SUPREME COURT OF QUEENSLAND

CITATION:	*R v FAS* [2019] QCA 113
PARTIES:	**R** **v** **FAS** (applicant)
FILE NO/S:	CA No 70 of 2019 SC No 63 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Rockhampton – Date of Sentence: 26 March 2019 (Crow J)
DELIVERED ON:	Date of Orders: 28 May 2019 Date of Publication of Reasons: 11 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	27 May 2019
JUDGES:	Fraser and Morrison JJA and Ryan J
ORDERS:	**Orders delivered 28 May 2019:** **1. Grant the application for leave to appeal against sentence.** **2. Allow the appeal.** **3. Set aside the sentence imposed at first instance.** **4. In lieu thereof, impose a sentence of 18 months' imprisonment and fix today as the date upon which the applicant is to be released on parole.** **5. The applicant is to report to a probation and parole office by 5 pm on Wednesday 29 May 2019 and obtain a copy of the parole order.** **6. Counsel or a solicitor for the applicant is to inform the applicant that if she fails to report as required, she will be unlawfully at large under the *Corrective Services Act* 2006.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS

FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of cruelty to a child under 16 years – where the applicant was sentenced to 18 months imprisonment, with parole release fixed after serving six months imprisonment – where the applicant contends that the sentence did not sufficiently take into account her particular mitigating circumstances – whether the applicant's sentence was manifestly excessive

Penalties and Sentences Act 1992 (Qld), Pt 9A

R v HJ, unreported, Rafter SC DCJ, DC No 584 of 2015; DC No 454 of 2016, 17 June 2016, considered
R v PU [2004] QCA 392, considered
R v R & S; Ex parte Attorney-General [2000] 2 Qd R 413; [1999] QCA 181, considered
R v WAO [2012] QCA 56, considered
R v WAV [2013] QCA 345, considered

COUNSEL: A Hoare for the applicant
C N Marco for the respondent

SOLICITORS: DJP Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The reasons for judgment of Ryan J reflect my own reasons for joining in the orders made on 28 May 2019.

[2] **MORRISON JA:** The reasons of Ryan J reflect those of my own and explain why I joined in the orders made on 28 May 2019.

[3] **RYAN J**: On 26 March 2019, the applicant pleaded guilty to an offence of "cruelty to a child under 16 years" on the basis of failing to provide the child with adequate medical treatment, available to her from her own resources, when she knew or ought reasonably to have known that the failure would be likely to harm the child.

[4] She was sentenced to imprisonment for 18 months, with fixed parole release on 25 September 2019 (that is, after six months). She sought leave to appeal against that sentence, arguing that it was manifestly excessive.

[5] On 28 May 2019, the application was granted and the appeal was allowed. The sentence imposed at first instance with set aside. In lieu thereof, the applicant was sentenced to 18 months' imprisonment, with 28 May 2019 fixed as the date upon which she was to be released on parole. The parties were informed that the reasons for those orders would be provided later. These are my reasons.

Overview

[6] The child victim of the offence was the applicant's infant son, who was born prematurely on 8 March 2013. He was killed by the applicant's then partner, HN, on

25 May 2013. He suffered a fatal brain injury, caused by shaking. He was about 12 weeks old at his death. His age corrected for prematurity was about eight weeks.

[7] On other occasions, before the fatal episode of shaking, HN had shaken the baby and inflicted other assaults upon him which left him with injuries. The most obvious of those injuries were fractures of the left femur and left clavicle.

[8] The applicant was not sentenced on the basis that she failed to provide the baby with adequate medical treatment after the final, and fatal, episode of shaking. She was sentenced on the basis that she had failed to provide the baby with adequate medical treatment for the obvious injuries. She was sentenced on the basis that the fractures would have caused the baby significant pain, and that the consequence of her failing to provide adequate medical treatment to him, had he lived, would have been a deformity of his left femur.

[9] The offence was committed by the applicant when she was aged 20. She was 26 at sentence.

[10] [Redacted]

[11] The material before the primary judge established that the applicant had seen HN's violence towards her son. It established that she had mild intellectual impairment and that she was herself a victim of HN's violence and was controlled by him.

[12] [Redacted]

The applicant's antecedents

[13] The applicant's criminal history commenced when she was 17 years old.

[14] She committed offences before and after her son was killed. All of her offending was dealt with in the Magistrates Court. Her criminal history was dominated by drug and property offences. Apart from a breach of bail committed in December 2015,[1] she had not committed an offence since 30 October 2015. The offence committed on that date was an offence of drug possession, for which she was fined.

[15] The applicant was one of six siblings but had little contact with them or her mother. She had infrequent contact with her father, whom she did not meet until she was 18.

[16] She had been taken into foster care when she was aged eight months. Her childhood was "good".

[17] She passed Year 9 at school and was popular. She was expelled in Year 10 for walking out of a maths class. She got into "the wrong group" when she was aged 13. She misused substances and lived on the street. She sniffed glue until she fell pregnant at 16. Her first child was in the care of her foster mother. Her second child was the deceased.

[18] She re-partnered in 2016 and is still with that partner. Their relationship is a stable one in which there is no domestic violence.

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1 For which a conviction was recorded but she was not punished.

[19] [Redacted]

Sources of the factual context for the plea

[20] The sentence proceeded at first instance on the basis of an agreed statement of facts.

[21] Additional factual context for the offending was provided by psychiatric reports tendered on behalf of the applicant[2] and the report and committal evidence of a paediatrician, Dr Jan Connors, which was tendered by the Crown at the primary judge's request.

[22] [Redacted]

[23] The applicant was described by one of the psychiatrists who saw her as "childlike" and that is reflected in the content and language of her police statement and her statements to the psychiatrists during their examination of her.

Facts

[24] The deceased baby was born at 36 weeks. For the first few weeks of his life, he lived with the applicant and HN with one of HN's aunties, T.

[25] T and another resident helped out with his care. The house was quiet with few visitors and the applicant was not concerned about the baby.

[26] In the applicant's own words, she and Mr HN left the house because T argued with HN over them (the applicant and HN) leaving the baby at home and going to the pub for a couple of drinks.

[27] They moved to a house which was occupied by KN and others.

[28] The baby was inoculated when he was six weeks old. He was then apparently unharmed.

[29] His serious injuries, including his fatal brain injury, were inflicted between 22 April 2013 (the date of his inoculation) and 23 May 2013, which was the day he experienced breathing difficulties after the last shaking episode and an ambulance was called.

[30] In material before the primary judge, the applicant explained that HN had "angry moods" brought on by several things including the baby waking in the middle of the night.

[31] She described one night when she saw HN shake the baby (although the baby's head was not unsupported during this episode). She said she was angry about it but was afraid to say anything because she did not want HN to bash her and leave her, so she kept her feelings to herself. She heard him apologise to the baby later that night and that made her feel better.

[32] She described having her son inoculated and seeing a lump on his left thigh a couple of days later, which she put down to the consequences of a needle at that site. The

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2 Which had been obtained for the purposes of the Mental Health Court proceedings.

baby was in fact suffering from a fracture of his left femur and the leg deformity was obvious – facts which the applicant, at sentence, accepted.

[33] She told the psychiatrists about other acts of HN's violence towards the baby which she witnessed. One occurred after the baby had been bathed. She was about to dress him, but HN became angry because he wanted to dress the baby. The applicant was nursing the baby. He grabbed the baby from her and said he knew "it" was not his.[3] He started "swinging" the baby. The applicant told Dr Flanagan that the baby's arm hit the wall and he started crying. She told Dr Heffernan that HN threw the baby against the wall with force because he was angry that he was not able to dress him after his bath.

[34] Another episode of violence occurred after the baby had woken during the night. HN did not want the applicant to feed the baby and he shoved a blanket on or around the baby's chest. On that occasion, the applicant said she told HN not to do that to the baby. She took the baby from him, fed him a bottle and nursed him to sleep. The applicant told Dr Heffernan that she saw the baby's swollen shoulder the next day. It seems that the baby's left clavicle was fractured on this occasion.

[35] After that episode of violence, health care workers visited the baby's residence to weigh him. At HN's instruction, because he feared "problems", the applicant would not let them in.

[36] The applicant told Dr Heffernan about seeing the injury to the baby's femur but said HN would not permit her to get medical treatment for the baby because he feared the doctor would report him to the police.

[37] She described the fatal shaking in detail. She said HN said, "Fucking shut up you little cunt". She said, "I just stood there. I was so angry. I wanted to stop [HN]. I knew what he was doing was not good for bub but I was so afraid to say anything because if I did I knew [HN] would bash me". She was crying but hid her tears.

[38] She described the baby's deterioration over the following day. During the course of his deterioration, HN assaulted the baby again by slapping his leg with an open hand. At one point, the applicant told HN that they should call an ambulance because the baby did not look well, but HN told her that the baby was fine. Not long after that, the baby struggled to breathe and an ambulance was called. Ultimately the baby was transferred to the Lady Cilento Hospital, where he died.

[39] At autopsy, the baby was found to have the following injuries –

- seven skull fractures;
- fractures of his left and right clavicles;
- seventeen rib fractures;
- wrist fractures;
- fractures to both forearms;

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[3] HN was not the baby's biological father.

- fractures to both femurs; and
- a fracture to his tibia.

[40] Some of those injuries were inflicted in the course of the fatal shaking. Others had been inflicted in previous weeks. The fracture to the left femur and the fracture to the left clavicle were the most prominent of the baby's injuries. As indicated above, the applicant was sentenced on the basis of her failing to provide the baby with adequate medical treatment for those prominent injuries. She was not sentenced on the basis that she failed to provide the baby with adequate medical treatment after the fatal injuries were inflicted.

[41] The applicant was sentenced on the basis that it would have been impossible not to conclude that the baby was in "serious trouble" having seen the deformities to the baby's femur and clavicle. Even if the applicant did not see all of the violence inflicted on the baby, the injuries to his clavicle and femur would have alerted her to the serious risk to his health. The baby was malnourished with swelling and bruising visible on many parts of his body. However, as the prosecutor explained, the basis of the cruelty charge lay in the applicant's failing to provide medical treatment to the child (rather than his malnourishment) but his malnourishment was a sign of his ill health.

Co-operation with the authorities

[42] Having been found not of unsound mind and fit to plead by the Mental Health Court, the applicant entered an early plea of guilty.

[43] [Redacted]

[44] [Redacted]

[45] [Redacted]

[46] [Redacted]

[47] [Redacted]

Mental Health

[48] Dr Flanagan, consultant psychiatrist, described the applicant as "quite childlike" in manner, having seen her on 29 November 2017.

[49] He diagnosed mild intellectual disability, which was probably due to a combination of congenital and acquired factors, including head trauma and hydrocarbon inhalation. She was also suffering from an anxiety disorder of PTSD type, which was difficult to disentangle from her personality damage.

[50] At the time the offence was committed, Dr Flanagan was of the opinion that, in addition to her intellectual disability, the applicant was suffering from an acute stress disorder, as a result of HN's physical, emotional and sexual abuse of her (see below).

[51] Dr Heffernan, consultant psychiatrist, examined the applicant on 28 June 2018.

[52] His impression of her was that she had cognitive deficits. She was softly spoken and her speech was slow or slurred, often the result of a neurological problem. The results of his testing were not consistent with cognitive impairment but the position would be clarified upon neuropsychological testing. The applicant had risk factors for cognitive impairment including severe substance abuse and a reported history of traumatic brain injuries secondary to domestic violence. She suffered grief related to the loss of her son. She also suffered from symptoms of PTSD related to HN's abuse of her and the traumatic death of her son.

Domestic violence

[53] The applicant and HN had been together for five or six years when the offence was committed.

[54] He was violent towards her. Her instructions to her barrister at sentence were that she was beaten daily to the point where she was unable to walk.

[55] The applicant told Dr Flanagan that she had experienced years of domestic violence, which included hits to her head, and had become forgetful. She told Dr Flanagan that HN bashed her "really badly" to the point where she could not walk properly. She said she had a bruised and swollen face and that he threatened to kill her. She said he would bash her "for nothing" including "for telling the truth".

[56] She told the psychiatrists that HN and his cousin raped her when she was pregnant with her deceased son. After the rape, she locked herself in the bathroom. HN used a knife to open the door. He entered the bathroom and bashed her and punched her "in the gut" and face.

[57] She was bashed by HN within a week of their moving in to Ms KN's house because he believed she had been unfaithful. The bashing included his punching her in the face and body many times. Among her injuries were black eyes, and a cut and swollen bottom lip.

[58] She wanted to go to the doctor but HN persuaded her not to: he was afraid that a domestic violence order would be made against him were her injuries revealed. The bashing left her in pain but she was afraid to say anything to HN because she thought he would hit her again.

[59] HN told her to wear sunglasses to disguise her black eyes, which she did. She made excuses to others for her lip injury. HN assaulted the applicant on another occasion while they were living with Ms KN, after he accused her of flirting with another man.

[60] She told Dr Heffernan that the baby was unplanned and there was always tension in her relationship with HN about it. She said that HN was a very violent man who physically and emotionally abused her. She said she was beaten on a daily basis and, on several occasions, lost consciousness as a result of the assaults. HN was controlling and she was trapped in her relationship with him.

[61] She told Dr Heffernan that she did not provide her son with the medical treatment he needed because of HN's threats.

[62] As noted under the heading "Mental Health" above, the applicant suffered PTSD or PTSD symptoms as a result of HN's abuse of her.

The applicant's rehabilitation after the baby's death

[63] The applicant told Dr Heffernan that her life changed significantly after meeting her current partner in 2016. Their relationship was stable. She was receiving counselling. Her mental health (her "anxiety") had improved. She had stopped using alcohol and cannabis and was feeling positive about her fourth pregnancy.

[64] Material tendered on her behalf established that she had attended at "Lives Lived Well" for alcohol and other drugs counselling. She had been a client at Gladstone's Women's Health Centre since 14 June 2016 and received general counselling as well as counselling related to domestic violence.

[65] Two of the applicant's children were in Rockhampton. She travelled to Rockhampton from Gladstone every week to visit them. She participated in parenting programs.

[66] As noted above, her last criminal offence was committed at the end of October 2015.

Comparable decisions and submissions made at first instance

[67] The prosecutor referred the primary judge to *R v PU* [2004] QCA 392 and *R v WAV* [2013] QCA 345.

[68] Defence counsel relied upon the cases referred to by the prosecutor. Both the prosecutor and defence counsel contended for a sentence of three years' probation or a short period of imprisonment without any requirement that the applicant serve any time in actual custody.

[69] [Redacted]

[70] [Redacted]

[71] [Redacted]

[72] His Honour conducted his own research and found the decision of *R v R & S; Ex parte Attorney-General* [2002] Qd R 413 which conveyed the need for community denunciation of offending of this kind.

[73] His Honour noted that in *WAV* the child was eventually taken to see a doctor. That had not occurred in the present case. His Honour also noted that the present case was serious and upsetting because the applicant had seen HN perpetrating serious violence on the baby.[4]

[74] In response to his Honour's concerns, the applicant's counsel referred to the applicant's age (she was 20 at the time of the offence; HN was nine years older); that HN had a criminal history which included offences of violence; and that she was the victim of his severe domestic violence.

[75] The applicant's counsel compared the likely consequences of the applicant's failure (that is, deformity of the leg) to the more serious consequences of the delay in *WAV*,

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4 [Redacted].

namely the needless increase of the child's pain and the exacerbation of a serious brain injury, leading to a destroyed opportunity for a normal life.

[76] [Redacted]

Sentence at first instance

[77] In passing sentence, his Honour recited the agreed facts. His Honour also noted the following:

- that many of the injuries to the baby's body were caused by the episode of fatal shaking [which were not the injuries relevant to the applicant's offending];
- other injuries were caused by direct blows;
- the applicant had a mild intellectual disability which placed her at a disadvantage in her life – but that did not excuse her from caring for her child;
- she had seen HN harm the baby, including by swinging him into a wall; shaking the baby; and shoving the blanket into the baby's chest;
- she saw the injury to the baby's swollen shoulder;
- she turned community nurses away on two occasions;
- on one of those occasions, the nurses were turned away because HN feared that the nurses would see the baby's shoulder injury and "cause them problems";
- HN perpetrated extreme violence upon the applicant – constant, sometimes daily, beatings and sexual violence;
- the baby was gravely unwell – the fracture to the collar bone was infected;
- the applicant was not to be sentenced on the basis that she had failed to seek medical treatment immediately after the fatal shaking, but on the basis that she failed to seek medical treatment for the other obvious injuries;
- the applicant's criminal history was completely unrelated to the present offending – but it was six pages long;
- the applicant's background was prejudicial;
- her children were not in her care but in the care of the Department of Child Safety;
- although not then employed, the applicant was trying to obtain employment skills;
- the applicant had taken courses to try and rehabilitate; and
- she was in a stable relationship without domestic violence.

[78] His Honour emphasised the importance of community denunciation:[5]

> "Ms FAS, there are a number of things for you and against you in respect of the sentence which must be imposed upon you. The first, of course, is this is a most serious charge. As a mother, as a parent, your primary obligation is to care for your children, and you failed your son dreadfully. In sentencing you, I must take into account a number of principles, and one is deterrence, personal deterrence, general deterrence and community denunciation. That is, in terms of caring for their children, most parents are very careful. Most parents, quite rightly, take their children to the doctors on multiple occasions, even with sniffles and colds.
>
> This child, with multiple fractures, and obvious fractures, you did not take for medical treatment, and as I have said, you in fact failed to open the door to the Community Nurse when they tried to call on you because of the risk of further violence being perpetrated upon you by HN. Community denunciation is very important in cases like this, and the Court of Appeal has said so. What that means, community denunciation, is that we as a society, the Australian society, will not tolerate this type of conduct. That is, when children are severely injured and their parents do nothing about it. It is the type of conduct that demands strong penalty."

[79] In imposing the sentence of 18 months' imprisonment, with release on parole after six months, his Honour took into account the many matters in the applicant's favour – including (but not limited to) the disparity in age between her and HN, the violence he committed upon her, her deep regret for what had occurred and the effect it had upon her, and her intellectual disability.

[80] [Redacted]

Present application

[81] The applicant submitted that the primary judge imposed a sentence which was manifestly excessive because his Honour failed to have proper regard to the matters in mitigation which included –

1. that the baby's injuries, in respect of which the applicant provided no medical treatment, were not life threatening and were not of themselves likely to have caused any permanent incapacity [although of course, on the evidence, the baby was likely to have been left with a deformity of the left femur];
2. the applicant's young age;
3. that the applicant was a victim of domestic violence;
4. the applicant's rehabilitation [which had been demonstrated in the six years between the date of the commission of the offence and sentence];

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[5] Transcript 5, ll 30 – 45.

5. the applicant's mental vulnerabilities – her mild intellectual disability and her anxiety disorder of the post traumatic type; and

6. her co-operation with law enforcement.

[82] [Redacted]

[83] Relying on the authorities which emphasise that sentencing is not a mathematical exercise; that there is no single correct sentence for an offence; and that sentencing judges are to be allowed as much flexibility in sentence as is consonant with consistency of approach and accords with the applicable statutory regime,[6] the respondent submitted that the sentence ultimately imposed was not manifestly excessive.

[84] [Redacted]

Authorities relied upon by applicant

[85] On appeal, the applicant referred to the decisions relied upon at first instance of *PU* and *WAV*; as well as *R v WAO* [2012] 1 Qd R 56; and *R v HJ*, Rafter SC DCJ, 17 June 2016.

[86] Before considering those authorities, it is important to consider *R & S; Ex parte Attorney-General*.

[87] That case involved offences of torture, doing grievous bodily harm, assaults occasioning bodily harm and deprivation of liberty, as well as cruelty. Separate sentences were imposed for each of the offences. The sentencing judge was found to have erred in imposing separate sentences for the offences of grievous bodily harm, assault occasioning bodily harm and deprivation of liberty when the sentence imposed for torture already punished those acts. It was correct to impose a separate sentence for the offence of cruelty which involved separate omissions. Because of the error, R and S were re-sentenced by the Court of Appeal.

[88] In re-sentencing them, the Court of Appeal emphasised the shocking abuse of their position of trust and power over the defenceless three year old child who was the victim of their regime of escalating violence towards him.

[89] The applicant submitted that the case was not of particular assistance because the sentence for the offence of cruelty imposed by the Court of Appeal – four years' imprisonment – was imposed concurrently with the sentence of imprisonment of 11 years' imprisonment imposed for the offence of torture. That 11 year sentence was intended to reflect the particulars of the torture offence which included the conduct which formed the basis of the offences of doing grievous bodily harm, the various assaults and the deprivation of liberty offences.

[90] The primary issue in *R & S; Ex parte Attorney-General* was the correct approach to sentence for conduct which was an element of more than one offence (for example, the acts which were the subject of the offences of torture and grievous bodily harm). The cruelty offence involved omissions which were not particulars of the offence of

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[6] *Barbaro v The Queen* (2014) 253 CLR 58 at [34]; *Kentwell v The Queen* (2014) 313 ALR 451 at [42]; *Hili v The Queen* (2010) 242 CLR 520 at [58] [59]. See also *R v Tout* [2012] QCA 296.

torture. The sentence imposed for the cruelty offence was not imposed arbitrarily – although it is true that in real terms it was overwhelmed by the sentence imposed for torture, a serious violent offence.

[91] However, the critical and distinguishing factual feature of *R & S; Ex parte Attorney-General* was that it was R and S themselves who compounded their own acts of torture by failing to seek medical assistance for their injured child.

[92] *R v PU* involved the less serious offence of failing to provide the necessaries of life – an offence which carries a maximum penalty of three years' imprisonment.

[93] PU was originally sentenced to 12 months' imprisonment, suspended after three months, for an operational period of two years. Her application for leave to appeal against sentence was granted and the appeal was allowed. The original sentence was set aside and she was sentenced to 19 days' imprisonment (which she had already served) followed by three years' probation.

[94] PU was 21 years old at the time the offence was committed. The victim was her two year old child. She left the child in her boyfriend's care for 15 minutes – during which time he injured the child. She did not see him inflict the injury and he lied to her about the way in which the child had been injured. She saw that the child's legs were stiff and that she was grinding her teeth. She and her boyfriend decided to wait until the next day to see a doctor. After a couple of attempts, the child drank from a bottle of milk and PU and her boyfriend kept watch over the child overnight.

[95] The next morning, they could not rouse the child. PU tried to get in touch with her mother for advice. She could not speak to her mother until the afternoon. Her mother advised her to take the child to hospital. Her boyfriend persuaded her to delay, arguing that she could lose the child to welfare.

[96] The child deteriorated to the point where an ambulance was called. She was found to have injuries consistent with having been violently shaken.

[97] The relevant delay in providing the child with medical attention was 22 hours. There was no suggestion that that delay exacerbated the child's injuries, which caused the child very serious physical and mental deficits.

[98] The primary judge found that PU was functioning intellectually at a low average – rather than at a below average – level. She had had a troubled early life. Her relationship with her boyfriend was abusive and it was under his influence that she failed to take immediate action. Evidence tendered on her behalf at sentence suggested that her behaviour was naïve and negligent but not intentional or deliberately malicious. She had undertaken to give evidence in the trial against her boyfriend.

[99] The Court of Appeal accepted that, ordinarily, for the offending, a term of 12 months' imprisonment, partially suspended would not be out of the range. But there were two extraordinary aspects of it, namely PU's need for supervision and counselling and the significance of her undertaking to give evidence against her then boyfriend.

[100] The Court of Appeal concluded that the interests of justice would be appropriately served were a period of three years' probation to follow the 19 days of imprisonment she had already served.

[101] [Redacted]

[102] In *R v WAV*, the applicant was sentenced at first instance to three years' imprisonment with parole eligibility after 12 months on his plea of guilty for the offence of cruelty. That sentence was not reduced on appeal.

[103] WAV was 29 when the offence was committed. The child victim, her daughter, was then six months old. She was the youngest of WAV's four children. WAV was an experienced mother. She had no intellectual impairment.

[104] WAV noticed a change in her youngest child in late February 2010. She was hard to settle and she was bruised. She took her to the doctor in the middle of March 2010 who ordered blood tests. The applicant returned with her child for a follow up appointment. The doctor she saw at follow up was concerned about the shape of the baby's head and referred the baby to a paediatrician. The blood tests confirmed an iron deficiency. WAV did not act on the referral.

[105] A witness saw the baby in late March. She was unsettled and not herself. Her forehead was bruised. Her look was vacant, she was unresponsive to attention and she was unable to hold her head up. The witness advised the applicant to take the baby to the doctor, but she did not. The baby deteriorated over the following days.

[106] The applicant noticed, as time wore on, changes to the baby's breathing; her cries as if in pain; her inability to settle; the faster beating of her heart; stiffness in her limbs; floppiness in her head; and an inability to make eye contact.

[107] In the face of the baby's obvious deterioration, the applicant inexplicably delayed before taking the baby to a medical centre. From there she was immediately transferred to the Mater Children's Hospital. She was extremely unwell. She was transferred to the Paediatric Intensive Care Unit in a critical condition. She suffered injuries consistent with violent shaking and physical assaults on at least two occasions.

[108] The applicant's delay in getting medical treatment for the baby had a negative impact upon her neurological outcome. The injuries had a catastrophic effect, including blindness and intellectual impairment, significant impairment in her growth and motor skills, and a stunted and misshapen head. She was unlikely to ever be able to control a wheelchair and would never live independently.

[109] The applicant was sentenced on the basis that, as well as causing the baby unnecessary pain and suffering, her delay destroyed the child's opportunity for a normal life.

[110] Also, she was sentenced on the basis that her plea was entered by way of a pragmatic exercise designed to attract the maximum discount on sentence. She was sentenced on the basis that her plea and cooperation did not reflect real remorse. Nor did her co-operation mean the difference between a charge being laid or not.

[111] In *R v WAO*, the applicant pleaded guilty to two counts of cruelty, namely failing to provide his child with adequate food and failing to provide his child with medical treatment, over a period of six months. He was sentenced to 18 months' imprisonment, with parole release after six months. His application for leave to appeal against that sentence was refused.

[112] The child victim of the offence of cruelty was one of the applicant's five children and the only one to be cruelly neglected. She was removed by an uncle from her parents' care. She was found to be severely malnourished and dehydrated, with untreated scabies. She had not been adequately fed for six months and was at high risk of death. Her treatment delayed her neurologically. The long term consequences were unknown at sentence. Also, while the four other children were taken to their family doctor over that six month period – this child was not.

[113] The applicant was not the child's primary care giver: his wife was. He worked from 2.30 pm until midnight. He was aware of the way in which his wife was treating the child. He raised his concerns about it with her on one occasion and said she "bit his head off". He thought his wife would "wake up". He could see that the child was very thin but did not realise the full extent of the problem.

[114] He was 26 when he was sentenced. His childhood had not been an easy one. His father was an alcoholic and his parents fought. He was prone to take a passive approach in his relationship with his wife. He was sentenced on the basis that it would have been clear to him that his child was suffering serious symptoms. He was sentenced on the basis that he was wilfully blind to it and abrogated his responsibilities to her.

[115] He was extremely remorseful. He entered an early plea. He had no relevant criminal history. However his neglect was not explained by any depressive illness.

[116] The defendant HJ was 26 at the time of the offending. Her criminal history, which the sentencing judge considered relevant, included assaults and other offences. She pleaded guilty to two offences: cruelty and failing to supply necessaries. The child victim was her baby daughter aged four months and two days.

[117] The defendant lived with the child's father, Shayne Quinn, who pleaded guilty to the baby's manslaughter.

[118] She took the baby to the doctor on 16 September 2013. At that time, the baby had arm injuries. The defendant lied to the doctor about how long those injuries had been apparent. She was told to take the child for an x-ray. She said she would, but she did not.

[119] Seven days later, the baby was dead. No definitive cause of death was apparent. Death might have been caused by asphyxia or smothering. The baby also had fractures and had suffered significantly.

[120] HJ was sentenced on the basis that she knew that failing to attend at the hospital (for the x-ray) and to get treatment for her child would in all likelihood cause harm to the child.

[121] The basis for the failing to provide necessaries charge seems to be a failure to take care of the child.

[122] The sentencing judge accepted that Quinn was a controlling individual who subjected the defendant to domestic violence, but that did not satisfactorily explain her utter lack of care for her daughter. She had co-operated with police and indicated a willingness to give evidence against Quinn. She agreed to, and did, secretly record a conversation with him at the watch house, although no incriminating evidence was obtained thereby.

[123] She was remorseful with good character references. She had undertaken parenting programs. She had three other children. She was deeply distressed and traumatised by the offending and there had been some delay in the resolution of the matter.

[124] His Honour sentenced the defendant to two and a half years' imprisonment for the offence of cruelty and to a concurrent sentence of 18 months for failing to provide necessaries. His Honour did not consider it appropriate to require the defendant to serve no time in custody having regard to the serious nature of the offences. His Honour considered parole release after six months to be required. The applicant had served about 16 days of pre-sentence custody and her parole release date was fixed at five and a half months after the date of sentence.

Consideration of the present application

[125] It must be remembered that the applicant was not to be sentenced on the basis that she failed to get medical treatment for her son's fatal or near fatal injuries. Her sentence proceeded on a much narrower basis and is distinguishable, for that reason, from *PU*, *WAO*, *WAV* and *HJ*.

[126] While the relevant injuries in the present case were visible, and likely to cause the baby significant pain when he moved, the baby did not deteriorate after his injuries were inflicted in the same obvious and serious way as the children or babies in the other cases discussed above.

[127] The applicant's delay did not destroy her son's opportunity for a normal life, as in the case of WAV. Nor did the present applicant fail her son in the face of his death or near death, in the same way as the offenders in *PU*, *WAV* and *WAO*.

[128] Also, the applicant suffered from a mild intellectual impairment. She was easily manipulated by her controlling and significantly older partner upon whom she was dependent and whose violence she feared. She had no other supports. In her circumstances, the applicant had a diminished capacity to fully appreciate the harm caused to her son by her failings.

[129] The applicant suffered traumatic grief after her son's death and was remorseful, unlike WAV. She was at a greater intellectual disadvantage than PU who was of low average intelligence. WAV, WAO and HJ had no intellectual impairment.

[130] In the six year delay between the commission of the offence and her sentence hearing, the applicant had demonstrably taken steps to improve herself. She had not reoffended since October 2015. She was doing all she could to maintain a relationship with her children. She had attended counselling for drug and alcohol abuse. There was no suggestion that she was abusing those substances at sentence. She had maintained a stable relationship. She was undertaking psychological counselling and counselling to address the aftermath of the domestic violence she had endured. The material tendered at sentence revealed an improvement in her presentation and communication over time.

[131] The applicant's exceptional combination of circumstances sets her case apart from those considered above.

[132] [Redacted]

[133] [Redacted]

[134] In all of the circumstances, the applicant's offending warranted the imposition of the head sentence of 18 months' imprisonment which was imposed by this court on 28 May 2019. On that date, the applicant had been in custody a little over two months. The interests of justice in this unique case did not require the applicant to spend any more time in actual custody and accordingly 28 May 2019 was fixed as her parole release date.