

IN THE COUNTY COURT OF VICTORIA

Revised
Not Restricted
Suitable for Publication

AT MELBOURNE
CRIMINAL DIVISION

CR-19-00171
Indictment No: J12930724

DIRECTOR OF PUBLIC PROSECUTIONS

v

PAUL JEFFREY WARDLE

JUDGE: HIS HONOUR JUDGE TINNEY

WHERE HELD: Melbourne

DATE OF HEARING: 30 May 2019

DATE OF SENTENCE: 6 June 2019

CASE MAY BE CITED AS: DPP v Wardle

MEDIUM NEUTRAL CITATION: [2019] VCC 855

REASONS FOR SENTENCE

Subject: 5 firearms offences including possess firearm whilst prohibited and shorten firearm.
Related summary offences: assault with weapon, fail to appear x 2, large delay over 5 years.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Crown	Ms N. Burnett	Office of Public Prosecutions
For the Accused	Mr H. Rattray	James Dowsley & Associates

HIS HONOUR:

- 1 Paul Jeffrey Wardle, last week you pleaded guilty before me in relation to five firearms offences that had been laid on the indictment filed that day, as well as three related summary matters, being one charge of assault with a weapon and two charges of failing to appear in accordance with bail. The maximum penalties were correctly set out in the prosecution summary. I will not now repeat them.
- 2 You were born in February 1980. You are 39 years of age now. You were 34 years of age at the time of the offending back in February of 2014. You have admitted a lengthy enough criminal history.
- 3 The matter was opened to me last Thursday 30 May by the prosecutor, Ms Burnett, in accordance with a written opening that was dated 10 May of this year. That document was tendered on the plea and was marked as Exhibit A. There are also some photographs and they were marked as Exhibit C. Your counsel informed me that this was an agreed statement and for that reason,
I see little need to set out the full factual basis of sentencing in my reasons. That is because I will sentence in accordance with those agreed facts.
- 4 I should still say something. Very briefly stated, in 2014, you were prohibited from having any dealings with firearms at all, courtesy of the two terms of imprisonment imposed upon you in 2011. You were a prohibited person for five years. In addition, of course, you had no firearms licence at all. The summary discloses the pretty extraordinary assault with a weapon committed by you upon Sarah Tonks on 8 February of 2014 down on the Mornington Peninsula. You were a passenger in a car travelling on Point Nepean Road. She was a passenger in another car driven by her partner and the assault occurred at about 5.45 in the afternoon. There had been some interaction

between the vehicles, their car moving ahead of the car you were in, the car you were in pulling alongside, one lane coming to an end and that other car that she was a passenger in, then braking to allow the car you were in to pass. In short, nothing to get too excited about at all. Nothing to give rise to any road rage incident at all, much less the incident that than unfolded.

5 Firstly, you the passenger, leaning out the window and then abusing the occupants of the other car. Ms Tonks shook her head at that display and gave you the finger, as it were. Total madness then for you to be dropping back into the car and then to emerge wielding a sawn-off shotgun, doing that in broad daylight and then pointing it out the window at another road user for some seconds whilst yelling at them. Over what? Over nothing. These acts were committed by someone who has previously received a prison term for assault with a weapon.

6 You were not even the driver and the other vehicle had done nothing wrong at all. It was a scary, nasty and really quite incredible assault. So much then for the assault with a weapon, though I should add that when that firearm was seized, it was not loaded and I cannot conclude that it was loaded at the time of the assault. That matters not one jot actually, as the assault is founded on the presentation of that weapon and the quite understandable fear created by that act.

7 That matter was swiftly reported to the police. The car you were in was intercepted quite some hours later at about 9.20 in the evening. It was searched and that sawn-down shotgun was seized, as well as some ammunition suitable for that weapon. Hence the prohibited person charge and the unsafe storage charge on the indictment. You were interviewed by the police and you told a pack of lies, as you know. That is not an aggravating circumstance. Had you made admissions, it would be something to take into account in a mitigatory sense. That is not what happened of course and in a way, you probably now regret not telling the police the truth, for had you done

so, this matter certainly would have been finalised many years ago, but of course, that is not what happened. Instead, you very strongly denied any knowledge of the weapon or involvement in or presence at that earlier assault. You pointed to an alibi and claimed that this was all some matter of set up. A DNA sample was obtained and you were released uncharged.

8 A couple of days later on 10 February of 2014, your house was searched in Somerville and the cut-off barrel of a shotgun was located, hence Charge 1. However, the explanation for that search was not a follow-up on the events of the 8 February, but rather a police pursuit in relation to a stolen car and that led the police back to your house. On that day, not only did they find the cut-off barrel and the stock relating to the sawn-off weapon I have already described, they also found a .22 calibre long-arm rifle that had been discarded from the vehicle by you. That charge of prohibited person possessing that firearm was dealt with at the Magistrates Court right back in January of 2015. It follows then, that having lost the sawn-off weapon by way of the police seizure on 8 February 2014, on 10 February, you were in possession of yet another firearm and ammunition for that weapon. The serial number of the sawn-down weapon had been erased, hence Charges 2 and 5. You failed to appear on two occasions last year and hence the final two related summary offences before me.

9 There has been a very complicated procedural history, as set out in the chronology and as supplemented by oral submissions made by your counsel and some documents placed before me, including the super case relating to what, at the time of the plea, were outstanding matters awaiting hearing in the Magistrates' Court. Those matters in fact have been dealt with the day after I last saw you. I am not going to set out the full details of the chronology, but I mention some key points, as it all becomes important to my task.

10 As I have said, you were arrested on 8 February 2014 in relation to the assault with the weapon and the sawn-off shotgun. You were interviewed and

you were released uncharged. You were told at the end of the interview that the matter would be further investigated and that you **may** receive a summons. No doubt the matter was further investigated, as it had to be, given that you had so strongly denied any role and spelt out directly that you would take it to a contested hearing, that it was all rubbish and that you had nothing to do with it. The police had taken your DNA. No doubt that had to be analysed. There was then a delay in your being charged with these offences. The informant also, as I understand it, had some health issues and went on sick leave for some time.

11 On a consolidated plea dealt with at the Magistrates Court at Frankston on 6 January of 2015, you received 150 days' imprisonment, of which you had served 133 days by way of pre-sentence detention. That consolidation scooped up a large variety of charges, some a good deal older, from February of 2013, some from after February of 2014 and some even arising from the 10 February 2014 arrest that I have described, including the charge of prohibited person in possession of the .22 rifle charge. Obviously, the matters that I am now dealing with were not dealt with, as you had not at that stage even been charged.

12 You were then extradited back to prison in Queensland at the expiry of that 150 day sentence and that was to serve the unexpired portion of the two year sentence imposed on 26 August of 2013 at the Hervey Bay District Court on a single charge of wounding. I interpose by way of backtracking a little bit further, you had been paroled on 26 August of 2013, as there was significant pre-sentence detention in relation to that sentence, but you skipped away in breach of your parole to Victoria. It follows then that the matters that I am dealing with occurred in a period where you had been conditionally released and should not even have been in this State. You were reclaimed to serve out the balance of that two year sentence and that balance stood at around 15 months.

- 13 As to the matters that I am dealing with, charges were filed and a warrant issued for these matters in February of 2015. Of course, by then you were up in Queensland. You completed your Queensland sentence in about April of 2016, but you were not arrested on the warrant until November of 2017.
- 14 Thereafter unwisely, you failed to appear on those two occasions last year and ultimately went into custody on 8 August of 2018, where you have since remained. There were then some mentions in the court below and also a summary jurisdiction application which failed. Correctly so, if I may say so. Then some more mentions amidst some level of confusion as to the extent of the Magistrate's order refusing summary jurisdiction. In fact, some matters were then hived off for a summary consolidated plea which was, as I say, pending at the time of the plea, but was, for whatever reason, dealt with at the Magistrates' Court on 31 May, the day after I last saw you. The matters now before me progressed to this Court by way of straight hand-up brief. You were committed in January of 2019 and here we are now in May of 2019, dealing with offences which occurred in early-2014. Plainly my sentencing task is made far more difficult, owing to the passage of time and all that has occurred since in your life.
- 15 Having set out all those stages of the proceeding and this tortured chronology, let me say that I will treat your plea as one made at the earliest opportunity.
- 16 I have only provided a pretty brief summary of the summary. I will sentence, of course, in accordance with the full agreed factual statement marked as Exhibit A before me.

Victim Impact

- 17 There is one victim impact statement from the victim of the assault on the road. It was read aloud by the prosecutor. This was clearly a frightening incident indeed. You intended to frighten, you intended to intimidate and

scare by producing such a weapon and over nothing. That is what the victim finds quite amazing. This is an event occurring just totally out of the blue, something quite shocking, something appalling, occurring as it did with people everywhere on a very busy road on a summer's late-afternoon. I have no doubt that this crime has impacted upon her. She describes after all the impact all these years later. She says it was shocking, upsetting and unnerving and none of that is in the least way surprising. So I take into account the impact of your crime.

In Mitigation

18 Your counsel, Mr Rattray, had failed to prepare any written submissions on the plea. Nor was there any chronology. Indeed nothing had been filed and frankly there was no good reason for the failure to comply with the Practice Direction. Undoubtedly he got the brief late, it happens from time to time, but he got it sometime on Tuesday before a Thursday plea listing, as other counsel was unavailable, but not so late as to provide really any reasonable excuse for not providing an outline, or for that matter, the expert report, which was dated 31 October of last year. Failure to comply with the Practice Direction has become an all too familiar event, but it has nothing to do with you. Instead, I was expected to grapple with what was undoubtedly a complex chronology placed before me, with an assortment of documents placed before me in dribs and drabs. In any event, I have put that behind me. I have spent a large amount of time, both on the day and since, coming to grips with the complicated history here and I have.

19 Mr Rattray tendered a report from Ms Ferrari, but abandoned any reliance on most of the report, including the conclusions and opinions and that was owing to his expressed view that there was no sound basis for her to have reached the various opinions that she had reached. He took me to what he argued was your disadvantaged and dysfunctional background, which he argued

could command at least some reduction in culpability here. He informed me of your personal history, including what has happened since the offending.

20 He made submissions as to the objective seriousness of the offending and cautioned me against the risk of double punishment that he said existed here in my sentencing task.

21 In addition he relied upon;

- Your early guilty plea;
- The presence of at least some remorse;
- Delay and the impact of that delay, including consideration of an earlier sentence served by you in January of 2015 and now the sentence imposed on 31 May of this year;
- He argued that you had some prospects of rehabilitation, but he accepted that those prospects were guarded.

22 Mr Rattray conceded the inevitability of a prison term and one extending beyond your pre-sentence detention, but raised the possibility of a combination-type disposition, with your ultimate release onto a community corrections order. Failing that, a head sentence with a non-parole period. Either way, he argued that the delay, was a significant factor in this case.

Prosecution

23 Ms Burnett argued on behalf of the Director of Public Prosecutions that a combination sentence was not open, owing to the seriousness of the offending and the weight to be given to general deterrence and community protection. That was so despite the delay. You had relevant history, she argued, had only guarded prospects of rehabilitation, had breached a variety

of court orders in the past and had a long history of drug use and highly relevant past offending. Remorse was questionable, she argued and the delay could not be laid at the feet of the police. You were responsible for some of it. Some of it had, she said, just arisen from the circumstances, with no one to blame. As to the offending, she argued that it was very serious.

Background

24 I turn to your background and your background was set out in the report of Ms Ferrari, as well as in the oral submissions made by your counsel. I am not going to set it all out in these, my reasons. There really is no point doing that. I accept that family and other background. Very briefly, you are 39 years of age, born in February 1980. It was hardly an ideal background, with much exposure to violence, criminality and drugs and from a very young age. You really did not get much by way of valuable guidance from your father. Far from it. There were, in fact, some dreadful role models in your early developmental life. Your parents separated, but you spent a good deal of time with your father. Your mother did her best and you have a good relationship with her.

25 It is plain that school was not your forte. I am told, in fact, that you are illiterate, but that you went on to obtain an apprenticeship, which you completed. I am not quite sure how those two matters, illiteracy and completing an apprenticeship as a painter and decorator are compatible, but that is by the by. There may have been some mechanism whereby you could do the trade or study component. You have worked in that trade for most of your working life and holding down work seemingly has not been the issue. Staying out of trouble has.

26 You have four children from two relationships and seemingly now are perhaps beginning to recognise the negative role model that you have been providing to them. Drugs and alcohol have been massively problematic for decades.

Perhaps you have started to understand how seriously they impact upon you and your future prospects, but you are a slow learner indeed in that respect, given the amount of times that you have been before the courts.

27 Now before moving on to your criminal history, let me say that I accept the submission of Mr Rattray as to the manner in which regard can be had to your disadvantaged and dysfunctional early life. It is true, it is many years ago, but backgrounds such as that, they are with you for life. They cannot be so easily shrugged off and they obviously leave a mark. (see the cases of *Bugmy* [2013] HC 37 and *Marrah* [2014] VSCA 119).

28 You did not choose that life as a child. I mean, who would? You did not choose your father or have any choice over the negative influences in your early life. None of that provides any excuse for your conduct, I want to make that plain, but I have no doubt that it is open to me to take into account, as far as I am able to, your disadvantaged background and factor in at least some reduction in your culpability. However, the significance of all this decreases in relation to a repeat offender, especially one engaged in violence, and other sentencing considerations assume real significance, for instance, community protection and specific deterrence. They loom large here, but I do still find some reduction in your culpability.

29 As to your criminal history, well you have a sizeable enough criminal history and it is of real significance to my task. There is no issue about that. I want you to understand that I am not sentencing you again for those past crimes. You have received sentences and you do not fall to be re-sentenced again by me for that conduct. However I am entitled to look at your history when I come to make judgements as to you future risk of re-offence, your prospects of rehabilitation and the need to deter you and protect the community from you. Courts have tried to deter you in the past, with pretty limited success. Specific deterrence and community protection must be given real weight in my task.

- 30 I see no useful purpose conducting a full survey of your criminal history and going through it line by line. It speaks for itself. You have committed a number of violent crimes including assaults, an assault with a weapon, a wounding, recklessly causing injury, intentionally causing injury and even recklessly causing serious injury. You have committed threats to kill. You have also engaged in conduct endangering serious injury. You also have a charge of possessing a handgun, being a pen pistol.
- 31 You have breached a variety of court orders which, no doubt, were designed to foster your rehabilitation and avoid exposure to prison. You are no stranger to prison, having served a number of sentences in the past. You offended in the days leading in to the November 7, 2017 warrant execution with a variety of driving matters committed on 4 November 2017. You failed to appear last year and even when re-bailed, you offended again on the 19 March 2018 with another unlicensed driving offence. You then failed to appear again on 22 March 2018 and offended on two occasions in the lead into the warrant being executed on 8 August. There was an unlicensed driving on 7 July of 2018 and on 8 August 2018, you were found to be handling stolen goods and in possession of a drug of dependence.
- 32 As I have said, at the time of the plea, those various matters were proceeding by way of a consolidated plea in the Magistrates' Court that was listed the day after, with the expectation that it would be adjourned. Mr Rattray placed the super case before me, which is Exhibit 1 on the plea and told me that the three relevant briefs of Holtzinger, Passmore and Williams were all going ahead as guilty pleas. Well that document shows the charges, it shows the commission dates and as I say, they were in fact dealt with by way of a consolidated plea on 31 May, for which you received a four month term of imprisonment.
- 33 The chronology that I have dealt with, if I go back earlier in these reasons, demonstrates your possession of a .22 long-arm rifle within a day or two of the

seizure of the sawn-off shotgun. As I have said already, you had breached your parole and left Queensland.

34 Finally a number of the summaries of some of the past matters and indeed one of the pending matters were placed before me and marked as Exhibit E. This was all done by agreement. So I received those documents without objection. Only having received them could I know what was in them. I noted and then raised with the parties the fact that there were some references in the Passmore summary to some threatening conduct in August of 2018 and also to the carriage of a firearm in July 2018 and that I would have no regard to those matters. And I will not. The relevant summary is that portion dealing with the property and the drugs, as of course, they are the charges you have admitted and now for that matter, pleaded guilty to.

35 You have been in custody now for over 300 days since your arrest in August of last year. You are in protection. Of course, since I last saw you, that consolidated plea went ahead. You received that four months' imprisonment, so your pre-sentence detention for the matter that I am dealing with cuts off from that point. The strict section 18, or pre-sentence detention figure, is 296 day.

36 Let me turn then to some of the other matters raised in mitigation.

Guilty plea

37 You have pleaded guilty. You have done that at the earliest opportunity. The delay, as set out in the lengthy chronology, does not alter that fact at all. After all, you could only plead once you were actually charged. I take into account your early guilty plea then. It is important. You have facilitated the course of justice. You have taken responsibility for your crimes. The community has been saved the time, cost and effort associated with a committal and a trial. Witnesses have been spared the experience of giving evidence and that can sometimes be a stressful event, especially for instance, for the primary victim

of the assault with a weapon charge. She has been spared that experience. There is a utilitarian benefit in pleading guilty. I take into account your early guilty plea and I will pass a lesser sentence owing to those factors.

Remorse

38 Your counsel argues that you have a level of remorse. He raised references to remorse spoken of in Ms Ferrari's report. That report was entirely unsatisfactory for a number of reasons. I will have a bit more to say about that in one moment. For instance, Ms Ferrari does not explain the factual basis of her opinion as to the existence of remorse and she should. Her opinion then is of virtually no weight to me. You were not too remorseful on the day of the interview, that much is clear, quite the opposite, but of course that was many years ago and you were then trying to avoid liability for these crimes. In contrast, once charged, you have pleaded guilty at the earliest opportunity. A guilty plea is usually, though not always, indicative of at least some remorse. I am prepared to find that your guilty plea is indicative of some remorse in this case and I take that into account in mitigation.

Delay

39 I turn now then to the delay. There has been a significant delay here. Most recently you failed to appear on two occasions last year and you were at large for some months until your arrest in August of last year. But for that hiccup, no doubt this matter would have been finalised last year. Once the warrant was executed, there was then an unsuccessful endeavour to keep the matter in the court below. The Magistrate correctly refused that application. The delay in the Magistrates' Court from that point, really was more a result of uncertainties, in terms of the scope, or the effect of the order refusing summary jurisdiction.

40 Now I am not going to rehash the whole chronology, I would be here for the

next hour. Earlier on, the delay was in part of course caused by your movements interstate. You had no control over that. Nor did the police for that matter. You were then imprisoned interstate. You were released in April of 2016 and you returned to this State. Your counsel suggests that you thought you had a clean slate. You told Ms Ferrari that you believed these matters had been dealt with back in the January 2015 consolidation. I do not accept that for one moment. You could not have had any doubt about that. You had not even been charged and you have had more than enough experience with the police and with the courts over your life to know that fact. You had heard no summary of that matter read out at court, as you had not been charged. You had never pleaded guilty to these matters or heard a Magistrate sentence you for them.

41 I reject your account of believing they had been finalised. However, I do not reject your view that you thought you had a clean slate. That is a different proposition altogether. You were told at the interview in February of 2014 that the matter would be further investigated and that you **may** receive a summons. And you did not. You more likely believed, or at least hoped, that the matter either had gone no further, or had somehow fallen between the cracks.

42 I certainly do not find that you have come back to Victoria with any knowledge at all of the pending charges or the existence of a warrant. I do not find that you were then engaged in any ducking or weaving to avoid the execution of a warrant. It probably did come as a very unpleasant surprise to be arrested, as you were, on 7 November on charges you thought had probably never been laid. I could spend, I am sure, the next half an hour talking of the matters that came into play in causing the delay. The fact is, I am met by the delay and it is sizeable. That is what is important to my task, not how it was brought about or who is at fault.

43 Now your counsel was explicit in his submissions that he was not levelling

blame at the police or the prosecution. There was a period where you were not charged, but of course you had made very strong denials, there was an identification which was less than positive and the DNA presumably had to be analysed. We then had the informant going off on sick leave and so you were not charged until a point after you had returned up to Queensland. There is no question of the police or the prosecution thereafter conducting themselves in any leisurely fashion. The delay is not inordinate in that sense. It is simply the fact that these various matters came together to produce this delay. For a variety of reasons, you were not charged swiftly. By the time you were, you were out of the State. By the time you were released from the prison, the police did not know where you were. Then the warrant was executed and by then it was November of 2017 and many years had passed. You have, at least in part, of course, dragged the process out with the two failures to appear and then being at large for some months last year.

44 The process was also dragged out to an extent by the summary jurisdiction application and confusion surrounding that issue. Well none of that lies at your feet or the feet of the prosecution actually. It was, of course, your right to make that application.

45 Now, Mr Rattray argues that delay is important here. My view is that there is little to be gained trying to apportion blame. It is just not in any way a profitable exercise and the authorities suggest that it should not be engaged in. I have a significant gap or delay between offence and sentence. That is just a fact and no amount of consideration as to who is to blame alters that fact one iota.

46 Delay is usually important for two reasons. Firstly the extent to which an offender has re-ordered their life and achieved rehabilitation during the delay, and secondly, the anxiety and uncertainty and the like arising from the delay operating almost as a form of additional punishment. On that second point, there is no anxiety or uncertainty in the lead into the warrant, as you thought

you had a clean slate. Since the warrant was executed, of course, your own conduct has contributed to a degree to the delay.

47 Going back though, to the first point, namely your rehabilitation in the period of the delay, you really have done yourself no particular favours. It is true that your offending is not at the same level as the offences that I am dealing with, but still you have offended and on a variety of occasions. So on 4 November 2017, three days before your arrest, then you offended by failing to appear on 23 January of 2018. You offended on 19 March once re-bailed. You offended by failing to appear on 22 March. You then offended on 7 July 2018 and then on 8 August of 2018. The super case has the details of the charges and the dates and those matters were dealt with, as I said the other day, by Magistrate Bazzani and she imposed four month term of imprisonment and some fines and some licence orders.

48 I take into account the delay here. Undoubtedly the execution of the warrant and then the emergence of these charges all those years later, it must have created some uncertainty and anxiety in your life from that point. So this matter has then hung over your head. I have regard to that.

49 Those two limbs of delay that I have dealt with, they are not of great value to you, given your continued misconduct in the interim and the lack of anxiety for all those years, as the charges were not, to your knowledge, even waiting in the wings.

50 It seems to me, having looked at the chronology more carefully since leaving the Bench on the day of the plea, that the greater issue for me and I think I said as much on the day, is just the fact of this lengthy delay. It exists. The various factors bringing it about, they combined and they leave you now to be dealt with by me in 2019 for conduct occurring in early-2014. That is just the fact of my sentencing predicament and your predicament.

51 Of course you would be in a stronger position if you had remained offence-

free. Mr Rattray said as much. Well you have not. However, I am dealing with offences that are quite stale. That is just a fact and sentencing for a stale crime long after the commission date, calls for a considerable measure of flexibility of approach. The passage of time between offence and sentence, when lengthy, often enough leads to consideration of fairness to the prisoner playing a dominant or greater role in the determination of what should be done in the manner of sentence. See the case of *Todd* [1992] 2 NSWLR 517.

52 As I said in the course of the plea, my task is complicated by the delay. The sentencing task would be far easier had the offences occurred, for instance, last year. Well that is not the position. I am dealing you in 2019 for offences committed in 2014, with much water under the bridge since, including your having spent 150 days in custody, courtesy of the 2015 consolidation, the balance of the 15 months reclaimed up in Queensland and then the 296 days by way of strict pre-sentence detention on these matters since the August 2018 warrant execution. And of course I have now the four months imposed more recently. Delay is important here and I must adequately recognise it, but I still must pass appropriate sentences.

Ms Ferrari

53 I turn then to Ms Ferrari's report and perhaps the less said about her report, the better. It is relied upon merely as providing your background. Your counsel abandoned any reliance on the report from paragraph 64 onwards and said that there was no evidentiary basis for the various conclusions and opinions in that report. I take into account the report in the way your counsel submitted I should. But before leaving her report, there is one final thing to say. I have said some pretty strong things in this case and other cases about the disturbing new trend of psychologists who use video links to assess clients in custody. It is frankly incredible that any of them think it is appropriate. Getting in the same room as the client surely is the bare minimum we as judges should be expecting from psychologists, as inconvenient and time

consuming as that is. These are actually meant to be serious reports and we should, as judges, be entitled to expect some level of rigour and adherence to at least some standards.

54 I have had other experts, such as Mr Ball, but not just him, spell out in evidence that a video link assessment is not a reliable or valid method for a forensic psychological report. That is hardly surprising. As far as I am concerned, this new trend must stop. At least in the past though, experts have identified when they have used a video link. This report did nothing of the kind and a fair reading of it would suggest that an in-person assessment took place at prison, commenting as it does upon the punctuality of your attendance and your appearance.

55 Instead, as a result of a question that I asked, we learn that Ms Ferrari was using a video link. It represents a new low, as far as I am concerned and I am seriously contemplating reporting her conduct to her professional body. That, of course, has nothing to do with you. It is not your fault that she behaved in this way, nor Mr Rattray's, nor even your solicitors, so I take into account the report in the way submitted by counsel, but it really is only relied upon as demonstrating your background and as commenting on remorse.

Rehabilitation

56 As to your prospects of rehabilitation, your counsel submitted that you had some prospects. He conceded that those prospects were guarded. I am not going to traverse all the matters which would explain why he pitched your prospects at that relatively low level. The fact is, his submission was sensible. What is the point in making an extravagant submission, when the facts do not support it? So we have your criminal history, we have a lack of response to some court orders, and a decades long battle with drugs, together with continued offending, even whilst awaiting finalisation of this matter. It hardly

adds up to an optimistic prediction as to your future prospects.

57 Against that though, you have a trade and finding work has not been the problem. Staying out of trouble, the courts and prison has been. Your age and criminal history and long-term struggles with drugs, gives me really no great cause for optimism. You have spent already a significant period in custody, 296 days on these matters and you have been in protection and are not enjoying that experience. Of course I take that into account.

58 You are reflecting, I am told, on your past life and the life ahead and the hope of playing a meaningful role in your children's lives. Five years have passed since the offending and there will be, no doubt, the deterrent effect of the sentence I will soon pronounce. I believe that you have at least some prospects of rehabilitation. I cannot rate them higher than that, owing to the factors that I have mentioned, but maybe, just maybe you are at an age where you may actually change. It is certainly not too late and I certainly will not write you off, but at this point, I can be only really very guarded as to your prospects into the future.

The Offences

59 I turn then to the offences. I must pay regard to the nature and gravity of the offences before the court. Not even a person with a firearm licence could possess the weapon you possessed. You had no licence. Indeed you were prohibited. You also had a past prior appearance relating to a pen pistol. The sawn-off shotgun has no lawful purpose. You had it. You shortened it. You stored it and ammunition insecurely. You defaced and possessed the weapon with no serial number. You were prohibited from possessing any firearm at all.

60 Your offending occurred back in 2014 but was as serious then as it would be today. Guns in the hands of the wrong people has always been of real

concern in these courts. Now there have been many legislative changes over the years, including alterations of the offence definitions and the penalties, including reductions of penalties in some cases. So, one has to be careful looking at other cases. But the principles dealing with prohibited persons possessing firearms really have not altered. Your counsel concedes the seriousness of the offending, but argues it falls, as he put it, in the mid-level. Cases of *Best* [2015] VSCA 151, as well as the cases of *Powell* [2015] VSCA 93 and *Simpson* [2015] VSCA 210 refer to the earlier case of *Berichon*, another decision of the Court of Appeal. That case, *Berichon*, has some references to the sentences available for the higher category or level of offending.

61 By mentioning *Berichon*, by the way, I am not suggesting that your criminal history is as serious as his. It plainly is not. But these various cases that I have mentioned describe the two broad categories of offending, as well as sentencing practices and range for each band. The first being the least serious where it is not open to conclude that the possession was associated with some ongoing criminal purpose and the more serious second category where the evidence enables that conclusion of possession for a criminal activity or specific criminal purpose, for example, in the context of criminal activity to provide security, or as a means of enforcement. Your counsel was never suggesting that you fell into the less serious category and plainly you do not.

62 The prohibited person charge can cover a multitude of factual settings. A person could have a non-functional firearm without any ammunition, one obtained years earlier out of curiosity or interest, but left for years undisturbed down the back of a garden shed with no movement of the weapon or desire to move it or touch it at all, but a prohibition arising as a result of a court outcome. Conversely, a person could be perched outside a bank almost ready to press a firearm into use in a serious criminal offence and there is

virtually everything between these two extremes.

63 This firearm you possessed was a sinister one. There is no question about that. It was a sawn-off shotgun. A weapon such as that has nothing but sinister purposes. Your counsel concedes it was a functioning weapon. You admit to shortening it, hence Charge 1. That act is serious enough in its own right, but that is a separate charge and not a matter aggravating the prohibited person in possession charge.

64 You had cartridges for that weapon.

65 I have to be astute to avoid double punishment here. Now you used it in the assault on Ms Tonkin. You are not charged that as a prohibited person, you used a firearm. So the assault is a quite separate offence. Assault with a weapon. The possession charge relates to the later possession by you of the sawn-down weapon in the car. I cannot use the assault with the weapon to elevate the seriousness of the possession charge, or somehow flavour the features of the possession to elevate it into the second broad category. So the actions of the assault cannot be used to aggravate the prohibited person charge.

66 However entirely independent of the assault, the facts of this case fall very comfortably into the higher category referred to in the cases to which I have referred. In fact, as I have said, it is a bit hard to imagine a case of the possession of such a functioning cut-down weapon with associated ammunition in a car by a prohibited person which does not fall into the higher category. Your counsel told me that you were, at the time, a regular user of ice, that you moved in a criminal milieu and that you associated with some very heavy people and as result, had armed yourself. That itself, as far as I am concerned, would place the case into the second category, involving as it does, an aspect of criminal activity and issues of security. This offence is a very long way removed from the low order examples of the offending that are

referred to in those cases that I have mentioned and the low order offending has been dealt with seriously enough, as those cases demonstrate.

67 Now there is a strong connection between the various firearms charges on the indictment, even though they are separate charges with separate elements and even separate timings. Again I must avoid double punishment. You had the weapon. You shortened it. That was serious conduct in its own right. You defaced it. Again serious conduct in its own right. You possessed the defaced weapon. You were a prohibited person in the car when you possessed it and the weapon and the ammunition were not safely secured. So there are these charges, but all of them focussing on that weapon in some respect. Some definitely demand a level of cumulation. Some, I believe, actually merit total concurrency, given the connections.

68 The assault with a weapon charge is a serious example of that offence. There was no reason at all to assault. It was a frightening weapon employed in a startling assault in a public place by a man who had previously been sentenced for just such an offence, that is, assault with a weapon.

Purposes

69 I have to consider a number of purposes of sentencing. I do pay regard to your prospects of rehabilitation. Those prospects are not strong here. There are other sentencing purposes which I also must give weight to. I am required to punish you justly and proportionately. Punishment is an important sentencing purpose. So too is denunciation of your conduct.

70 I must pay due weight to deterrence, both general and specific. There is the need for this court to seek to deter you and others from offending in the future. Specific deterrence is important here. Courts have tried to deter you. I will try again. Community protection is also important.

71 General deterrence is a significant sentencing purpose. We are sick of guns

and guns in the wrong hands. It is a serious crime indeed to possess a weapon such as the one you did whilst being prohibited. It serious as a crime to shorten a weapon. It is a serious crime to deface it and to remove the serial number. The courts must convey the message through the sentences imposed that stern sentences will be imposed on those who choose to commit crimes such as yours.

72 I must have regard to the maximum penalties in play, as well as the impact of your crimes. The assault, as I say had real impact here.

73 I do pay regard to current sentencing practices. It is not a single controlling factor.

74 I have looked at the relevant portions of the SACStat data for the prohibited person charge, as well as the various cases that I have referred to. But other cases are not precedents and statistics always have obvious and inherent limitations.

75 I have taken into account all the submissions made by both your counsel and by the prosecution counsel.

76 Plainly I have only one option here and that is to send you to prison. The question for me is, how long? Your counsel concedes that further prison is inevitable, but argued that I can impose a combination sentence with your ultimate release onto a community corrections order.

77 Prison is always a disposition of last resort. I do not believe it is open to me in the sound exercise of my discretion in this case to release you on a combination-type order. This was serious offending by a man with relevant prior criminal history. In terms of the assault, you were not some silly teenager letting off steam in some immature manner, you were a fully grown adult. One who has had a variety of serious encounters in the criminal justice system. You chose to assault the other motorist in the way that you did. You

chose to ignore the prohibition and possess the sawn-down weapon as you did. General and specific deterrence are powerful purposes of sentencing here. So too, community protection, denunciation and punishment. That is so despite the delay and all that has happened since. Rehabilitation is not unimportant, but your prospects are not strong and I believe it is the sort of case where rehabilitation must surrender some ground to these other purposes. I do not believe that a combination-type disposition would give adequate weight to those purposes.

78 I will provide for the possibility of your early release by fixing a non-parole period. I proceed on the understanding that you will serve every day of the head sentence that I will soon pronounce. That is because I am not able to take into account the possibility of your release on parole. The Adult Parole Board will make that decision as to whether you can be released. You can apply and they will then consider an application and either grant it or not. It has nothing at all to do with me.

Totality

79 I must consider whether the effect of the sentences is just and appropriate and commensurate with your overall criminality. I have to avoid double punishment here, as I have said. Totality is an important consideration. It is true that you have served 150 days by way of the sentence imposed on 6 January 2015 and that included in that consolidation was the prohibited person charge arising from the arrest on 10 February relating to the .22 rifle.

80 Mr Rattray suggested I could have regard to that sentence in the application of the totality principle. He seemed to be suggesting that if charged with the current matters at that same time, they all could have been dealt with then. I do not accept that at all actually, given the nature of the sawn-off shotgun. It strikes me as highly unlikely that any Magistrate could sensibly have conferred summary jurisdiction here. Who knows? Maybe it is more likely

that the other prohibited person charge may have travelled north to this court. The fact is, had a Magistrate conferred summary jurisdiction, plainly enough the sentence would have been far greater than that which was imposed. At least though it might have brought a swift end. That is not what happened and there is really little point speculating about what could have happened in that setting. What I have to do is to pass appropriate sentences now.

81 I do not ignore the 150 days that you have served. I do not say it is entirely irrelevant to my task, as it does relate to offending, some of which occurred in the same time frame and earlier for that matter, so I do pay some regard to it in a general way. However, it has to be accepted, it was a consolidation of a large number of separate matters, some preceding and some post-dating the offence date of the matters that I am dealing with. I have to pass an appropriate sentence for these crimes and what happened on 6 January 2015 says nothing as to the sentence required for these matters. The fact is though, you have spent that 150 days and that has, it seems to me, more relevance to my task than the 15 months served in Queensland.

82 I do not ignore any of the matters arising since, as they are all periods of time that you, the person I am sentencing, has spent in custody and I include, of course, the receipt of the four month term imposed by the Magistrate. As I say, bewilderingly, she took the view that it was appropriate to get in ahead of this court, when it was surely apparent that the sentence in this court would dwarf the sentence imposed by her. So I am faced with the reality of that four month term imposed the day after the plea was conducted before me last week, so I have to take that into account as well.

83 I had, in fact, considered passing an aggregate sentence in relation to the five firearms offences, but on reflection, when I considered that, it seemed to me important that there be actual and real transparency, so that all concerned can see the actual individual sentences imposed and the levels of cumulation that I have pronounced. That sort of thing would be lost in an aggregate sentence

imposed across the five offences. The firearms matters are separate charges with separate elements and targeting separate criminality, so it seems to me, total concurrency is not appropriate. However, all of it occurs in a tight timeframe and as I have said, the five firearms offences are mainly connected with a single weapon, or dealings with it, or your status in possessing it.

Ancillary orders : Forfeiture and Disposal

84 Now there are some ancillary orders, I think, in this case. Was there only one order, or not?

85 MS BURNETT: That is right, Your Honour, it is a forfeiture.

86 HIS HONOUR: There is a forfeiture order.

87 MS BURNETT: In respect of the firearm and the associated exhibits.

88 HIS HONOUR: Yes, all right, thank you.

89 MR RATTRAY: And consent to that.

90 HIS HONOUR: Yes, thanks very much. All right, well there is an application then for a forfeiture order in relation to the firearm, that is, the sawn-off weapon and the related ammunition. There is no opposition to that order, indeed it is consented to and I will sign that order. I have now essentially pronounced it, the pre-conditions for the making of the order under the *Firearms Act* are made out, obviously given the nature of the charges before me. And I order, pursuant to s.151 of the *Firearms Act*, that the property referred to in the schedule be forfeited to the relevant Minister.

91 Yes, all right, I will have you stand up now, Mr Wardle, if you would please. Thank you.

Sentence

92 On Charge 1, the charge of shortening the barrel, you are convicted and

sentenced to six months' imprisonment.

93 On Charge 2, that is the charge of defacing or altering the identifying number, you are convicted and sentenced to six months' imprisonment.

94 On Charge 3, the prohibited person possessing a firearm, this is obviously the most serious of the offences before me, with the highest maximum penalty in play. I convict and sentence you to 18 months' imprisonment, which I should tell you, is a good deal less than I would have imposed without the delay in play here.

95 On Charge 4, a charge of unlicensed storage of the firearm and the ammunition, I convict and sentence you to four months' imprisonment.

96 So too on Charge 5, possession of a firearm without a serial number, you are convicted and sentenced to four months' imprisonment.

Related summary matters

97 On the summary assault, that is the charge of assault with a weapon, I convict and sentence you to four months' imprisonment.

98 On the two charges of failing to appear on bail, I believe it is open to me in that setting to impose an aggregate term of imprisonment. You are convicted and sentenced to seven days' imprisonment by way of aggregate.

Base sentence

99 The base sentence therefore is the 18 months imposed on charge 3.

Cumulation

100 I direct then that two months of the sentence imposed on Charge 1, two months of the sentence imposed on Charge 2 and two months of the sentence imposed on the summary assault with a weapon, are to be served cumulatively upon the base sentence and upon each other.

101 The other sentences, including the sentences imposed for the failures to appear in relation to bail, will all be served concurrently. Now, there is not total concurrency in relation to Charges 1 and 2, as each actually involve separate serious criminal acts in relation to that weapon, quite apart from the mere possession of it, whereas Charge 4 and 5 are bound up in the issue of possession in such a way as to make total concurrency appropriate, in my view.

Total Effective Sentence

102 So these orders produce a total effective sentence then of 24 months' imprisonment, or two years' imprisonment.

Non-parole period.

103 I fix a period of 14 months during which you will not be eligible for release on parole.

Section 18 pre-sentence detention.

104 You have already served 296 days by way of strict pre-sentence detention and that declaration is to be entered into the records of the court.

Section 6AAA.

105 I have taken into account your guilty plea. If you had pleaded not guilty and been found guilty of these offences by a jury, I would have sent you to prison for four years. I would have fixed a non-parole period of two and a half years. That statement is also to be entered into the records of the court.

106 I have reflected also on the sentence that has been passed upon you on 31 May. The Magistrate, as I say, got in first for some reason, rather than waiting for this sentence and then passing whatever she regarded as the appropriate sentence and making appropriate orders for cumulation, as she could have. She imposed a four month term upon you.

107 I recognise, of course, that those offences relate to matters that have post-dated the commission date of this offending, so the issue for me is the extent to which there is concurrency, if any, in relation to those matters. It seems to me it is another way to adequately reflect, in a meaningful fashion, the principle of totality of sentence, which is important to my task. In those circumstances, I am going to in fact direct that the sentences imposed by this Court will be served concurrently with the sentences that you are currently undergoing. So it is another means of me recognising the importance of totality, which is a significant issue in this case, given the delay and the passage of time and the various other sentences that you have served.

108 It strikes me that to cumulate in such a setting, even though there probably is a decent ground to do so, would then, by way of the order of service of sentence, almost present a debilitating sort of picture ahead for you, such that you would be serving the four months imposed last week and only then commencing my sentence. I do not regard that as appropriate, so I am going to order total concurrency in the circumstances. Have a seat for a moment. Let me see if there is anything else I need to deal with. Are there any other orders I need to impose at all, or not?

109 MS BURNETT: No, Your Honour. Thank you.

110 HIS HONOUR: Mr Rattray?

111 MR RATTRAY: No, sir.

112 HIS HONOUR: No. All right, well thanks for your assistance, each of you. And you will go downstairs and have a word to your client about all of this, Mr Rattray, or at some stage anyway?

113 MR RATTRAY: Yes, I have already spoken to my client. I am going to do a video conference early next week.
