

THE QUEEN

v

AARON JAMES TOAL

JUDGE: KAYE J
WHERE HELD: Melbourne
DATE OF HEARING: 27 July 2009
DATE OF SENTENCE 3 August 2009
CASE MAY BE CITED AS: R v Toal
MEDIUM NEUTRAL CITATION: [2009] VSC 304

CRIMINAL LAW – Manslaughter – Plea of guilty – Offending at low end of scale of manslaughter – Young offender – Rehabilitation – Genuine remorse – No previous convictions – Good character – Parity with co-offender.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Crown	Mr D Brown	Office of Public Prosecutions
For the Accused	Mr M Croucher	Galbally & O'Bryan

HIS HONOUR:

- 1 Aaron James Toal. You have pleaded guilty to the manslaughter of Yuxiong Han on 18 July 2008.
- 2 On 30 June of this year, I passed sentence on your co-accused, OJS. In my sentencing remarks, I summarised the circumstances of the offence to which both you, and previously OJS, have pleaded guilty. However, because your plea took place later than that made on behalf of OJS, and you are being sentenced separately, it is appropriate that I restate the circumstances of the offence in these sentencing remarks.
- 3 The circumstances which led to the death of Yuxiong Han took place late in the evening on Monday 7 July 2008. Earlier, in the afternoon of that day, you had met with a group of friends, and had remained in company with them in the Forest Hill and Blackburn areas. During the evening, your group of friends and you attended the McDonald's store near the corner of Canterbury Road and Main Street. You then boarded a bus, intending to travel to a friend's place. At that stage you were in a group of about eight friends, whose ages ranged between 16 and 18 years. You yourself were then 18 and a half years old. You all alighted

from the bus at the intersection of Canterbury Road and Blackburn Road, and commenced to walk in an easterly direction along Canterbury Road towards Forest Hill Chase.

4 On the same evening Mr Han, who was 21 years of age, had been working at a restaurant in Box Hill. He had caught the same bus from the Blackburn Railway Station, and also alighted from it at the corner of Blackburn and Canterbury Roads. After Mr Han left the bus, he also walked in an easterly direction along Canterbury Road towards his accommodation in Forest Hill. He walked past the group of which you were a member, and continued along Canterbury Road.

5 As your group was walking, it broke into smaller groups. You were in the front group, together with OJS and Sami-Jones Tactay. When the three of you approached the intersection of Blackburn Road and Drummond Street, Tactay said to OJS and you "Do you want to go him?", referring to Mr Han who was then in front of you. Mr Han turned around. Mr Tactay then told you and OJS to leave him alone. However, you and OJS decided otherwise. One of your group was heard to say words to the effect "let's roll him" or "let's hit him", and you offered OJS \$10 to do so.

6 Thereupon, both you and OJS ran towards Mr Han. OJS was slightly ahead of you. As he got close to Mr Han, he swung out his arm towards him. In response, Mr Han ran off in a north easterly direction on to the westbound carriageway of Canterbury Road. At that point Canterbury Road is a divided highway, with three lanes for traffic travelling in either direction.

7 As Mr Han ran on to the roadway, Mr Leigh Furness was approaching the same intersection in his vehicle, travelling in a westerly direction in the middle lane of Canterbury Road. Mr Han ran directly into the path of Mr Furness's car, without giving Mr Furness any opportunity to take evasive action. Mr Han was struck by the front of the vehicle. At the time of the collision, it is estimated that Mr Furness's vehicle was travelling at less than the prescribed limit of 70 kilometres per hour. As a consequence of the collision, Mr Han sustained massive head injuries.

8 Immediately after the collision, both you and OJS walked away quickly from the scene, without pausing to render assistance to Mr Han, or to obtain help for him. Some other members of your group remained at the scene, and some nearby residents, who heard the noise of the impact, came on to the roadway to offer their assistance. The residents telephoned the police and the ambulance. You and OJS returned to the scene and asked onlookers what had happened, so as to give a false impression that you had just arrived there. You then departed the scene with all of your friends, before the ambulance and the police arrived.

9 Mr Han received emergency treatment by the ambulance officers, and then was conveyed to the Royal Melbourne Hospital. He died at the hospital as a result of his head injuries on 18 July 2008.

10 On the evening of 8 July, you attended the Nunawading Police Station in company with your father. There you were interviewed in relation to your involvement in the accident which occurred on the previous evening.

Initially, in the interview you did not tell the truth to the police. Rather, you told them that you were walking along and having a normal conversation with your friends, when the male in front of you stepped onto the road and was hit by the car. However, when the police put to you that your account of the accident was not consistent with the version given to them by other witnesses, you agreed that you had had a discussion with OJS about assaulting the male, before the male ran onto the road. In particular, you told the police that Sami-Jones Tactay had suggested to OJS, as a joke, that he should "roll" the male who was in front of you. You stated to the police that you, together with Tactay and OJS, started to run towards the male in front of you, and then Tactay told you to stop. You told the police that you then stopped running, but that OJS continued running, and struck the male from behind, causing the male to run onto the road in the path of the oncoming vehicle. Later in your interview, you gave a different version, saying that you in fact followed OJS as he ran towards the man in front of you, in order to stop him. However, you also told the police that, while you were doing so, OJS said to you "have you got my back?", to which you did not respond.

11 Initially, you intended to plead not guilty to the charge of manslaughter, and accordingly the committal proceeding was set down for a contested hearing for 20 July last. However, shortly before that hearing, and subsequent to my sentencing of OJS, you decided to plead guilty. Consequently, the committal proceeded as a hand up brief. At the conclusion of the proceeding, you pleaded guilty. The basis upon which you have pleaded guilty to manslaughter is that you were criminally complicit in the unlawful and dangerous act of OJS in assaulting Mr Han, which brought about his death. By your plea of guilty, you have acknowledged that a reasonable person of your age, in your circumstances, would have realised that OJS's assault of Mr Han involved an appreciable risk of serious injury to him.

12 In sentencing submissions before me, there was some discussion as to the precise basis upon which you have pleaded guilty. The discussion arose from the inconsistencies in your record of interview, and the fact that the account given by you in your interview is not consistent with the accounts given by other witnesses in their statements to the police. For the purposes of sentencing you, it is necessary that I make some findings as to your involvement. I am, to some extent, limited in doing so, because I have not had the opportunity to hear any evidence, and none of the witnesses were cross-examined at your committal. However, the preponderance of the evidence of those witnesses was that, immediately before Mr Han ran onto the roadway, both you and OJS were running towards him. I am satisfied that you were close to OJS when he either struck, or attempted to strike, Mr Han from behind. I am also satisfied that, having bet OJS \$10 that he assault Mr Han, you did not at any time signify to OJS that he should not do so. In those circumstances, I am satisfied beyond reasonable doubt that, at the time of OJS's assault of Mr Han, you

were acting in concert with him, and, alternatively, you were aiding and abetting his assault.

13 The offence of manslaughter is a particularly serious crime. By your unlawful and dangerous actions, you have been responsible for the death of another human being. It is fitting that I say something about your victim, so that you can have an understanding of the person who has lost his life because of you and OJS.

14 Yuxiong Han was born in China in February 1987. He has a sister, who is now 18 years of age. After Mr Han completed his secondary education in China in 2006, he undertook studies in the English language, and then qualified to be enrolled in the Box Hill TAFE College, in order to study automobile engineering, in which he was interested. Before he came to Australia Yuxiong had devoted much of his time to his work, so that he would qualify to come to Australia. He also played basketball.

15 Yuxiong Han arrived in Australia on 17 March 2008, just 12 weeks before his fatal accident. He attended Box Hill Institute in order to further his English studies, and then he commenced his automobile engineering course. At that time he was living in shared accommodation with other students in Box Hill. In order to survive, he was working part time in a restaurant in Box Hill as a waiter. He was close to his parents, and he spoke to them once per week in China. He last spoke to his mother and father just one day before his fatal accident. In his statement to the police, Mr Han's father stated "we only heard positive feedback about (Yuxiong's) life in Australia and his education. He had made many friends in Australia".

16 I have told you something about Yuxiong Han, because by your actions you have taken the life of a good and decent young man. Mr Han came to Australia, because we welcome overseas students. They are an important part of our society, and they make a significant contribution to it. Unlike you, Mr Han did not have spare time to wander about the suburbs with his friends. Rather, on the evening of his death, he had worked until late in the evening as a waiter, in order to make ends meet. He was enjoying his life, undertaking his studies so that he could pursue his chosen career.

17 By your actions, you have not only cost a decent young man his life, but you have taken from his parents their only and much beloved son, and deprived his sister of her only sibling. I have read the heart-rendering victim impact statements of Mr Han's two parents. The trauma, anguish and despair, suffered by them as the result of your offending, will remain with them for the rest of their lives. The victim impact statements are an appropriate reminder that not only did your actions cost the life of another human being, but that there are others who are left to struggle with the ongoing grief and desolation occasioned by them. Those consequences are a direct result of your criminal behaviour.

18 You, yourself, are 19 and a half years of age, having been born in December 1989. You completed Year 11 at secondary school, and then attended the VCAL stream for the next two years, intending to undertake an

apprenticeship as a plumber. At the time of the offence, you were engaged in a pre-apprenticeship course with a firm in North Ringwood. After you completed your education at the end of 2008, you were unable to secure an apprenticeship as a plumber. However, you obtained employment with a house framing company. I have read a character reference from your employer, who speaks highly of you. In addition to your interest in plumbing, you have also had an interest in graphic design. Accordingly, you recently applied to undertake a graphic design course at a private school in the city. That course commenced on the day on which your plea was made on your behalf. If you undertake the course on a full time basis, you will complete it in 18 months.

19 You have no previous convictions. On your plea, six character references were tendered on your behalf. The authors of three of those references, your father, your mother and your aunt, each gave evidence on your behalf. Each of the references, and each of the witnesses, have told me that you are a good natured and gentle person. None of the witnesses have noticed that you have any violent or aggressive tendencies.

Each witness was shocked to learn of your involvement in the offence, which they considered to be entirely out of character for you. Furthermore each of the witnesses, and the character references, spoke of your genuine remorse and contrition for your involvement in the offence. I was impressed by the witnesses who gave evidence before me. Based on their evidence, and also the report of Mr Ian Joblin, the psychologist who examined you on 15 July, I am satisfied that you are sincerely remorseful for your actions. In particular, I am satisfied that you have genuine insight as to the tragic consequences which your actions have had for Mr Han and for his family, and that you are deeply remorseful for the fact that your actions have resulted in the loss of a life of a young man, and have caused profound grief and loss to his parents. I also accept the evidence that, apart from your offending in this case, you are a young man of good character, and in particular that you do not have aggressive, violent or anti-social tendencies.

20 In this respect, I am fortified in my views by the report of Mr Joblin. Mr Joblin confirms that you have a proper understanding of the impact of your behaviour, not only on your own family, but also on Mr Han's family. He also states that you do not have any underlying anti-social tendencies. Based on his report, and the evidence of the character witnesses, I accept that your prospects of rehabilitation are very good, and that there is a low risk of re-offending by you. I also add that I am satisfied on the evidence that Mr Han's ethnic origins did not play any part at all in your offending in this case. As I noted in the sentence of OJS, the group of friends, with whom you were associating on that night, included at least two persons of Asian origin. Both your parents and your aunt were categorically confident that you are not racist.

21 As I have stated, the offence to which you have pleaded guilty is a particularly serious offence. The maximum sentence for manslaughter is 20 years, which reflects the high value which our society places on

the sanctity of human life. Mr Han gave you and OJS no cause at all to attack him. Rather, he was an innocent young man making his way home, after completing his long evening's work. I am concerned that at the time of the offending you were a member of a group of young men. Gratuitous unprovoked attacks by groups of youths on innocent members of our society have become much too prevalent. The offending, in which you were involved, has as its hallmarks the same disgraceful cowardice which is a characteristic of other such attacks in our community. Your offending is aggravated by the fact that Mr Han was attacked in the dark from behind, in circumstances in which he had no opportunity to anticipate that assault, let alone to defend himself from it. It is little wonder that Mr Han took fright in those circumstances, and reacted in the way in which he did.

22 Furthermore, your conduct shortly after the incident reflects no credit on you at all. Not only did you depart the scene of the accident with undue haste, but later that evening you and your friends sought to collaborate to fabricate an untrue account of what had happened. Initially in your interview with the police, you adhered to that plan, and lied to the police about what had happened. It was only when you were confronted with the fact that witnesses had told the police a different version of what had occurred, that you then gave them an account which implicated yourself in the death of Mr Han. Even in doing so, in your interview you sought to minimise your own guilt, by seeking to distance yourself from OJS at the time of the fatal accident.

23 On the other hand, I accept the submission, made by Mr Croucher on your behalf, that there are a number of significant mitigating circumstances in your favour. Firstly, although, as I stated, the offence of manslaughter is a serious criminal offence, I do accept that this case can properly be characterised at the very low end of the scale of cases of manslaughter which ordinarily come before this Court. The attack on Mr Han only involved one blow at him, and neither you nor OJS were armed with any weapon. I accept that the attack was the product of a thoughtless prank, instigated by Tactay and yourself, which got out of hand. Your offending was very much the outcome of an act of stupidity on the spur of the moment. It is to be distinguished from those cases where the offender has prowled the streets, in company with a large group of offenders, bent on violence. Rather, on the evening in question you had been innocently associating with your friends, and as I have stated, the offending was very much a spontaneous matter.

24 In addition, as I have already stated, I accept that your offending was entirely out of character. Indeed, I am satisfied that your actions on that night were quite contrary to your normal behaviour. I am impressed with the maturity with which you have dealt with the separation of your parents, and with the manner in which you have applied yourself to your studies and to your career. Those matters reinforce my conclusion that the type of conduct in which you involved yourself on the night in question is not a true reflection of your real personality.

25 In addition, I accept that your youth is a significant mitigating circumstance. At the time of the offence, you were 18 and a half years of age. You were certainly three years older than OJS, and, as such, your level of culpability is higher than that of OJS. Nevertheless, I accept that you were at an age at which impulsiveness and immaturity can contribute to a momentary lapse in judgment, and can thus give rise to the type of actions in which you involved yourself. I therefore accept that your youth did play a role in contributing to your involvement in the offence, and also to your disgraceful conduct immediately after the accident, both at the scene, and later, when you sought to collude with your friends to fabricate a false account as to what had occurred.

26 Your youth is also of particular importance, because the law recognises the primacy which is placed on the rehabilitation of young offenders. Your rehabilitation is not only important for you personally, but is also in the best interests of the community. Although, in a number of cases, the rehabilitation of a young offender may need to take second place to other sentencing considerations, in my view in this case it is a factor of substantial weight. I am persuaded that if you were to be sentenced to a term of imprisonment or to a term in a youth justice centre, your rehabilitation may well be jeopardised.

27 I also consider that your plea of guilty in this case is a factor which should be given substantial weight. Although you pleaded guilty at a later time than OJS, nevertheless you did plead guilty before the contested hearing of your committal proceeding. In that respect, I accept that your plea of guilty was made at a relatively early stage of the proceedings. As I remarked in the course of sentencing submissions by your counsel, it is understandable that, before you pleaded guilty, you had received advice that you should contest your guilt, not only on the basis of your version of your actions on that night, but also because of the question as to whether the actions of OJS and yourself could be characterised as “dangerous”. Thus, you pleaded guilty, notwithstanding that a person in your position might have been tempted to trust his fate to the jury. As such, your actions in pleading guilty, and thereby assuming and acknowledging proper responsibility for your criminal actions, substantially mitigate the sentence which I would otherwise impose on you.

28 I also accept that, as a result of your plea of guilty, and as a result of your involvement in the offence, you have suffered a substantial penalty of itself. As a young man with a conviction for manslaughter, you will find it more difficult to obtain employment in the future, and will suffer other impediments, such as if you seek to travel overseas. In addition, I am satisfied on the evidence of your parents and your aunt that you are, and that it is likely that you will continue to be, deeply conscious that by your foolish and thoughtless actions you have cost a young man his life, and that you have taken a cherished son from his loving parents. I accept that you recognise and genuinely feel for the irreparable harm which you have caused to Mr Han’s family.

29 Finally, I accept the submission made by Mr Croucher that issues of parity of sentence with OJS are relevant. In sentencing OJS, I made a youth attendance order, albeit with substantial hesitation. There are relevant differences between your case and OJS's case. In particular, as I have noted you were and are three years older than OJS, and he pleaded guilty at an earlier stage than you. Nevertheless, principles of parity require that, in sentencing you, I take into account the fact that I have imposed a non-custodial sentence on your co-accused.

30 On your behalf, Mr Croucher submitted that I should make a community based order, or alternatively an intensive correction order, rather than imposing a custodial sentence on you. Mr Brown, who appeared to prosecute the plea, accepted that a community based order would be within the range of sentence which is appropriate in your case. Accordingly, at the conclusion of your plea, I directed that a pre-sentence report be prepared pursuant to both s 19(1)(b) and s 36(1)(b) of the *Sentencing Act*. I have now read that report, which states that you are considered to be suitable for a Community Based Order or, alternatively, an Intensive Corrections Order.

31 In sentencing you, it is important that the sentence which I pronounce should be sufficient to reflect the seriousness of your offence, and to recognise the high value which our community places on human life. It is also important that the sentence should be such as to deter other like minded individuals from indulging in the type of gratuitous and cowardly violence which characterised your offending in this case.

32 On the other hand, as I have already stated, it is important that I give full weight to each of the mitigating circumstances to which I have referred, and in particular to the significance which our community places on your rehabilitation as a young offender.

33 Notwithstanding the concession made by the Crown, the decision as to what sentence I should impose on you is difficult. However, having given the matter anxious and careful consideration, I am persuaded that it would be appropriate to make a community based order in your case. I do so, because I have come to the conclusion that the mitigating factors, to which I have already referred, combine to make this an exceptional case, which would justify the imposition of a non-custodial sentence on you. In summary, those factors are:

- (1) Your offending was at the low end of the scale of manslaughter cases. It involved a relatively moderate degree of violence on your behalf. There was no premeditation in your offending, and your involvement in it occurred on the spur of the moment.
- (2) Your offending was entirely out of character, and indeed contrary to your normal personality and antecedence.

- (3) Your plea of guilty, signified at a relatively early stage, is a circumstance of substantial weight. As I have already stated, this is not a case in which you had no option other than to plead guilty. The fact that ultimately you decided not to try your fortune in front of the jury, but were correctly prepared to acknowledge your responsibility for your illegal actions, and for the death of Mr Han, is a significant mitigating circumstance.
- (4) You are and have been genuinely remorseful.
- (5) Your youth, both at the time of the offending, and particularly at the time of sentence, is a factor of primary importance. In particular, as I have stated, the law regards the rehabilitation of young offenders such as yourself as an important sentencing objective, in the best interests of the community.
- (6) You have good prospects of rehabilitation. Equally, I am satisfied that a custodial sentence might well have an adverse effect on your rehabilitation.
- (7) You have to some extent at least suffered, and will continue to suffer, a substantial penalty as a result of your offending, apart from any sentence which I could impose on you. In particular, you now stand convicted of the serious crime of manslaughter, which will be an impediment to you in your future employment. In addition, you have suffered and continue to suffer emotionally from feelings of shame and remorse, and from the insight that your irresponsible actions have resulted in the death of a decent young man.

34 Accordingly, but with some hesitation, I intend to accede to the submission of your counsel, and to make a community based order in respect of you. The community based order will be for the maximum period of 2 years. I consider it appropriate that the order contain a condition that you perform the maximum amount of unpaid community work prescribed by the *Sentencing Act*. Accordingly, the order shall contain a program condition, under s 38(1)(a), that you perform 500 hours unpaid community work as directed by the regional manager for a period of two years. The performance by you of that work will enable you to make some reparation to the community, and to reinforce to you the wrongfulness of your actions. I consider that the imposition of that work is a constructive way of depriving you of a substantial part of your spare time over the next two years, while requiring you to put something back into the community.

35 In addition, as recommended by the pre-sentence report, the community based order will contain a program condition, under s 38(1)(b) of the *Sentencing Act*, that you be under the supervision of a community corrections officer, and a condition, under s 38(1)(g), that you undergo assessment for programs to reduce your risk of re-offending, and participate in such programs, as directed by the

community corrections officer.

36 In making that order, it is important that I point out to you that a core condition of the order is that you do not commit, within or outside Australia, another offence punishable on conviction by imprisonment for the duration of the community based order. If you breach that, or any other, condition of your order, you may be dealt with for breach of the order. I can assure you that if that were to occur, there is a very high likelihood that your community based order would be cancelled, and replaced by a custodial sentence.

37 Section 6AAA of the *Sentencing Act* requires me to state the sentence which would had been imposed on you, had it not been for your plea of guilty. As I have already stated, I regard your guilty plea, in this case, as a factor of substantial weight. Notwithstanding the concession by the Crown, I deliberated long and hard before determining not to impose a custodial sentence on you. Certainly, if you had not pleaded guilty, I would have sentenced you to an immediate term of detention. Taking into account the other mitigating circumstances, if you had not pleaded guilty, I would have sentenced you to a term of 3 years' detention in a Youth Justice Centre.

38 Accordingly, for the reasons which I have stated, I make a community based order in respect of you. The order will be for a period of two years. In addition to the core conditions of that order, I also specify the following program conditions of the order:

- (1) That you perform 500 hours unpaid community work as directed by the regional manager for a period of two years.
- (2) That you be under the supervision of a community corrections officer.
- (3) That you undergo assessment for programs to reduce your risk of re-offending, and that you participate in such programs, as directed by the community corrections officer.