



# Unshackled punishment - the DPP's campaign for tougher sentences in Victoria

Dr Martine Marich, David Grace Q.C., and Saul Holt (in absentia)



# Introduction

- August 2010: the Victorian DPP's campaign for tougher sentencing
- Aggravated burglary
- Practice: 20 page outline of submissions served on practitioners in every case involving an indictable information with charges including this offence



## Aggravated burglary: s. 77 *Crimes Act 1958* (Vic)

- Entry into a building or part of building,
- With intent to steal, assault, or cause property damage, and
- Either having a weapon, or in circumstances where there is a person present in the building or part of building
- With requisite intent and knowledge
- Punishable by a maximum of 25 years' imprisonment



## Notes

- Preparatory offence, in spite of maximum penalty
- Triable summarily in certain circumstances (alleged theft is less than \$100,000), and 40% of cases are resolved summarily
- Enjoyed statutory revision in 1997: change to maximum penalty from 15 years to 25 years, and introduction of alternative actus reus element “with a person present”



## The Director's concerns

- In previous dicta in Director's appeals against sentence, the Court of Appeal has indicated that the sentence passed "*raised a serious question ... about the adequacy of sentencing practices for [the] offence [of aggravated burglary.]*"
- See *DPP v El Hajje* [2009] VSCA 160, *R v Saltalamacchia* [2010] VSCA 83, and *R v Van Hung Le* [2010] VSCA 19



- For similar dicta in other areas of law, see *DPP v CPD* (2009) 22 VR 533 (re sex pen of a child under 10), *Leeder v R* [2010] VSCA 98 (rape), *Nguyen v R* [2010] VSCA 12 (cultivate commercial quantity), *Kane v R* [2010] VSCA 21 (ICSI)



## Section 5(2) of the *Sentencing Act 1991*

- In sentencing an offender a court must have regard to-
- (a) the maximum penalty prescribed for the offence; and
- (b) current sentencing practices; and
- (c) the nature and gravity of the offence; and
- (d) the offender's culpability and degree of responsibility for the offence; ...



## *DPP v CPD* (2009) 22 VR 533

- Obiter dicta in a Director's appeal against sentence
- "But the significance of the decision in *R v AB (No 2)* is that a sentencing judge who concludes ... that current sentencing practices are not consistent with the statutory maximum for the offence in question is not constrained by those practices. Rather, the judge, while giving due regard to current practices, is obliged to sentence consistently with the maximum (subject to considerations of fairness associated with a plea of guilty ...)." per Maxwell P, Redlich JA and Robson AJA





# The empirical basis for the Director's challenge

- Sentencing Advisory Council of Victoria's Sentencing Snapshots in relation to sentencing in higher courts for the offence of aggravated burglary indicate a median sentence of two years' imprisonment
- There has been no marked increase in sentencing since the change to the maximum penalty in 1997
- Aggravated burglary is increasing in prevalence
- A global challenge to current sentencing practices is therefore being made
- Out of procedural fairness, notice should be given to an accused at first instance that the challenge is being made



## The irresistible conclusion

- If the submission is accepted, sentencing judges should be unshackled by current sentencing practices
- Sentencing Judges, instead, should adopt a range for an ordinary case of Aggravated Burglary of 5 – 10 years imprisonment.
- An accused who pleads guilty may attract the imposition of a sentence in accordance with current sentencing practices, though an accused who pleads not guilty may not



## Issues with the submission

- Director's submission was met by a 20 page response from the Public Defenders' Unit at Victoria Legal Aid
- Document is publicly available, and can form the seed document of individuated submissions in individual cases
- It is contended therein that (i) the issues are for the Court of Appeal and not for sentencing Judges, and (ii) the argument is fundamentally flawed



## Criticism of the Director's argument

- Increase in prevalence of aggravated burglary is nonsense
- Exaggeration of role of Prosecutor on sentencing
- Risk of traversing traditional role of preventing the court from falling into appellable error by ignoring statutory mandate
- Consider the proper context of the dictum in *AB (No 2)*, which related to sentencing for the worst kind of manslaughter, thereby setting up conflict between the maximum penalty and current sentencing practices; not intended as general call to action where there is a statistical differential between median and maximum



# Consistency

- The first stated purpose of the *Sentencing Act*
- Piecemeal acceptance of the Director's argument promotes inconsistent punishment
- If the Director's argument is accepted in all cases, we see a dramatic multiplication of sentences imposed in past and present cases; cf. *Poyner v The Queen* (1986) 60 ALJR 616 the High Court confirmed that, while not a binding principle, sentences should be increased only by an upward trend and not by abrupt leaps.



## Further observations

- Court of Appeal in *R v Winch* [2010] VSCA 141 held that offender enjoys benefit of past sentencing practices where they have changed
- It cannot be said that a sentence out of proportion with current sentencing practices at the time of commission of the offence has proper deterrent consequences
- The underlying criticism – many courts have erred on many past occasions
- Ignores statutory capacity of Court of Appeal to pass guideline sentencing judgments



# Resolution

- To date, all County Court judges have resisted the temptation to accede to the Director's submission (which was, only once, made personally)
- Note the acceptance of the argument in once large commercial quantity drugs case, separate to this initiative
- Victorian Director has now resigned



## Hot off the press

- Sentencing Advisory Council, *Aggravated Burglary: Current Sentencing Practices* (June 2011)
- “Overcoming the limitations of snapshots”
- Qualitative analysis of 210 cases resolved in the higher courts involving agg burg between July 2008 and June 2009





## Ibid, x

Common features of aggravated burglaries sentenced in the higher courts:

- The offender was usually a person already known to the victim (71.8% of charges) rather than a stranger.
- The offence almost always occurred in residential premises (90.4%).
- The offender almost always committed at least one other offence (96.6%) – frequently this was an offence of causing injury or criminal damage.
- More than half of the offences involved at least one co-offender (59.0%).
- The offender was usually armed with a weapon (61.8%).



## Qualitative factors; ibid, 28-29

- Six distinct forms of aggravated burglary, five of which had sufficient numbers to perform meaningful analysis and each of which had a distinct sentencing range
- Intimate relationship (15.7% of cases analysed)
- Sexual offence related (5.1%)
- Confrontational (57.3%)
- Robbery related (11.8%)
- Theft related (3.4%)
- Spontaneous encounters (1.7% or 3 cases)



# Qualitative categorisation influences sentencing

- The Sentencing Advisory Council concluded that robbery and theft-related aggravated burglaries, and sexual offence-related aggravated burglaries attracted higher sentences than other forms
- In addition to empirical and statistical analyses, a review of relevant cases was undertaken
- This is clearly a much more sophisticated analysis than in the SAC's previous snapshots
- Heralds a clearer debate as to methodology in aggravated burglary sentencing patterns



## Conclusion and comments

- Note from Sentencing Advisory Council's initial Snapshot, that the offence is often charged as a matrix of overall offending
- Change of government
- Turn to the right
- Mandatory minimum sentences