

S/C Julian TANG

V

James HABERFIELD

SENTENCE

1. James HABERFIELD you have pleaded guilty to one charge of assaulting paramedic [REDACTED], an emergency worker whilst on duty (s.31(1)(b) of Crimes Act 1958 - **CHARGE 2**) and one charge of Recklessly Causing Injury to paramedic [REDACTED] (s.18 of Crimes Act 1958 – **CHARGE 5**).
2. The summary of the facts of the case were read by the prosecutor Sgt Eales and were as follows: (*refer to summary*):
3. Sgt Eales also tendered a Victim Impact Statement (VIS) in the course of opening the case written by the victim [REDACTED] dated 18 March 2019, which was read to the court by her father [REDACTED] who was present in court on the plea together with his wife and the mother of the victim, [REDACTED].
4. In the VIS, paramedic [REDACTED] who had been working in a professional capacity for Ambulance Victoria for 9 years, outlined the physical and psychological impact she suffered as a result of your actions on 29 January. It is trite to say they were and continue to be significant. I do not intend for these purposes to revisit the entirety of the statement, but rather to simply summarise the effect your actions have had on her.
5. She suffered a serious haematoma and significant swelling to her left cheek from your punch, as well as injuries to her neck and back and whiplash to her neck and head. The ongoing pain and sensitivity she suffered affected her sleep and necessitated her requiring regular medication and physical therapy. She was constantly reminded of the assault each time she had cause to see her own reflection, and even 5 to 6 weeks after the assault was still unable to participate in any physical activity which was particularly difficult for her as personal fitness played a significant role in her enjoyment of life and her mental well-being.
6. That however is not the end of it. She has also been diagnosed with PTSD and anxiety as a result of the assault, causing overwhelming emotions and panic attacks, confusion, fear, distress and nausea. She feels unsettled, unsafe and hyper-vigilant even in her own home. Her usual confidence in social situations has been severely affected, as has her independence.

7. Her income was affected by your actions, causing financial strain on top of the myriad issues I have already outlined. At the time of the plea she was still not back on operational duties.
8. All these deleterious effects of your behaviour were underscored by several documents to which I have had regard, tendered by Sgt Eales:
 - Photographs of [REDACTED] injuries
 - A report dated 20 February 2019 from [REDACTED] treating psychologist of [REDACTED]
 - Progress notes from the victim's treating GP; and
 - A report dated 21 February 2019 from Osteopath [REDACTED] attaching consultation notes regarding his treatment of the victim.
9. Also tendered by the prosecutor, in the absence of a victim impact statement from the victim [REDACTED] was his statement to police dated 30 January 2019. I have had regard to the matters referred to therein, including but not limited to his feelings of anger about what happened, and the unfairness of what he and his partner had to endure simply for trying to do their job and assist you.
10. Both charges to which you have pleaded carry a maximum penalty of Level 6 imprisonment (i.e., 5 years gaol), however *s.10AA(4)* of the *Sentencing Act 1991* requires that a term of imprisonment of not less than 6 months be imposed for an offence against *s.18*, if the victim is *inter alia* an emergency worker on duty unless the court finds under *s.10A* of that Act that a special reason exists.
11. If a court makes such a finding under *s.10A* of the *Sentencing Act*, the requirements of *s.10AA (4)* of that Act do not apply and the court has full sentencing discretion, i.e., there is no fetter on my usual sentencing discretion to impose any sentence I deem appropriate in all the circumstances.
12. *S.10A(2)* of the *Sentencing Act* sets out that for the purposes of *s.10AA*, a court may make a finding that a special reason exists if one of a number of sets of circumstances outlined in that section are in existence.
13. In his argument that such a special reason exists, your lawyer Mr Halphen relied on those circumstances set out in *paragraph (c)(i)* and/or *(ii)* of *subsection (2)*.
14. *Section 10A(2)(c)(i)* states that a court may make a finding that a special reason exists if the offender proves on the balance of probabilities that *subject to subsection (2A)* (my emphasis) at the time of the commission of the offence, he had impaired mental functioning that is causally linked to the commission of the offence and substantially reduces the offender's culpability.
15. The proviso to the operation of *paragraph (c)(i)* of *s.10A(2)* outlined in *subsection (2A)* provides that *subsection (2)(c)(i)* does not apply to impaired mental functioning caused *solely* by self-inflicted intoxication (my emphasis).

16. *Section 10A(2)(c)(ii)* states that a court may make a finding that a special reason exists if the offender proves on the balance of probabilities that he has impaired mental functioning that would result in him being subject to substantially and materially greater than the ordinary burden or risks of imprisonment. *Paragraph (c)(ii)* carries no proviso to its operation such as that contained in *paragraph (c)(i)*.
17. *Section 10A (1)* sets out that 'impaired mental functioning' for the purposes of the section includes *inter alia*: a mental illness within the meaning of the *Mental Health Act 2014*, or an autism spectrum disorder. (I have referred only to those definitions applicable to this case).
18. *Section 4(1)* of the *Mental Health Act 2014* defines 'mental illness' (subject to *subsection (2)*) as a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory.
19. The proviso to *s.4(1)* in *subsection (2)* sets out the circumstances under which a person is not considered to have a mental illness, none of which in my view apply to this case, and nor was it argued by the prosecution on the plea to the contrary.
20. In support of his arguments for the existence of a special reason, Mr Halphen tendered a number a reports:
- A report dated 25 July 2019 by Associate Professor [REDACTED] – Consultant Forensic Psychiatrist. In preparing his report Professor [REDACTED] had regard to the following:
 - A letter dated 15 July 2019 from [REDACTED] your treating psychiatrist;
 - A report dated 11 July 2019 from Headspace Youth Early Psychosis Program (hYEPP) co-signed by [REDACTED] Clinical Psychologist/Case Manager, and [REDACTED] Clinical Lead, Practice and Service Design; and
 - A letter dated 13 July 2019 from [REDACTED] your GP.
21. It should be noted that the prosecution did not tender any expert statements of their own, nor did they call for any of the authors of the defence reports to be available for cross-examination, nor in any other way did they seek to challenge the professional conclusions contained in such reports.
22. I will now address Mr Halphen's first argument for the existence of special reasons, i.e., that that on the balance of probabilities it is open for me to conclude that at the time of the commission of the relevant offence:
- a) you had impaired mental functioning,
 - b) that is causally linked to the commission of the offence, (i.e., the commission of the offence occurred as a result of the impaired mental functioning);
 - c) that impaired mental functioning substantially reduces your culpability; and that
 - d) any impaired mental functioning was not caused solely by self-inflicted intoxication.

23. In my view the significant issue for determination in this first defence argument for the existence of special reasons is not whether you had impaired mental functioning, or whether it was causally linked to the commission of this offence, or whether your culpability was substantially reduced as a result, as in my view these are comparatively straightforward propositions in the circumstances of your case. Really the ultimate question is whether your impaired mental functioning was caused solely by self-induced intoxication.
24. I am satisfied that at the time of the assault on the victim [REDACTED] you were in the words of Professor [REDACTED] at p.13 paragraph 136 "*...in an acutely psychotic state, with very frightening persecutory delusions wherein he felt in acute, serious fear for his safety. At the time of the attack on paramedics, he believed that he was at imminent risk of serious harm and was thus seeking to escape from the ambulance.*"
25. I am satisfied that that 'acutely psychotic state' satisfies the definition of a 'mental illness' in s.4(1) of the *Mental Health Act 2014* as there is little doubt that at all relevant times you were suffering a significant disturbance of thought, mood and perception. After this incident your psychotic symptoms remained such that you required admission to a hospital for over a week.
26. In my view, it follows that your impaired mental functioning, i.e.; your psychotic state; your delusional frightening persecutory belief that you were in imminent risk of serious harm (and the concomitant desperation to escape from the ambulance) is causally linked to your offending in that you thought [REDACTED] was trying to harm you, which in turn reduces your culpability.
27. But as I have already foreshadowed, the real question is whether your impaired mental functioning was caused solely by self-inflicted intoxication – 'solely' being the crucial word.
28. The word 'solely' implies that if I am satisfied on the balance of probabilities that as well as self-induced intoxication, your impaired mental functioning at the time of commission of the relevant offence was attributable to any other factor, to whatever degree, then I am bound to find that a special reason exists and my full sentencing discretion becomes enlivened.
29. This is a difficult proposition as it cannot be controversial that your impaired mental functioning was due to the cornucopia of illicit drugs you ingested at the Rainbow Serpent Music Festival, including methylamphetamine, MDMA (ecstasy), and ketamine. Whilst I am bound to accept the unchallenged professional opinions of the authors of the reports tendered in support of the arguments made on your behalf, that you first developed psychotic symptoms in October 2018 almost immediately after commencing use of synthetic cannabis, and that your Autism Spectrum Disorder traits would have made you more susceptible to the development of psychosis, I

cannot ignore the fact that the initial onset of psychotic symptoms coincided with your use of synthetic cannabis, no matter how susceptible you may be to such afflictions.

30. Professor ██████ opines at paragraph 162 of his report that your mental impairment at the relevant time was not solely due to self-induced intoxication, and that other relevant aetiological (or causal) factors to the genesis of your psychotic state at the time would likely have included factors such as your pre-existing 'prodromal' psychotic state (which dates back to October 2018), your Autism Spectrum Disorder traits and the trauma of the events of the music festival.
31. However, in my view the reality is that notwithstanding your susceptibility to psychosis, your Autism Disorder traits or the unfortunate events at the music festival that Professor ██████ believes in all probability did occur and are not as a result of delusional beliefs, had you not used those drugs at the music festival, I am satisfied on the information before me you would not have developed such a significant disturbance of thought, mood or perception, you would not have required the assistance of paramedics and the incident that brings you before the courts would not have occurred. In those circumstances I am not satisfied that your impaired mental functioning on the day in question was not caused solely by self-inflicted intoxication, and I therefore conclude that no special reasons exist for the purposes of *s.10A(2)(c)(i)*.
32. I should interpolate here, that I have not overlooked the other definition of impaired mental functioning applicable to you, i.e., is the diagnosis made by Dr. ██████ about your Autism Spectrum Disorder. However, I cannot see how I could conclude that your Autism Spectrum Disorder is causally linked to your offending. The evidence suggests that your Autism Spectrum Traits arguably make you more susceptible to psychosis, but to my reading of the materials to manifest the development of such psychosis, the use of illicit drugs is required - synthetic cannabis in the 1st instance and ultimately the myriad drugs consumed at the Rainbow Serpent Festival. To reason that in those circumstances your Autism Spectrum Disorder is causally linked to the offending is perhaps to draw a long bow.
33. Even if I'm wrong about that, the defence argument under *s.10A(2)(c)(ii)* is in my view a stronger one, and this was more or less conceded on the plea by Mr Halphen. I am satisfied on the material before me that you suffer from a Major Depressive Disorder, you are diagnosable with a Schizophreniform Disorder and Autism Spectrum Disorder.
34. I am satisfied that it has been demonstrated on your behalf on the balance of probabilities that you have impaired mental functioning that would result in you being subject to substantially and materially greater than the ordinary burden or risks of imprisonment. In coming to this conclusion, I rely on **paragraphs 150-159** of Professor ██████ report – i.e.:
 - Your clinically depressed state in and of itself would mean that you would find any term of imprisonment more burdensome than a prisoner not so afflicted;
 - Estrangement from your supportive family and treatment network would place you at a very high risk of further deterioration in your mental state;

- In prison you would not be able to obtain anywhere near the same level of intensity or range of treatments that you currently receive and require. Currently you are in receipt of weekly psychotherapy from a psychologist as well as weekly contact with a consultant psychiatrist with special expertise in developmental disorders. Specifically, you see your headspace psychologists every week, your psychiatrist Dr [REDACTED] every week and your GP Dr [REDACTED] fortnightly.
- In prison you would be seen by psychiatric nurses at times of crisis and would have more occasional reviews with a psychiatrist focussed on medication. You would not be able to avail yourself of psychotherapy from a clinical psychologist. You would receive your medication.
- If concerns about suicide became an issue in prison, then you would likely be managed from time to time in very onerous and burdensome settings including isolation cells.
- Although it is possible that you would be transferred to the 'Mental Health Precinct' at Ravenhall prison, this is not a psychiatric hospital. It would not be likely that you would be readily transferred to Thomas Embling Hospital, given the current demands on beds there.
- In addition to the issue of your Major Depressive Disorder, which remains very active and places you at an elevated risk of suicide, Professor [REDACTED] would also have concerns about your heightened vulnerability to becoming psychotic. It is certainly possible that the stress of imprisonment would lead to deterioration in that sense and that you would again become psychotic.
- In addition to all of that, there is the issue of the events at the Rainbow Serpent Music Festival in January 2019. Thus, the context of being in prison surrounded by potentially threatening males with criminal backgrounds would be extraordinarily frightening and stressful for you.
- Your autism spectrum traits would additionally make it very difficult for you to navigate the rather complex social environment of prison, which would be entirely alien to you. Your autistic traits mean that you are somewhat socially naïve and hence render you especially vulnerable to bullying or other forms of abuse from co-prisoners.
- Given all these factors and your already prominent suicidal thinking, Professor [REDACTED] has significant concerns that imprisonment would place you at acute risk of suicide. The comments made by Headspace regarding difficulties in detecting stress in you are obviously of relevance in this regard: *"In the context of James' tendency to internalise his distress, his symptoms may not be likely to be easily observed by others and instead James' mental state is likely to deteriorate undetected until a crisis point."*

35. It was argued by the prosecutor that in considering my decision I ought to have regard to the intention of Parliament, and in support of this submission Sgt Eales tendered a copy of the second reading speech for the legislation that introduced the statutory minimum sentences. That speech read in part:

"The longer sentences reflect the opprobrium that the community attaches to acts of violence against emergency workers who put themselves on the line in emergency situations on behalf of the community. It sends a clear message to

perpetrators of these acts that violence against emergency workers will not be tolerated and will be met with strong penalties.”

36. The prosecutor also tendered a copy of DPP v Hudson [2016] VSCA 254, and relied on paragraphs 111 and 112 of the judgment, in particular the passage that reads:
“It was clearly the intention of Parliament that that the burden imposed upon an offender who sought to escape the operation of s.10 should be a heavy one, and not capable of being lightly discharged.”
37. Whilst I agree with the general sentiments espoused in Hudson, it’s important to point out that the respondent in that appeal was charged with Intentionally Causing Serious Injury in circumstances of gross violence, arguably the most serious violent offence short of murder. Moreover, he was 36 years old and had priors for violence and had pleaded not guilty at trial.
38. Similar sentiments were expressed in the case of DPP v Arvanitidis [2008] VSCA 189 tendered by the prosecutor, however this was not a case that dealt directly with the issue of s.10A of the *Sentencing Act 1991*.
39. The intention of Parliament and the comments of the Court of Appeal have resonance, and of course I agree that the message needs to be sent to the community that emergency workers are not ‘punching bags’ and must be given a significant level of protection by the law. However, whilst amending the Sentencing Act to impose the mandatory minimum terms designed to protect emergency workers on duty, Parliament in its wisdom also recognised that there are those in the community to whom such statutory minimum sentences ought not apply subject to the satisfaction of certain conditions. Hence the enactment of s.10A.
40. In light of my ruling on the defence submissions regarding paragraph (c)(ii), my general sentencing discretion is enlivened, and I am not compelled by legislation to impose a term of imprisonment.
41. On the plea, Mr Halphen relied on the following factors:
- Your young age – You were 21 at the time of the offending and are still only 22 years of age.
 - You have no prior criminal history.
 - There has been no subsequent offending – it flows from that there are no matters outstanding.
 - Your remorse – it is clear from the psychological/psychiatric materials tendered on the plea that you are, in the words of Mr Halphen, mortified, dismayed and deeply ashamed.
 - As a further indication of your remorse you have pleaded guilty at the earliest opportunity
 - Your plea has a utilitarian value, as it saves the victims of your behaviour from having to be further traumatised by coming to court to give evidence, and reliving the events of the night in question

- It is submitted that your prospects of rehabilitation are excellent. It is a submission with which I agree.
 - You are an intelligent young man – You completed your VCE as a boarder at St. Patrick’s College Ballarat, and you are in your final year at Deakin University studying Construction Management. An academic transcript was tendered on the plea showing you your studies from 2016 through to and including this year.
 - You have strong family support. On the plea you were supported by your parents and other members of your family including your sister.
 - You have been actively seeking treatment for your mental health issues – As stated you see a psychologist at headspace and your treating psychiatrist weekly, and your GP fortnightly.
 - A letter was tendered on the plea from your GP Dr [REDACTED] that attests to the fact that between 1 April and 18 July 2019 you have provided 25 drug screens which have been ‘entirely negative’ for illicit substances.

42. The following testimonials were tendered on your behalf:

- Undated letter from your mother [REDACTED]
- Letter dated 19 April 2019 from [REDACTED] (your sister’s fiancé);
- Letter dated 23 April 2019 from [REDACTED] (your aunt);
- Letter dated 23 April 2019 from [REDACTED] (your uncle); and
- Letter dated 17 April 2019 [REDACTED] Director of Boarding/Overseas Student Coordinator at St Patrick’s College in Ballarat.

43. All these references speak of you as someone who is ordinarily shy, modest and gentle natured, decent, kind, trustworthy and hardworking. A young man of sound character. The impression is that this offending is entirely out of character for you, and all attest to the fact that you are mortified by your behaviour.

44. Mr Halphen’s submission was that in all the circumstances of your case the most appropriate disposition was a Community Corrections Order.

45. The prosecutor Sgt Eales submitted on behalf of the informant that even if I were to decide (as I have) to find that a special reason exists and as a corollary my sentencing discretion is enlivened, given the matters tendered on the plea by the prosecution and the nature and gravity of your offending I should still find that a term of imprisonment is an appropriate disposition.

46. However in light of all the material before me, and for the reasons I have already touched upon, (primarily those matters I highlighted in Professor [REDACTED] report at paragraphs 150-159) it is my view that sending you to gaol for this offending undoubtedly could and in all probability would have a disproportionately catastrophic effect on your future.

47. I should also note at this point that as well as all the reports that were tendered on your behalf on the plea by Mr Halphen, as part of having you assessed for a rehabilitative disposition between the plea and today, you were also assessed by Mr

██████████ Forensicare Mental Health Community Corrections Screening Program – who also formed the view that were you to be given a custodial sentence that your mental state would decline, that you would be highly vulnerable in the prison environment and that your risk of suicide/self-harm would increase significantly.

48. It is my view that given your multiple psychological and psychiatric issues you are not a suitable vehicle for general deterrence, and I am very much of the view that your travels through the criminal justice system will have proved a sufficiently significant specific deterrent to you.
49. Given all the circumstances of this case, your rehabilitation in my view must play a greater role than in my sentencing considerations than other sentencing considerations because I am satisfied that if you continue to receive the appropriate treatment and support you are very likely never to come back before the courts again. By contrast, were I to sentence you to an immediate term of imprisonment, even if you were to survive the ordeal, I fear given the psychiatric profile outlined in the materials before the court, your rehabilitation would be set back indefinitely.
50. It is not only to your benefit that you are rehabilitated, but also the community's. A rehabilitated James Haberfield will never be a danger ever again to any emergency workers on duty or anyone else for that matter. A rehabilitated James Haberfield will be a productive, contributing, hard-working member of society. An unrehabilitated and further traumatised James Haberfield might find himself a burden and drain on society indefinitely.
51. Since the last occasion you were before me, I had you assessed for a CCO/MTMO (Mandatory Treatment Management Order) for which you have been assessed as eligible and as a low risk of re-offending.
52. The offences for which you have pleaded guilty meet the legislative requirements of a MTMO, and the core conditions of such an order require that you would participate in Judicial Monitoring (that is coming back before me at regular intervals so I can monitor your progress) and undergo treatment and rehabilitation aimed at addressing your mental health.
53. Under such an order you will be allocated to an Advanced Case Manager at the Melbourne Justice Service Centre, whose role it will be to implement case management practices and interventions for more complex individuals such as yourself, who present with higher responsivity issues such as mental health illness. I am advised by corrections that you will receive a high level of support and case management intervention to address your mental health and drug treatment rehabilitation.
54. This will assist me with being provided with more comprehensive updates when preparing the judicial monitoring reports.

55. On the charges before the court, you are convicted and sentenced to an 18-month CCO/Mandatory Treatment Management Order (MTMO). I believe Mr Haberfield that you are the first person in Victoria to be sentenced to this disposition since it came into law in October last year.

56. Copy of CCO/MTMO