid being hit by your car. This is the conduct that gives rise to the charge of reckless conduct endangering life; the charge relates to both Mr H and Mr G (charge 6).
11. You then executed a 180 degree sliding turn, before travelling at speed through a red traffic light on Swanston Street, again narrowly missing cars travelling along Flinders Street. You then drove up St Kilda Road before making another abrupt U-turn, accelerating along St Kilda Road towards Swanston Street, stopping in front of a tram. You then reversed at speed along Swanston Street, entering the intersection of Flinders Street where you made another 180 degree turn, coming to a stop at the corner of the intersection.
12. At that point, two members of the public approached the car, one throwing a bicycle behind the rear tyres of your car. You then opened the driver's door and stepped out of the car, in possession of a black handled knife and the bicycle pump; which had the appearance of an extendable baton. As you stepped out, you became tangled in the seatbelt and dropped the knife. You did not pick it up. You then moved towards one of the men who had approached your car, who ran off towards the train station. You then paced back towards the passenger side of the car, approaching the other man, who also ran off. In the circumstances, including the fact you were fully clothed in military-styled gear, you appeared menacing and frightening as you moved towards those members of the public.

13. You still appeared agitated as you walked around the intersection waving the bicycle pump around before you returned to the car to retrieve a black back pack. You put the pack on your back and continued to pace around the intersection.
14. At this point, police were deployed to the intersection. Acting Senior Sergeant Kael Oosthuizen, together with other police officers, gave you many verbal and physical directions to drop the weapon and lie on the ground. When you did not do so, ASS Oosthuizen deployed OC spray at you but your protective clothing and helmet meant this had little effect. You then moved towards ASS Oosthuizen, swinging the bicycle pump at him twice, causing him step backwards to avoid being hit. He then fell backwards onto the tram tracks, at which point you lunged at him again with the bicycle pump. He was able to avoid being struck by kicking at you. This is the conduct that gives rise to the charge of assaulting an emergency worker, being the police officer ASS Oosthuizen, in the performance of his duties (charge 9).
15. You were subsequently tackled to the ground and members of the Critical Incident Response Team arrived, deploying a Taser to affect your arrest. Police then removed and secured the items you were wearing, including a tactical vest, backpack, pouches, boots and gloves. Because the glove box in the car was taped shut and a digital clock was found on top of the dashboard, as a protective measure, the Bomb Response Unit was called to ensure the safety of the public. You were transported to St Vincent's Hospital for medical assessment and then returned to police custody. You were assessed as unfit for interview by the attending Forensic Medical Officer.

Victim Impact Statements

16. The prosecution tendered two victim impact statements in the plea. They vividly outline the emotional impact of your conduct on the victims, including victims' feeling very anxious about attending the city after being placed at significant risk by your driving. Mr H, the man you narrowly missed whilst he was straddling his bike on the footpath in Swanston Street says his anxiety has resulted in him feeling angry and frustrated. He was unable to return to work for a week after the incident in order to "come to terms with what happened" to him. He says he now avoids going to Swanston Street and is reluctant to bring his family into the city. Ms P says the incident left her feeling anxious and fearful of going to events in the city, such as Christmas and New Year festivities. I have taken the impact of your offending on the victims into account in sentencing you. It is important you understand the profound effect your behaviour had on these victims and the community more broadly.

Serious nature of the offending

17. These are serious offences. The offence of reckless conduct endangering life carries a maximum penalty of 10 years' imprisonment under the *Crimes Act 1958* (Vic.). The offence

of reckless conduct endangering persons carries a maximum penalty of five years' imprisonment, as does the offence of assaulting an emergency worker. The offence of unlicensed driving carries a maximum penalty of three months' imprisonment or a fine of up to 25 penalty units. These are the penalties that are potentially available to a court sentencing adult offenders and reflect the seriousness with which Parliament, on behalf of the community, regards such offences.

18. By pleading guilty to these offences, you engaged in reckless conduct that endangered other people's lives (for charges 5 & 6) and placed others at significant risk of serious injury (for charges 4 & 12). Also, by pleading guilty you acknowledge you knew your manner of driving would probably create these significant risks. You were unlicensed to drive and had no experience driving a car. The manner of your driving over a sustained period of time that day placed not only you, but many other road users and members of the public at risk of serious harm; a risk you recklessly disregarded. It is important that you appreciate that you bear responsibility for your serious offending.
19. I turn now to comment on the role of the attending police. During the course of the plea, the prosecution fairly accepted that your offending was not to be viewed as an act of terrorism. However, this was not readily apparent to either members of the public or to the police, whose role it is to protect the public from harm. It is a particularly serious offence to assault a police officer when they are performing their important duties. In the circumstances of your offending, the arresting police exercised remarkable professionalism and restraint, despite facing a difficult and uncertain threat. They are to be commended for their measured response which avoided placing you at risk of harm while at the same time safeguarding the members of the community who were present.

Matters personal to you and mitigating factors

20. I have spent some time discussing the circumstances of your offending and the impact it had on victims and the community. I am now going to move to other aspects of your case that are important for the Court to consider when determining what is an appropriate sentence. The first of these are your personal circumstances and background.
21. You are fifteen years old, having been born in Melbourne on [date removed]. Your parents were refugees, both of whom have limited English. You lived with your parents, your older brother and sister, until your parents separated in 2004. You then lived with your mother until a notification to child protection lead to you and your siblings being removed from her care, due to concerns that you were not being properly fed or cared for and were being physically abused. Since 2008 you have lived with your father, now 70 years of age together with your 18 year old sister, [name removed] and your 20 year old brother, [name removed].

22. It was not until you commenced school at 5 years of age, that you were diagnosed with a profound hearing loss. You are also mute. You started school at [location removed] Primary in late January, 2008. A report at the time notes that your teacher was concerned about your inability to communicate and behavioural problems you were displaying at this young age, including punching, spitting and kicking. Between the years 2008-2009 you attended a special school for the deaf, the [name removed] school, where it is reported your behaviour improved. Staff did however recall that you had no language, only rudimentary communication and would sit separately from the group. It took six months for you to learn only a little Auslan.
23. Between the years 2010-2015 you attended [name removed] Primary School, at the end of which it was recommended you attend the [title removed] College. However, your family sent you to [name removed] College because it was a local school with a deaf facility and a dedicated teacher for the deaf, who could work with students up to 8 periods a week. It is reported that you struggled with communication at the school and could become aggressive with other students, misunderstanding social cues. Your family believe you were bullied at the school, and chose to isolate yourself. You did not engage with learning and it appears the school was unable to meet your specific needs.
24. In September, 2016 you transferred to the [titled removed] College. The College reports that you initially attended wearing black clothing and were not regularly attending classes, although you were sent to school every day by taxi. This situation improved over time, with you wearing school uniform and attended some classes. Behaviour difficulties were identified however, and it is reported you continued to isolate yourself; preferring to go to the library to look at Melway's street maps. Teachers noticed that you avoided looking directly at people making it difficult to teach you sign language. At home, you spent your time in your room on your computer or watching films.
25. Following your arrest, you were remanded in Parkville Youth Justice Centre. At the recommendation of Dr Adam Deacon, psychiatrist, arrangements were made for you to transfer to the Box Hill Adolescent Inpatient Psychiatric Unit from 9-22 November 2017 to be assessed by a range of paediatric experts. It was only following the expert assessment conducted by Dr Sian Hughes, Consultant Paediatrician, Vivien Williams, Speech Pathologist and Dr Michelle Rowland, Clinical Psychologist, that you were also diagnosed with an autism spectrum disorder. Dr Adam Deacon, Consultant Psychiatrist, in his report dated 19 December, 2017 says that your autism spectrum disorder is at a level 3 severity, meaning you require very substantial support for this disorder. Your language communication skills have been assessed as equivalent to a 3-5 year old.
26. The assessments and opinions expressed by the paediatric experts are highly relevant to the sentence I impose on you today. That is because they shed light on the relationship

between your unique, profound disabilities and your offending behaviour on 30 September, 2017.

27. Dr Deacon, in his report, states [at paragraph 5]:

"...[Name removed] needs to be understood under the lens of an autistic person, rather than trying to understand him 'as if' he isn't autistic. It is very clear that [name removed]'s internal world is very different and very likely to be confusing and often distressing. It seems very likely that his unique needs have not been effectively met throughout his development and in many respects he has been neglected and deprived."

28. Further, [at paragraphs 6 & 10], Dr Deacon provides an insight into the connection between these characteristics of autism and the offending:

"[Name removed] developed an interest in cars, trucks, army equipment and the military during his childhood. These interests have persisted, as is so commonly seen in autistics. It is in this context that his decision to drive his father's car whilst wearing army clothes needs to be understood under the paradigm of an autistic person, rather than someone who has a comparatively morbid interest in driving recklessly and military-related phenomena... [name removed] appears to have been frightened and confused whilst he drove the car. He would not have been able to interpret the response to people he observed in a conventional manner. Instead, it seems likely that he was distressed and highly anxious."

29. Consistent with the opinion expressed by Dr Deacon, Dr Sian Hughes in her report dated 21 November, 2017 expresses the following view about the relationship between the diagnosis of autism and the offending behaviour:

"The diagnosis of autism for [name removed] does provide some insight into the actions...coming from a background where he has been poorly supported an interest in the army and weapons is not surprising and as a result of his autism has become an obsession. His response to being denied a demand [for a mobile phone] led to frustration which he could not communicate and he acted out his anger by taking off in his father's car... People with autism have difficulties processing sensory information and too much visual input is distressing, so the high city buildings could have been threatening to him. People with autism are not able to regulate their emotions so erratic behaviour after his arrest would be expected".

30. The expert opinions expressed by Dr Deacon and Dr Hughes are not challenged. I give significant weight to the opinions they express regarding the impact of your profound and complex disabilities on your offending behaviour on 30 September last year. It is accepted by the prosecution, and I am satisfied, that these considerations lead to a finding that your moral culpability for your offending is low.

31. The other reason these expert opinions are relevant to the sentence I impose is due to the conclusion I am able to reach about your prospects of rehabilitation, and therefore the need to impose a sentence that protects the community.
32. Dr Deacon expresses the view that if your complex needs are met, and you are appropriately supervised, your risk of further offending is “extremely low”. Since being bailed on 2 January, 2018 you have been subject to strict conditions of bail with the support of a multi-disciplinary team to address your mental health needs, learning needs including one-on-one Auslan tutoring, an aide to support your education, the assistance of an occupational therapist, and support for your family in managing your complex needs. You have now been assessed as eligible for a comprehensive package of supports through the National Disability Insurance Scheme (NDIS). It is unfortunate indeed that your complex needs, and the need for commensurate resources, were not identified much earlier.
33. Further, since being bailed you have complied with all conditions imposed to protect the community, including a strict regime of supervision. You have received significant support from your family, notably your father and older sister, in this regard.
34. Importantly, Ms AB, Principal at the [title removed] College reports that since your return to school your behaviour and engagement in your learning has improved significantly. Eastern Health continue to support the school in meeting your complex needs. Significantly, it is reported that your relationships with other children at school are improving, and friendships forming. In a report dated 28 February, 2018, Ms AB states that as your communication in Auslan continues to improve, it is expected your learning will also continue to improve. A support worker has been allocated through Oncall, to support you in activities outside the home, including sport and other activities.
35. I assess that your prospects of rehabilitation are very good and the risk you pose to the community is low provided you continue to receive the extensive supports, supervision and intervention established in response to the detailed and considered recommendations of the Eastern Health paediatric team of specialists. In this regard, the active support of your family will continue to be a very significant factor in the effectiveness of these interventions.
36. Two other matters are relevant in relation to the sentence I impose. The first is your plea of guilty to the offences. This is of significance because it saves the community the cost of a lengthy court hearing, and saves the many witnesses and victims the distress often associated with a court case. It is also relevant because by entering a plea of guilty you are indicating your understanding of the importance of accepting responsibility for what you have done. Secondly, I have taken into consideration the period of 95 days pre-sentence detention, which I accept was a period of time that you found very difficult due to your

profound and complex disabilities. In this regard I have given weight to Dr Deakin's assessment that you did not cope well at Parkville College, and elected to isolate yourself resulting in you remaining in your room relatively unoccupied. He expressed the view that a prolonged period on remand would have "inevitably contribute[d] to perpetual stress and distress". I have taken the hardship of your time on remand into account in sentencing you.

Relevant sentencing considerations

37. The fact you were 15 at the time of the offending means that the charges are heard and determined in the Children's Court. The sentencing considerations for children under the *Children, Youth and Families Act 2005* (Vic.) (CYFA) are very different to those that apply to adults. As a general principle the law has always recognised the importance of rehabilitation as a sentencing principle for young offenders – particularly, a young first-time offender.

38. The difference between an "adult" court and the system established for sentencing young offenders was discussed by the Court of Appeal in *Webster v the Queen* [2016] VSCA 66, where Maxwell P and Redlich JA stated at [7]:

"What is so distinctive, and so important about juvenile justice is that it requires a radically different balancing of the purposes of punishment. The punitive and retributive considerations which are appropriately applied to adults must be largely set aside."

39. The Court of Appeal referred to the principles that apply to the sentencing of children and young persons as summarised by Vincent JA in *R v Evans* [2003] VSCA 223, at [25]:

"Underlying this system is the attribution of considerable significance to the generally accepted immaturity of young people who appear before the Children's Court and the need, in the interests of the community and the young person concerned, to endeavour to divert them from engagement in anti-social conduct at that early stage of their lives. 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".
(emphasis added).

40. I have also had regard to the provisions of s362 of the CYFA in determining the sentence to impose, and in particular the need to strengthen and preserve your relationship with your family, the desirability of allowing you to continue to live at home and to continue in specialist education, supported in the community by a multi-disciplinary team of support services.

41. The sentence must also, where appropriate as here, ensure you understand you bear responsibility for what you have done, and that the sentence operates to protect the community.
42. The prosecution submits that these sentencing considerations warrant the imposition of a lengthy supervisory order, such as a youth supervision order. Defence counsel submit that non-conviction probation order is the appropriate order, having regard to the obligation under s361 of the CYFA to impose no more onerous sentence than is appropriate. In particular, it is submitted that your complex needs are now being met, particularly under the comprehensive package of supports provided through the NDIS. This submission is supported by Youth Justice.
43. In sentencing you, I have had to balance the very serious nature of the offending behaviour with the other important considerations to which I have referred. You are a young man with no prior convictions. You have strong family support. The expert opinion evidence is that your unique, profound disabilities meant that you lacked insight to your behaviour due to your disability. As a result, your moral culpability for the offending is low. Your complex needs are now being met for the first time through a range of support services, including support with learning at the [titled removed] College.
44. The difference between a youth supervision order and a probation order is that a youth supervision order is more intensive than a probation order. In balancing the seriousness of the offending with the significant matters in mitigation to which I have referred, I am satisfied that a youth supervision order is the only appropriate sentence to impose. It is important, having regard to the serious nature of the offending and the risks it posed to the community that the regime of supervision be more intensive than that offered through a probation order, consistent with the recommendation of Dr Adam Deacon.
45. The prosecution submits a youth supervision order of 18 months duration should be imposed. However, the term of a youth supervision order is governed by s387 of the CYFA, which provides:

“If the Court finds a child guilty of one or more offences, whether indictable or summary, the Court may, with or without conviction, release the child on a youth supervision order for a specified term-

(a) not exceeding 12 months; or

(b) not exceeding 18 months if the offence or one of the offences is punishable by imprisonment for a term of more than 10 years-

and not extending beyond his or her twenty-first birthday.”

46. In this case, you are being sentenced for more than one offence. The prosecution contends the reference to the maximum imprisonment term exceeding 10 years applies to the aggregate of the offences which may be imposed on you for more than one offence. However, I do not consider this construction is open on the plain language of the section, and in particular, the use of the words “the offence or one of the offences” as carrying a penalty of more than 10 years. Here, not one of the offences for which you are to be sentenced is punishable by imprisonment of more than 10 years. Accordingly, the maximum period of any youth supervision order I am able to impose is 12 months under the provisions of the CYFA.
47. In exercising the discretion whether or not to record a conviction, I accept that the considerations under s8(1) of the *Sentencing Act 1991* (Vic.) are relevant to the consideration in addition to the matters referred to in s362 of the CYFA. Your offending was serious, it placed many people in fear. You have pleaded guilty to charges that involved conduct endangering people’s lives and placing others at significant risk of serious injury. The consequences of your driving could have been catastrophic. Fortunately they were not. However, notwithstanding your absence of priors and the significance your disability played in your conduct, the serious nature of the offending warrants the imposition of a conviction.
48. I therefore sentence you, with conviction, to a 12 month youth supervision order in respect of the charges to which you pleaded guilty. In a moment I will explain to you the general conditions of the youth supervision order and what would happen if the order was breached. It is a special condition of the youth supervision order that you do not drive a motor vehicle and that you only have access to a computer or other internet connected device for activities approved by your disability support worker or your school.
49. I make the forfeiture order sought by the prosecution, noting it is not opposed on your behalf.
50. I will now proceed to explain the conditions of the youth supervision order that I have made. You should be aware that if the order is breached by any further offending or by non-compliance, you would be returned to court and re-sentenced on these offences.

Judge A Chambers
President
Children’s Court of Victoria