

## *Carbis v The King* [2023] VSCA 38

[Tim Smurthwaite](#), Barrister

A consideration by the Court of Appeal as to the granting of leave to appeal sentence.

### Facts

In April 2021, Mr. Carbis was involved in a violent altercation with Mr. Minns; in the course of which, he stabbed Minns multiple times. The injuries which Mr. Minns suffered were serious and necessitated him being flown by air ambulance from Mildura to Royal Melbourne Hospital.

Carbis was charged with attempted murder, but the case was able to be resolved on the basis of a plea of guilty to Intentionally Causing Serious Injury (s16 *Crimes Act*). The offending eas to have sequels in the County Court (a plea hearing) and the Court of Appeal, the latter hearing arising following the filing of an application for leave to appeal sentence on behalf of Mr. Carbis.

### Determination of Appeal

The application for leave to appeal was granted by T. Forrest, JA on the basis that the sentencing Judge of the County Court had impermissibly allowed Carbis' 'intentionality' to aggravate the offending.

The impugned passage in the sentencing remarks was as follows:

"This was a deliberate, ruthless, armed attack. I am satisfied beyond reasonable doubt that you intended to cause really serious injuries"

The argument made on behalf of Carbis was that this was a problematic finding, because his criminality was "completely captured by his plea, and it was not open to the Judge to treat his intention as an aggravating feature. His intention was inherent in his plea of guilty [to the charge of Intentionally Causing Serious Injury]"

Forrest, JA did not make a finding that the sentencing Judge *had* allowed the applicant's intentionality to aggravate the offending, but in circumstances where this had arguably occurred (the sentencing Judge's language making this unclear), it was appropriate to grant leave to argue the appeal.

## Key principles

This decision is instructive in two ways:

1. In its focus upon the impermissibility of an offender's 'intentionality' aggravating the offending behaviour giving rise to the offence.
2. It demonstrates that there can be appeal opportunities where sentencing remarks are somewhat loose, imperfect, or ambiguous.

While this is good news for Mr. Carbis, the substantive appeal is yet to be determined, and it remains to be seen whether the 10-year, 6 month sentence will be reduced on the appeal.



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Tim accepts briefs for defendants in criminal and quasi criminal matters.

Prior to coming to the bar Tim worked as a solicitor advocate for 32 years.

He had held the status of Accredited Criminal Law specialist for 20 years.

For the last four years before coming to the bar Tim was employed by Stary Norton Halphen and headed the Ringwood office.

Over the course of his career Tim has had the conduct of criminal law matters in all jurisdictions and appeared regularly in the Magistrates Court and County Court.

Tim also has experience in local government prosecutions (Food Act and Planning) and other quasi criminal matters, coronial enquiries and IBAC matters.

Tim has had the conduct of matters concerning the Crimes (Mental Impairment and Unfitness to be Tried) Act.

Tim is also admitted to practice in the Northern Territory.

Tim's life in criminal law was featured in an article in the Australian Financial Review.

Tim does not accept direct briefs. He is reading with Michael Stanton and his senior mentor is George Georgiou SC.

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