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| IN THE COUNTY COURT OF VICTORIA | Revised  Not Restricted  Suitable for Publication |

AT Melbourne

CRIMINAL DIVISION

CR-18-01868

Indictment No: H12597758

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| DIRECTOR OF PUBLIC PROSECUTIONS |  |
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| v |  |
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| TIMOTHY JAMES SMITH |  |
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| JUDGE: | HIS HONOUR JUDGE TINNEY | |
| WHERE HELD: | Melbourne | |
| DATE OF HEARING: | 9 April 2019 | |
| DATE OF SENTENCE: | 11 April 2019 | |
| CASE MAY BE CITED AS: | DPP v Smith | |
| MEDIUM NEUTRAL CITATION: | [2019] VCC 488 |  |

REASONS FOR SENTENCE

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Subject: RCSI, Victim thrown to the ground and then kicked to the head; Skull fracture and bleed on brain, some hearing loss. Victim had pre-existing ABI

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| APPEARANCES: | Counsel | Solicitors |
| For the Crown | Mr S. Devlin  (For Plea)  Ms B. Bleazby  (For Sentence) | Office of Public Prosecutions |
|  |  |  |
| For the Accused | Ms E. Clark  (For Plea)  Ms K. Watson  (For Sentence) | Stary Norton Halphen |

# HIS HONOUR:

# Timothy James Smith, you have pleaded guilty to a single charge of recklessly causing serious injury. That offence carries a 15-year maximum term of imprisonment.

# You were born on 10 August 1982 and you are 36 years old now. You were 35 when you committed this crime back in August 2017. You have admitted a criminal history which your counsel concedes has at least some relevance to my task. The plea in mitigation was conducted on Tuesday of this week and I remanded you to today’s date for sentence.

# Two days ago, the matter was opened to me by Mr Devlin who appeared on behalf of the Director of Public Prosecutions. A written opening, dated 18 March 2019, was tendered on the plea and marked as Exhibit A. Your counsel, Ms Clark, told me that this was an agreed summary. Some photographs were also marked as part of that same exhibit, Exhibit A.

# As the written opening is an agreed summary, it really is unnecessary for me to descend to the full factual detail in these, my sentencing remarks. I will not go beyond the agreed facts in this case.

# This was undoubtedly serious offending as your counsel correctly concedes. Very briefly, on the day in question, you came into contact with a complete stranger, being your victim, 43-year-old Mr Simon Leonard. There was a verbal altercation, which was foolish enough on both sides. He was significantly affected by alcohol with a reading of over .23 per cent. It would appear from the photographs and your interview that you were riding on the footpath, but nothing turns on whether it was the footpath or a shared path. Your victim took exception to your presence on the bike and you took exception to him taking exception. It escalated with you saying, "Get out of my way, you’re in my way". Arms were flailing on each side with some physical contact on each side. Foolish stuff indeed on both sides.

# You then passed each other and there it should have been left. It was silliness and should never have even gone as far as it had, but there it should have stopped. You had passed him but then returned to him from a very short distance away. You could have and should have just left and no doubt as you sit there now you wish you had. You were at this point the aggressor and what had to that point been foolishness then escalated wildly with you throwing your victim face first down to the footpath. He landed face down on the hard surface. You then kicked him with the heel of your shoe to the head as he was on the footpath.

# Your victim was rendered unconscious. If only that was the extent of the injury, but of course as you know, it was far more severe than that. You left him unconscious on the footpath; of course you should not have. He had sustained a serious head injury with arterial bleeding to his right temporal area. Others came to his assistance. Essentially he sustained a fractured skull with swelling and bleeding on the brain. He was transferred from the local hospital to the Alfred Hospital where he remained for some five days.

# CCTV footage showed you leaving the scene on your pushbike and you were identified from that footage. In fact you had attended at an employment agency a couple of days after the event and described to someone at that agency what had happened; to use your words, you said you had been, "Decking a cunt who had pulled you off your bike [and] hearing the crack of his head hitting the ground".

# The serious injury is described in paragraph 12 of the opening. The situation is complicated here by the existence of an earlier assault and acquired brain injury sustained by your victim in consequence of that earlier assault, and of course you are not to be sentenced by me for that. Indeed you are not to be sentenced by me for any cognitive decline owing to the events of the 22 August 2017. You plainly are responsible for the loss of consciousness, for the skull fracture, for the brain bleed and the resultant hearing loss and of course the social impacts arising spoken of in the impact statement. As to the injuries caused to Mr Leonard in this event on 22 August, it is impossible to know if the throwing to the ground or the kick to the head or both caused the serious injuries. So much then for my short summary of the summary, that is all it is, and I sentence in accordance with the full factual statement set out in Exhibit A.

# You were arrested on 14 September 2017 and you were interviewed that day. You put up a bit of bluster actually initially, but ultimately after a break in the interview you made some admissions. You asserted that you were acting in self-defence. Of course you were not. You conducted a contested committal and then there were two mentions before this court before it ultimately settled. You have been continuously in custody from the day of your arrest, a period now of over 570 days.

# **Impact**.

# There is a victim impact statement marked as Exhibit B. It was read aloud by the prosecutor the other day. Your victim Mr Leonard has no memory of the event; however, it is plain that your crime has had a significant impact upon him. As I say, I do not factor in or take into account any reduction in his cognitive state or level of functioning. The Crown conceded that those things cannot be established here. Still he spent time in hospital and time recuperating and is now wary of strangers and hyper-vigilant. He is very anxious in crowds and in public places. This crime has caused significant impact, which I take into account.

# **In Mitigation**

# Your counsel Ms Clark conducted a very sensible and realistic plea on your behalf. She had prepared some excellent written submissions that were marked as Exhibit 1 and tendered an expert report from a neuropsychologist as well. She took me to your background in some detail. She relied principally upon:

# The fact of your pleading guilty and at a relatively early stage;

# The presence of some remorse;

# The absence of lengthy or particularly relevant criminal history;

# She took me to the particular circumstances of this event with an altercation that escalated badly out of control, and a level of spontaneity to it all;

# She spoke of the efforts that you had been making in custody over the sizeable period you have been held and the fact that this was the first time that you had been in custody;

# She argued that you had reasonable prospects of rehabilitation;

# She relied upon some character references provided by various family members;

# She took me to some other instances of sentences being imposed by other courts on other offenders as demonstrating current sentencing practice for this crime.

# Ms Clark conceded the seriousness of the offending and the fact that the only appropriate sentence was a term of imprisonment and one requiring the fixing of a non-parole period.

# **Prosecution**

# Mr Devlin, who appeared on behalf of the Director of Public Prosecutions, made only brief submissions. That is often the position when there are sensible and realistic defence submissions made on the plea, as there were here. There was really not much he needed to say. He reminded the Court of the fact that the silly argument that was the start of this event had stopped, that you had walked past each other and that you went back. The Director submitted that the only available disposition was a term of imprisonment and one requiring the fixing of a non-parole period, but so much had already been conceded by your own counsel.

# **Background**

# I turn now then to your background and as to your background I was informed of it in oral submissions made on the plea by Ms Clark, in the written submissions, as well as in the expert report of the neuropsychologist. It is also mentioned in some of the character references that are placed before me. I am not going to say a great deal about your background in these reasons. There is just no need to for me to do that. Your personal background is not in dispute in any way and I accept what I have been told about it. By the way, there is nothing in your background explaining this offence.

# Very briefly you are 36 years of age, born on 10 August 1982. You are single with no children. You were the eldest of three boys. You had, as you put it to the expert, "A pretty good childhood". No doubt you are right, but it is plain that you had some significant learning issues at school and some level of social isolation as well. You had attention deficit hyperactivity disorder from a very young age and required medication for that condition. Now, none of that could have been easy for you growing up.

# You left school at the end of Year 9 and you then worked in a variety of unskilled jobs that are set out in the written outline. You have had serious issues with drugs and alcohol over the years. Homelessness has sometimes been an issue. I was told that the period of remand has been your longest period of abstinence from drugs for many years. Your parents separated but only when you were an adult and it is plain you still have significant family support as was demonstrated by the references placed before me and the presence of a variety of family members on the day of the plea, and again today.

# You have a criminal history, but it is padded out a bit by breaches and appeals. It is not an overly long history at all. In fact it is not nearly as long as it looks. Your counsel set out in a more user friendly fashion in the chronology on page 2 of her written submissions the pertinent features of your criminal history. She is correct when she says there is nothing like this offending in your past history. You have been out of trouble for quite some years and it is your first time in custody. Of course the history is of some relevance, there are some crimes of violence including an assault and a couple of threats to kill. You have also previously caused serious injury negligently, but that related to the use of a car back in 2002, so a very different setting indeed. Your brother and a friend were those who were seriously injured. There is nothing in your history suggesting to me that this sort of conduct displayed on 22 August 2017 is your norm. Indeed the character references suggest to me that it is not.

# You have been in custody now for a long period and are doing your best to make a go of it. You are working, and you are a valuable worker, and have done some programs. All of that is obviously positive.

# **Expert report**

# I have read the expert report of Susan Carey that is marked as Exhibit 2 on the plea and I take it into account. It was really obtained, as Ms Clark told me, as a matter of completeness and was scarcely mentioned on the plea. It certainly does not come close to enlivening any of the principles from the well-known decision of *Verdins v The Queen*. It sets out your background in detail, which is useful. It sets out your level of functioning and I do take it into account, though your counsel conceded there is no reduction in culpability to be found in that report. You have no acquired brain injury or intellectual disability at play either at the time of the offence or now nor any suggestion of increased custodial burden.

# **Guilty plea**

# I turn then to some of the matters that have been raised in mitigation. The first of those is the fact of your guilty plea. Well, you have pleaded guilty. Your counsel was not suggesting it was the earliest plea and of course it was not. After a couple of false starts, one owing to the unavailability of a magistrate, one relating to the withdrawal of counsel, a committal was conducted in the Magistrates' Court. Your counsel was engaged in the cross-examination of witnesses other than the victim.

# You pleaded guilty after a couple of listings in this court, but it was plain that discussions were under way from day one in this court, which was the day after the committal had actually concluded. So whilst not the very earliest of pleas chronologically, it is still a guilty plea and one entered at an early enough stage. There were other charges, including intentionally causing serious injury and intentionally causing serious injury in circumstances of gross violence, and a live issue flagged as to the impact of the earlier acquired brain injury of the victim, and all those things needed to be explored.

# I am sure these various matters held back the discussions and serve to explain the delay in the court below and in this court for that matter. There are plenty of pleas that are much later than yours. In fact I will treat your plea as an early guilty plea as it seems to me that you were taking steps to resolve it very early on in this court. I must reward you for your guilty plea and the stage at which that plea was entered. You have facilitated the course of justice in that respect. You have taken responsibility for your crime; not everyone does, but you did, and at that relatively early stage.

# It follows then that the victim in this case has been spared the experience of actually giving evidence in this court or in the court below. It is true that other witnesses were called down below, but it was a very brief and focussed committal hearing and I am sure had some role to play in the ultimate resolution of the matter. Ultimately the community has been saved the time, the cost and the effort associated with a contested trial up in this court, so I take these various matters into account in your favour as I am required to. You also cooperated with the police and answered their questions upon interview and I take that into account as well.

# **Remorse**

# I turn then to the issue of remorse. A guilty plea is often indicative of some level of remorse but is not always so. As I have said, your guilty plea was entered at what I would treat as an early enough stage and I do not think you are revelling in this offence. Why would you? You know that you have caused serious injury to another person and over virtually nothing. Some of the references placed before me from your family members also suggest the presence of remorse and/or regret for committing this act upon that other person. I am prepared to find that you do harbour a level of remorse here and I take that into account in your favour.

# **Rehabilitation**

# As to your prospects of rehabilitation, well, you have taken some decent steps in custody. You are working well and you have done some programs.

# You were arrested back in September 2017. You have been in custody since. You have pleaded guilty at what I have treated as an early stage and as I have already announced I am prepared to accept that there is also evidence of actual remorse here. You have had plenty of time to reflect upon your crime. You know how serious it was and how unnecessary it was. You also know that you have missed out on a lot whilst you have been in custody, as the references attest, including the ability to attend your grandmother’s funeral. There was apparently a mishap on the day when you were meant to be escorted to the funeral and regrettably you were not taken out of prison to that event.

# The chronology set out in the materials placed before me shows that there has been a bit of a delay in the matter being finalised, with the false starts in the Magistrates' Court. You have had the matter hanging over your head for a sizeable enough period. You have done your best in custody in the meantime, in the period of the delay, and I take those matters into account as well.

# It is probably the longest period you have been off drugs for many years and you do not need me to tell you, drugs have been a major problem for many years and you need to address that or you will have no future at all. What is plain is that you have family support, as the references and court attendance earlier this week and today made clear. You have also complied with the most recent court order, the previous community corrections order imposed in 2011. You have worked in the past; unlike many who sit in the dock, you have held down jobs. And you will have a job to go to as well as accommodation to go to upon your ultimate release.

# Your criminal history, though it is relevant, does not suggest to me that you are beyond hope, not by a long shot actually. So I am certainly not going to write you off. In fact I am prepared to conclude that you have relatively decent prospects of rehabilitation into the future upon your ultimate release, but they will be very much conditional upon your remaining drug free.

# **General remarks**

# I take into account all of the submissions made as well as all of the materials placed before me. I have not descended to a close examination in these reasons of the written character materials placed before me. I have read that material again more than once since the plea, including in fact again this morning, and I take it into account. Amongst other things, it spells out some of your background. It spells out your level of regret and remorse for the offending as well as the sense held by others of this conduct really being out of character. As is usually the position, you are far more than just the person who has committed the serious crime. Undoubtedly you fall to be sentenced for this serious crime but others who know you well speak of your qualities: your loving and caring nature and the fact that you have had ups and downs but you had settled down over the last handful of years.

# I turn then to make some general remarks about your offending. I must have regard to the nature and the seriousness of the offence before the court. Your counsel concedes that this was serious offending and with significant impact. Well, she is right. Though the fallout from this event was hardly happy for either you or for your victim, it could have ended far more disastrously for both of you. Had there been a different ending, and with head and brain injuries there are never any certainties, you could have been sitting in a dock in the Supreme Court charged with murder or manslaughter.

# This ridiculous incident was just whipped up out of the blue. It was foolish stuff indeed: a victim taking objection to you riding on the footpath or shared pathway, you rising to the issue. You could and should have just ignored him and probably he you. Instead egos took over and the event took a dreadful turn. Obviously it was not premeditated. It arose very much spontaneously as you were both going about your business, but regrettably it comprised two physical acts and each was totally unwarranted.

# It started with you throwing him to the ground and you were, by the way, right to think, as you said in the interview, that he was drunk. He was very drunk, with a blood alcohol content of over .23 per cent. He posed no danger to you and you then kicked him whilst he was down. None of this was in self-defence and you acted with the foresight of the probability that your acts would cause him serious injury. They did.

# It is not that profitable to express a view as to where this particular offence fits on the spectrum of offence seriousness. The Court of Appeal has said there is not much benefit in that approach, see *Weybury*. Ms Clark took me to features of aggravation which she said were absent here. Here there was at least no weapon. It was not a sustained or in-company attack. Well, all that is true, but the absence of aggravating features is not itself a matter in mitigation. It does not alter the actual facts that I have to sentence upon. It was brutal, it was unnecessary and it led to a not insignificant skull and brain injury. A weapon was not used. A footpath is a hard surface. A foot can be a decent enough weapon itself. So the mechanism was not a slight one by any stretch of the imagination and the impact has been sizeable. This was serious offending.

**Current** **sentencing practice and offence gravity**

# I take into account, as I must, current sentencing practices, though it is not a single controlling factor. It actually never has been. I have considered the Sentencing Advisory Council’s Snapshot, No.214 of 2018, which relates to the offence of recklessly causing serious injury. The median sentence of imprisonment where a person was imprisoned for this crime was two and a half years' imprisonment. All that means is half got more than that and half got less. A median is just a statistical measure or term and there is no basis to seize upon such a figure and sentence according to it.

# The most common sentence of imprisonment where prison was selected for this offence was between two and three years and the average sentence for this crime in the years 2016-2017 was three years and one month's imprisonment. However, over the period in which that data was collected, a pretty decent proportion of people received sentences of between three to four years and a not insignificant group received sentences of between four and five years, and some got more. Of course some got less and some avoided prison altogether.

# The Court of Appeal has spelt out repeatedly the essential seriousness of the offence of recklessly causing serious injury by examining the required mental element. As I have said already, it requires the foresight of the probability of causing serious injury. Serious injury is one, or the cumulative effect of more than one injury, that endangers life or is substantial and protracted. The assessment then of the seriousness of an instance of recklessly causing serious injury involves, amongst other things, a consideration of the degree of probability that a serious injury will result and the degree of seriousness of the injury foreseen.

# The seriousness of the actual injury caused is also obviously important. Here we are dealing with a throwing to the footpath and striking of the head followed up by a blow to the head with a shoe. We do not know which act caused serious injury. One may have or both may have, but it does not actually matter. Your follow-up kick to the head of the defenceless man on the ground conveys perhaps all that needs to be conveyed as to the degree of probability of serious injury and the degree of seriousness of the injury foreseen by you and that is so whether that final blow actually caused it or not.

# I have considered the Judicial College of Victoria sentencing manual, which has an overview of sentences imposed for this crime. See 29.7.2.1 and 3.

# I was taken to a couple of other cases by your counsel, a case of *Kalepo* [2016] VSCA 220 and the case of *Maele* [2018] VSCA 206. I looked also at a case of *Al Wahame* [2018] VSCA 4. As I predicted, the exercise in going to other cases has not been of any great value to me. As is almost always the case, there are many differences in offending and in personal circumstances. *Kalepo* was for instance a 20-year-old at the time he delivered two blows to a standing victim. There was a bad jaw injury. There was no brain injury. There was no blow delivered whilst the victim was on the ground. He was much younger and also had the risk of deportation to contend with.

# In fact none of the cases that I have mentioned are on all fours either in terms of the offending, victim impact or in terms of the offender personal circumstances. None are truly comparable. And by the way, there is no such thing as one correct sentence to be imposed in a given case, nor can the outcome in any other case be decisive as to the actual sentence to be imposed in your case. Other sentencing decisions are not precedents. Every case is very different and so too is every offender. As to the statistical material, well, it has inherent limitations. I have to pass an appropriate sentence in your case and it is not a mathematical or statistical exercise.

# You foresaw the probability of serious injury being caused. There is no question about that. It is admitted by your plea. This was not a fight in any real sense. As to the injuries, well, they are certainly not low-level serious injuries. We are talking about a traumatic head and brain injury. There is also a residual hearing loss. They are sufficient to amply meet the definition of serious injury contained with the *Crimes Act*.

# Having said all that though, it is clear enough that (1) the event arose very much spontaneously and (2) the serious injuries are a fair way removed from the sort of catastrophic injuries that regrettably are all too often seen in these courts. Make no mistake, they are serious indeed, I am not downplaying them, but they can be contrasted with someone being left in a vegetative state or in a wheelchair for life. That is not what I am dealing with here, thank heavens. I repeat I cannot sentence you for bringing about any reduced cognitive ability here. That is not made out on the materials and the prosecution have made that clear and I act on that concession.

# Sentencing always involves a balancing of a number of purposes which are set out in the *Sentencing Act 1991*. One of those purposes is the rehabilitation of the offender before the court. I do not ignore that purpose. I have already commented on my assessment of your prospects of rehabilitation. I think there are decent enough prospects into the future for you, subject to your abstaining completely from the use of drugs.

# I have to consider the need for specific deterrence, that is the need to deter you from committing crime in the future. Well, obviously I must give some weight to that purpose here and your counsel concedes that is so. You have to be deterred from ever engaging in this sort of serious conduct ever again. I suspect in part that has been achieved, so I believe there can be some moderation of specific deterrence in this case. Likewise, whilst community protection has to be at least considered and given some weight, I give it more limited weight in this case given the absence of significant and serious criminal conduct in the past and my sense that you have probably already learnt a pretty strong lesson here. It still has to be given some weight.

# General deterrence, however, is a very important sentencing purpose in this sort of case, for obvious reasons. The courts have to make as plain as we can to others in the community that conduct such as yours will be dealt with very sternly. This was a startling and unnecessary assault. It occurred in a public place. It involved causing serious injury to another person and you foresaw that outcome. That is the fact of serious injury being occasioned. Stunned bystanders observed the event and then came to your helpless victim’s assistance whilst you just rode away.

# The sort of conduct that you engaged in simply cannot be tolerated in any civilised society. Likeminded potential offenders, they must understand that serious violent conduct, even conduct arising spontaneously such as this, will be met with immediate and stern punishment. I have to punish you justly and proportionately and I also have to denounce your conduct and I do. This was serious criminal conduct indeed and you know that.

# I have to pay regard to a variety of other things including of course the offence maximum, here 15 years' imprisonment. I also must have regard to the impact of your crimes and your counsel concedes it has been significant.

# Prison is always a disposition of last resort. If there is any other option open to the court then of course it must be preferred. Your counsel concedes that prison is the inevitable outcome here and of a dimension requiring the fixing of a non-parole period. Well, again she is right. There is no alternative here other than to impose a substantial term of imprisonment. I have looked at the sentence that I am about to impose to guard against the imposition of a crushing outcome and to ensure that it is commensurate with the overall gravity of your crime and your culpability.

# **Section 464ZF**

# There are some ancillary orders that are sought here. There is a 464ZF application for a forensic sample. There is no opposition to the making of this order. Pursuant to s.464ZF of the *Crimes Act*, I order that you undergo a forensic procedure for the taking of a scraping from the mouth in accordance with the relevant provisions of the *Crimes Act* until a sample of sufficient standard is obtained for placement on the database. I am satisfied that the order is justified, owing to the seriousness of the offending, the existence of the prior convictions, the fact that the order is not opposed and that I judge it to be in the public interest to make the order.

# I have to inform you that notwithstanding your present consent to the taking of this mouth scraping that the authorities may use reasonable force to enable the forensic procedure to be conducted. Now, look, this is not an invasive process, I have only authorised the scraping from your mouth, it is a mouth swab and that will be run around the inside of your mouth by the authorities. They can use reasonable force to do that, but it should not be an issue for you. If it presented any issues, no doubt the authorities would be back before me wanting to have me authorise the taking of a blood sample. Well, I have not authorised that today because I am authorising the least invasive procedure, which is the scraping from the mouth. I have signed that order.

# **Disposal**

# Secondly there is a disposal order that is sought. Again it is not opposed and I will make the order. Pursuant to s.78 of the *Confiscations Act* I forfeit to the State the property referred to in the schedule. I direct that it be handled in the manner as set out in the order that I have signed.

# Yes, all right. I am sorry to have taken so long getting to this point, Mr Smith. If you would just stand up briefly now, please. Thank you.

# **Sentence**

# On the charge of recklessly causing serious injury to Simon Leonard, you are convicted and sentenced to 48 months or four years' imprisonment. There is only the one charge and that is therefore the total effective sentence.

# **Non-parole period.**

# I fix a period of 28 months, that is two years and four months, during which you will not be eligible for release on parole.

# **Section 18 pre-sentence detention.**

# You have already served 574 days by way of pre-sentence detention and that declaration is to be entered into the records of the court. You have served that already.

# **Section 6AAA.**

# I have taken into account your guilty plea. If you had pleaded not guilty and been found guilty of this offence by a jury, I would have convicted and sentenced you to six years' imprisonment. I would have fixed a non-parole period of four years four months and that statement is to be entered into the records of the court.

# Just grab a seat then for a moment, thanks, and I will see if there is anything else that I need to deal with.

# Are there any other matters I need to deal with at all?

# MS BLEAZBY: No, Your Honour.

# HIS HONOUR: Ms Watson, any other matters?

# MS WATSON: No, Your Honour.

# HIS HONOUR: All right. Your client's been in custody obviously for a significant period already and I wouldn't have thought there's any need for me to make any custody management orders, are there?

# MS WATSON: I don't believe so, Your Honour.

# HIS HONOUR: No. All right You'll go down and see your client downstairs?

# MS WATSON: I will.

# HIS HONOUR: Thanks very much. I'll just sign that formal order then. Yes, all right. I've signed that formal order then. So that completes the matter, then, Mr Smith. Your counsel will come down and see you and have a chat downstairs, all right? So Mr Smith can head back out, thank you.

# Look, I might make an enquiry of the reserve list, but it won't involve either of you. I'll just stand down.

# - - -