

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Not Restricted

S ECR 2021 0252

Between:

THE QUEEN

-and-

LINDIM ALITI

Accused

JUDGE: Croucher J
WHERE HELD: Melbourne
DATES OF HEARING: 25 November & 8 December 2021
DATE OF SENTENCE: 13 December 2021
CASE MAY BE CITED AS: R v Aliti
MEDIUM NEUTRAL CITATION: [2021] VSC 825

CRIMINAL LAW – Sentence – Manslaughter – By unlawful and dangerous act – TT (aged 20) came to assist friends in possible fight with another group of young males – TT’s group of seven fought rival group of four – TT and three others chased rival group as they ran away from fight – LA (aged 18) then came to scene in response to earlier call for help from friend in rival group – LA followed both groups but then stopped – TT subsequently ceased chase, turned and headed back in direction of LA – TT unarmed and displayed no aggression towards LA – LA frightened nevertheless – LA, in fear and panic, stabbed TT once to chest and once to hip – Chest wound fatal – LA fled without assisting TT – Callous post-offence remark by LA – LA tried to conceal crime by disposing of SIM card and clothing – Knife never found – Profound victim impact – TT’s parents lost only child – Young offender – Immature and impressionable – Plea of guilty – Remorse – No prior convictions – Positively good character – Excellent prospects of rehabilitation – LA’s epilepsy increases hardship of incarceration – Pandemic restrictions in custody – Current sentencing practices – Importance of general deterrence, denunciation, just punishment and rehabilitation – Specific deterrence and community protection of less weight – Parsimony – LA assessed as suitable for youth justice centre (“YJC”) order – But maximum YJC order of four years’ detention disproportionate to gravity of offence – Longer sentence required, achievable only by prison sentence – Yet LA impressionable, immature and likely to be subjected to undesirable influences in adult prison – Sentence of six-and-a-half years’ imprisonment with non-parole period of three-and-a-half years – Court recommends to Adult Parole Board that LA be transferred to YJC to serve prison sentence – But for plea of guilty, sentence of nine years’ imprisonment with non-parole period of six years – *Crimes Act 1958 (Vic)*, s 4A, 5 & 322K; *Sentencing Act 1991 (Vic)*, ss 3, 5, 6AAA & 32; *Children, Youth and Families Act 2005 (Vic)*, ss 356I & 471.

APPEARANCES:

Counsel

Solicitors

For the Director of
Public Prosecutions

Mr M Rochford QC with
Ms J McGarvie

Solicitor for Public Prosecutions

For the Accused

Mr R Richter QC with
Ms C Marcs

Kilic & Associates

OVERVIEW

- 1 On a winter's evening last year, in the middle of Oakleigh, three young males casually traded slights of the middle-finger kind. As innocuous as these puerile gestures may have seemed, mutual offence was taken and things soon got well out of hand. Initially, there was just a bit of a push-and-shove. Next, however, two of the protagonists made threats so offensive to ordinary sensibilities that they do not bear repeating. As those two left, they vowed to return with backup. True to their word, within an hour, they returned as a group of four, bearing arms, but with more recruits to come. The other side then did the same, but they numbered seven and, it seems, had no weapons. The two groups confronted one another in a car park. Abusive words quickly escalated into a brawl. The smaller group must have thought better of this, because, pretty soon after the fight started, they ran away. Instead of leaving it at that, four from the larger group then peeled off and chased their fleeing rivals about the streets.
- 2 Horribly, this all ended in an irretrievable tragedy. For, ultimately, Thomas Tran, who had been part of the splinter group doing the aggressive chasing, was stabbed in the chest by a new recruit from the rival group. Within minutes, Mr Tran died where he fell. He bled to death because his heart had been pierced. He was only 20.
- 3 This senseless act of violence was committed by Lindim Aliti. He was one who, late in the piece, had answered the call to join the fray. By the time he arrived, his friends were being pursued by Mr Tran's group. While Mr Aliti was frightened and in a state of panic at the time of the stabbing, Mr Tran had given up the chase moments before, was unarmed, was showing no aggression and posed no actual threat to him. It is a troubling truth, but Mr Aliti was only 18, and, in many ways, still just a boy.
- 4 Inevitably, Mr Tran's loved ones were devastated. They still are, and always will be. For his parents, their cherished only child has predeceased them in a violent manner at the hands of another. Yet his adult life was just beginning and was so full of promise. It is every parent's worst nightmare.

5 While Mr Aliti's young life is intact, it is a life that will be marred forever. Not only must he live with what he has done for the rest of his days, a fact he acknowledges, but, now, he must be sentenced for the crime of manslaughter, which he admits by his plea of guilty.

6 There is, however, good reason to be hopeful for Mr Aliti. While it is hard to fathom why he overreacted so viciously to his fear, he is, at 19 now, a capable young man with a supportive family. Despite making a callous remark in the aftermath of the stabbing, he has since shown genuine remorse for his conduct and its terrible consequences. He has no criminal history and is of positively good character. Moreover, he has very strong prospects of reform and of leading a productive life.

7 But what should his sentence be? The law requires that a custodial sentence be imposed for manslaughter unless there are substantial and compelling circumstances that are exceptional and rare and that justify a different sentence, or unless other specified circumstances exist.¹ There was no dispute that a custodial sentence must be imposed here.

8 Further, as his counsel conceded, despite Mr Aliti's tender age and his potential qualification for an order detaining him in a youth justice centre, such a sentence would be disproportionate to the gravity of his crime, because it would be limited to a maximum of four years' duration. Instead, there must be a longer custodial sentence. And this may be achieved only by an order for imprisonment.

9 That said, I accept that, because Mr Aliti is so young, immature, impressionable and likely to be subjected to undesirable influences in adult prison, I should recommend that he be transferred to a youth justice centre to serve any prison sentence. Whether that recommendation is taken up or not will be a matter for the Adult Parole Board.

10 The principal remaining issues concern the length of the prison sentence and the fixing of an appropriate non-parole period. Matters pointing to a longer sentence include

¹ See ss 3(1) (definition of "category 2 offence", paragraph (a)) and 5(2H) of the *Sentencing Act 1991* (Vic).

the nature of the crime of manslaughter, its maximum penalty, the gravity of this particular instance of the offence, and the profound impact it has had on Mr Tran's loved ones. Without more, the sentencing purposes of general deterrence, just punishment and denunciation would compel a substantial term of imprisonment.

11 Among the matters pointing to a shorter sentence are Mr Aliti's youth, immaturity and impressionability, his plea of guilty and remorse, his previous good character and his excellent prospects of rehabilitation. There is also the unusual feature of the added hardship involved in any sentence of confinement as a result of Mr Aliti's epilepsy and the dangers it presents.

12 Finding a just and appropriate balance among the various competing considerations, however, is not as simple as it may seem. Sentencing is not a process attended by mathematical certainty or surgical precision. Nor is it colour by numbers. Usually, "[t]here is no objectively correct sentence, only a range of sentences that the majority of experienced judges would agree applied to the case".² While the task is governed by findings of fact, statutory requirements and matters of principle, including the need for consistency, sentencing is very much a discretionary exercise involving an instinctive synthesis of numerous relevant considerations, including the weight to be given to competing purposes. It has been said that, in sentencing, "the only golden rule is that there is no golden rule".³

13 Cases like this are always especially difficult. But I have agonised over this particular sentence. On the one hand, Mr Aliti has done a terrible thing. Mr Tran's loved ones, I fear, will never recover from their loss. I think that sentencing purposes such as general deterrence, denunciation and just punishment must feature prominently in the sentencing synthesis. On the other hand, so must rehabilitation. After all, Mr Aliti was, and still is, so young and impressionable and has such outstanding prospects of reform.

² *Markarian v The Queen* (2005) 228 CLR 357 at 384[66] (*per* McHugh J) (see also at 383[65]).

³ *R v Geddes* (1936) 36 SR (NSW) 554 at 555-556 (*per* Jordan CJ).

- 14 The imposition of any substantial prison term upon one so young as Mr Aliti risks corrupting him and thwarting his chances of reformation. In my view, it is necessary to avoid compounding the tragedy of this case by sentencing Mr Aliti in such a way as to increase that risk unduly. This will occur if there is too heavy an emphasis on those purposes that conduce to a more punitive sentence or a failure to have sufficient regard to any purpose tending in the other direction, or both. Put another way, it is essential to remember that the most fundamental of all sentencing principles – that of parsimony – requires that I must not impose a sentence that is more severe than that which is necessary to achieve the purposes for which the sentence is imposed.
- 15 In the end, balancing all matters as best I can, I have concluded that Mr Aliti must be sentenced to six-and-a-half years' imprisonment with a non-parole period of three-and-a-half years.
- 16 My more detailed reasons for this sentence follow.
- 17 In the balance of this judgment, I shall discuss the following matters:
- a) the background to, and events surrounding, the killing of Mr Tran;
 - b) the procedural steps that have brought the matter to this point;
 - c) the contents and relevance of the victim impact statements;
 - d) the nature and gravity of the offence of manslaughter generally and of this instance of the offence in particular, including Mr Aliti's level of culpability;
 - e) Mr Aliti's personal circumstances;
 - f) the mitigating factors;
 - g) the applicable sentencing purposes and principles;
 - h) current sentencing practices for manslaughter;
 - i) the sentence and its structure; and
 - j) my recommendation to the Adult Parole Board.

SUMMARY OF BACKGROUND TO, AND EVENTS SURROUNDING, THE OFFENCE

Introduction

18 The summary of events I am about to give is taken mostly from the prosecution opening read by Mr Rochford QC, who appeared with Ms McGarvie for the Director of Public Prosecutions. It is supplemented by other material before the Court.

Thomas Tran

19 Thomas Tran was born on 3 March 2000. He was therefore just over 20 years old at the time of his death. He was the only child of Mai (“Amie”) Tran and Tan Nhieu, with whom he lived in Springvale. He was about to embark on a course in personal training, which was his passion. He and his girlfriend Trisha Nguyen had known each other since childhood. Also living with Mr Tran and his parents was his cousin Fiona Tran, with whom he was very close. He also left behind a larger extended family.

Lindim Aliti

20 Lindim Aliti was born on 25 February 2002. He was therefore just four months past his eighteenth birthday at the time of the offence, and is now aged 19 years and nine months. I shall say more about his personal circumstances later in these reasons.

Events leading up to offence

21 When describing the events leading to Mr Tran’s death, I shall not give the age of each of the many protagonists. Suffice it to say that all were young, ranging in age from a boy of 15 to young men of about 20. I should say, however, that the way in which most conducted themselves does them no credit at all and suggests a gross level of immaturity and a misplaced sense of machismo. This sorry affair commenced in this way.

22 On 29 June 2020, at about 6:36 p.m., Andre Huc went to Domino’s (a pizza shop) in Oakleigh. After ordering food, Mr Huc stood outside the shop to wait. While he was

there, a white Mercedes sedan drove past. Inside the car were Veton Rasimi, Jarma Abdulle and Sercan Turkoglu.

23 Charmingly, Mr Rasimi and Mr Abdulle each stuck his middle finger up at Mr Huc. Not to be outdone, Mr Huc returned the gesture. Mr Rasimi then parked the car. He and Mr Abdulle stepped out and physically confronted Mr Huc. Mr Turkoglu stayed in the car. A scuffle broke out. As chance would have it, two of Mr Huc's friends – Kyriacos Chronis and Ethan Konstantas – happened along at this moment and came to his aid. It seems that no physical harm was done, but egos must have been bruised and tempers must have been raised, because awful things were said.

24 Further, while retreating, Mr Rasimi and Mr Abdulle yelled, "We'll be back," and, "We'll bring more people." They then drove to Alfred Grove in Oakleigh East, where they met another friend, Zaki Hallabi.

25 Mr Huc was picked up by his friend, Stephen Gatsidis, and was driven to a gym in the Springvale area. At the gym, Mr Huc and Mr Gatsidis met another friend, Mark Karlic. For their part, Mr Chronis and Mr Konstantas headed to the Vanilla Lounge Café in nearby Eaton Mall.

26 About 20 minutes after Mr Rasimi left Oakleigh, at 6:58 p.m., he started sending messages via a Snapchat group chat to 26 of his friends. This group chat included Mr Aliti. Mr Rasimi's message was that he and Mr Abdulle had just had a "run-in" with "the Greeks" in Oakleigh. In response, Mr Rasimi's friends started travelling towards Oakleigh.

27 Mr Rasimi's group, which by this stage comprised four (namely, Messrs Rasimi, Abdulle, Turkoglu and Hallabi), left Alfred Grove and drove to a car park in Chester Street, Oakleigh, in the vicinity of Eaton Mall.

28 At 7:22 p.m., another associate of Mr Rasimi returned a message on the group chat asking, "where we goin." Mr Rasimi replied, "Vanilla."

29 Five minutes later, at 7:27 p.m., while at the Vanilla Lounge, Mr Chronis and

Mr Konstantas saw Mr Rasimi's group of four walking through the mall. Mr Konstantas rang Mr Huc and told him that the males who had assaulted him were back in the area and had more people with them.

30 Mr Huc's group of three (namely, Messrs Huc, Gatsidis and Karlic) left the gym in Springvale and began making their way to the Oakleigh area.

31 Mr Huc rang his friend Mr Tran and told him of the situation. Mr Tran in turn called his friend Middlemore Tupou, telling him that his other friend was being "arked up" by a group of "random guys" and that he needed help for a possible fight.

32 On arrival in Oakleigh, Mr Huc's group of three parked their vehicles in Hanover Street, where they were met by Mr Tran and Mr Tupou.

33 At 7:45 p.m., Mr Rasimi sent a further message to those in the Snapchat group, asking them to come to the "car park". (He was referring to the car park in Chester Street.)

34 It is from here that matters escalated alarmingly. For, at that car park, Mr Rasimi's group of four ended up facing off with Mr Huc's group, which, by then, had grown to seven (comprising Messrs Huc, Tran, Gatsidis, Karlic, Tupou, Chronis and Konstantas). Some in Mr Rasimi's group were holding weapons, including poles and machetes, and one had a knife. A hostile discussion soon turned into a physical fight between the two groups.

35 Perhaps feeling outnumbered and despite possessing weapons, Mr Rasimi's group of four thought better of things and broke away from the fight. They ran off through Eaton Mall towards Atherton Road. As they ran, they were chased by four from Mr Huc's group (namely, Messrs Huc, Tran, Karlic and Tupou).

Mr Aliti arrives with others

36 Soon afterwards, Mr Aliti and four others joined the fray in response to Mr Rasimi's request for assistance via Snapchat. In particular, Mr Aliti arrived in the Oakleigh area at about 7:46 p.m. with Jeton Isa, Adem Arifoski, Arif Hajrula and Salim Aliti. Mr Isa

parked the vehicle he had driven in the vicinity of Drummond Street. These five young males then split into two groups. Mr Aliti, Mr Hajrula and Salim Aliti walked south through Eaton Mall, while Mr Isa and Mr Arifoski headed east on Atherton Road.

37 Minutes later, at 7:53 p.m., Mr Aliti's group of three approached the intersection of Eaton Mall and Chester Street. They saw Mr Rasimi's group running from Chester Street into Eaton Mall. Mr Aliti turned and ran a short distance with them. He then moved to a nearby wall where he stopped and allowed Mr Rasimi's group to run ahead. He also allowed Mr Huc's group, who were still doing the chasing, to run past.

38 Mr Aliti remained stationary with Mr Hajrula in Eaton Mall as they watched the two rival groups of four approach Atherton Road. Mr Aliti then began jogging behind Mr Huc's group.

39 At this point, a CCTV recording shows Mr Aliti holding his hand inside his front jumper pocket. As his counsel conceded, given subsequent events, it can be inferred that Mr Aliti was holding a knife inside his pocket.

40 After reaching Atherton Road, Mr Rasimi's group turned left, and then continued to run towards the Oakleigh Railway Station.

41 At about this stage, also at Atherton Road, Mr Huc and his group gave up the chase. In particular, when near the intersection of Atherton Road and Station Street, Mr Tran stopped, turned around and began walking east on Atherton Road, back towards Messrs Huc, Karlic and Tupou, who had stopped slightly earlier. Thus, at this stage, the pursuit had ceased.

The stabbing

42 The fatal stabbing occurred only moments later. At 7:54 p.m., Mr Tran, unarmed and alone, walked towards his friends and neared Eaton Mall. As he did so, Mr Aliti approached him and stabbed him once to the chest and once to the right hip area. The stab wound to the chest penetrated Mr Tran's heart. He collapsed to the ground,

mortally wounded.

The stabbing was from the front, not from behind

43 I pause here to clarify an important aspect of these events. In the depositions, there are differing accounts of the stabbing by those who claimed to have witnessed it. The fatal stab wound was on the left side of Mr Tran's chest. The incised injury to the hip was on his right side. Some witnesses had Mr Aliti coming from behind Mr Tran and, with his right hand, either lunging at him or somehow reaching around to stab him in the chest. Others had it that Mr Tran was attacked from the front, or at least from a point within his field of vision. Plainly, the difference is important in assessing the gravity of the offence and Mr Aliti's level of culpability.

44 Mr Rochford accepted that, on the evidence, it could not be established beyond reasonable doubt that Mr Tran was stabbed from behind. Instead, that it occurred from the front could not be excluded. Mr Richter QC, who appeared with Ms Marcs for Mr Aliti, submitted that, in those circumstances, I should sentence on the latter basis. I accept that submission. I read the relevant statements closely. While it may not be biomechanically impossible, it strikes me as very unlikely that Mr Tran was stabbed to the chest from behind by Mr Aliti with a knife in his right hand, especially when regard is had to the position and trajectory of the wound. Instead, it is far more likely that the stabbing occurred from the front.

45 Later in these reasons, I shall return to other important matters of fact pertaining to the stabbing, including those concerning Mr Aliti's state of mind at the critical moment. For now, I turn back to the prosecution summary.

Mr Aliti flees the scene

46 Despite the grave damage he had done, disappointingly, Mr Aliti did not come to his senses there and then and render assistance to Mr Tran. Instead, immediately after the stabbing, he ran off in a westerly direction on Atherton Road.

47 He arrived at the Oakleigh Railway Station just as a taxi was leaving. Inside the taxi

were Messrs Rasimi, Abdulle, Turkoglu and Hallabi. Mr Aliti motioned to the driver to stop. He opened the taxi's door and had a brief conversation with those inside. The driver was offered additional money to take Mr Aliti as well, but he refused. The taxi then left the rank, leaving Mr Aliti at the station.

48 Mr Aliti then entered the station alone. He sat on the train platform for a short time before leaving on foot at 8:03 p.m.

49 Around this time, Mr Isa returned to the intersection of Atherton Road and Drummond Street, where he met Salim Aliti and Mr Hajrula. After a short conversation, the three of them ran down Drummond Street back to Mr Isa's vehicle and then drove into Atherton Road. Mr Isa did two laps of the area, passing the scene where Mr Tran was being administered first aid. Police had arrived there by the time the vehicle passed by a second time.

50 Mr Aliti's mobile phone records show a series of seven communications between Mr Isa and him in the period between 7:57 p.m. and 8:08 p.m. The final communication was a multimedia message sent by Mr Isa to Mr Aliti.

51 Mr Aliti walked to the intersection of Atherton Road and Warrigal Road, where he waited near the Oakleigh Police Station until about 8:08 p.m. He then walked through parkland behind the police station, where he was picked up by Mr Isa a short time later. Mobile phone records show that the pair left the Oakleigh area by 8:09 p.m.

Mr Tran dies at the scene

52 Mr Tran was assessed by paramedics to have a deep penetrating wound to his chest. Sadly, he could not be resuscitated and was pronounced dead at the scene.

53 Police established a crime scene and commenced an investigation into the incident.

Arrest of Mr Rasimi's group of four

54 Mr Rasimi's group of four were driven in the taxi from Oakleigh Station to Alfred Grove. After dropping off his passengers, the taxi driver returned to Atherton Road

and reported their behaviour to police, which he considered to be suspicious. Police went to Alfred Grove to investigate further.

55 Mr Rasimi's group left Alfred Grove in two vehicles, followed by police. At 8:45 p.m., both vehicles were intercepted by police on the Princes Highway at Noble Park. All four in the group were arrested.

56 Police seized their mobile phones. Examination of Mr Rasimi's phone revealed members of the Snapchat group chat discussing the events leading up to the stabbing of Mr Tran, and conversations afterwards. Between 8:13 p.m. and 8:16 p.m., the chat records the following things said by Mr Mustafovski and Mr Imerovski:

8:13 p.m. (Mr Mustafovski): Next time

8:14 p.m. (Mr Mustafovski): 5 of them gonna be stabbed

8:15 p.m. (Mr Mustafovski): When just then?

8:16 p.m. (Mr Imerovski): Hahah

8:16 p.m. (Mr Imerovski): Line I'm⁴

8:16 p.m. (Mr Imerovski): Lindim

8:16 p.m. (Mr Mustafovski): On ya Lindim

Things said and done at a shisha lounge

57 After Mr Aliti, Mr Hajrula and Salim Aliti were picked up by Mr Isa, they were driven from the Oakleigh area to Dunya Entertainment, a shisha lounge and pool hall in Dandenong South. They arrived at 8:31 p.m. and met several others in an outdoor smoking area.

58 The CCTV inside the venue, which recorded both audio and visual files, captured conversations and interactions between Mr Aliti and others. At about 8:37 p.m., Mr Aliti, while speaking on a mobile phone to another, said to the group sitting with him, "That's one down now ... confirmation." This was a heartless thing to say. I

⁴ This must be a predictive text error.

shall return to this remark shortly.

59 At 8:43 p.m., Mr Aliti sat with friends Fisnik Gashi and Veton Isa. He had a whispered conversation with Mr Gashi, telling him he had been in Oakleigh and had stabbed someone. He also said that “he was running, and these guys were running at him and pretty much staunched him, this other guy had a knife, so he stabbed one of them”.

60 Mr Aliti asked that Mr Gashi give him a lift home. At 8:47 p.m., Mr Aliti left the venue with Mr Gashi and Veton Isa. He was taken to his home, where he changed his clothing.

61 At 9:18 p.m., Mr Aliti and Mr Gashi returned to Dunya Entertainment without Veton Isa. The pair entered the venue and sat with associates in the same area they had been in earlier in the evening. At 10:02 p.m., Mr Aliti was captured on CCTV removing a SIM card from his mobile phone and placing it in the hot coal reservoir of a shisha pipe on the table in front of him.

62 At 10:20 p.m., Mr Aliti’s group left Dunya Entertainment.

63 The knife used by Mr Aliti has not been found.

Post-mortem

64 On 30 June 2020, Dr Paul Bedford conducted a *post-mortem* examination on Mr Tran at the Victorian Institute of Forensic Medicine. He opined as follows:

- a) The cause of Mr Tran’s death was a stab wound to the heart.
- b) The examination confirmed the presence of a stab wound to the chest, which was found to penetrate the left ventricular wall of the heart, resulting in blood being lost into the heart cavity and into the left chest. The combined measurable blood loss was 1,350 millilitres. The acute loss of blood led to death.
- c) The stab injury to the chest went from front to back, slightly upwards and from the left side to the right side of the body, where it penetrated into the heart.
- d) The right hip incised injury did not contribute to Mr Tran’s death.
- e) There were no other internal injuries or significant internal pathologies.

- f) There were no defensive injuries.
- g) The toxicology results were negative for common drugs and poisons.

PROCEDURAL HISTORY

Arrest, charge and bail

- 65 Nearly three weeks after Mr Tran's death, on 18 July 2020, police executed a search warrant at Mr Aliti's home address. He was arrested and taken to the Melbourne West Police Station where he was interviewed. He exercised his right to silence. He was charged with murder and remanded in custody.
- 66 On 22 September 2020, Mr Aliti was granted bail in this Court. The judge, who is of vast experience in these matters, was satisfied that the exceptional circumstances required to justify bail were established.⁵

Charge of murder withdrawn; plea of guilty to manslaughter

- 67 On 9 September 2021, Mr Aliti offered to plead guilty to manslaughter. A week later, that offer was accepted by the Director of Public Prosecutions.
- 68 On 20 September, in the Magistrates' Court, Mr Aliti pleaded guilty to manslaughter and accepted committal to this Court by way of a straight hand-up brief.
- 69 On 5 October, Mr Aliti was arraigned in this Court on an indictment charging manslaughter. He pleaded guilty.

Plea hearing

- 70 On 25 November, I heard the plea in mitigation. Mr Rochford opened the matter; Ms McGarvie read the victim impact statements made by Mr Tran's parents, and tendered two others; and Mr Richter conducted a plea in mitigation.
- 71 At the conclusion of the plea, I ordered that a pre-sentence report addressing Mr Aliti's suitability for detention in a youth justice centre be prepared by Youth Justice. While

⁵ See *Re Aliti* [2020] VSC 647 (Coghlan JA).

I had already indicated to the parties that I considered that a youth justice centre order would not be a sufficient sentence, I was concerned to have regard to the views of Youth Justice in considering whether I might recommend that the Adult Parole Board make an order that Mr Aliti be transferred to a youth justice centre to serve any prison sentence.

72 Subsequently, I received a report from Youth Justice. Unsurprisingly, Mr Aliti was assessed as a suitable candidate for a youth justice centre order.

73 Last Wednesday, I heard *viva voce* evidence from Bridget McGeoch, who authored the report on behalf of Youth Justice. I shall come to her evidence later. I also heard further submissions by counsel.

VICTIM IMPACT STATEMENTS

74 I turn now to the victim impact statements. They were made by Mr Tran's mother Mai ("Amie") Tran; his father Tan Nhieu; his girlfriend Trisha Nguyen; and his cousin Fiona Tran.

75 Mrs Tran's days are spent thinking about her son, tending to his grave and crying. She finds comfort in being with him at the cemetery, but it is also very painful. She doubts that the pain will ever stop. Mrs Tran was very close to her son. He would hug and kiss her every morning. Just the two of them would travel overseas together when Tan Nhieu could not go because of work commitments. Mrs Tran cannot have more children. When she sees another happy family, it just hurts so much. She was so happy to see her son grown up, flourishing and looking forward to his personal training course, but all their plans are gone now, and she has nothing left. Her only solace is that her husband and her father look after her dearly.

76 For Mr Tran's father, the impact on his wife and him is indescribable. When he is not busy, he thinks about his son constantly. While driving, he breaks down in tears spontaneously. He hides this from his wife, as he does not want to upset her. For the two of them, every day is more like survival than living. They cook a meal, but have

no appetite; they eat just to stay alive. He thinks that, had his son's death been an accident, it might be easier to accept. But someone took their son's life from them. He accepts that we all die one day, but, understandably, says it should not be in this order. No parent expects this. He and his wife have not disposed of their son's things or altered his room, as it makes them feel he is still there. Sometimes, he goes into his son's room and ends up putting on his clothes and lying in his bed – just so that he can feel close to him.

77 For Mr Tran's girlfriend, losing him has changed her life completely. He was her life and was very supportive of her. Ms Nguyen used to be carefree but now she finds herself overthinking everything. She abandoned her university studies, as her passion for learning fell away. She is now anxious and fearful. If ever she sees a group of boys, she gets scared that there will be a fight.

78 Mr Tran's cousin misses him so much. He was more like her little brother than a cousin. Ms Tran lived with him and his family for his last five years. The two of them had planned to buy a house together, but that cannot happen now. She was the one who, on behalf of the family, was tasked with identifying Mr Tran's body. She found this very distressing. The whole week of the funeral is embedded in her brain. Like Mr Tran's father, she laments that it is not the natural order of things to lose someone so young.

79 These are profoundly moving statements. In an understated yet compelling way, they convey the aching grief of a family struggling with a loss that should not have occurred. Just for a moment, picture Mr Tran's mother crying in pain at her son's grave. Or Mr Tran's father wandering about his son's room, dressed in his clothes and lying in his bed. I find it heart-breaking even to utter these words. Yet it must be another thing altogether for his family to live this awful reality.

80 In so far as it is permissible to do so, I have had regard to these victim impact statements in considering sentence.

81 I wish to add this. I know that there is nothing this Court can say or do to salve, let

alone heal, the grief and pain suffered by Mr Tran's loved ones. The sentence I must impose is not a reflection of the worth of his young life. It cannot be. For a start, such a precious thing is immeasurable, at least by a stranger. But, in any event, the sentence I must impose reflects many factors which I am required by law to take into account, only one of which is the impact on victims.

NATURE AND GRAVITY OF OFFENCE

82 I turn now to the nature and gravity of manslaughter generally and this offence in particular, including Mr Aliti's level of culpability.

83 Manslaughter in this State is (mostly) a common law offence,⁶ the maximum penalty for which, at the time of this killing, was set by statute at 20 years' imprisonment.⁷

84 The form of manslaughter relied on is manslaughter by unlawful and dangerous act. This means that, when he stabbed Mr Tran to the chest and killed him, while Mr Aliti neither intended to cause death or really serious injury nor was reckless as to either outcome (for otherwise it would be murder), his conduct was unlawful and dangerous. The stabbing was unlawful because it amounted to an assault without legal justification or excuse. It was dangerous because a reasonable person in Mr Aliti's position would have realised that, in stabbing Mr Tran to the chest in that way, he was exposing him to an appreciable risk of serious injury.

85 While manslaughter is one of the more serious crimes known to the law, the circumstances of the offence and the offender, and the resulting sentences, vary widely. Of the two categories of the offence remaining in Victoria,⁸ manslaughter by

⁶ The notion of dangerousness, for the purposes of the common law concept of manslaughter by unlawful and dangerous act, has been modified by s 4A of the *Crimes Act 1958* (Vic), but that provision has no application to the present case.

⁷ See s 5 of the *Crimes Act 1958* (Vic) (see version 291). For offences committed on or after 1 July 2020, the maximum penalty is 25 years' imprisonment (see s 3 of the *Crimes Amendment (Manslaughter and Related Offences) Act 2020* (Vic)).

⁸ Voluntary manslaughter no longer exists in Victoria as a result of the abolition of provocation as a defence to murder (see s 3B of the *Crimes Act 1958* (Vic)). In *Wilson v The Queen* (1992) 174 CLR 313, the High Court held that battery manslaughter is no longer part of the common law.

unlawful and dangerous act is usually regarded as more serious than manslaughter by criminal negligence. But there is no inflexible rule. An offence falling within one category may be more or less serious than one falling within the other. Each case must turn upon its own particular facts.⁹

86 The manslaughter committed by Mr Aliti had some serious features, including the following.

87 First, every offence of manslaughter has a grave component, by definition, in that the life of another human being has been lost in circumstances amounting to a crime. The law must maintain a special concern for the sanctity of human life.

88 Second, here, the life of a beloved only child, a boyfriend, a cousin and one who was part of a wider family, aged only 20, has been taken as a result of violent, unlawful and dangerous conduct. Inevitably, and as the victim impact statements make so plain, the grief and pain for the loved ones left behind is palpable.

89 Third, Mr Aliti used an inherently dangerous weapon to inflict a stab wound to a vulnerable part of the body.

90 Fourth, as indicated earlier, it is accepted by Mr Richter that Mr Aliti carried the knife with him before the incident, as is suggested by the CCTV footage of him with his hand in his pocket. It is not as if he grabbed the knife spontaneously from elsewhere in the midst of a confrontation.

91 Fifth, while only one wound was fatal, Mr Aliti inflicted two wounds on Mr Tran.

92 Sixth, whatever may be said about his conduct seconds earlier, Mr Tran was not aggressive towards Mr Aliti or anyone else in the moments immediately before the stabbing. By that stage, the chase by Mr Tran (and his group) had ended and he was simply walking back, alone and unarmed, towards his friends.

93 Seventh, the nature and position of the stabbing to the chest, I am satisfied, implies

⁹ See *R v Jagroop* (2009) 22 VR 80 at 90[63]-91[69] (*per* Weinberg JA; Williams AJA agreeing at 92[75]).

that Mr Aliti must have intended to do Mr Tran an injury.

94 Finally, Mr Aliti's post-offence conduct did him no credit. He did not stay to render any assistance to Mr Tran. Later, he changed his clothes and disposed of those that he had been wearing, as well as his SIM card. He also made the troubling remark at the shisha bar: "That's one down now ... confirmation". As we shall see, it is apparent from what he told a psychologist in recent times, that, when he uttered those words, Mr Aliti believed that Mr Tran was dead (or at least in a very bad way), which makes it all the worse. On the other hand, I am satisfied that there was an element of immature bravado operating on his mind at the time, which he now regrets.

95 The foregoing matters must be weighed against the several factors limiting the gravity of this instance of manslaughter, which include the following.

96 First, as grave an act as the stabbing to the chest was, and while there was another (albeit much less serious) wounding, this was not a protracted assault involving numerous acts of violence.

97 Second, there were no gratuitous further acts of violence once Mr Tran went to ground, as sometimes happens in homicides.

98 Third, while common sense tells that a stabbing to an area as vulnerable as the chest can result in death, and while he intended to injure Mr Tran, I am not satisfied that Mr Aliti actually foresaw the possibility of grave harm or death.

99 Fourth, while Mr Aliti brought the knife to an encounter he must have expected would involve some form of confrontation, and while I am satisfied that he must have intended to use it as he approached Mr Tran, the stabbing otherwise appears to have been spontaneous rather than premeditated.

100 Finally, Mr Richter submitted that I should be satisfied that Mr Aliti acted out of fear. In my view, the following matters, together with the events described in the prosecution summary I have just read, make good that submission:

a) First, almost immediately after his arrival, Mr Aliti saw his friend

Mr Rasimi and his group running away from, and being chased by, Mr Tran and his group. In those circumstances, it is understandable that he should have been frightened.

- b) Second, Mr Tran was the last in his group to give up the chase. Uncomfortable though it may be to hear, it is plain that Mr Tran was leading the charge by Mr Huc's group and in circumstances where, on the prosecution case, some in Mr Rasimi's group were armed, whereas those in Mr Huc's group, it seems, were thought to be unarmed. In those circumstances, if they, while being unarmed, were prepared to chase armed individuals, it is easier to see how Mr Huc's group, including Mr Tran, may have been perceived by Mr Aliti, in the moment, as young men to be feared.
- c) Third, Mr Aliti was separated from Mr Rasimi's group at the time he was near Mr Tran, who was walking towards him, and the other three from Mr Tran's group were close by.
- d) Fourth, it will be remembered that Mr Aliti told Mr Gashi "he was running, and these guys were running at him and pretty much staunched him, this other guy had a knife, so he stabbed one of them". Mr Richter explained that being "pretty much staunched" by others, in context, meant that Mr Aliti felt surrounded. Mr Rochford did not gainsay that interpretation. It seems right to me. Whether or not he believed that one of the others in Mr Tran's group had a knife, Mr Aliti's admission is consistent with a belief that Mr Tran and his group were near him and that he was frightened of them, and also with the view that he stabbed Mr Tran in that state of mind.
- e) Fifth, in his psychological report, Patrick Newton recorded that Mr Aliti told him that "the offending occurred when he had been alone and frightened". The report was admitted without objection. No challenge was made to this or any other part of the report.
- f) Sixth, and similarly, in his letter of apology to the Court, which was also received in evidence without objection, Mr Aliti said this, among other things:¹⁰

When I had arrived, there was a lot going on and I was trailing behind a group of my friends. Everyone was running in opposite directions. *In a split moment, I felt isolated and threatened.* Before I knew what happened, a person had died because of my actions. My explanation doesn't excuse or justify my actions and what happened was all because I made the decision to get involved. I shouldn't have gotten involved at all. Now I know that even if *I felt that I was threatened in any way by anyone*, I would handle the situation differently, make better choices and walk away.

¹⁰ My emphasis.

g) Finally, I did not understand Mr Rochford to submit that I could not find that Mr Aliti acted out of fear.

101 Mr Richter conceded that, whatever fear or threat was felt by Mr Aliti, it could not be said that it was reasonably possible both that he believed that his conduct was necessary in self-defence and that his conduct was a reasonable response to the circumstances as he perceived them. This is because, if both were so, self-defence could not be excluded and, therefore, Mr Aliti would be not guilty of manslaughter.¹¹

102 I should add this. While I accept that Mr Aliti acted in fear and panic, I think that it would be a misnomer to label his conduct as amounting to what is sometimes called excessive self-defence. Nor did Mr Richter put it in that way. After all, Mr Tran had given up the chase; he was unarmed; and he was not the aggressor in the moments before the stabbing.

103 Nevertheless, that Mr Aliti did act out of fear and panic is relevant to an assessment of the gravity of his offence. The evidence also persuades me that it is very likely that the truth of the matter is that, by stopping when he did, Mr Aliti had expected, and hoped, that those chasing his friends would keep running. But, as things turned out, Mr Tran's group stopped only a moment or two later, and then turned back. It is at this point that, instead of conforming to the stereotype of the brave defender of his friends, Mr Aliti went to water once he realised that the opposition were nearly upon him. This is the sense in which he felt surrounded, frightened and threatened. In that moment of fear, he panicked. That said, he completely overreacted by responding to that fear in a violent, destructive and wildly disproportionate manner. To state the obvious, he should have just walked away.

104 Mr Richter submitted that, balancing all matters, this instance of manslaughter falls within the middle range of gravity, and, in particular, towards the lower end of that middle range.

105 Mr Rochford did not seek to classify the offence by placing it within a given range of

¹¹ See ss 322K(1) and (2) of the *Crimes Act 1958* (Vic).

gravity. He thought it difficult to do so. Instead, he submitted that, even if properly classified as a “mid-level” manslaughter, it was still a senseless, unprovoked attack with an inherently dangerous weapon against an unarmed Mr Tran who, after the chase had ceased, was just walking along and posed no threat to Mr Aliti. I accept that submission, as far as it goes.

106 This description, taken in combination with the other aggravating features mentioned earlier, also suggests rather culpable behaviour. However, the gravity of the offence, and Mr Aliti’s culpability, must be assessed against the matters pointing in the other direction, including my finding that Mr Aliti was afraid at the time and that his fear, and his panic, drove his conduct.

107 The Court of Appeal has cautioned against fixing a taxonomy of the gravity of offences according to lower, middle and upper ranges and then attempting to classify – or “shoehorn” – an instant offence into one of those ranges or, it seems, worse still, into a band within any such range.¹² This approach is said to entail the risk that a judge will unconsciously fetter his or her instinctive synthesis by reference to sentencing ranges rather than consider the individual facts of comparable cases.¹³ As it happens, helpfully, counsel have referred me to some comparable cases. I shall discuss them in a moment.

108 Nevertheless, while I bear in mind injunctions of those kinds, and the reasons for them, I am prepared to say that Mr Aliti’s offence of manslaughter is far from the upper end examples on the scale of gravity and is nowhere near the lowest end of that scale either. Further, while I do not accept that his offence is to be classified at or towards the lower end of the middle range of gravity, I am persuaded that it falls comfortably within that broad middle range.

¹² See, for example, *Lee v The Queen* [2018] VSCA 343 at [31] (*per* Ferguson CJ, Priest JA and Beach JA), citing *DPP v Weybury* (2018) 84 MVR 153 at 165[33]-[34] (*per* Maxwell P and Hargrave JA) and 170-171[54] (*per* Priest JA).

¹³ *DPP v Weybury* (2018) 84 MVR 153 at 165[33]-[34] (*per* Maxwell P and Hargrave JA).

PERSONAL HISTORY

109 I turn now to Mr Aliti's background and personal history in more detail.

Family

110 Mr Aliti is the second of three children born to parents who migrated from Albania some years prior to his birth. He lives with his parents and two siblings as well as his grandparents.

111 His parents' relationship has always been harmonious. Discipline within his family was relatively strict, but not problematic in any way.

112 Mr Aliti has a large extended family. Shared activities with his cousins have always been an important and pleasant part of his life.

Epilepsy

113 Mr Aliti developed an atypical form of epilepsy from about the age of 13 years. His condition is characterised by classic tonic-clonic seizures during sleep, with partial seizures occurring less frequently through the day. I shall say more about Mr Aliti's epilepsy later.

Education

114 Mr Aliti attended a local primary school in Dandenong South. His first language is Albanian, but he has greater functional proficiency in English, which he acquired quickly. His academic skills were advanced to the extent that he was awarded a prize for his writing. He enjoyed school and had a supportive friendship circle. He was a house captain and progressed through the grades without repeating or suffering other significant difficulties.

115 Mr Aliti went to Dandenong South Secondary College for his secondary schooling. Initially, he was placed in an accelerated programme for students with advanced abilities. At first, he flourished, but his motivation for his schoolwork deteriorated

markedly once he started having epileptic seizures. He said this to Mr Newton:

It all went downhill from there. I wasn't focused and I became a troublemaker. There was nothing bad, but instead of working I became a clown and started getting behind on work.

116 In Year 9, he was returned to "the ordinary class". While he no longer got behind on tasks, he found himself bored by the less demanding work, with the result that his motivation flagged. Increasingly, he associated with disaffected and unmotivated students. By the time he reached Year 11, he was truanting regularly in order to spend time socialising at the local shopping centre. He did not want to be at school, but, wisely, his parents would not let him leave.

117 Later that year, Mr Aliti was expelled after becoming involved in a fight with another student he believed had sexually assaulted his girlfriend. He told Mr Newton that he had "hurt" the other boy and had "mouthed off". There was, however, no finding of guilt recorded, as this matter was diverted by the Children's Court.

118 Mr Aliti has not completed any post-secondary training, apprenticeship or vocational course. After he was expelled from school, he lost direction and purpose, and became somewhat depressed. While he planned to attend TAFE, he did not end up doing so.

Employment

119 Mr Aliti worked briefly for his brother assisting with the delivery of doors, but soon discontinued that job, and instead spent his time "at home playing video-games".

120 He was unemployed at the time of the offending.

121 Since being bailed, Mr Aliti has worked as a labourer within the construction industry, followed by work as a factory hand.

122 A fortnight before the plea, he ceased work in order to spend time with his family before what he accepted would be his inevitable incarceration.

Relationships

123 Mr Aliti has had one intimate relationship, which lasted about three years. His former girlfriend has spent some time with him since his release on bail as a means of supporting him throughout the criminal justice process.

Mental health

124 Mr Aliti found the experience of remand upsetting. He felt particular anxiety about the management of his epilepsy while in custody. His anxiety reduced considerably once he was placed in a youth-specific unit and could “talk with the boys about stuff”.

125 In Mr Newton’s opinion, Mr Aliti remains an immature young man who is not adept at discussing his feelings. Nevertheless, he was able to determine that Mr Aliti was disconsolate, mildly dysphoric and anxious. He has a range of mild depressive symptoms, including a persisting sense of physical malaise and lowered energy levels. He experiences a chronic lack of direction in life, which, unsurprisingly, has been rendered more intense by this prosecution. Beyond that, in Mr Newton’s view, the combination of Mr Aliti’s above-average intelligence and disengagement from mentally stimulating activities has seen him experience long spells of boredom, which in turn have fed a broader alienation from society that threatens to derail his potential.

126 Mr Aliti has experienced some intrusive rumination about the plea hearing and the prospect of a lengthy prison sentence. Rather than express worries directly, however, in Mr Newton’s assessment, Mr Aliti typically discusses the physical symptoms of his epilepsy or the impediments they cause. He often avoids talking about his emotional distress by focusing on his physical problems. He finds these easier to acknowledge than his emotional problems and, in Mr Newton’s view, they have likely come to serve as something of a focal point for other stressors and tensions. While this approach is not uncommon among those with chronic illnesses, it not only intensifies emotional distress but also hinders its effective resolution. In Mr Newton’s view, Mr Aliti’s symptoms lead to an increased level of anxiety relative to other young men.

127 That said, while Mr Aliti reported feelings of pessimism and uncertainty about his future, he was not feeling hopeless. Similarly, during clinical interview, he denied any suicidal ideation and did not report thoughts of self-harm or the like.

Substance use

128 As for his substance use, Mr Aliti began to smoke cannabis at about the age of 15. This took place with his peers and typically occurred on a weekly basis. Cannabis helped him “chill out and relax”. It also helped him connect with his peers. Mr Aliti’s cannabis use escalated somewhat, but he is adamant that it never reached the point of daily use. He continues to smoke cannabis, albeit less frequently. He does not consider that his use of the drug is problematic.

129 Mr Aliti drinks alcohol relatively sparingly and generally does not like its effects.

130 He has not experimented with other drugs.

131 Mr Aliti was not affected by any substance at the time of the offending.

Mr Aliti’s account of the offending to Mr Newton

132 Mr Aliti had considerable difficulty discussing his offending with Mr Newton. He was clear that he was pleading guilty to the charge but said that he had only a patchy recollection of the event itself.

133 Mr Aliti told Mr Newton that he went to the area on the night after he received a call from one of his cousins telling him that “they were in trouble and needed help”. He said that the offending occurred when he had been alone and frightened. He had no prior acquaintance with Mr Tran.

134 Mr Aliti also admitted to Mr Newton that he had been almost immediately aware that he had killed Mr Tran. He said, however, that it had not been until he saw a television programme about this matter that he realised the effects his behaviour had had upon others. In particular, he said this:

After I saw [the programme], I felt like a monster. I don’t think anyone would

want to hear from me, and I don't want to say anything if it upsets anyone more, but I want to say I'm sorry for taking a mother's son away from her. I've seen how much she is hurting and I can't believe that I did that to anyone – it's not who I am, really.

Intelligence

135 Mr Newton estimated Mr Aliti's intelligence to fall no lower than in the high end of the average range.

136 In his opinion, Mr Aliti's "disengagement from school following the diagnosis of epilepsy ushered in a cascading cycle of boredom, behavioural disturbance and further disengagement that reached its apogee in this offending".

137 Mr Newton added that he "hoped that this cycle [might] be reduced through Mr Aliti's participation in appropriate remedial education and vocational training".

Immaturity

138 Despite his intelligence, as indicated earlier, Mr Aliti was assessed by Mr Newton as being quite immature. Not only is his sense of identity diffuse and poorly formed but he is still in the process of developing his views on major life issues. His sense of direction and purpose in life is still only partially in place and risks being derailed by his involvement in this prosecution. In Mr Newton's view, Mr Aliti is still to navigate many of the typical tasks necessary to make the transition to adult responsibility. Thus, he has not completed education or undertaken relevant training; and even his sense of career direction is not clearly established. Beyond this, in Mr Newton's opinion, Mr Aliti is yet to establish the skills necessary to engage in truly mature intimacy with another.

139 Mr Newton went on to say these things:¹⁴

[40] While the level of immaturity evident in Mr Aliti's personality is not pathological in itself, it is clear that he is yet to establish himself as an adult: remaining in the adolescent stage of exploration and 'acting out'. In keeping with many adolescents, he manifests a rather egocentric approach to situations, a relatively low level of empathy for others, and *a tendency to act*

¹⁴ My emphasis.

quickly without allowing sufficient time for the likely risks of a situation to become apparent.

[41] Not only does Mr Aliti's immaturity intensify his anxiety at the challenges he is currently facing and *underscore his vulnerability*, but at a deeper level he also seems to feel dissatisfied and frustrated with himself for his own role in delaying and diverting the process of maturation. As a result of such issues, he has been left with lingering feelings of inadequacy and a fragile sense of self-esteem. *Mr Aliti has been prone to seek approval from those around him (such as older cousins and disaffected peers) and to have relatively poor social judgment. Moreover, he lacks confidence. These factors combine to leave him relatively vulnerable to negative peer influence.*

[42] *There is a clear risk that prolonged immersion in a custodial context may place Mr Aliti at risk of negative influence from other, more 'hardened' individuals within the correctional system. In turn, there would be some risk that he will internalise the dysfunctional mores of prison culture so that his personality development could be permanently diverted into more pathological paths. Finally, an extended period out of the mainstream community could undermine the opportunities to take steps toward pro-social goals and positive community engagement once he is ultimately released.*

[43] ... [T]here would be clear benefit to having Mr Aliti domiciled in a youth-specific context for as long as possible. Moreover, the more his connections with pro-social individuals from mainstream society can be maintained and enhanced, and the more dysfunctional associations can be discouraged or interdicted, the better Mr Aliti's long-term rehabilitative prospects are likely to be.

140 I accept this assessment and will say more about it later.

MITIGATING FACTORS

141 I turn next to consider the mitigating factors urged on behalf of Mr Aliti.

Plea of guilty

142 First, there is Mr Aliti's plea of guilty. This is a factor of substantial weight in mitigation, for several reasons. His plea was offered and entered at an early stage. This course avoided the need for a contested committal hearing and a trial. It thereby relieved potential witnesses of the ordeal of giving evidence and saved the resources that would have been devoted to such proceedings. The plea is of additional utilitarian value in view of the backlog of cases and the associated strain on the criminal justice system in the wake of the COVID-19 pandemic.¹⁵ I also accept that,

¹⁵ See, for example, *Worboyes v The Queen* (2021) 96 MVR 344 at 356[35] (*per* Priest, Kaye and T Forrest

along with other matters, the plea of guilty indicates remorse, to which I now turn.

Remorse

143 Thus, the second matter in mitigation is that I am satisfied that Mr Aliti is genuinely
sorry for, and has some insight into, the irreparable loss he has caused. There are four
sources of evidence that drive me to that conclusion.

144 First, as I just mentioned, there is his plea of guilty.

145 Second, the character references from his former girlfriend and his employer both
attest to Mr Aliti's remorse.

146 Third, despite his callous remark at the shisha bar soon after the stabbing, I am
satisfied that immature bravado, rather than any innate nastiness, explains this
behaviour. Further, I am persuaded that the passage I extracted earlier from
Mr Newton's report reflects the way Mr Aliti thinks now.

147 Fourth, during his assessment by Youth Justice, Mr Aliti expressed remorse to
Ms McGeoch. In her estimation, he appeared to have an understanding of the far-
reaching impact of his offence.

148 Finally, without objection, Mr Richter tendered two letters of apology penned by
Mr Aliti. One was written to Mr Tran's family. It reads in this way:¹⁶

I understand that I would be the absolute last person you ... would ever want
to hear from. However, despite this, I don't think I [could] live on if I didn't
try [at least to] apologise. I'm writing this letter to offer my sincere apologies
for all the pain and suffering my actions have caused you all over the last year
and a half. There isn't a day that goes by [when] I don't think about what I
have done. My actions have resulted in your family losing your beloved son,
your boyfriend and your cousin, Thomas.

I know that Thomas was your only son and your only child. Anything I say or
do, or any punishment I receive from the Court, will never be enough because
it will never bring Thomas back home to his family. So, from the bottom of my
heart, I am truly sorry.

JJA).

¹⁶ I have edited the document slightly to correct some minor errors.

I can only imagine the immense pain that you were going through from losing Thomas because of my actions. For the rest of my life, I will have to live with the guilt that I have taken an only son away from his family. If I could go back and change things, I would without a second thought, and I would make better choices and decisions. This is a very hard lesson for me to learn, and it is something I will carry with me forever.

I know I don't deserve your forgiveness. However, I wanted to let you all know [that] I never meant for this to happen and I wish I never went to Oakleigh that night. I am truly sorry for my actions which caused the death of Thomas. I know that any punishment given to me by the Court will never be enough and can never replace Thomas.

149 I mentioned the other letter of apology earlier. It is addressed to this Court. Excluding the passage I quoted before, the letter reads in this way:¹⁷

The reason I am writing this letter is to say that I'm sorry for all the pain and suffering my actions have brought about to the Tran family. I know any apology or any punishment I receive will never bring back their only child. It will never come close to making up for all the grief I've caused. For the rest of my life, I will have to live with the guilt that I took someone's life away from them and took an only child away from his parents. I know that anything I say or do will not ease the pain. However, if I could turn back time and change things, I would not involve myself in any incident or conflict, especially one that didn't have anything to do with me.

[The paragraph extracted earlier is positioned here.]

Growing up, I always had ambitions of studying and completing my education to become an accountant. Never in my wildest dreams would I have guessed what would come next. In saying so, I take full accountability for my actions and will continue to pursue my dreams after fulfilling my punishment. I plan to come back and accomplish my ambitions, making my parents proud of me after all the stress and worry I put them through during this horrific incident. Every time I look into their faces, all I see is worry about [whether] my epilepsy will be getting the proper treatment I need while I am imprisoned, and whether I will be safe in there. They do not want their son to go away. However, [they] do understand [that] I need to be punished for my actions.

This has been a hard lesson for me to learn and the guilt I felt after this incident is something that will be with me forever. I know that I have been lucky enough to be on bail and at home with my family while waiting for this matter to resolve. I understand that, because of me, Thomas will never return home to his family and for that I feel terrible. I have tried not to cause further pain to the family and told my lawyers to make an offer for me to plead guilty to manslaughter. I am very sorry. I know that any punishment given by the Court to me will never be enough because it will not bring Thomas back to his family.

150 Mr Richter explained, and I accept, that Mr Aliti declined offers of assistance from his

¹⁷ Again, I have edited the document slightly to correct some minor errors.

solicitors to write these letters. They are his words. I accept that these remarks reflect Mr Aliti's genuine remorse and an insight into the devastation he has caused.

Good character

151 The third matter in mitigation concerns Mr Aliti's prior good character.

152 This arises in these respects. First, Mr Aliti has no prior or subsequent convictions or findings of guilt.

153 Second, earlier, I mentioned the matter that was diverted in the Children's Court. A child who completes a diversion does not enter a plea and must be discharged without any finding of guilt, and the fact of his or her participation in the diversion programme is not to be treated as a finding of guilt except in limited circumstances, none of which is relevant here.¹⁸ Accordingly, Mr Aliti's fight with a fellow pupil cannot be treated as a relevant prior finding of guilt, much less a conviction. Even if I were entitled or required to have regard to the incident giving rise to the diversion, I would give it no weight, as I consider it irrelevant to the present offending and this particular sentencing task.

154 Third, what is of relevance is that I am satisfied that Mr Aliti was, and remains, a person of positively good character. The references describe him as one who is respectful, well-behaved, family-oriented, kind and considerate to others, and the first to volunteer when help is needed. I accept this evidence.

155 Further, his letters of apology show that he is a thoughtful person and concerned for others, especially Mr Tran's family.

156 Finally, given those positive traits and the absence of any criminal history, I accept that this offence does not reflect Mr Aliti's true character or disposition. While he has done a terrible thing, he is not a monster.

¹⁸ See s 356I(1) of the *Children, Youth and Families Act 2005* (Vic).

Prospects of rehabilitation

157 The fourth matter in mitigation concerns Mr Aliti's prospects of rehabilitation.

158 While predicting human behaviour in years to come is perhaps a fraught exercise, there are several factors that, in combination, persuade me that Mr Aliti's prospects of rehabilitation are excellent.

159 Among those factors are his plea of guilty and the acceptance of responsibility that comes with it; his remorse; the insight he has shown in his letters of apology, especially his understanding of the enormous grief he has caused; his positively good character; his ability to learn; his resolve to better himself; and the support he enjoys from his family and friends.

Youth, immaturity and impressionability

160 Fifthly, I am satisfied that Mr Aliti's youth, immaturity and impressionability are important considerations in sentencing him. This is so for several reasons:

- a) First, he was only 18 at the time of the offence and is still only 19.
- b) Second, I accept Mr Newton's opinion that, despite Mr Aliti's high intelligence, he is immature.
- c) Third, I also accept that Mr Aliti is at a stage where his values and attitudes are still being formed.
- d) Fourth, Mr Newton and Ms McGeoch are also of the view that Mr Aliti is impressionable and at risk of being corrupted in a custodial environment, especially in an adult prison. I agree.
- e) Fifth, as we have seen, Mr Aliti has no prior or subsequent convictions, is of positively good character and has excellent prospects of rehabilitation.
- f) Finally, all else being equal, a younger person is less likely to appreciate risk or consider consequences. Mr Aliti's offence, I accept, is a product, at least in part, of youthful limitations of that kind.

161 Rightly, one of the great aims of the criminal law is to rehabilitate younger offenders. Given the foregoing factors, this is not a case in which the weight to be accorded to youth is to be subjugated to other considerations, let alone extinguished, because of

the nature of his offence, grave though it is.¹⁹ Instead, youth, immaturity and impressionability, and the aim of rehabilitating such a young offender, remain important considerations in sentencing Mr Aliti, as do the other sentencing purposes I mentioned at the outset of these reasons.

162 It is of course a pity that, as a result of the sentence to be imposed, Mr Aliti will have to develop his values and attitudes in a custodial environment, and for a substantial period. That, of course, is an unavoidable consequence of the nature and gravity of his crime. In a case as serious as this, the sentencing purposes of general deterrence, just punishment and denunciation require nothing less. But the sentence still must be tempered, and markedly so, by reason of Mr Aliti's youth, impressionability and immaturity. In my view, it would be wrong and counterproductive to fail to do so.

Impact of epilepsy on hardship of incarceration

163 The sixth factor in mitigation concerns Mr Aliti's epilepsy.

164 Mr Aliti has been under the care of a paediatrician since the onset of his seizures some years ago. The process of diagnosis, identification of causal factors and treatment of his condition has been difficult. Early in his diagnosis, the drug he was prescribed resulted in a range of adverse reactions, including behavioural changes and weight gain.

165 More recently, Mr Aliti consulted Professor Mark Cook, an eminent expert in the field, who has prescribed a change in medication. As Professor Cook explains, however, Mr Aliti continues to suffer seizures despite regular therapy and the new medication.

166 The professor also opines that an important component of Mr Aliti's seizures is that, after an episode, he feels disturbed and has unpleasant thoughts, including suicidal ideation.

167 While his seizures generally seem to occur in his sleep, there are minor episodes

¹⁹ See, for example, *Azzopardi v The Queen* (2011) 35 VR 43 at 53[34]-57[44] (*per* Redlich JA; Coghlan AJA and Macaulay AJA agreeing).

during the day where Mr Aliti feels strange and slightly paranoid. The seizures can be provoked by sleep deprivation or stress, which are very common features of epilepsy.

168 Professor Cook said this in his most recent report:

So far as any term of imprisonment goes ... , I would say this is likely to have significant impact on him as custodial conditions including disrupted sleep cycles, stress, and inability often to access medications appropriately has certainly placed him at risk of poor seizure control. This is certainly ... my experience [in] managing many people over the years through the prison system who suffer epilepsy.

... Given his condition then, I would certainly say that custody would affect him more onerously than someone who does not have epilepsy. Again this relates to the unpredictable nature of seizures which cause the potential for injury, but also which make the individual more vulnerable in a prison environment as they are often unaware and confused after the events. As well in this period aggressive and sometimes irrational behaviour occurs. Poor seizure control, particularly with nocturnal seizures, is associated with a significantly increased risk of death. The mechanisms of this are not clear, but the syndrome of sudden unexpected death [in] epilepsy is the major cause of death in young people with seizure disorders.

169 As Mr Newton also explained, despite his new medication, Mr Aliti, understandably, is anxious about the potential challenges associated with controlling his condition in custody in the future.

170 In view of the foregoing evidence, which was unchallenged, I am satisfied that Mr Aliti's epilepsy will make his time in custody harder than it would be for someone without his condition. He will be at risk of poorer seizure control and associated harm. Further, in the aftermath of a seizure, he will be more vulnerable to the misunderstanding of, and risks from, violent and cowardly types. I also accept that he will remain anxious about these matters, which will intensify the hardship of any custodial sentence.

COVID-19 restrictions in custody

171 Finally, I am satisfied that the hardship of a custodial sentence for Mr Aliti will be greater than usual for as long as the COVID-19 pandemic's effects on incarceration protocols is operative.

172 From March last year, personal visits were suspended in Victoria's prisons, as were educational programmes and many recreational activities. Prisoners were kept locked down in their cells for far longer periods. As Ms McGeoch explained in her *viva voce* evidence, similar restrictions have been imposed in the youth justice system.

173 These restrictions have been relaxed somewhat at times, and then reimposed, as the threat posed by the pandemic has been perceived by the authorities to wax and wane.

174 Throughout this period, however, there has been the ever-present feeling of vulnerability to contracting the virus in an environment over which the prisoner or detainee has no control. I expect that this feeling will remain a constant for a good while yet.

175 Just how long these restrictions will remain in prisons and youth justice centres is unknown. I think it is safe, however, to proceed on a timeline of the foreseeable future, as uncertain as that might be.

SENTENCING PURPOSES

Introduction

176 At this stage, it is necessary to say something more about the purposes of sentencing.

177 Section 5(1) of the *Sentencing Act* 1991 (Vic) provides that the only purposes for which sentence may be imposed are, to use the shorthand, general deterrence, specific deterrence, denunciation, protection of the community, just punishment and rehabilitation.

General deterrence, denunciation and just punishment

178 As I indicated earlier, I accept that general deterrence, denunciation and just punishment are important sentencing purposes in this case.

179 All persons, whether young or old, should understand that the carrying of knives can lead to tragic consequences of the kind that occurred here. Conduct of the type

engaged in by Mr Aliti is denounced by the courts and will result in a term of imprisonment that reflects, among other things, that a person's life has been taken by an act of violence and that, in this case, the lives of Mr Tran's loved ones have been marred forever in consequence.

Specific deterrence and protection of the community

180 The gravity of Mr Aliti's offence and the method of its commission suggest that there is a need for some weight to be accorded also to specific deterrence and protection of the community. On the other hand, this need is moderated to a significant extent by my view that Mr Aliti is very unlikely to offend in this or any similar way again. The matters informing this conclusion are his acceptance of responsibility by his plea of guilty, his remorse and insight, his prior good character and his prospects of rehabilitation. Indeed, Mr Aliti strikes me as the type who, with growing maturity, will come to an even deeper appreciation of the impact of his offending and of the means of avoiding situations of the kind that led to this dreadful outcome.

Rehabilitation

181 In my view, rehabilitation remains an important purpose in fixing sentence. There are at least two groups of reasons why.

182 First, that Mr Aliti has such strong prospects of rehabilitation, and that he is still just a callow teenager, make rehabilitation a sentencing purpose that must be afforded substantial weight.

183 Second, it is necessary to recognise the interplay between rehabilitation and protection of the community. Sooner or later, Mr Aliti will be returning to the community. It is therefore in the community's interests that such prospects of rehabilitation as he has be maximised, and that he is not corrupted by his time in custody, so that, when he does return to the community, his risk of reoffending is as low as it reasonably can be and his chances of successful reintegration into society are as strong as they can be.

Parsimony

184 Earlier, I mentioned the principle of parsimony. It is reflected in s 5(3) of the *Sentencing Act*, which I need not rehearse. I will say, however, that it is a fundamental principle, sometimes forgotten. I have applied this principle in considering the appropriate sentence in this case.

CURRENT SENTENCING PRACTICES

Introduction

185 In so far as I can determine them, I have had regard to current sentencing practices for manslaughter. Such practices are but one factor in sentencing, and certainly not a controlling one at that, but they are nevertheless important in the sentencing synthesis.

Sentencing statistics for manslaughter

186 Sentencing statistics show that in respect of prison sentences for manslaughter for the period from 2015-16 to 2019-20:²⁰

- a) they ranged in length from about one-and-a-half to 13 years;
- b) the average (or mean) term ranged from just over seven years in 2015-16 to nine years and six months in 2018-19;
- c) the average term over the whole period was eight years and five months and the median and the mode were nine years; and
- d) non-parole periods ranged from two to ten years, the median was six years and the mode was five years.

187 These statistics are, of course, of limited utility, mainly because they do not distinguish cases according to their most important sentencing considerations – such as the form of manslaughter, the gravity of the particular offence, whether there were significant aggravating or mitigating factors, whether there was a plea of guilty or not guilty, whether or not there were significant prior convictions, the age of the accused, and so on. Nevertheless, they do give some guidance.

²⁰ Sentencing Advisory Council, *Sentencing Snapshot: Manslaughter, No 249*, April 2021, pp 3-5.

Case comparisons

188 Sometimes, case comparisons may assist in gauging current sentencing practices. With this in mind, helpfully, Mr Rochford referred to several sentences for manslaughter committed by a single instance of stabbing. The cases included *R v Horton*,²¹ *DPP v Frost*,²² *DPP v Awad*,²³ *R v Garrard*,²⁴ *DPP v Farrell*²⁵ and *DPP v Yassin*.²⁶ I considered other cases as well, including the comparators referred to in the foregoing sentences.

189 The head sentences imposed in the six named cases ranged from seven to eleven years' imprisonment. The two at the upper end of that range are not really comparable, as they involved either a far more serious example of the offence (*Horton*) or a plea of not guilty (*Frost*). Further, the accused in each case had very significant prior convictions,

²¹ *R v Horton* [2021] VSC 396 (Tinney J) (11 years as part of a total sentence of 13½/9½; in course of robbery in company, accused stabbed deceased while latter held by confederate; accused then stabbed deceased's brother in leg and tried to stab him again on the ground and when he stood up; victims unarmed; manslaughter fell just short of murder; accused aged 18 at time of offence; found guilty at trial but had offered to plead guilty to manslaughter and did so before jury; not genuinely remorseful; prior criminal history for armed robberies, affrays, assaults; previous sentence of youth justice centre order; difficult background; anti-social personality disorder; serious drug problems; high risk of violent offending; poor prospects of rehabilitation; hardship of prison conditions in pandemic).

²² *DPP v Frost* [2019] VSC 672 (Elliott J) (10½/7¾; single stabbing to side of back while facing deceased; deceased had been aggressive, with bottle in hand; disproportionate response by accused, aged 35; plea of not guilty; no remorse; prior convictions for violence, some resulting in gaol sentences (e.g., 6/4); deportation likely; history of psychosis; prospects of rehabilitation not strong).

²³ *DPP v Awad* [2019] VSC 706 (Macaulay J) (7/5; armed deceased and another assaulted accused, aged 34; accused chased them and stabbed deceased in excessive self-defence; plea of guilty; remorse; prior convictions for armed robbery; previous sentences in youth justice centre and prison (6/3); history of drug addiction but engaged in rehabilitation programme; prison harder because of epilepsy).

²⁴ *R v Garrard* [2020] VSC 154 (Incerti J) (7/5; deceased had accused, aged 20, in headlock; single stab wound; excessive self-defence; plea of guilty; remorse; deprived childhood; serious drug problems; poor mental health; some intellectual impairment; prospects of rehabilitation linked to capacity to remain drug-free; time in prison harder because of impaired mental functioning; hardship of prison conditions in pandemic).

²⁵ *R v Farrell* [2021] VSC 414 (Jane Dixon J) (7/5; single stab wound in course of fight; accused, aged 22, grabbed knife spontaneously; excessive self-defence; plea of guilty; remorse; limited criminal history but prior conviction for recklessly causing injury; on a CCO at time of offence; drug problem; time in prison harder because of physical and mental ailments; hardship of prison conditions in pandemic).

²⁶ *DPP v Yassin* [2021] VSC 780 (Niall JA) (7/4; single stab wound in course of fight; spontaneous; deceased armed with chisel; accused fled but not aware of extent of injuries; accused aged 24 at time of offence; plea of guilty; remorse; prior convictions for affray; subsequent conviction for assault; drug problems; guarded prospects of rehabilitation; hardship of prison conditions in pandemic).

including for violent offences.

190 Each of the other four cases (*Garrard, Farrell, Awad* and *Yassin*) attracted a head sentence of seven years' imprisonment. In my view, each involved a manslaughter of a lesser order of gravity than Mr Aliti's offence. In particular, each deceased was aggressive and two were armed; all accused acted in excessive self-defence; and, to my eye, each had an arguable defence to homicide.

191 On the other hand, none of those four cases involved the same compelling combination of mitigating factors present in Mr Aliti's case. In particular, those four accused were older at the time of their offending (they were aged 20, 22, 24 and 34), had lesser or guarded prospects of rehabilitation, and, in three cases, had prior convictions for violence. Unusually, one accused had epilepsy, which was relevant to the hardship of his imprisonment, but he was aged 34 and had been imprisoned previously for armed robbery.

Concluding remarks

192 It is possible to make more nuanced comparisons between these cases, the present case and others.²⁷ But, in the area of sentencing, it is almost always difficult usefully to compare other cases. No two cases are ever truly alike. None of those I considered was quite the same as Mr Aliti's case. And, in any event, sentences are not precedents to be applied or distinguished.

193 Nevertheless, I found those other sentences, and the reasons given for imposing them, instructive in gauging both the order of sentence imposed for manslaughter

²⁷ See also, for example, *R v Mazzaro* [2015] VSC 528 (Priest JA) (6/3; while accused, aged 19, held him, deceased stabbed once to chest by principal; aiding and abetting; dying deceased pushed naked out of back of van in front of hospital; plea of guilty; remorse; priors for threat to kill and intentionally causing injury; also, on CCO imposed only two weeks before offending for recklessly causing injury; moderate prospects of rehabilitation); and *R v Brown* [2017] VSC 240 (Croucher J) (6 ¼/3¼; accused, aged in his 30s, killed brother by single stab wound to chest; albeit unarmed, brother had been engaging in threatening behaviour to family, would not leave and there was reasonable belief that his violence would escalate; excessive defence of others; accused fled and contemplated suicide, then handed himself in to police; full admissions; plea of guilty; remorse; prior convictions; offence committed while subject to drug order; Aboriginal heritage; reasonable to good prospects of rehabilitation; sentence complicated by totality considerations; unusual case; parents lost deceased son but accused son protected them and they wanted him home so that they might begin to heal).

committed by a single stabbing, and the extent to which those sentences tend to be affected by various aggravating and mitigating factors.

SENTENCE

194 With all of the foregoing considerations in mind, I turn now formally to impose sentence.

A sentence of imprisonment is required

195 Earlier, I mentioned that I accepted Mr Newton's assessment of Mr Aliti's immaturity, vulnerability and impressionability. Ms McGeoch's pre-sentence report contains similar thoughts, which I accept. These views, I think, have an important bearing on whether Mr Aliti should be housed in a youth justice centre, instead of an adult prison. As I have said, however, despite the powerful mitigating considerations suggesting the contrary, I think that the four-year sentence to which an order for detention in a youth justice centre is limited would be disproportionate to the gravity of Mr Aliti's crime. Only a prison sentence could be long enough to meet all of the necessary sentencing purposes.

196 In those circumstances, Mr Aliti's youth, immaturity and impressionability must be confined in their impact to the length of the term of imprisonment and the non-parole period to be imposed, and to the question whether to recommend that he be transferred from prison to a youth justice centre.

Sentence

197 Mr Aliti, would you stand, please?

198 As I indicated earlier, balancing all matters as best I can, I have concluded that, for the manslaughter of Thomas Tran, Lindim Aliti will be convicted and sentenced to six-and-a-half years' imprisonment with a non-parole period of three-and-a-half years.

Non-parole period

- 199 I have fixed a non-parole period that is a bit shorter than usual both as a proportion of the head sentence and in absolute terms.
- 200 In my view, this non-parole period, like the head sentence, meets all of the purposes of sentencing, including the punitive purposes.
- 201 Wherever he may serve his time in custody, the structure of this sentence, I hope and expect, will give Mr Aliti the incentive to engage in programmes offered by the authorities in order to work towards his earliest possible release upon parole. If he is released in that way, Mr Aliti will be supervised and guided for a substantial period within the community. If that occurs, it should redound to the benefit of both Mr Aliti and, ultimately, the community.

Declaration as to pre-sentence detention

- 202 Pursuant to s 18 of the *Sentencing Act*, I declare that 66 days of pre-sentence detention be reckoned as served under this sentence.

Declaration under s 6AAA of the Sentencing Act

- 203 I am required, by s 6AAA of the *Sentencing Act*, to declare the sentence I would have imposed if Mr Aliti had pleaded not guilty but been found guilty of manslaughter following a trial.
- 204 This is hard to know, because it is difficult to estimate how, or to what extent, absent a plea of guilty, some of the findings I have made might have been affected in ways less favourable to Mr Aliti. The findings to which I am referring include Mr Aliti's remorse, his prospects of rehabilitation and the weight to be given to the sentencing purposes of specific deterrence, protection of the community and rehabilitation.
- 205 That said, my best estimate is that, absent a plea of guilty, I would have imposed a sentence in the order of nine years' imprisonment with a non-parole period of six years.

RECOMMENDATION TO ADULT PAROLE BOARD

206 As I flagged I would, I recommend that the Adult Parole Board consider²⁸ transferring Mr Aliti to a youth justice centre, as soon as may reasonably be possible, to serve his sentence.

207 For the reasons I have given, and for the additional reasons I am about to give, I am satisfied that Mr Aliti's rehabilitation is more likely to be fostered in a youth justice centre than in an adult prison. His ultimate reform is as important to the community as it is to Mr Aliti.

208 Earlier, I promised that I would return to Ms McGeoch's *viva voce* evidence in more detail. Among other things, she said this.

209 First, Ms McGeoch was advised that, usually, a month or two would be spent in an adult prison before the Adult Parole Board would be in a position to transfer a prisoner to serve his or her time in a youth justice centre. In this case, that may take even longer, given that the Christmas break is almost upon us.

210 Second, it seems that it is open to house a prisoner (or a detainee) in a youth justice centre up until he or she is aged 25.²⁹ That said, whether a prisoner would remain in such a centre until that age, or up until any earlier point before the expiry of any non-parole period, or be transferred back to a prison, would depend upon a host of considerations, including behaviour, the wishes of the prisoner, the availability of places and so on.

211 Third, if, after completion of any non-parole period while in a youth justice centre, a prisoner were released on parole, that parole order would be made and administered

²⁸ Pursuant to s 471(1) of the *Children, Youth and Families Act 2005* (Vic).

²⁹ So much seems to follow from these matters. First, a prisoner may be transferred from a prison to a youth justice centre if he or she is under the age of 21 years (see s 471(1) of the *Children, Youth and Families Act 2005* (Vic)). Second, a young offender may be sentenced to a youth justice centre order until he or she is aged 21 and, in the County Court or the Supreme Court, the maximum term of such an order is four years (see ss 3(1) (definition of "young offender") and 32 of the *Sentencing Act 1991* (Vic)). See also the website of the Adult Parole Board under the heading "Youth Justice Transfers".

by the Youth Parole Board.³⁰

212 Fourth, Mr Aliti would be able to complete his VCE in a youth justice centre. Wisely, he made it plain to Ms McGeoch that he is keen to do so. Various other programmes directed at education, training and rehabilitation are available when serving a sentence in a youth justice centre. Naturally enough, the focus in these centres is on the rehabilitation of young offenders.

213 Finally, Ms McGeoch was taken to the following part of her report, in which she explained that, in order to understand how Mr Aliti's particular condition might be managed within a youth justice centre, she consulted a colleague in the Youth Justice Classification and Placement Unit:

[The colleague] advised that presently between nightly [lockdown] and [midnight] there is one custodial staff member on each unit who conducts checks three times per hour via a viewing window and light. From [midnight] to morning, these checks reduce to once per hour. Importantly to note, the custodial staff member is unable to open a bedroom door without first calling for a second worker to be present. At present, the rooms are individual and not shared, and an assessment would need to occur prior to any [room-share] arrangements. It is also noted that there are circumstances which may lead to increased observation levels overnight. Each young person has an individualised [healthcare] plan, and given Mr Aliti's condition, further investigation and consultation would need to occur prior to this being formulated.

214 Ms McGeoch confirmed that, were Mr Aliti to be transferred to a youth justice centre, he, like any other prisoner or detainee, would have an individualised healthcare plan designed to address his particular needs, including the management of his epilepsy.

215 In my view, the foregoing matters, the views of Ms McGeoch, Mr Newton and Professor Cook, and my understanding of the differences between prisons and youth justice centres, all suggest that it would be preferable for Mr Aliti and the community were he to be transferred to a youth justice centre to serve his prison sentence.

³⁰ See s 471(6) of the *Children, Youth and Families Act 2005* (Vic). Further, a prisoner transferred to a youth justice centre must not be released by the Youth Parole Board before the expiry of his or her non-parole period (see s 471(7)). By way of contrast, an order for detention in a youth justice centre does not have a non-parole period but the Youth Parole Board may release a young offender on youth parole at any time it considers appropriate (see s 458).

216 Given the terms of the sentence I have just imposed, and allowing for the 66 days of pre-sentence detention just declared, Mr Aliti's non-parole period should expire in the early part of April 2025. By that time, he will be just over 23. If any emergency management days were to be credited against his sentence over time, as has been occurring in respect of many sentences served during the pandemic restrictions, then he might end up becoming eligible for parole even before he turns 23.

217 I shall direct that these reasons and the expert reports and other plea materials be forwarded to the Adult Parole Board to assist it in considering this recommendation. Ultimately, it will be a matter for the Board, not this Court, whether it is considered appropriate that Mr Aliti be transferred to a youth justice centre. The same is true of any decision to release him on parole.

CERTIFICATE

I certify that this and the 43 preceding pages are a true copy of the sentencing remarks of the Honourable Justice Croucher of the Supreme Court of Victoria delivered on 13 December 2021.

DATED this thirteenth day of December 2021.


.....
Associate

A red circular seal of the Supreme Court of Victoria is overlaid on the signature. The seal contains the text "SUPREME COURT OF VICTORIA" at the top and "Associate of a Judge of the Court" at the bottom. In the center of the seal is the coat of arms of the State of Victoria.