

DIRECTOR OF PUBLIC PROSECUTIONS

v

THOMAS SEWELL & JACOB HERSANT

JUDGE: Her Honour Judge Blair
WHERE HELD: Melbourne
DATE OF HEARING: 26 September 2023
DATE OF SENTENCE: 27 October 2023
CASE MAY BE CITED AS: DPP v Sewell & Hersant
MEDIUM NEUTRAL CITATION: [2023] VCC 1937

REASONS FOR SENTENCE

Subject: Criminal Law
Catchwords:
Legislation Cited:
Cases Cited:
Sentence:

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the DPP	Matthew Cookson	OPP
For the Accused Sewell	Mr Michael McGrath	KPT Legal
For the Accused Hersant	Mr Alex Patton	SLKQ Lawyers

HER HONOUR:

- 1 Thomas Sewell and Jacob Hersant on 27 July 2023 you appeared before me seeking a sentence indication on a charge of violent disorder, Mr Sewell you also had a summary related matter of committing an offence whilst on bail. The prosecution did not oppose the application. Your trial was listed to commence on 7 August 2023.
- 2 On 28 July 2023 I indicated pursuant to s. 207(1)(a) of the Criminal Procedure Act that if you were to plead guilty I would impose a 1 month term of imprisonment on each of you and a 20 month CCO for you Mr Sewell and a 30 month CCO for you Mr Hersant. I adjourned the further hearing of your matter until 1 August 2023 to allow you time to consider whether to accept my indication.
- 3 In due course, I was advised the sentence indication was accepted and on 1 August 2023 you were each arraigned on indictment C2114739.1 and entered a plea of guilty to one charge of violent disorder. The trial date of 7 August 2023 was vacated. A pre-sentence report from Corrections was ordered and your matters were adjourned to 1 September 2023 for plea. At a time prior to this date Corrections contacted the court and requested that they undertake an extended pre-sentence report. Accordingly, your matters were administratively adjourned and listed for plea on 26 September, 2023.
- 4 On 26 September 2023 a plea hearing took place. The arraignment process was completed, you Mr Sewell agreed to have a summary related offence heard by the court and pleaded guilty to a summary charge of committing an offence whilst on bail and you Mr Hersant admitted your one prior conviction. On 18 September, 2023, I received an extended pre-sentence report from Corrections for each of you dated 15 September 2023. You were both assessed as suitable for such an order.

Circumstances of offending

5 A summary of prosecution opening for sentence indication was adopted as the opening for plea. This document was tendered and marked as Exhibit A. A summary of the opening is as follows.

6 Mr Jacob Hersant, you were at the relevant time the leader of an organisation called the National Socialist Network (NSN). Mr Thomas SEWELL, you were at the relevant time the leader of the European Australian Movement (EAM). EAM used a distinctive organisational emblem based on the Celtic Cross.

7 The two of you were present, along with other members of the two organisations, at the Cathedral Ranges State Park to hike and camp on 8 May 2021.

8 A separate group of six friends had been holidaying at an Airbnb at a nearby town and were visiting the Cathedral ranges for a hike on the day of the offending.

9 On 8th May 2021 at about 12 midday, police surveillance observed each of you in your separate vehicles travelling north along the Maroondah Highway. At about 12.50pm they observed your vehicles parked on the road near the 'Sugarloaf Saddle' carpark. About 25 members of EAM and NSN attended at the Cathedral Ranges State Park. They had backpacks and equipment for camping. The 'Cooks Mills Campground' was about a 10 minute drive from Sugarloaf Saddle carpark.

10 Sometime between midday and 1.30pm members of the EAM/NSN group parked their vehicles at the 'Sugarloaf Saddle' carpark and hiked towards 'Sugarloaf peak'. Police attended the carpark and recorded some of the vehicle registrations.

11 At about 2.00pm, the separate group of six arrived at the 'Sugarloaf Saddle' carpark in two vehicles. They parked near the toilets at the start of the hiking trail to Sugarloaf Peak. They hiked up towards the peak together in two groups.

12 During their hike up, they crossed paths with some members of the EAM/NSN group who were walking down from the peak. Some of the males in each group exchanged friendly words. The EAM/NSN males were wearing black t-shirts with

a white emblem consistent with the Celtic Cross. On the way up one of the group of six observed a sticker on a tree stating, 'Australia for the white man.'

- 13 When the group of six arrived at the peak they observed a large group of the males, dressed in black with the white chest emblem. Some of the group of six speculated that the other group may be Neo-Nazis but did not say much more about it. After about an hour, they began their decent to the carpark.
- 14 At about 3.40pm the group of six reached the carpark. There were about 15-20 males of the EAM/NSN group a short distance away. All were wearing the black t-shirt with white Celtic Cross emblem. They put on backpacks and walked towards the Messmate trail. These males were observed by another witness, who was driving past in her vehicle.
- 15 The group of six returned to their respective vehicles, a Volkswagen and Skoda. One of the group was going to use the toilets but after seeing the EAM/NSN group decided to continue to his vehicle. When the group of six went to leave in their vehicles one of them googled neo-Nazi symbols on his phone and saw a Celtic Cross image. He decided to take a short video of the EAM/NSN group using his iPhone. He made a short recording through the closed car window of some of the group walking past on the trail.
- 16 Two members of the group of six heard yelling "ANTIFA". Two males threw down their backpacks, pulled up scarves over their faces to conceal their identity and ran towards the Volkswagen. One of the occupants of the car yelled at the driver "go go go!" and "lock the doors". The two EAM/NSN males reached the vehicle first and tried to open the driver's side door, but the driver hit the central locking in time.
- 17 About 10-15 males from the EAM/NSN group ran towards the Volkswagen and surrounded it. Most, if not all, had put on balaclavas or face scarves that covered their faces. The group of males surrounded the Volkswagen on each side, kicking

and punching the vehicle, as the driver tried to leave. This caused minor damage to the panels.

- 18 One of the males hit the front passenger window with his hand causing it to smash. Another hit the front driver's window causing it to smash. The driver of the Volkswagen drove forward to get away and in the process hit a large rock that was to the left of the carpark entrance/exit. He realised his engine had been turned off by someone. He looked around and saw a male slightly behind him by the driver's window holding a knife in a 'ready stance'. He urinated on himself in fear.
- 19 One of the males said "grab the keys". More than one male reached in through the driver's window and tried to grab the key and turn the ignition off, the Volkswagen stalled. This happened at least three times, with the front passenger putting the Volkswagen in park and telling the driver to start it again. The driver said, "what have we done, what do you want". The males were hanging on to the car and yelling at them to get out.
- 20 The prosecution alleges that you Mr Sewell, injured your right wrist on the broken passenger window, either by striking the window itself or by reaching inside the Volkswagen.
- 21 The prosecution alleges that you Mr Hersant, reached into the Volkswagen through the driver's side window and touched the ignition, either to turn the engine off or to try and grab the car key.
- 22 One of the occupants of the car saw two males with Stanley knives standing at the driver's side window of the Volkswagen and another male had a hunting knife with a curve at the tip. This occupant also observed one of the males thrust his Stanley knife through the smashed front driver's window and feared the driver would be stabbed.
- 23 One or more males by the window were demanding "give us your phones" and "get out of the car" one of the occupants said "What do you want? Take my phone"

and held out his phone. The driver immediately handed over his iPhone to the male through the driver's window. One male took another iPhone from the rear passenger's hand. The front seat passenger threw his phone under his seat. Some of the males were still yelling at them to get out of the car and started hitting or kicking the vehicle again.

24 Mr Hersant, you appeared at the vehicle's driver's side window. You were not wearing a face covering and were holding phones taken from the occupants. You said "Do you want your phones? Get out of the car." One of the occupants of the car thought you appeared to be the leader as you seemed to be confident and in a position of authority with the others.

25 As the group of males from the EAM/NSN group attacked the Volkswagen, two males stood in front of the Skoda and put on balaclavas. One said, "We're not attacking you, we just need you to stay put". One of the group of six sat down on the ground in front of the Skoda. When another occupant took out her mobile phone, the male said not to take any photos or call anyone.

26 Eventually the driver was able to start the Volkswagen engine and accelerate out of the carpark. The others from the group of six got in the Skoda and also drove out of the carpark.

27 The violent conduct of both of you and the group towards the occupants of the Volkswagen caused a minor injury to rear passenger's right index finger. All the occupants of the car were in fear of being assaulted or killed. **(Charge 3 – violent disorder)**

28 The others in the group in the Skoda and the witness from the carpark were also terrified by the violence that occurred.

Subsequent events

29 At least two of the group of six and the witness from the carpark all called 000 as they drove away from the area. In response, police intercepted you Mr Hersant,

also driving your vehicle away from the area. A search of your car was conducted, and a Canon DSLR camera was located and seized, as well as a black balaclava. You were not wearing a shirt or shoes. You told the police you had been at the Cathedral Ranges. You were not arrested at this time and were permitted to leave.

30 Police attended at the victims' accommodation and took statements. The victims were too afraid to remain at their accommodation and left the next morning.

31 The Canon camera contained a number of photographs of members of the EAM/NSN dressed in black t-shirts with the white Celtic Cross emblem, and with face coverings to protect their identity. The photographs were taken between 1.19pm and 2.33pm on Sugarloaf Peak.

32 One photograph taken at 1.31pm the top of Sugarloaf Peak had 13 members posing, all with covered faces. One of them was wearing a Casio watch as well as the black t-shirt and black shorts and had no injuries on either hands or wrists. The prosecution alleges this male is you Mr Sewell.

33 On 8 May the Volkswagen was seized and examined by police. It was noted to have black and white scuff marks and several dents on both rear panels and the driver's side panels of the Volkswagen. The driver's and passenger side windows were smashed, with shattered glass on the seats and footwells.

34 The Volkswagen was forensically examined for presence of fingerprints and DNA the following day. Two fingerprints belonging to you, Mr Sewell, were located on the outside of the rear passenger side window. Blood was located on the outside of the rear passenger trim of the Volkswagen. The blood was analysed for presence of DNA. A single source DNA profile was obtained, that in short appears to belong to you Mr Sewell.

35 The ignition barrel of the Volkswagen was swabbed for presence of DNA. The swabs were analysed and found to contain a mixed DNA profile, that again in short appears to belong to you Mr Hersant.

- 36 On 26 July 2021 one of the occupants of the car was shown a photo board containing an image of you, Mr Hersant and identified your image as the male he saw holding their phones in the carpark, who appeared to be the 'leader'.
- 37 On 14 May 2021 you Mr Hersant, were arrested and cautioned. You were taken to Melbourne West police station, interviewed and stated 'no comment'. You consented to the taking of your DNA.
- 38 You were examined by Forensic Medical Officer Dr Dannica Velasco. She noted you had a group of linear scratches to your right and left forearms as well as some bruises to your left arm. Linear abrasions suggested the object the caused them would be narrow and they could be caused by, for example, thorns, tree branches, or broken glass.
- 39 On 14th May 2021 police executed a search warrant at an address and seized various items including, 3x black EAM t-shirts; 2x black balaclavas; Black Under Armour shorts; EAM t-shirts with Celtic cross x2; An orange box cutter knife with name HERSANT on it; car keys from the pocket of some shorts in HERSANT's room. Police also seized, a buck hunting knife with curved tip and a bad brand red pocketknife.
- 40 Mr Sewell your car was located parked in the driveway and Mr Hersant your vehicle was parked near a reserve across the road. Mr Sewell you were observed to have your right hand and wrist bandaged. You were arrested, cautioned and taken to Melbourne West Police Station. You were interviewed and stated 'no comment'. You consented to the taking of your DNA. The police removed a black Casio wristwatch from your left wrist.
- 41 A Forensic Medical Officer Dr Dannica VELASCO examined your injured right hand and took photographs. There were five sutured wounds on the front inner part of your right wrist, and some signs of early scabbing and infection. Due to the

wounds being sutured she was not able to comment on the mechanism that could have caused them.

- 42 Police seized medical records from your general practitioner. The records show you attended the clinic on 10 May 2021 and had five sutures to an injury to your right wrist.

Nature and gravity of offending

- 43 The offence of violent disorder, by its nature, is an inherently serious offence. It involves a group of 6 or more offenders, engaging in violent conduct for a common purpose. Neither of you wore face coverings and so the maximum penalty is 10 years imprisonment.
- 44 Each of you, Mr Sewell and Mr Hersant offended with a group of approximately 10-15 males. Whilst it is accepted by the prosecution that neither of you covered your faces, the majority of the group wore scarves or balaclavas. Your group set upon a vehicle containing people attempting to leave the carpark by punching and kicking the vehicle as the victims tried to drive off. The vehicle had two windows smashed and knives were produced by members of the group.
- 45 Mr Hersant, your counsel submitted that your offending falls to the lower end of seriousness for the following reasons: you did not possess a weapon, your face was not covered or obscured; you were not alleged to have made threats; you did not instigate or direct the assault on the occupants of the Volkswagen; only a minor injury was sustained by one of the victims; the offending was spontaneous; was of a relatively limited duration, it was not planned, but rather was reactive to one of the group of six taking a photograph or video of your group.
- 46 Further, your counsel submitted that the absence of premeditation along with your own conduct in the course of the offending inform the gravity of the offence. Further there is no allegation that the offending was a 'prejudice motivated crime'.

- 47 Mr Sewell your counsel submitted that I should find that your own criminality was toward the lower end of seriousness. He relied on the following reasons: the incident was of short duration; the conduct was not planned; there had been no animosity between the groups prior to reaching the carpark; the genesis of the incident appears to be the filming by the group of six; an injury received by one of the victims was very minor; you did not cover your face; you did not make any threats directly to the victims; you were not armed; you were not responsible for the commencement of the incident and did not control the actions of others.
- 48 Further, your counsel submitted that the gravity of your offending was limited to your presence at the scene, which was threatening, whilst others in the group committed the acts of kicking and punching the vehicle and smashing the front windows of the vehicle. He submitted you were not to be sentenced beyond the charge of engaging in violent disorder.
- 49 In response the prosecution submitted that the offending was only of a short duration as the victims were able to escape, not because your group ceased their attack. Further, the prosecution submitted the offending was unprovoked; the victims posed no threat or danger to your group and were making their way out of the carpark; they were prevented from leaving by members of the group reaching into the vehicle and turning off the ignition.
- 50 It was accepted by the prosecution that there is no evidence of either of you carrying or producing a weapon, making a threat, or engaging in a specific act of violence. However, the prosecution submits that your participation at close range to the overall offending is demonstrated by the forensic evidence found around the ignition and window area of the vehicle. Although neither of you can be ascribed any specific act of violence you were both active participants in the violent offending, in the sense that you both performed actions in support of the common purpose.

- 51 I have had regard to the limited number of comparable cases available referred to by the prosecution.¹ What is apparent is that these cases all involve retributive, organised gang violence, with the use of weapons, perpetrated by relatively young offenders. In the case of *Tafa* the victim died of a stab wound to the chest and in the cases of *Akok & others* several of the victims and offenders sustained significant injuries including stab wounds. What emerges from these cases is that offenders were sentenced according to their age, role, prior convictions, and whether they caused injury to others. The use and possession of a weapon or a knife was an aggravating feature that significantly elevated the seriousness with which the court viewed the role of particular offenders.
- 52 With these cases in mind I agree with the submissions of your counsel that the offending of each you should be seen towards the lower end of seriousness for offending of this type. This is because your offending was not planned, there was an absence of any animosity, it was spontaneous, neither of you wore face coverings, neither of you had a weapon, neither of you instigated the offending or engaged in any specific act of violence. That is not to say that I do not consider this incident of offending to be serious.
- 53 Although this offending has arisen in part because of your association with the EAM/NSN, that is you were together with members of those groups on a camping weekend, I do not consider the offending to be directly or causally related to your political views. I accept that your offending was reactive in nature to the situation that unfolded on the day. There is no evidence to suggest that it was politically or racially motivated.
- 54 Despite the absence of victim impact statements it is clear that each of the victims were terrified at being set upon by your group of angry, armed and masked

¹ *The Queen v Tafa* [2022] VSC 466; *DPP v Puoch* [2022] VCC 1063; *DPP v Leek* [2022] VCC 1071; *DPP v Akok, Pal, Nimir, Laula, Kor and Diu* [2021] VCC 1795

associates. It is the pack mentality and violence perpetrated as a group that is the real gravamen of the offence of violent disorder.

Personal circumstances

- 55 Mr Hersant, you are currently 24 years old and were 22 at the time of the offending. You had a relatively happy childhood and were close with your brother; however, this relationship now involves limited contact due to disagreements over your political views. You maintain a close relationship with both parents. Your father, Grant submitted a reference on your behalf. He described that together with your mother they fully support you and consider you to be a wonderful person, and a loving partner, father and son.
- 56 You completed VCE at University High School, where you excelled academically. Although you struggled socially and displayed some behavioural issues during your schooling you were able to build a strong social network.
- 57 During your school years you worked part time in retail and hospitality, and later found employment as a factory worker and labourer. You completed a Certificate II in Electrical Technology, after which you found work as an electrical assistant. You have indicated an intention to undertake an apprenticeship as an electrician upon the conclusion of this matter.
- 58 You are in a committed relationship and have been for over 4 years. This is best described as a strong and supportive relationship, and you have a 10-month-old son. You, together with your partner and child currently live with your partner's parents. Your partner in her testimonial to the court said you were a very supportive partner and a fantastic father who cares very much for his family. She also spoke of your intellect and your recent and successful foray into poetry writing.
- 59 Currently, you are unemployed, which has been attributed in part to the media coverage surrounding this offending. Accordingly, you are the main carer for your child, and spend your time reading and writing poetry. I received a letter from your

former employer, who spoke of you as extremely well-mannered and respectful to others. He has indicated his intention to sign you up as an apprentice electrician once this court matter has concluded. He, like others who submitted testimonials on your behalf, was surprised that you were involved in the current offending before the court.

60 Other character references were tendered at the sentence indication hearing and on your plea. Broadly, each of these letters attested to the fact that you are an intelligent and good person who has had positive impacts on those around you. Ms Michael, a friend of your partner, described the weekly tutoring sessions you provide her son on a range of topics. In addition, she attested to the great bond between you and her son and your patience and understanding.

61 Your mother-in-law, with whom you live, indicated that you are polite and have been a good partner to her daughter and a good father to your son, her grandson. Further, she described that you spend time looking after the home, the garden and renovating and painting rooms which has been of huge assistance to her and her husband who has recently had a kidney transplant.

62 You have a limited prior criminal history. You were found guilty of stating a false name, trespassing, and posting bills without permission in 2018. In 2019 the charges were dismissed due to your compliance with the bond imposed by the Magistrates' Court. You also have a pending summary matter that I was informed of but have not taken into account in sentencing you today.

Sewell

63 Mr Sewell, you are now 30 years old and you were 28 at the time of the offending. You were born in New Zealand in 1993 and moved to Australia with your parents when you were a young child. You were raised by both parents and an older brother in a supportive and caring environment. Your father submitted a testimonial and described you as a disciplined individual with a strong work ethic and sense

of fair play for your fellow citizens. Further, he spoke of your enjoyment in solving problems and helping those less fortunate than yourself.

64 Throughout your secondary education you attended Balwyn High School and completed VCE in 2010. Again in his testimonial to the court, your father described you as an above average student who excelled in most sports, particularly soccer and squash. Additionally, you have also been involved in weightlifting for several years.

65 You have a varied employment background and experience. During your school years you worked in hospitality, continuing in that occupation for a year after completion of your VCE. In 2012 you enlisted in the Australian Army. Upon the completion of your basic training, you were stationed in Darwin serving with the 5th Battalion, Royal Australia Regiment.

66 You left the Army in 2014. Upon returning to Melbourne, you worked in hospitality and security whilst also studying civil engineering at Swinburne University. You left university without completing your degree.

67 From 2016 to 2018 you worked for McKillop Family Services in residential care for children at risk. You supervised children in care, first at a house in Broadmeadows and later at an address in Bentleigh. I understand this to have been challenging work at times and your role included overnight stays.

68 Since this time, you have predominantly worked as a labourer in a variety of roles, including at a steel factory where you suffered a workplace injury that prevented you from working for a period. Like many during the covid-19 pandemic, your employment was impacted and you were unemployed for a time. Currently you work for a plumber who runs his own small Roofing and Plumbing business and have done so since early 2022. Your employer provided a testimonial to the court. He spoke of you in terms of being courteous and respectful to clients in their

homes, a consistent and honest employee and described you as a dependable worker upon whom he relies.

69 You are currently in a relationship and are engaged to be married. You have a young daughter who was born this year. You have been together with your partner since 2019 and have a stable relationship. Your partner cares for your daughter whilst you work. In her character reference she described you as a dedicated partner and father who supported her through sleepless nights without complaint.

70 You have no prior criminal history; however, you have a subsequent conviction for an assault on a security guard. This occurred on 1 March 2021, and you were convicted on 12 January 2023 of affray and recklessly causing injury. You were sentenced to a work order only Community Correction Order for a period of 18 months.

71 It was this matter that you were on bail for at the time of the offending before this Court. It is likely as a result of being on bail that you were refused bail on this matter and consequently spent over 6 months on remand in extremely onerous conditions.

72 Since the May 2021 offending, you have not committed any further offences.

Rehabilitation

73 In circumstances where each of you have considerable family support, are young fathers, have good employment prospects and have had limited involvement with the criminal justice system I consider that in both of your cases, your prospects for rehabilitation are good.

Plea of guilty

74 A trial date was set for 7 August 2023, and you both accepted a sentence indication provided on 28 July 2023. In this context your pleas cannot be seen as early ones. However, you have spared the victims the need to give evidence again which no doubt would have been a harrowing experience for them. Further, your pleas have

freed up valuable court time. In these circumstances, your pleas have significant utilitarian value and have demonstrated your desire to facilitate the course of justice. I propose to allow a considerable discount for your pleas of guilty.

75 Further, I take into account the benefits of these pleas in the context of the court backlog, which though now easing, was still a relevant issue when your matters entered the court process. Consistent with the principles enunciated in the case of *Worboyes*, your pleas will attract a greater amelioration of sentence.

Sentencing

76 I consider the relevant sentencing principles that must be applied in each of your cases are general and specific deterrence, denunciation, protection of the community, rehabilitation and just punishment.

77 I must also be mindful of the principles of parsimony and proportionality. They require me to ensure the sentence is appropriate for the criminality perpetrated by each of you and require that the sentence be no more severe than is necessary to achieve the sentencing purposes.

78 I have weighed up all relevant matters including the submissions of your counsel, the prosecution submissions and the testimonials tendered on behalf of each of you. Further review and consideration of this material along with the comparable cases for violent disorder offending, has caused me to depart from my original sentence indication, but not in way that offends against the process.

79 Mr Sewell and Mr Hersant if you could please stand.

80 Mr Sewell you are convicted of the offence of violent disorder and one summary related offence of committing an offence whilst on bail. On the charge of violent disorder you are sentenced to be imprisoned for a period of 1 month. In relation to the bail offence you are convicted and sentenced to be imprisoned for a period of 7 days which is to be served cumulatively on the 1 month. The total effective sentence is therefore 1 month and 7 days imprisonment. I reckon that you have

already served 1 month and 7 days by way of pre-sentence detention. I do not intend to impose a community correction as I had indicated. Upon reflection I am of the view that the punishment you have endured having spent over 6 months in very difficult conditions in custody is sufficient punishment and to impose a Community Correction Order would be excessive in the circumstances of your case.

81 Mr Hersant, in your case you are convicted of the charge of violent disorder and I sentence you to be imprisoned for a period of 3 days. I reckon that you have served a period of 3 days by way of pre-sentence detention. After careful consideration, I have come to the conclusion, as submitted by your counsel that there is little utility in returning you to custody. It is my view that it would be more appropriate that you perform your punishment in the community, by giving back to the community through unpaid community work.

82 Therefore, I order that you undertake a Community Correction Order for 14 months. The only condition of this order will be that you undertake 200 hours of unpaid community work. Because I have imposed an order with work as your only condition the order will expire once you have completed the hours of unpaid work.

83 In addition to the community work there are standard conditions about which I must inform you. You must report within 2 working days from today to the Melbourne Justice Service Centre. Most importantly you must not commit any offence punishable by imprisonment for the next 14 months or the length of your order. You must accept and receive visits from a Community Correction officer and you must not leave the state of Victoria without permission. In addition, you must notify Corrections of any change of address of where you live and work. If you do not comply with the conditions of this order then you will be in breach and you will be brought back to me and I may have to resentence you.

84 Mr Hersant, do you understand what is involved in a Community Correction Order and do you agree to such an order.

85 Pursuant to 6AAA of the sentencing act had each of you not pleaded guilty I would have sentenced each of you to 18 months imprisonment with a non-parole period of 12 months.