

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
CRIMINAL DIVISION

Revised

No. 0114 of 2010

THE QUEEN

v

BRENDAN SOKALUK

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JUDGE: COGHLAN J  
WHERE HELD: Melbourne  
DATE OF HEARING: 9, 10, 13-15, 20-24, 27-29 February; 1, 2, 5-9, 13-17 March;  
4 April 2012  
DATE OF SENTENCE: 27 April 2012  
CASE MAY BE CITED AS: R v Sokaluk  
MEDIUM NEUTRAL CITATION: [2012] VSC 167

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CRIMINAL LAW - Arson Causing Death - Circumstances of Offending - Offender's intellectual disability of reasonably mild degree - Diagnosed with autism spectrum disorder - Principles of *R v Verdins* 15 VR 269 applied - Sentenced as a serious arson offender.

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Crown	Mr R. Elston SC with Mr N. Hutton	Office of Public Prosecutions
For the Accused	Ms J. Dixon SC with Mr J. Williams	Victoria Legal Aid

HIS HONOUR:

1 Brendan Sokaluk, you have been convicted by a jury of ten counts of arson causing death. That offence carries a maximum term of imprisonment of 25 years.

2 It should be said at the outset that the offence is somewhat unusual in that the intentional aspect of the offence relates to the crime of arson so that any person who commits the crime of arson which causes death of another is guilty of this very serious offence. In characterisation only offences which carry life imprisonment are more serious.

3 The crime of arson is that of intentionally destroying or damaging property by fire.

4 For the purposes of that section:<sup>1</sup>

a person who destroys or damages property shall be taken as doing so intentionally if, but only if –

- (a) his purpose or one of his purposes is to destroy or damage property; or
- (b) he knows or believes that his conduct is more likely than not to result in destruction of or damage to property.

5 I am satisfied beyond reasonable doubt, for the purposes of sentencing, that you intentionally lit the fire, intending to set fire to eucalypt plantations owned by Hancock Victoria Plantations. I am also satisfied that you lit the fire at two distinct places at or near the intersection of Jellefs Outlet and Glendonald Road, Churchill.

6 Although the case was left to the jury on the basis that on one view of the facts there may have been only one point of ignition and that you may have recklessly lit the fire, I am satisfied to the requisite standard that what I have set out in the previous paragraph is the proper basis on which to sentence you.

7 I am satisfied that you knew your actions would cause damage to the plantation. I am also satisfied that you did not intend to kill anyone but, as I have observed, such an intention is not necessary for the offence to be committed.

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<sup>1</sup> Section 197(4) *Crimes Act* 1958.

- 8 The facts of the case are simple enough. At about 1.30pm on Saturday 7 February 2009, you lit the fire which rapidly spread to the south east through eucalypt plantations and then into pine plantations. Over the next few hours, the fire burnt for about 15 kilometres towards Yarram. A great deal of property was damaged and the fire was out of control. You had driven down Glendonald Road to the south and your car broke down before you reached the intersection of Glendonald and Thompson Roads. You were evacuated from that area, although it was not significantly affected by the fire at that stage as the fire was burning in a south easterly direction.
- 9 When you were being evacuated from the Glendonald Road area and taken back to Churchill, you spoke to your father on the phone and told him you had come up to the hills to avoid the heat and to visit Peter. Peter Townsend, who had previously worked with you, did live nearby. Your father had advised you earlier in the day not to go up to the hills on that day and you were concerned as to what your father's response would be about leaving the car behind.
- 10 You returned to your home in Churchill. At about 2.00pm, you tried to return to the car with your father, but road blocks were then in place. At about 4.30pm or so you, decided to walk back into the area to see if you could retrieve your car. You did return by walking around the place where you knew one roadblock at least was in place. You also told the police that you wanted to check on your friend Peter, but when you got to the area, neither he nor his wife were home.
- 11 You said you checked your car, locked it up and set out to return to Churchill. At about 6.15pm, the wind changed and therefore the direction of the fire changed, and you were forced to take refuge at 9 Mitchells Outlook where the Ferguson and Moretti families were fighting the fire. You assisted them to some degree.
- 12 At about 10.00pm, you were taken to Eddie Marek's house on the corner of Mitchells Outlook and Glendonald Road, and a few hours later you were given a lift back into Churchill. During that time, you had given additional explanations for your

presence in the area and that, as well as your concerns for Peter, you also had concerns for another friend, who must have been David Butler.

13 Your car was destroyed by the fire and you and your father saw that when you returned to the scene at about 7.45am on Sunday.

14 At about 9.13am, you made a claim on your insurance policy by phone. The call was in evidence and your level of functioning in that call was at the very least reasonable. As a result of the claim, you were able to have your car collected that afternoon.

15 On Sunday and Monday, you had made various comments about who had been responsible for lighting the fire. On Tuesday 10 February 2009, you made a report to Crime Stoppers by email in which you said you had seen a DSE fire fighter driving a white four wheel drive utility and deliberately lighting the Churchill fire on the edge of Glendonald Road.

16 That was a deliberate and careful attempt to attach the blame to others. It was not particularly sophisticated, but bore some resemblance at least to the means by which the fire had been lit.<sup>2</sup>

17 Later, you acknowledged to the police that you had sent the report so that you would not be blamed for the fire.

18 The police interviewed you at length about the fire on 12 and 13 February 2009.

19 Before any formal interview commenced, you volunteered the following version:

“Want to tell you what happened Saturday about, regards to the fire stuff. I was, but first I was smoking in the car when I was driving, I’m well it’s like now suffer. Get to my mate’s place, you can go bitumen road or the gravel, and the bitumen road is dangerous because of hoons. So I go the gravel road, and I like to take shortcuts off the gravel, but then it’s rough it just shakes the car. And I was smoking, a bit fell down and so, so I grab a bit of paper to grab it and flick out sort of thing, have to squish flick that and it must’ve ignited, and I went up this track, this road there that goes up, top of this was rubbish up there. I went up there and I reckon the car wasn’t working too well and stuff and had to like turn around. And then I noticed there was fire and I panicked, and I called 000 and I just tried to get away as

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<sup>2</sup> See evidence of witnesses Pridgeon, Xydias & Keating.

quick as possible, just panicked.”

20 It is true that at 1.32pm you did ring 000 and report the fire.

21 That basic version of events advanced was maintained by you really in that form throughout the whole of the continuing interviews.

22 Later in the formal interview, in summary and omitting many of the questions, you said:<sup>3</sup>

“I went out and shopped with my dad and stuff and got changed and I was going up to see my mate’s place.

I take one of the short cuts and stuff and the vibration rocks the car and stuff and so I was smoking and had, a burnt bit fell off onto the floor, so I used a bit of paper to pick it up and I didn’t properly so I squished it out, sort of thing, and when I threw the paper on the road, it ignited. I didn’t know. It was too late. I came, left the area.

I called ‘000’ and started telling them there was a fire on that road. I did a bad thing and I’m scared shit – shit scared. My car broke down and stuff and I couldn’t, had to be evacuated out of the area and I was dropped off at Churchill.”

23 And:<sup>4</sup>

“I was smoking whilst driving, a cigarette, Pall Mall or something.

A burnt bit went on the floor with a bit of paper and I chucked it out the window the whole lot, I was hoping that it was out but it wasn’t.

What was around the location when you dropped the cigarette ash out the window and the paper?---I was probably too close to the trees and I did it – yeah on the edge of the plantation – road.

After I threw the paper out the window I kept driving –

Yeah, I went up to where the dump spot is and that to check it out and stuff like me car started to play up and I broke down going up so I had to turn around and that’s when I noticed I was coming back down towards there, there was a fire there so I called ‘000’ and told them there was a fire.

...

Right on a road between the two plantations, yeah.

When I was up close to road I could see there was a fire there – on the edge of road where the trees are. I couldn’t put it out, it was too big so I had to

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<sup>3</sup> At questions 80, 84 and 85.

<sup>4</sup> At questions 112, 119-127, 138, 147, 157, 164 and 177.

call '000'.

When he got to the bottom of road, he rang '000' and told them there was a fire on Glendonald road and that it was on the right hand side.

Yep. Now when you got back after the call what did you do?---I called them as I was going down the road and stuff and, but I didn't get very far before the car finally conked out."

24 And:<sup>5</sup>

"So how far down was your driver's side window?---It was broken so it didn't go all the way down.

So there's a big gap or a little gap?---A big gap.

Okay, how much gap of air was there between the top of the door and where the window came up to? Was it small like this or - - -?---A lot, a big gap.

- - - how did you scrunch the paper up?---I did it real quick. I just grabbed the paper, grabbed it and just like that out sort of thing so I wanted to get it out of the car.

What did you light it with?---Cigarette lighter.

A hand held one?---Yeah, 'cause I don't have one in the car."

25 The expert evidence in this case from Messrs Pridgeon, Xydias, Keating and Dr Tolhurst would lead to the conclusion that the fire could only have been lit by the ember in the way described if the serviette was actually burning as it was thrown out of the car.

26 I proceed on the basis that the jury rejected your explanation of events.

27 The fire was a very serious one, being fanned by winds going up to 65 kilometres per hour. The maximum temperature on the day was 46.3 degrees at 4.00pm. At 6.00pm, there was a wind change which led to truly catastrophic consequences. Prior to that time, nobody had been killed by the fire.

28 The wind changed from a north westerly wind to a south westerly wind. A few kilometres of fire front became 15 kilometres of fire front, with winds gusting up to 70 kilometres per hour. The fire spread rapidly towards the townships of Koornalla, Traralgon South, Jeeralang, Callignee and Callignee Upper, which were in the path

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<sup>5</sup> At questions 494, 496, 500, 505 and 506.

of the fire and ultimately impacted by it.

29 The fire became known as the Churchill fire. This was Black Saturday. As a result of the fire, some 36,000 hectares were burnt, 156 homes and a community hall were destroyed. That total destruction is reckoned as part of the arson aspect of each of the ten offences for which you have been convicted, but I will say more of that shortly.

30 All that would have been serious enough, but the real culpability for which you come to be sentenced arises from the fact that ten people died as a result of your actions.

31 Charges 1 and 2 relate to the deaths of brothers David and Colin Gibson, who died while trying to defend their parents' property at 420 Glendonald Road. They were caught as a result of the wind change between 6.00pm and 6.15pm when the property was totally destroyed.

32 Charge 3, Mrs Annette Leatham, died when trying to defend her daughter's property on Cooks Road, Callignee. After the wind change, it was decided by all present that they should leave the property, but Mrs Leatham was trapped after her car broke down and she tried to return to the house.

33 Charges 4 and 5 relate to the deaths of Alfred Frendo and his younger son Scott at the home of Alfred Frendo and his wife at 320 Old Callignee Road, Callignee. Scott Frendo had come from Traralgon, where he lived, to assist defending the house, and he did that at about 4.00pm. After the wind change, Alfred and Scott Frendo tried to escape the fire; that was at about 6.50pm. Alfred Frendo was found in his burnt out 1990 Toyota Hilux about 1.5 kilometres from his home and the body of his son Scott was found near his own vehicle nearby.

34 Charge 6 related to Martin Schultz. Mr Schultz died when he was trying to drive to Traralgon from his home at 20 Factory Road, Callignee. He left his home at about 7 00pm. His body was found in his burnt out Holden utility in a creek bed just off

Symons Road, Callignee, but more tragically, not until a week after the fire.

35 Charges 7, 8, 9 and 10 relate to the deaths of Allan and Miros Jacobs, their son Luke and Luke's friend Nathan Charles. Luke and a group of his friends came to his parents' house at 1594 Traralgon Creek Road, Koornalla during the afternoon to assist with preparation for defending the fire. Most of the group left and the four deceased remained at the house. At about 7.00pm, as a result of the wind change, the fire front came over the property. The Jacobs family and Nathan Charles took refuge in a concrete workshop under the house, but the fire was so intense that they were asphyxiated.

36 The fire was catastrophic. In addition to the deaths and the property damage caused, one assumes there were people injured and stock destroyed, as well as fencing and other matters related to the rural properties, including the matters involved in the eucalypt and pine plantations. The event was terrifying for all involved in the fires, whether directly or otherwise. The crime of arson always exposes the emergency services personnel to risk, but this fire did so quite dramatically. Three of the fire appliances that we know about, with their crews inside, were burnt over in the Glendonald Road area. The self-sacrifice and courage of all those involved in fighting the fire, but in particular the volunteers, cannot pass without comment, and I acknowledge the debt owed by our community to all of you.

37 Brendan Sokaluk, you do not fall to be sentenced separately for those matters, but they do provide the background context in which your offending is to be assessed and which cannot be separated from the crime of arson, which is at the heart of your offending.

38 This was a very hot day, perhaps our hottest day after a week of very hot weather. There had been a very long drought and the amount of dried material in the plantation was obvious. You had, in the past, at least some rudimentary training in the CFA and you must have known of the risk and potential damage of this fire.



When viewed objectively, your offending is very serious.

39 I received and heard victim impact material from the following victims:

- Grant Jacobs - son of Alan and Miros Jacobs, brother of Luke Jacobs;
- Rhonda Jacobs - sister of Alan Jacobs, sister in law of Miros Jacobs, aunt of Luke Jacobs;
- Raymond Jacobs - father of Alan Jacobs, father-in-law of Miros Jacobs and grandfather of Luke Jacobs;
- Margaret Jacobs - mother of Alan Jacobs, mother-in-law of Miros Jacobs and grandmother of Luke Jacobs;
- Rodney Leatham - husband of Annette Leatham;
- Elaine Frendo - wife of Alfred Frendo and mother of Scott Frendo;
- Lachlan Frendo - son of Scott Frendo;
- Robert Charles - father of Nathan Charles;
- Maureen Reid - mother of Nathan Charles;
- Sherrie Charles - sister of Nathan Charles;
- Rachael Elswyk-Schultz - wife of Carl Schultz;
- Peter Elswyk - father-in-law of Martin Schultz;
- Allyson Macinnis - sister of Martin Schultz;
- Parker Schultz - son of Martin Schultz;
- Jennifer Schultz - step-mother of Martin Schultz;
- Sonia Vickery - step-sister of Martin Schultz

40 Victim impact material was also received from the following:

- Shirley Gibson - mother of Colin and David Gibson;
- Kim Maree Jacobs - sister of Alan Jacobs, sister-in-law of Miros Jacobs and aunt of Luke Jacobs;
- Tracey Baillie - defacto partner of Colin Gibson;
- Rhonda Reid - step-mother of Nathan Charles;
- Jenny Rogers - daughter of Annette Leatham;
- Kim Birrell - partner of David Gibson;
- Sheree Lee-Ann Pretty - step-daughter of David Gibson;
- Harold Schultz - father of Martin Schultz

41 The circumstances of these deaths are particularly hurtful to those who grieve for the

loss of their loved ones. Death from natural disaster would be bad enough, but their suffering is significantly increased from knowing that the fire which caused the death was deliberately lit. Because of the peculiar nature of these matters and the wide ranging effect of them, there were great delays in the finalisation of identification, with everything which flowed from that, which increased the hurt for the victims.

42 For the victims, these were and are life changing events, and no sentence that I impose can in any way compensate for their loss, but it does bring to an end one part of the process.

43 Each life is precious not just to the victim but to the community as a whole. It should be noted, however, that when I impose a sentence, the law, through me, does not intend to put a value on a life in those terms and I ask that to be borne in mind in particular when I deal with the accumulation of sentence.

44 Brendan Sokaluk, you are now 42 years of age, having been born on 11 October 1969.

45 I have received a great deal of material about you both directly related to the trial and a bail application which was made on your behalf. I have regard to all that material. Both Professor Ogloff and Dr Goode gave evidence at your trial.

46 There was further material from Dr Cohen, Dr Buras, Ms Cusack, Dr Walton and Ms Brown. There is no doubt now that you suffer from an autism spectrum disorder and you are intellectually disabled of "reasonably mild degree", to quote Dr Walton.

47 You grew up in the Churchill area, having been born in Seymour, and had difficulties at school, which is consistent with the more recent diagnosis of autism spectrum disorder. You were always unlikely, therefore, to thrive in a normal school. You had no involvement in sporting activities. As a result of attending a special school, you managed to get employment at Monash University (Churchill Campus) where you worked for 16 or 17 years. You were teased and perhaps bullied there, as you were at school. I suspect your time in the CFA many years ago

was also difficult. I doubt that people intended to be hurtful to you, but your own social skills are and were inadequate, which made your dealing with others very difficult.

48 You stopped work probably in about 2006, and at the time of these events you were on a disability pension. You own your own house in Churchill and live there alone, but in general you have been dependent upon your parents for cooking, cleaning and managing your finances.

49 You had two serious relationships with women in the years immediately preceding the offending. You have few friends and, as it emerged in evidence, you have a special relationship with your dog, "Brocky".

50 You have no prior convictions and I have taken that into account.

51 There is a major issue as to how I am to regard your autism and your intellectual disability for the purpose of sentencing.

52 The relevant principles have been set out by the Court of Appeal in *R v Verdins*.<sup>6</sup>

53 The question which arises directly is whether or not you are to be regarded as having impaired mental functioning.

54 In that regard, what Professor Ogloff said in his report is a fair summary of your condition to be distilled out of much of the material.

55 Professor Ogloff, in his report, said under the heading "Opinion"

"Mr Brendan Sokaluk is a 42 year old Caucasian man who has lived most of his life in Churchill. It was reported that he was 'slow' from birth, had difficulties in school, and has not been involved in group activities such as sport. Both Mr Sokaluk and his father, in his police statement, have reported that Mr Sokaluk was bullied and teased for most of his life across many domains. While he was employed as an assistant gardener at the Monash University campus in Churchill, Mr Sokaluk reported being harassed by co-workers. This resulted in him threatening or attempting to take his life.

Mr Sokaluk is socially distant from others, including his brothers and even

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<sup>6</sup> 16 VR 269

his parents. He reported that he has had two live-in relationships with women, although the information provided by his most recent live-in girlfriend in her statement to the police shows how unusual his interpersonal relationships are (e.g., they did not have sexual relations despite having cohabitated and slept in the same bed for two or three months).

Mr Sokaluk does not have any forensic history.

Mr Sokaluk meets the criteria for a diagnosis of Autism Spectrum Disorder. This disorder has affected his social and adaptive functioning all of his life. He does not meet the criteria for a diagnosis of a major mental illness or personality disorder at present, although he has been treated with medication in the community for depression and in prison for lowered mood and anxiety.

Whilst his overall level of intellectual functioning is in the borderline range, his verbal capacity is more limited and, in fact, falls in the intellectually disabled range. Conversely, his perceptual capabilities are much better, falling in the low average range. This suggests that while Mr Sokaluk has been able to hold a job, operate a motor vehicle, and live on his own own, his level of intellectual reasoning and verbal comprehension is very impoverished. He has been dependent on his parents for maintaining his finances, cleaning his house, and providing him with meals. It takes him much longer to acquire information or to learn a task than would be the case for most others and his abstract reasoning capacity is very limited. His presentation, reasoning, receptive and expressive language are affected by the confluence of his Autism Spectrum Disorder and decreased level of intellectual functioning. For example, he is a very concrete and literal thinker.”

56 I might there, in parenthesis, add matters which were reasonably obvious from the record of interview.

57 In the case of *Verdins*, the Court said<sup>7</sup>,

“Impaired mental functioning at the time of the offending may reduce the offender’s moral culpability if it had the effect of:

- (a) impairing the offender’s ability to exercise appropriate judgment;
- (b) impairing the offender’s ability to make calm and rational choices, or to think clearly;
- (c) making the offender disinhibited;
- (d) impairing the offender’s ability to appreciate the wrongfulness of the conduct;
- (e) obscuring the intent to commit the offence; or

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<sup>7</sup> 16 VR 269, [26]

(f) contributing (causally) to the commission of the offence.

As we have said, this is not to be taken as an exhaustive list.”

58 It follows that on the balance of probabilities I accept that you have a mental impairment within that definition.

59 That, however, is not the end of the matter. By virtue of s 6D of the *Sentencing Act* 1991 you will, after being sentenced to a term of imprisonment on Count 1, thereafter fall to be sentenced as a serious offender, in your case a serious arson offender.

60 Because of those provisions in sentencing, I -

- (a) must regard the protection of the community from the offender as the principal purpose for which the sentence is imposed; and
- (b) may, in order to achieve that purpose, impose a sentence longer than that which is proportionate to the gravity of the offence considered in the light of its objective circumstances.

61 It is not suggested in this case that I should impose such a sentence; that is, a disproportionate one.

62 Section 6E carries with it the assumption that sentences would be cumulative rather than concurrent. That is simply a different automatic provision to that otherwise contained in the *Sentencing Act*.

63 As I have said, it is not suggested that I ought to use the provisions of s 6D(b) to impose a disproportionate sentence. It follows that I am therefore constrained by the principles of totality.

64 I am required to carry out a balancing exercise taking into account all of the matters in the case.

65 Your sentence, Mr Sokaluk, is a very difficult one indeed.

66 If protection of the community is to be the principal purpose of the sentence, less regard must be given to your personal circumstances, including your impaired mental functioning, but I have given weight to them. I have had regard to your

reduced moral culpability and I have moderated general deterrence. The provisions do, however, mean that personal deterrence looms somewhat larger for you than it might for others.

67 I do regard you as being genuinely remorseful and, as I have already said, I do not think in any sense you set out to achieve this awful result. I am also of the view that your sentence will weigh more heavily upon you than on others. In assessing what weight is to be given to that feature, I have had regard to the material which was put to me on the bail application, and to Professor Ogloff's report.

68 On your plea I was referred to the decided cases about this section; namely *R v Chambers*<sup>8</sup> and *DPP v Bennett*,<sup>9</sup> and to one of the manslaughter cases. None of the cases can compare in seriousness to this case and none involve the sentencing of a serious arson offender. I was also referred to the High Court decision of *Muldrock v R*,<sup>10</sup> but there are such significant differences in the statutory regime as it operates in the State of New South Wales that it is of little significance in this case, but in view of the attitude I have taken to the operation of *R v Verdins*, it is of little consequence.

69 I was also asked to fix a longer than usual non-parole period. I am not satisfied that that would be appropriate in this case. It would be appropriate in this case to fix a minimum non-parole period lower than the one that I have fixed, consistent with all the matters relevant to the fixing of that part of the sentence for which authority is set out.

70 On each of Charges 1 to 10, you will be sentenced to be imprisoned for 11 years.

71 In relation to Charges 2 to 10, ten years and three months of each of those charges will be served concurrently with Charge 1, otherwise to be served cumulatively.

72 That is a total effective sentence of 17 years and 9 months. I fix a non-parole period of 14 years before you will be eligible for parole.

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<sup>8</sup> (2005) 152 A Crim R 164.

<sup>9</sup> 2004 VSC 207.

<sup>10</sup> [2011] HCA 39.

73 I declare that you have served 1041 days pursuant to this sentence.

74 I declare that in relation to Charges 2 to 10, you are sentenced as a serious arson offender.

75 I direct that those declarations and their contents be entered into the records of the court.