

# Sary Norton Halphen Criminal Law Moot 2017

## The Problem

STARY  
NORTON  
HALPHEN

CRIMINAL  
LAW SPECIALISTS



**AT THE SUPREME COURT OF VICTORIA  
COURT OF APPEAL**

**TANN  
v  
THE QUEEN**

**THE FACTS**

1. During 2016, Michael Tann (“Tann”) completed his final year of schooling at Lakeside High School, Craigieburn. Throughout the year, Tann was bullied by Thomas Cottrell (“Cottrell”) and four of Cottrell’s friends. They called themselves 2Kool4Skool, and used its short form (“2K4S”) as graffiti everywhere. It was common knowledge that the group was affiliated with a local motorcycle club, known to be involved in violent matters and occasional drug deals.
2. Tann turned 18 years old on 2 February 2016. He is a high-achieving student, with his grades never slipping below an ‘A’ (80% and above). He wants to become a chemical engineer, and work with the advancement and development of biofuels, for use in every day energy-driven facilities and processes. His father, Ethan Tann, had been an engineering professor at the Australian Institute of Technology (AIT, Melbourne). He passed away from head injuries in 2013, when he discovered a group of male students stealing exam papers from his office late in the night. The students ran away after pushing Tann’s father down a staircase near the door. Tann is still traumatised by the loss.
3. Cottrell was 19 years old, and was living with a member of the local motorcycle club. He referred to the club’s members as his only family. Cottrell had lived in a share house with other children from troubled backgrounds before turning 18 years old.
4. On 23 March 2016, during a school lunch break, Tann was at his locker when 2K4S members approached him. Cottrell stood the closest to him, and began verbally abusing Tann. Yusuf Ali, one of the group members, then slammed Tann’s head into his locker behind him. Tann did not report the assault out of fear of retaliation.
5. As the year progressed, Tann was continuously victimised and assaulted by Cottrell, and other group members, on many occasions. This victimisation and assault was witnessed by many students at the school. He became depressed and, at times, had suicidal thoughts. His 2016 diary detailed 2K4S’s encounters with him, and often mentioned him missing his father.

6. Shortly before the VCE exams, on 28 September 2016, Tann was cornered in the male's bathroom by Cottrell and some of the 2K4S group. Cottrell brandished a bowie-knife and said to Tann, *"I feel like you don't smile enough, mate. We can fix that."* While saying this, Cottrell brushed the knife against Tann's cheek. Cottrell then laughed and said, *"Another time. I don't feel like getting my uniform dirty today. And Tann-man, I wouldn't go around telling anyone about your smiling problem - we all know where you live."*
7. When Tann returned home, he messaged his girlfriend, Elli Grimes, through Facebook messenger. Tann stated, *"Elli, I can't go on like this. There's only one thing I can do. I'm going to get him. He can push me around all he likes but I'll get him and when I do, I'll get him good."* Grimes replied, *"I hope you're joking, Mikey. You've been through enough already."*
8. The week after the VCE exams concluded, on 12 November 2016, Tann attended a house party with Grimes. The 2016 Year 12 cohort had been invited to Thea Orelli's house for an end of year party at 9 Moon Terrace, Craigieburn. Tann arrived at the party around 7:00pm.
9. By 9:00pm, Tann had consumed 10 standard drinks of alcohol. He then noticed that Cottrell and the rest of 2K4S had arrived at the party. Tann resolved to keep his distance and proceeded to the backyard for a cigarette. Grimes had gone to the restroom. Tann observed Cottrell looking over at him, from inside the house, and pointing in his direction. Cottrell then walked directly towards him. Tann felt apprehensive.
10. When Cottrell was about three metres from Tann, he waved at Tann with his right hand, in which he was holding a lighter. As he was waving, he reached into his jacket breast pocket with his left hand. In an instant, Tann jumped up, grabbed the bottle of beer from which he had been drinking, raised his arm above his head and struck Cottrell hard to the forehead. As Cottrell fell, a packet of cigarettes fell from his jacket pocket. Cottrell was rendered unconscious.
11. Tann ran from the scene, driving home very quickly. Some guests at the party called an ambulance for Cottrell. He was taken to the Royal Melbourne Hospital but subsequently died from a brain haemorrhage. Upon returning home, Tann texted Grimes: *"I got him good E. I made sure he didn't hurt me. I couldn't find you. Make sure you leave now and text me when you get home."*
12. When the ambulance was called to the party, the police also arrived. They interviewed several witnesses, including Cottrell's friends and Grimes. They also found the packet of cigarettes that Cottrell dropped. Later, the police examined Cottrell's clothing. They found no weapons, or items that could be used as weapons, in his clothing. Cottrell was unarmed.

Witnesses said that Cottrell was merely walking out into the backyard, greeting different people. No one saw Cottrell do anything threatening to Tann, except wave at him.

## THE TRIAL

13. Tann was charged with murder. He pleaded not guilty and was subsequently tried in the Supreme Court of Victoria at Melbourne.

### *Self-defence*

14. Counsel for Tann raised self-defence as an issue before the trial judge, prior to the trial commencing.
15. During the trial, he adduced evidence about the ongoing victimisation at the hands of Cottrell and his group set out above. That included Grimes giving evidence about the victimisation and the wave at Tann by Cottrell.
16. At the conclusion of the defence case, and before the directions to the jury, the trial judge said that he would not instruct the jury about self-defence. In his view, it was not properly raised in this case. The counsel for the prosecution agreed. Counsel for Tann asked for the direction and said that it was highly prejudicial to his client if the defence was not considered by the jury. The judge ruled that self-defence was not open. The judge said:

*“In this case, the defence claims that the accused acted in self-defence. I have considered the evidence as a whole in this trial, including the victimisation-type conduct and the conduct immediately preceding the striking of the victim on 12 November, and in my view, nothing that occurred during the year is temporally or logically relevant. Further, the conduct preceding the striking could not be described in any sense as threatening or arousing any fear in the mind of the accused. I therefore will not leave self-defence to the jury and I decline to give a direction to that effect.”*

### *Admissions*

17. In the course of Grimes giving evidence, counsel for the prosecution cross-examined her. At this stage, evidence of the Facebook messages and text messages that she received from Tann was adduced from Grimes by the prosecution.
18. Counsel for the prosecution said that he wanted a direction that the Facebook messages

were admissions for the purposes of the *Evidence Act 2008*, and asked the trial judge to direct the jury accordingly. Counsel for Tann objected, saying that they were too ambiguous to be admissions and the jury should not be permitted to consider them as such.

19. During the charge, the trial judge directed the jury that the statements made by Tann to Grimes were capable of being used as admissions.

### *Manslaughter*

20. During the trial, counsel for Tann also called evidence from another witness, Mark Paul. Paul stated that he thought he saw Tann attempt to strike Cottrell's left arm, rather than attempt to strike directly at his head. He said that Cottrell moved to avoid the bottle hitting his arm, and in so doing, moved his head under the bottle, which then struck his forehead. Paul further stated that he was somewhat intoxicated and could not be absolutely sure about what he saw. Counsel for the prosecution cross-examined Paul. He adduced evidence of Paul's two prior convictions: one for theft and one for obtaining financial advantage by deception.
21. Counsel for Tann asked the trial judge for a direction about manslaughter. The trial judge said that he would give a direction about manslaughter. Although he believed the witness, Mark Paul, was unreliable because of his intoxicated state on the night, and his dishonesty offences, Paul's evidence may provide a barely viable alternative explanation for the death other than murder, in his view.
22. The trial judge directed the jury in relation to manslaughter. The trial judge said:

*"I must now direct you about the crime of manslaughter. To prove this crime, the prosecution must prove the following four elements beyond reasonable doubt:*

*The accused committed an act that caused the victim's death;*

*This act was committed consciously, voluntarily and deliberately;*

*This act was unlawful;*

*This act was dangerous.*

*...Earlier I explained to you the first three elements. Now I will explain to you the fourth element. In relation to the 'dangerous' element, you must be satisfied that the accused subjectively believed that his conduct was dangerous and that a reasonable person would think that the act was likely going to expose the victim to an appreciable risk of serious injury."*

23. Counsel for Tann did not take exception to the direction.

*Further request for self-defence direction*

24. After the jury retired, counsel for Tann asked the trial judge to re-consider his ruling about not leaving self-defence to the jury, because he had directed them about the admissions. The trial judge said that he would reconsider his ruling and direct the jury about self-defence, but said he could not. The trial judge said:

*“Unless counsel can point me to some law on the matter, I don’t think that I have can now direct the jury about self-defence after they have retired to consider their verdict.”*

**THE VERDICT AND THE SENTENCE**

25. The jury returned a verdict of guilty of murder and Tann was convicted. He was sentenced to 20 years’ imprisonment with a non-parole period of 15 years.
26. Tann appealed his conviction pursuant to section 274 of the *Criminal Procedure Act 2009* (Vic).

**THE APPEAL**

27. Tann was granted leave to appeal on each ground of appeal that he advanced in his written case. Leave was granted on the following four grounds:
- a. The learned trial judge erred by refusing to direct the jury about self-defence;
  - b. The learned trial judge erred in his direction to the jury about manslaughter.
  - c. The learned trial judge erred in allowing the Facebook messages and text messages to be admitted into evidence and leaving to the jury as capable of being used as admissions.
  - d. The learned trial judge erred by failing to accept the defence invitation to direct the jury about self-defence when requested by the trial counsel.

### THE APPEAL HEARING

28. The full appeal is heard before a bench of three judges in the Court of Appeal, Supreme Court of Victoria.
29. The Appellant argues that each of the grounds of appeal is made out, and that there has been a substantial miscarriage of justice as a result.
  - a. Senior counsel for the Appellant argues grounds (a) and (b);
  - b. Junior counsel for the Appellant argues grounds (c) and (d).
30. The Respondent argues that each ground of appeal has not been made out, and even if any one of them had, there has been no substantial miscarriage of justice.
  - a. Senior counsel for the Respondent argues against grounds (a) and (b);
  - b. Junior counsel for the Respondent argues against grounds (c) and (d).

## CLARIFICATIONS

1. **With regard to point of appeal (b) the trial judge erred in his direction to jury about manslaughter. The direction given at trial favours the accused as a subjective mens rea is harder for Prosecution to prove than objective mens rea. With that in mind, should that point be called a “cross-appeal”?**

The ground of appeal may be superficially unwarranted but was framed by Tann’s counsel because of a specific issue with the way the direction of law might impact on the jury’s deliberation in relation to mens rea. Counsel should consider how this ground might be a complaint raised by Tann.

2. **Does Tann have any other family? Mother, and/or siblings?**

Tann was living with his mother and younger sister. Anne Tann, the mother, is 41 years old and Sophie Tann, the sister, is 17 years old.

3. **Is it proven or assumed that Cottrell was involved in illegal activities?**

It was never proven that Cottrell was involved in illegal activities.

4. **Does Cottrell have a prior criminal history? If so, what is the nature and extent of the criminal history?**

Cottrell had no prior criminal history.

5. **Did Tann see a school counsellor or independent psychologist in relation to his mental health issues? Is there any psychological/psychiatric material to details Tann’s mental health condition? Was this material adduced at trial?**

The facts do not state whether Tann visited a school counsellor or an independent psychologist. Tann was mentally assessed after being charged with the murder of Cottrell, and it was determined then that he was suffering from depression. This was adduced at trial.

6. **Were there any convictions in relation to the death of Tann’s father? If so, were there any connections to Cottrell?**

The student, who had pushed Tann’s father down the staircase, was convicted and is currently serving his sentence. The other students were charged with other offences. Cottrell is unrelated to the incident.

- 7. Did Lakeside High School have any documentation of any incidents (of bullying or otherwise) in relation to Tann (generally or connected to Cottrell or any members of the 2Kool4Skool gang)?**

Tann did not report the abuse to school officials. There are no recorded incidents in relation to Tann or otherwise.

- 8. What other witnesses were called at trial and, essentially, what evidence did they give?**

Students are to rely on known facts between paragraphs 1 to 12, and the information under 'Trial'.

- 9. Were any witnesses called at trial that gave evidence of the ongoing bullying and victimisation of Tann?**

Elli gave evidence of the ongoing bullying and victimisation of Tann by Cottrell.

- 10. Were Tann's diary entries adduced at trial?**

Yes, they were.

- 11. Was Cottrell under the influence of drugs or alcohol at the time of the incident resulting in his death?**

No drugs were found in Cottrell's system on the night of the incident. He had a blood alcohol content of 0.04.

- 12. What motorcycle club was Cottrell associated with?**

The club is called Lakeside Destroyers. They are often referred to as 'the destroyers' by locals.

- 13. Why is Cottrell still at school at age 19? Did he have to repeat a year or more? Was this due to disciplinary or academic reasons?**

When Cottrell entered Lakeside High School, he repeated Year 10 as he had not attended school for six months after expulsion from St George College.

- 14. At what age was Tann and Cottrell when the offence was committed?**

Tann was 18 years old and Cottrell was 19 years old. Currently, Tann is 19 years old.