SUPREME COURT OF QUEENSLAND

CITATION:	*R v WAV* [2013] QCA 345
PARTIES:	**R** **v** **WAV** (applicant)
FILE NO/S:	CA No 120 of 2013 DC No 326 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	22 November 2013
DELIVERED AT:	Brisbane
HEARING DATE:	7 November 2013
JUDGES:	Muir and Morrison JJA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave granted to amend the indictment by adding, at the end, the words "when WAV knew or ought reasonably to have known that would be likely to cause harm to WI".** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – OTHER MATTERS – where wording of indictment is different to wording of offence under s 364(1) of the *Criminal Code* – where indictment uses wording from Form 211 of schedule 3 of the *Criminal Practice Rules* – where s 707 of the *Criminal Code* provides that a form prescribed under a rule of court for a criminal proceeding is taken to be sufficient for purpose for which it is to be used – where case authority provides that where the disparity in wording between approved form and statute changes essential nature of charge, s 707 of the *Criminal Code* will not avail – whether there is a defect in the indictment which impacts on the conviction CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted on

her own plea of guilty to an offence under s 364 of the *Criminal Code*, namely causing harm to a child by failing to provide the child with adequate medical treatment when that was available to the applicant from her own resources, and when the applicant knew or ought reasonably to have know that the failure to provide that care would be likely to harm the child – where the applicant was sentenced to three years imprisonment with parole eligibility set at one third or 12 months – where the applicant seeks leave to appeal against sentence on the basis that it is manifestly excessive – whether leave should be granted for the applicant to appeal against sentence

Criminal Code 1899 (Qld), s 61, s 69, s 208(1)(a), s 364, s 364(1), s 402, s 408C, s 564(2), s 707
Criminal Practice Rules 1999 (Qld), r 15, sch 3, Form 141(1), Form 211, Form 236, Form 241

Binge v Bennett (1988) 13 NSWLR 578, considered
Dearnley v The King [1947] St R Qd 51, considered
R v Aniba [1995] 83 A Crim R 224; [1995] QCA 529, considered
R v Bailey [2003] QCA 506, considered
R v Dwyer [2008] QCA 117, cited
R v Fahey, Solomon & AD [2002] 1 Qd R 391; [2001] QCA 82, considered
R v Forman [1983] 1 Qd R 85, considered
R v PU [2004] QCA 392, considered
R v R & S; ex parte Attorney-General [2000] 2 Qd R 415, [1999] QCA 181, cited
R v SAV; ex parte A-G (Qld) [2006] QCA 328, cited
R v WAO [2012] QCA 56, considered

COUNSEL: D Rogers *(sol)* for the applicant
P J McCarthy for the respondent

SOLICITORS: Caxton Legal Centre for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA:** I agree that leave to appeal should be refused for the reasons given by Morrison JA.

[2] **MORRISON JA:** This is an application for leave to appeal against the sentence imposed on WAV on 19 April 2013. The applicant was sentenced to three years imprisonment with a parole eligibility date of 18 April 2014 (that is to say, after 12 months). The sentence was imposed on a plea of guilty to an offence under s 364 of the *Criminal Code*, namely causing harm to a child by failing to provide the child with adequate medical treatment when that was available to the applicant from her own resources, and when the applicant knew or ought reasonably to have know that the failure to provide that care would be likely to harm the child.

[3] The basis of the application, and appeal if leave is granted, is that in all of the circumstances the sentence imposed was manifestly excessive. Before embarking on that question I can dispose of a matter raised by the respondent in relation to the indictment.

Defect in the indictment?

[4] Section 364 of the *Criminal Code* provides:

> "(1) A person who, having the lawful care or charge of a child under 16 years, causes harm to the child by any prescribed conduct that the person knew or ought reasonably to have known would be likely to cause harm to the child commits a crime.
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> …
>
> ***prescribed conduct*** means –
>
> (a) failing to provide the child with adequate … medical treatment … when it is available to the person from … her own resources …"

[5] The indictment bore the title "Count 1 Section 364(1) Criminal Code Form 211". The text reads:

> "that between the twenty-eighth day of February, 2010 and the thirtieth day of March, 2010 at Brisbane in the State of Queensland, WAV having the lawful care of WI, a child under 16 years, caused harm to her by failing to provide her with adequate medical treatment when it was available to her from her own resources."

[6] It is apparent that the indictment did not include the words from s 364(1), namely "that the person knew or ought reasonably to have known would be likely to cause harm to the child".

[7] Rule 15 of the *Criminal Practice Rules* 1999 (Qld) provides that the statement of an offence in an indictment may be in the words of the schedule form for the offence, with the changes necessary to make the words consistent with the particular circumstance of the alleged offence. The relevant form is that recited in the indictment, namely, Form 211 in Schedule 3 of the *Criminal Practice Rules*. That form does not include the words which appear in s 364(1) of the *Criminal Code* and which are omitted from the indictment. Therefore, the wording on the indictment conforms to Form 211 of the *Criminal Practice Rules*.

[8] Section 707 of the *Criminal Code* provides that a form prescribed under a rule of court for a criminal proceeding is taken to be sufficient for the purpose for which it is to be used, and if used, is a sufficient statement of the relevant offence.

[9] The question raised by the respondent, though not by the applicant, is whether there is a defect in the indictment which impacts on the conviction.

[10] For many years indictments have been couched in the form of the wording used in the approved forms under the *Criminal Practice Rules*. There have been a number

of instances where the wording in the forms does not match the wording of the actual offence under the *Criminal Code*. Where that has occurred, the impact of s 707 of the *Criminal Code* has been a matter that this Court has ruled upon.

[11] In *R v Forman*[1] the Court of Criminal Appeal dealt with a case where the charge was under s 402 of the *Criminal Code* which provided that:

> "Any person who kills any animal **capable of being stolen** with intent to steal the skin or carcass, or any part of the skin or carcass is guilty of a crime …".[2]

[12] The words of the charge were: "That on the 10th day of January, 1982 near Charters Towers in the State of Queensland one … killed one pig with intent to steal the carcass thereof".[3] Notwithstanding that the words "capable of being stolen" were not included in the charge, the form of the charge followed the wording of Form no 236 in the Schedule to the *Criminal Practice Rules*. The court[4] referred to s 707 and its impact upon use of the prescribed forms under the *Criminal Practice Rules*. It went on to deal with the discrepancy in these terms:[5]

> "It cannot be said that the applicants pleaded guilty to charges which were not known in law even though an essential element in the relevant offence was not recited in the words of the charges. This is simply because it has been provided that the charges were properly and sufficiently made in the words which were used. That this is the appropriate effect attributable to s 707 of the *Code* was clearly the view of McCawley CJ (with whom Blair J agreed) in delivering his reasons in a judgment of this Court in *R v Connolly and Sleeman (No 2)* [1922] St R Qd 278, at p 281. In *Dearnley v The King* [1947] St R Qd 51 this Court was concerned with the offence constituted under s 69 of the *Code* in respect of going armed in public so as to cause "terror", (as the section then read) and it had to consider the effect which flowed from the fact that the relevant form of proceedings spoke of going armed so as to cause "fear". It was accepted that there was a difference between the concepts of terror and fear and it then became necessary to consider the effect of this difference. The Court readily decided that the essential elements of the offence could not be altered by the wording adopted in the form and since the learned trial judge had directed the jury in terms of the form it became necessary to quash the conviction. However, the Court did not suggest that the indictment, conforming as it did with the prescribed form, was itself bad in law as a statement of the offence. It may then be accepted that a statement of an offence in terms of the form prescribed under the *Criminal Practice Rules* is sufficient and that this is so whether the proceedings on the offence are by way of indictment or are taken summarily."

[13] In *R v Aniba*[6] this Court considered a conviction based upon an indictment which alleged that a person "had carnal knowledge against the order of nature of (a named

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1 *R v Forman* [1983] 1 Qd R 85.
2 Emphasis added.
3 *R v Forman* [1983] 1 Qd R 85 at 86.
4 Macrossan J (as he then was), Matthews and Kelly JJ concurring.
5 *R v Forman* [1983] 1 Qd R 85 at 86-87.
6 *R v Aniba* [1995] QCA 529.

person)". The circumstances were that the applicant had committed sodomy on a 13 year old boy, an act which was made a crime by s 208(1)(a) of the *Criminal Code*, providing:

> "Any person who –
>
> (a) has carnal knowledge by anal intercourse of any person not an adult …
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> is guilty of a crime and is liable to imprisonment for 7 years".

[14] The indictment followed the wording of Form no 141(1) of the *Criminal Practice Rules*. The question was whether s 707 of the *Criminal Code* applied so as to preserve the conviction where the indictment did not match the terms of s 208(1)(a) of the Code. The court referred to a passage from the decision of E A Douglas J[7] in *Dearnley v The King*:[8]

> "E A Douglas J pointed out the difference between the meaning of the word "terror" and that of "fear" and said:
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> > "… where the word in the section is capable of more than one meaning the form may give one of those meanings so as to constitute an offence. R v Connolly and Sleeman [1922] St R Qd 278 … but the used of the word "fear" instead of "terror" does alter the meaning of the word "terror".
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> > …
> >
> > I think that the power contained in the *Criminal Code* and rules already stated does not extend to create another offence more easily proved and of a lesser nature than that provide by s 69. Consequently the conviction should be set aside.""

[15] This Court took the view that the difference of wording in *Aniba* was at least as substantial as it was in *Dearnley*. It went on:[9]

> "There must be some limit on the extent to which a form can, while remaining valid, depart from the wording of the relevant section; for example, a form referring only to stealing could hardly be regarded as a proper exercise of the power under s 707 if it purported to prescribe a mode of charging robbery."

[16] The point that seems to have emerged from those cases is that where the disparity in the wording, between that in the approved form and that in the statute, changes the essential nature of the charge, as it did in *Dearnley* and in *Aniba*, s 707 of the *Criminal Code* will not avail. However, where the disparity is such that the essential nature of the charge is still plainly clear on the face of the indictment, such that it cannot be said that the plea of guilty was to a charge not known at law, then s 707 will be given full operation.

[17] The question was considered more recently in *R v Bailey*.[10] In that case Bailey was tried and convicted of an offence under s 408C of the *Criminal Code*, namely

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7 With whom Matthews J concurred.

8 *R v Aniba* [1995] QCA 529 at p 3 quoting *Dearnley v The King* [1947] St R Qd 51 at 60 per E A Douglas J.

9 *R v Aniba* [1995] QCA 529 at p 4.

10 *R v Bailey* [2003] QCA 506.

having dishonestly gained a quantity of materials for herself. The single count in the indictment was accompanied by the averment of a circumstance of aggravation, namely that Bailey "was an employee of the Minister for Education of Queensland". That wording was different from s 408C(2) of the *Code*, which provided that the particular circumstance of aggravation was "if the offender is an employee of another person, **and the victim is the other person**".[11] McPherson JA[12] held that s 707 applied so that there was a sufficient statement of the charge. Thus:[13]

> "[7] Section 564(2) of the Code requires that if it is intended to rely on a circumstance of aggravation, it must be charged in the indictment. The form in which the circumstance of aggravation was charged in the indictment against the appellant did not in terms allege that the Minister was the "victim". It alleged no more than that the appellant was an employee of the Minister. This, however, accords with the version ("And AB was an employee of EF") prescribed in Case 6 of Form 241 of Schedule 3 to the *Criminal Practice Rules 1999*, which sets out Forms for indictments, information and complaints – Statement of offences under the Code. Section 707 of the Criminal Code provides:
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> "**707.** A form prescribed under a rule of court for a criminal proceeding is taken to be - -
>
> (a) sufficient for the purpose for which it is to be used; and
>
> (b) if used, a sufficient statement of the relevant offence or matter."
>
> [8] The form in which the circumstance of aggravation was charged in the indictment against the appellant was, under s 707, therefore a sufficient statement of the relevant matter or circumstance of aggravation under s 408C(2)(b) of the Code: see *Binge v Bennett* (1988) 13 NSWLR 578, 582, 593, for the reference to which this Court is indebted to Mackenzie J. The omission in the indictment to allege that the Minister was the "victim" was therefore not fatal to the validity of the circumstance of aggravation being charged against the appellant."

[18] The reference to *Binge v Bennett*[14] is to a decision of the New South Wales Court of Appeal which concerned the issue of a warrant to compel a person to return to Queensland to be tried on charges of riot. The contention was the warrant was defective because it omitted from the averment that the appellants had conducted themselves "with intent to carry out some common purpose". That was an ingredient of the offence provided for by s 61 of the *Criminal Code*. The contention was that because that essential ingredient of the offence was not set out in the warrant, the warrant was defective in law. The court rejected that contention, in the course of which, after referring to s 707 of the *Code*, Kirby P said:

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11 *R v Bailey* [2003] QCA 506 at [4] (emphasis added).

12 With whom Williams JA and Mackenzie J concurred.

13 *R v Bailey* [2003] QCA 506 at [7]-[8].

14 *Binge v Bennett* (1988) 13 NSWLR 578.

> "It was not in dispute that the first respondent had used the form prescribed by the General Rules made by the judges of the Supreme Court of Queensland in respect of the charge of riot. Accordingly, the defects, if any, in that form, are not such as to affect its validity. By the authority of the Queensland Parliament such defects are rendered insufficient to challenge the warrant, as the appellants do, at least in the circumstances of this case: cf *R v Forman* [1983] 1 Qd R 85. This challenge to the return of the appellants must therefore be rejected."[15]

[19] Returning to the present case, one additional feature that needs to be noted is that the omitted words did appear on the Bench Charge Sheet before the Wynnum Magistrates Court, a charge to which the applicant had admitted guilt. To that should be added that the applicant had instituted an appeal against conviction which was subsequently abandoned. Those matters strengthen the contention that there could be no doubt that the applicant was charged with the appropriate offence, and the court intended to direct a plea of guilty to be entered to an offence properly known under s 364(1), as did the applicant.

[20] In my respectful opinion the circumstances of this case fall within that category where the essential nature of the charge has not been altered by the variation in the wording, and s 707 of the *Criminal Code* operates to preserve the indictment as presented as being a sufficient statement of the relevant offence.

[21] Nonetheless, the indictment should be amended so that there is no inconsistency in the court's records.[16] The respondent sought leave to amend the indictment by adding at the end the words "when WAV knew or ought reasonably to have known that would be likely to cause harm to WI". The applicant did not object to that course. Accordingly, leave should be granted to amend the indictment in those terms.

The applicant's personal circumstances

[22] The applicant was born in 1981 and was thus 29 years of age at the time of committing the offence, and 32 years of age at the time of sentence.

[23] The applicant's daughter, WI, was born on 1 September 2009. Thus she was six months old at the time of the offence and about three and a half years old at the time of sentence.

[24] At the time of the offence the applicant had three older children, two sons aged 10 and eight, and a three year old daughter.[17] She was living with the older son and daughter. The eight year old son lived with his father, who had separated from the applicant. The applicant had a de facto partner, Mr OM, who stayed with the applicant and her children approximately three nights per week.

Circumstances of the offence

[25] The following paragraphs are taken from an agreed statement of facts.

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15 *Binge v Bennett* (1988) 13 NSWLR 578 at 582. See also Mahoney JA at 593 and McHugh J at 600.
16 *R v Fahey, Solomon & AD* [2001] QCA 82 at [29].
17 AR 236.

[26] After about 25 February 2010 the applicant started to notice a change in her daughter, describing her as "whingey, hard to settle, uneasy and she also had a lot of bruises on her feet, arm, shoulder and all over her head".[18]

[27] The applicant provided various explanations for the bruising including being hit with toys, falling out of prams, bumping her head and sucking her feet.

[28] On some occasions, when the bruises appeared, the child became very irritable and was waking up in the middle of the night. In that period the applicant made an appointment with the doctor to find out why the child had boils that were not getting better, and was bruising easily.

Tuesday 16 March 2010

[29] The applicant went to the Edith Street Medical Centre with the child on 16 March 2010. The child was diagnosed with school sores, the doctor noting that she was very quiet, did not react much to her surroundings and did not move her limbs much. The doctor ordered some blood tests and told the applicant they may need a referral to the Redlands Hospital for a CT scan on her head, to check for hydrocephaly.

[30] The applicant was told the blood tests were to eliminate a blood disorder. She had the blood tests done about half and hour later. The applicant was subsequently contacted and asked to attend earlier for a follow up consultation.

Friday 19 March 2010

[31] The doctor's surgery called the applicant in the morning to advise that the blood tests results had come back. The applicant attended at the medical centre for a follow up appointment with the child on 19 March. On that day she saw a different doctor, who examined the child and noted that the child's head was abnormally shaped, possibly a symptom of Craniosynostasis.

[32] The doctor noted a bruise on the child's forehead, and the applicant explained it by saying that the child was hitting herself with toys.

[33] The results of the blood tests showed an iron deficiency which could indicate infection. The doctor said that she would refer the child to a paediatrician at the Redlands Hospital for an opinion on the Craniosynostasis. The hospital received the referral on 19 March, and on 31 March the applicant was sent an appointment for a consultation on 10 May.

Wednesday 24 March 2010

[34] Ms KR was a friend of the applicant, and knew the child well. She noticed the child acting strangely on 24 March 2010. The child, normally a very contented baby, was very upset and could not be settled. She was not responding normally, and had a distant gaze. She seemed unable to make eye contact. Ms KR noticed bruising on the child's forehead.

Thursday 25 March 2010

[35] Ms KR next saw the child on 25 March, at 4.00 pm to 4.30 pm. The child was in a pram, and her head "was slumped off to the right side", whereas she usually held

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[18] This was what she had told the police; AR 236-237.

her head up. Ms KR described the child as having a "vacant" look. Ms KR was unable to get a response from the child when she kissed her, waved at her and spoke to her. Usually the child would smile and grab Ms KR's hand when she saw her.

[36] Ms KR suggested that the applicant take the child to the doctor, and the applicant said that she would call and make an appointment.

[37] The applicant told police that it was on this occasion when she first noticed a change in the child's behaviour, in that she did not want to be handled much, she stopped enjoying bath time and was not receptive.

Friday 26 March 2010

[38] The applicant told police she could not recall the events of this particular day. The de facto partner, Mr OM, described the child as being normal.

Saturday 27 March 2010

[39] On this day, according to what the applicant told police, the child looked fine. In the morning, between 10.00 am and midday, the child was left with one of the applicant's friends, Ms MJ, while the applicant went shopping. When the applicant arrived home the child was very dribbly, her face was red from crying and her eyelids were heavy. She had vomited a couple of times and had two soiled nappies. At about 1.30 pm the child looked alert but was irritable. The applicant concluded that the child was teething.

[40] That afternoon the applicant gave the child a dose of Panadol as she appeared to have a temperature. The child also vomited a little after a bottle.

[41] The applicant was due to go out to a cousin's twenty-first birthday that evening, and arranged for Ms MJ to be a babysitter. The applicant left home at about 5.30 pm.

[42] At about 9.30 pm Mr OM returned and check on the child. He told police that she was asleep, but had a wheezy chest and appeared unsettled because she was moving her arms and legs around as if she was uncomfortable.

[43] The applicant returned home later that night at 10.45 pm and checked on the child, who was sleeping in the foetal position which was odd for her. The applicant stayed home for another hour before going out again to the Wynnum Tavern. Ms MJ and Mr OM were at home with the children.

Sunday 28 March 2010

[44] The applicant told police that she arrived home at about 2.00 am on this day, at which time she checked on all the children, all of whom appeared fine. The youngest child was fast asleep.

[45] At about 4.00 am the child work up, crying. Mr OM said the child was making wheezy noises, she was sooky and uncomfortable, moving her arms and legs about trying to stretch out. Mr OM gave her a bottle. He could not calm her, so he woke the applicant up and told her that he thought something was wrong with the child. The applicant said that the child looked whingey, and looked as though she was in pain. The applicant thought the child was getting sick, but it may have been teething.

[46] The child cried on and off for about an hour. She was not moving her legs as much as she usually would, and seemed more settled when she was propped up. She was given a bottle.

[47] At about 6.00 am the child woke up again. Mr OM told the applicant that she should take the child to the doctor, but the applicant responded that it was just reflux. The applicant took the child into her bed until about 7.00 am, and then took her downstairs.

[48] That morning the child was still very whingey, she was unresponsive to being comforted, and the applicant could not make her comfortable. This continued throughout the morning. On the occasions when the applicant went to pick the child up, she appeared to be in pain. She was still moving her arms and legs, but her head appeared floppy.

[49] At times that morning the applicant observed that the child's shoulders were slumped forward, she appeared tired in the face and continued to cry on and off and be unresponsive to comforting. At this stage the applicant became concerned, although she noted that the child did not have a temperature.

[50] After breakfast, Mr OM took the child back upstairs but she only slept for about half and hour, waking up crying. Her temperature was taken, and it was 37.2C. There was no new sign of bruising.

[51] The applicant watched a movie with the child, and noticed that her heart was beating faster than normal and she had shallow breathing, and continued to cry as if she was in pain. At about lunchtime, Mr OM told the applicant again that she should take the child to the doctor because the child was not herself.

[52] Later that evening the child was crying. Sometime after 8.00 pm she was whinging, and cried louder and harder. The applicant changed a wet nappy and gave the child a bottle but the child would not settle. She appeared at that time to have control of her neck muscles. The child went to sleep after having a bottle.

[53] The child woke a short time later and was whinging. She burped, and the applicant rubbed her tummy and the child went back to sleep. She woke again with a wet nappy, which the applicant changed, wrapping the child in a blanket. The applicant was worried as they had never had a night like this before, and she thought at this stage it was more than teething and that she was getting sicker.

[54] On Sunday night the applicant knew she had to call the doctor first thing Monday, because the child was getting sick, and was unsettled. Mr OM said the child was wheezing and appeared very sick.

[55] The applicant didn't think to take the child to the hospital; she just thought she would make an appointment with her doctor the next day.

Monday 29 March 2010

[56] The child was still unsettled on Monday morning. The applicant woke at about 7.30 am and checked on the child, who appeared pale and her eyes were sunken. The child was also warm to touch, but asleep.

[57] At approximately 8.00 am the applicant went to her neighbour's unit to call the doctor's surgery, as it opened at that time. She asked to see Dr Hage and was told

that Dr Hage would not be available until 2.00 pm. The applicant did not describe the child's symptoms to the receptionist. She asked to be contacted if an earlier appointment became available.

[58] At about 8.00 am that morning Mr OM noticed the child's foot was twitching. He showed the applicant and said to her that it was not right. He said that the child looked like "shit", she was tired and exhausted, and he told the applicant to take her to the doctor that day. The applicant did not want to go to a hospital because she did not want to sit around for ages in the emergency department, waiting to be seen by a doctor (which had happened in the past). She said she had had a previous bad experience with her son at the hospital, and trusted her own doctor.

[59] At about 8.30 am the child woke. She looked very unwell and had a blank stare on her face. The applicant put the child back to bed but she woke up again 30 minutes later. When the applicant picked her up the child's head was very floppy and winced in pain.

[60] The applicant noticed that the child appeared to be frowning, she was very stiff and had her legs stretched out. Every time she picked the child up she seemed to be in pain. The applicant spent most of the day with the child, noticing that her heartbeat was quick, she had shallow breathing, would not feed other than a few sucks, and cried like she was in pain.

[61] At about 11.00 am that morning the applicant and Mr OM tried to shower the child. Her head was floppy, she had no head control, and her eyes appeared unusual. Mr OM urged the applicant to take the child to the doctor earlier.

[62] After the shower the applicant noticed that the child's left foot and cheek were twitching in unison. By midday she had noticed on two occasions that the child's eyes were wide open, her pupils were quite large and she was staring straight through the defendant, unable to make eye contact.

[63] The applicant left home shortly before 1.00 pm. She put the child in a pram, and caught a bus to Wynnum Central, arriving there at 1.20 pm. The applicant then visited three shops and made some small purchases before taking the child to the doctor's surgery. Whilst at the store next to the doctor's surgery the child woke and was "whinging", stopping when she was given a dummy.

[64] The applicant arrived at the doctor's surgery at 1.45 pm, and was seen by Dr Hage at 2.00 pm. The applicant told Dr Hage that the child had been lethargic, with poor intake and poor urine output, for 36 hours. The applicant told Dr Hage that the child's leg was twitching earlier that morning. She also told the doctor about the other symptoms she had observed.

[65] Dr Hage observed the child in her stroller and noted that she was wide eyed, moaning and unresponsive. The child moaned when the applicant picked her up. When Dr Hage told the applicant that the child was very sick and questioned her as to why she had taken so long to get medical attention for her, the applicant replied "she got worse this morning".[19] The child's pupils were dilated and non-responsive to light, her chest examined revealed bilateral wheezes, and she was suffering from seizures. Dr Hage arranged for the child to be transferred immediately by ambulance to the Mater Children's Hospital.

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19 AR 242.

Nature of the injuries

[66] Upon arrival at the hospital, Dr True examined the child. She was extremely unwell with reduced consciousness, suffering seizures, and she was poorly responsive.[20] She was sedated, incubated, ventilated, and transferred to the Paediatric Intensive Care Unit where she remained in a critical condition.

[67] Numerous tests were conducted, including CT and MRI scans. Dr True gave a report detailing the extensive injuries, to which I will return. In short the child had suffered bilateral injuries to the brain resulting in brain damage, subretinal haemorrhages, numerous fractures and extensive bruising. Dr True concluded that the likely mechanism for the majority of the injuries was violent shaking, and she concluded that the child had suffered severe physical assaults on at least two occasions. Dr Edwards concluded that the subdural haemorrhages were caused by head trauma. It was her view that there was at least one high force head injury and this could have led to a degree of susceptibility to subdural change.

[68] Dr True assessed the child's long term prognosis as poor. She is likely to have physical, visual and intellectual impairment, and will require ongoing rehabilitation with frequent therapy and medical support throughout her life.

Police interviews

[69] The applicant was interviewed by police on four separate occasions in mid to late April 2010, and cooperated with police.[21] Throughout the interviews the applicant attempted to proffer innocent explanations for the injuries. It was the Crown's case that her attempts to proffer innocent explanations demonstrated her failure to provide adequate medical treatment where such a need for treatment was patent, irrespective of the timing and possible mechanism. The Crown contended that those attempts to proffer innocent explanations were made in a desire to minimise the applicant's failure to provide appropriate care.

Basis of the sentence

[70] The agreed statement of facts provided to the learned sentencing judge set out the basis upon which the sentence would proceed.[22] It was that the harm was limited to the pain and suffering experienced by the child, and included the loss of opportunity to treat the secondary injury expeditiously and to potentially minimise further brain injury. It was accepted that it was not possible to quantify the amount of harm caused as a result of the delay:

> "It may be that there was no further brain injury occasioned as a consequence of the delay (Dr Edwards), however the absence of care during the secondary brain injury phase was likely to have led to further brain damage (Dr True)."[23]

The paediatrician's evidence as to the impact of delay

[71] The child was treated by Dr True, a paediatric specialist, at the Mater Children's Hospital Paediatric Intensive Care Unit on her admission on 29 March 2010. Dr True provided three reports, 10 June 2010, 16 June 2011 and 9 August 2012.[24]

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20 AR 242.
21 AR 242.
22 AR 243.
23 AR 243.
24 AR 244, 253 and 256.

[72] Dr Edwards, a paediatric forensic physician, provided a report on 23 January 2012,[25] after examining the medical records. She did not have the opportunity that Dr True did, namely examining the child at the time.

[73] Dr True stated that the child had presented to the GP "in an extremely critical state".[26] On admission the child was floppy, unresponsive, with a reduced level of consciousness and dilated pupils. She had:

(a) subdural haemorrhages and hypoxic ischemic brain injury;

(b) bilateral severe retinal haemorrhages;

(c) multiple bruises on the forehead, right arm, lower legs and both feet;

(d) posterior rib fractures; and

(e) metaphseal fractures to the thighs and lower legs.

[74] Dr True concluded that the child had sustained a severe physical assault, causing a brain injury on at least two occasions.[27] The most recent was some days before, and the earlier brain injury was some weeks to months before that. They were most likely due to inflicted head injury. The most likely cause was being held around the chest and violently shaken back and forth, causing the head to move rapidly on a weak neck. The posterior rib fractures supported that conclusion, as they could only have been caused by the chest being squeezed from front to back. The fractures to the limbs were likely caused by the limbs flailing during shaking, or twisting and pulling.

[75] Dr True's opinion was that the applicant had failed to provide timely care for the child, and that "[a]ny further delay may have led to her death".[28] As to the signs of injury, Dr True said:[29]

> "At the time of the incident that caused [the child's] head injury, significant brain damage would have occurred and she would have been symptomatic immediately. The symptoms vary according to the severity of the injury at the time and range from; immediate loss of consciousness and stopping breathing, and seizures to sleepy, not very responsive, floppy, not feeding well, vomiting and irritable. However, it would be very clear to a caregiver an immediate change in the child's well being. [The child] had a severe head injury and therefore it would be expected she would have significant and obvious symptoms."

[76] On the question of the impact of the delay, Dr True said that once the head injury occurs, secondary brain injury occurs, including swelling of the brain, and deprivation of blood and oxygen to the brain. She went on:[30]

> "If medical attention is not sought soon after the initial injury then the damage of the secondary brain injury cannot be managed and minimised by Paediatric intensive care and therefore further damage to the brain will occur than if attention was sought immediately.

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25 AR 258.
26 AR 254.
27 AR 251.
28 AR 251.
29 AR 254.
30 AR 254-255.

> Therefore, it is likely the [the child's] long term prognosis is worse due to the significant delays in seeking medical attention."

[77] In her last report Dr True referred again to the impact of the delay. She said that if it was the case (as Dr Edwards had reported) that the trauma had occurred just prior to the symptoms revealed on the Sunday morning, 28 March:[31]

> "...then at least 34 hours passed prior to seeking medical attention. The first 36 to 48 hours after the primary brain injury is when secondary brain injury occurs. The major focus of Paediatric Intensive Care is to minimise secondary brain injury by managing the airway, breathing and circulation of a child, maintaining normal blood glucose levels, stabilising body temperature and managing seizures.
>
> As [the child] did not receive medical attention until late in this phase of secondary brain injury, this represents a lost opportunity for medical care to minimise further brain injury.
>
> It is not possible to quantify the amount of harm that has occurred to [the child's] brain as a result of this delay. The primary brain injury is the major cause of her neurological impairment but the absence of care during the secondary brain injury phase was likely to have led to further brain damage."

[78] Dr Edwards' conclusion, as a result of reviewing all available medical records, was that the original head injury was likely to have occurred some weeks before her admission to hospital, and that injury resulted in the ultimate development of chronic bilateral subdural collections.[32] Further, the presence of subdural haemorrhages had a direct correlation to the increased head size seen in the child by the GP's on 16 and 19 March.[33]

[79] In Dr Edward's opinion the symptoms seen in the child in the week before she was hospitalised (refusal of feeding, vomiting, irritability, enlargement of the head, and seizures) were all common symptoms for a child with altered conscious levels due to cranial pressure.[34] They are the symptoms reported by the neighbour Ms KR, who raised concerns on 24 March.

[80] Dr Edwards was of the view that the second head injury occurred within a few days prior to admission to hospital,[35] though one could not be definitive about when the head injuries occurred.[36] However she disagreed with Dr True that the child's extremely critical state on presentation to the GP on 29 March, indicated that the condition had been there for a prolonged period of time.[37]

[81] On the impact of the delay Dr Edwards said:[38]

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31 AR 256-257.
32 AR 267.
33 AR 267-268.
34 AR 268.
35 AR 270.
36 AR 270.
37 AR 271.
38 AR 272.

> "The global developmental delay and visual impairment are the end result of [the child's] chronic subdural haematomas, raised intracranial pressure and hypoxic ischemic brain damage. How much of her documented poor neurological outcome can be directly related to primary traumatic axonal injury as apposed to the secondary damage cannot be determined. Secondary brain injury, when it does develop, begins very soon after the primary insult but the degree and time over which it progresses is variable between individuals and not well understood. Infants have a limited repertoire of behaviours to indicate when they are suffering from a head injury (ie they can't walk or talk) and it is recognised that there may be a period of non-specific symptoms with gradual worsening and fluctuation over hours to days following a significant head injury which is ultimately fatal or associated with a poor outcome. In other words they are not always profoundly and severely affected from the moment of head injury. As outlined above the actual pathophysiological processes involved in [the child's] intracranial injury progression and the relationship to her original head injury are not clear."

[82] She concluded that:

> "… no definitive conclusion about the likelihood or otherwise of the mother's timing of seeking medical attention affecting [the child's] ultimate neurodevelopment outcome can be made. If her condition had been diagnosed by her GP 10 days before and this led to drainage of her subdurals and relief of pressure on her brain it is very likely that her outcome would have been more favourable."[39]

[83] Therefore, whilst the doctors disagreed about the timing of the two head injuries, and whether one could be definitive about how much of the adverse outcome could be attributed to the delay in seeking medical treatment, they agreed that the delay did have an impact on the neurological outcome. Specifically that it meant there was a lost opportunity for medical assistance which could well have resulted in a more favourable result for the child. Given the catastrophic result of the injuries, including blindness and intellectual impairment for life, the lost opportunity was very significant indeed.

[84] The primary judge recorded the impact of the delay appropriately[40] as set out at paragraphs [87] to [93] below.

The sentencing judge's remarks

[85] The learned sentencing judge was given the agreed statement of facts. As well there were extensive submissions made to her Honour, which reflected what was put to this Court on the application for leave.

[86] The sentencing judge proceeded on the basis that the applicant was not being suggested to be the person who shook the child.[41] But the plea of guilty was an acknowledgment that the child needed urgent medical treatment, that the applicant

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39 AR 272-273.
40 AR 176.
41 AR 173.

knew that or should have known it, but "nonetheless, waited an unreasonable length of time before seeking help and that your delay caused further harm" to the child.[42]

[87] The sentencing judge noted that the de facto, Mr OM, and a neighbour, Ms KR, had urged that the applicant take the child for medical assistance, but the applicant did not do so.[43]

[88] The progression of the child's symptoms over the days leading to 28 March was noted. This included that the applicant had twice taken the child to the clinic.[44] It cannot be seriously argued, therefore, that her Honour forgot the evidence of the care that was given to the child by the applicant. However, as noted by her Honour, "[b]y 28 March ... it was abundantly clear that something was very wrong".[45] That comment led her Honour to recite the events of Saturday 28 March, including the urging of the de facto, Mr OM, that the child be taken to the doctor.

[89] Then her Honour turned to the events of Sunday 29 March. They showed symptoms that were known to the applicant, and, on any view, unusual and alarming. The child's head was floppy, her heart was racing, her breathing was shallow and wheezing, she had hardly fed all day, and she was crying in pain. All of this led to another exhortation by Mr OM to take the child to the doctor. But the applicant did nothing.

[90] As the primary judge noted, even though the applicant might have taken the child to the hospital; that did not happen.

[91] Her Honour also noted the fact that when, on Monday 30 March, an appointment was finally sought with the doctor, and the only appointment time offered was hours away in the afternoon, even then the applicant did not explain the seriousness of the symptoms to the receptionist.

[92] Then her Honour noted the fact that the applicant went shopping for some things while waiting for the doctor's appointment.

[93] The catastrophic consequences for the child were noted;[46] she is blind, severely intellectually impaired, has significantly impaired growth, significantly impaired motor skills, and a stunted and misshapen head. Now three and a half, she is never likely to be able to control a wheelchair, she will never live independently, and never walk. Her quality of life has been seriously compromised.

[94] So much reveals her Honour's thorough recognition of the child's plight, and how she arrived at that point. Her Honour clearly proceeded on the basis that the applicant was not to be punished for the violent assault on her child.[47] She said: "You are to be punished for the harm that resulted from your delay in getting help".[48] The harm was clearly, and I may say, accurately, identified. It was the "unnecessary pain and suffering that could have been alleviated by medical care – and the delay in treatment for the brain injury".[49]

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42 AR 173.
43 AR 174.
44 AR 173-174.
45 AR 174.
46 AR 176.
47 AR 176.
48 AR 176.
49 AR 176.

[95] Her Honour recognised that it was impossible to now quantify the exacerbation of the brain injury caused by the delay, but that the delay "was likely to have contributed to further damage".[50] She said: "Certainly your crime created a real risk of more extensive permanent damage and [the child], tragically, lost an opportunity that she should have had".[51]

[96] Factors in the applicant's favour were taken into account including: her lack of any relevant criminal history; her deprived upbringing; cooperation with police, though this was recognised as a pragmatic exercise to attract the maximum discount on sentence; the plea of guilty, even though efforts were made to withdraw it, and that resulted in further court proceedings; and the appropriate trips to the doctor in the weeks before the offence.

[97] Finally her Honour said:[52]

> "The offence of cruelty must be viewed seriously. Your baby was totally dependent upon you. In failing in your duty to her you added to the grave danger she faced and you extended her suffering needlessly. It is an offence that cannot be tolerated. General deterrence and denunciation are important here."

[98] That statement was in light of what her Honour had earlier said: "No matter how she came to be injured your responsibility as her mother was to get proper care for her."[53]

[99] On any view the applicant failed in doing so, and the consequence was that the child suffered needlessly increased pain, and exacerbation of a serious brain injury leading to a destroyed opportunity for a normal life.

Applicant's contentions

[100] The sole ground of the application was that the sentence was manifestly excessive. Three points were made:

(a) insufficient weight was given to the factual basis of the plea, namely that the applicant's criminal responsibility resulted solely from her delay in getting the child help;

(b) too much weight was placed on the delay in pleading guilty; and

(c) insufficient weight was given to the matters of mitigation (in particular admissions to police).

[101] As to the first point, in my respectful opinion the primary judge was well aware of the factual basis of the plea as the basis for the sentence. She noted that the applicant had participated in four lengthy interviews with police,[54] the explanations given and the denials of knowledge of the cause of, and therefore responsibility for, the injuries. Then her Honour immediately said: "No matter how she came to be injured your responsibility as her mother was to get proper care for her."[55]

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50 AR 176.
51 AR 176.
52 AR 178.
53 AR 173.
54 AR 173.
55 AR 173.

[102] Then, having recited the history of events from 16 March to the day the child was taken to hospital, and the consequences for the child, her Honour expressly recognised that the plea was on the basis that she was only guilty of the delay and what that delay caused, by stating:

> "You cannot be punished for the violent assault upon [the child] that injured her head. You have not been convicted of that. You are to be punished for the harm that resulted from your delay in getting help."[56]

[103] The learned primary judge could not have made it clearer, in my opinion, that she was proceeding on the basis that the plea reflected only responsibility for the delay and the delay consequences.

[104] As to the second and third points, the history was that a plea of guilty was entered in the Magistrates Court, which the primary judge characterised as "a pragmatic exercise designed to attract the maximum discount on sentence".[57] She was correct in that. In the course of giving evidence on her application to withdraw the plea, the applicant gave evidence that the plea was given to achieve exactly that.[58]

[105] The applicant was arrested on 17 February 2010. The proceedings commenced in the Wynnum Magistrates Court and were transferred to Brisbane for a committal hearing. The plea of guilty was entered at the committal, on 9 December 2010.[59] That plea was in response to the bench charge sheet which correctly averred the offence of failing to provide adequate medical treatment, under s 364(1) of the *Code*.[60] Instructions to do so were given by the applicant to her solicitor that day.[61]

[106] The indictment was presented on 28 February 2011, and the applicant pleaded guilty to that indictment on 18 August 2011, nine months after the plea in the Magistrates Court.[62] The indictment was deficient in that it included the word "not" so that it wrongly alleged a failure to provide adequate medical treatment when that was not available to the applicant.[63] No one noticed the defect identified in paragraphs [6] to [9] above, namely that it did not allege that the failure to provide adequate medical treatment was something that the applicant knew or ought to have known would cause the child harm.

[107] The matter was listed for sentence in June 2011 but adjourned. It then came before the court on 19 August 2011 but was again adjourned.

[108] The applicant applied to withdraw the guilty plea. The application relied not only on the defect in the indictment, but also alleged that the plea was induced by an intimation of a better sentence if she did so.[64] The application to withdraw the plea was determined on 21 December 2012, some 10 months after it was instituted.[65] The application to withdraw the plea was rejected.

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56 AR 176.
57 AR 177.
58 AR 48-55. See also the primary judge's reasons at AR 132.
59 AR 125.
60 AR 37-38.
61 AR 92.
62 AR 125.
63 AR 126.
64 AR 132.
65 AR 125.

[109] In those circumstances it is hard to see any legitimate criticism of her Honour's treatment of the weight to be given to the plea, and the applicant's cooperation. True it is that each side needed to get further expert evidence and that caused some delays. However, her Honour was well aware of that, having dealt with the application to withdraw the plea, and she referred to the "protracted proceedings" caused by that application.[66] The findings of the primary judge, in dismissing that application, make it clear that there was never any true basis to suggest that the respondent offered an inducement for the plea. One could be forgiven for characterising that also as a pragmatic exercise, rather than being borne of a real sense of remorse.

[110] In my opinion it was correct to describe the initial plea in the Magistrates Court as a pragmatic exercise by the applicant, for the reasons given above. Further, her Honour expressly took into account the cooperation with police and the fact that the guilty plea saved court time and resources, as well as sparing witnesses the necessity to attend at a trial.[67] However, in my opinion no error can be demonstrated in her Honour's observation that the plea and cooperation did not reveal "any real remorse".

[111] This was not such a case where one could say that the applicant's cooperation meant the difference between a charge being laid or not. The police had the evidence available from the de facto (Mr OM), the friend (Ms KR), and the doctors (both at the clinic and the hospital).

[112] I do not consider that it has been demonstrated that the primary judge erred in the respects contended.

Comparable cases

[113] The learned primary judge was pressed with a number of cases which were said to be comparable in terms of sentencing. They included:

(a) for the respondent: *R v SAV*[68]; *R v R & S*[69]; *R v Stevenson*[70]; *R v WAO*[71]; *R v PU*[72]; and *R v Date*[73];

(b) for the applicant, those listed above plus *R v Jones*[74].

[114] The circumstances of each were thoroughly reviewed.[75] The parties told her Honour the sentence they were suggesting. For the respondent that was: three to four years with parole eligibility at one third of the term.[76] For the applicant that was 18 months with parole eligibility at one third of the term.[77]

[115] Her Honour considered that *PU* was the most helpful of all those referred to her. That case involved a 21 year old woman, whose intellectual functioning was

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66 AR 177.
67 AR 177.
68 *R v SAV; ex parte A-G (Qld)* [2006] QCA 328.
69 *R v R & S* (1999) 2 Qd R 328.
70 Sentencing Remarks, Dearden DCJ, District Court, 15 December 2008.
71 *R v WAO* [2012] QCA 56.
72 *R v PU* [2004] QCA 392.
73 Sentencing Remarks, Durward SC DCJ, District Court, 14 November 2006.
74 Sentencing Remarks, Martin SC DCJ, District Court, Ind No 2321 of 2011, 6 January 2012.
75 AR 158-163.
76 AR 157-158.
77 AR 166-167.

impaired. She had no prior convictions. Her partner caused some injuries to a two year old child, consistent with the child having been violently shaken. The injuries to the child bore some similarity to those in the present case. The child suffered subdural and subarachnoid haematomas, and retinal damage. PU was charged with failing to provide the necessities of life, an offence punishable by a maximum penalty of three years. That is to be contrasted with the present case where the maximum penalty is seven years. Her partner dissuaded her from seeking assistance. She delayed getting treatment for the child for some 22 hours, at a time when her child was in obvious need.

[116] PU was sentenced to 12 months, suspended after three months, with an operational period of two years. This Court considered the sentence excessive, particularly in light of the undertaking to cooperate and give evidence against her partner (the perpetrator of the assault on the child), and PU's need for further treatment and counselling.[78] It was replaced with probation for three years. This Court made it clear that but for the s 13A undertaking the sentence of 12 months, suspended after three months, would have had merit.

[117] There are points of distinction between *PU* and the present case. In *PU* there was no suggestion that the delay had exacerbated the injuries. The child had serious mental and physical defects that were not attributable to the applicant there, nor to the delay. The most significant factor was the undertaking to give evidence against the partner who had shaken the child. But for that, the sentence first imposed was appropriate.

[118] The present case is more serious that *PU*. The doctors agree that the delay caused secondary brain injury, and undoubted pain and suffering. During the delay, which occupied several days, the child was almost certainly in constant pain, and went downhill to the point where she was suffering seizures, and likely would have died if any more time had passed. Whilst there was some cooperation from the applicant there was nothing like the critical assistance PU promised in bringing the perpetrator to justice. PU was intellectually impaired; the applicant cannot claim any such thing, and was an experienced mother, having had three previous children. The applicant's partner (Mr OM) repeatedly urged the applicant to take the child to the doctor; PU had been discouraged from doing so by the very partner who had assaulted the child.

[119] In *WAO* the applicant was sentenced at first instance to 18 months imprisonment with a parole release date after six months. The applicant was a man, aged 26 at the date of the offence and 28 at sentence, who, together with his partner had failed to provide adequate food and medical attention to their three and a half to four year old child. The applicant and his wife (NRB) had other children but it was only this one who was neglected. The neglect extended over six months, and resulted in the child being severely malnourished and dehydrated. As well as this, the child went untreated for scabies and the like. There was a risk of death involved.

[120] The husband pleaded guilty, and had no relevant criminal history. This Court did not disturb the sentence for the husband.

[121] The husband was not the primary caregiver; that was his wife, NRB. She had no criminal history and was of good character. She was in a depressive state at the

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78 *R v PU* [2004] QCA 392 at [20].

time. The husband had raised concerns at the time, only to be rebuffed by the wife. She pleaded guilty and was sentenced at first instance to two and a half years, with a parole release after 10 months. She did not appeal.

[122] Whilst the time delay in the case of *WAO* was longer, the child made a recovery which was far better than the child in this case. Whilst there was a threat to the child's life and wellbeing in *WAO*, both the severity of harm and the outcome in that case was well below this. Here the delay caused secondary brain damage to occur, contributing to the child's severely impaired state now, which will endure for her whole life.

[123] We were pressed with a number of other decisions, many at first instance, in an attempt to show that the sentence imposed was excessive. Particular attention was paid to *R v Jones*[79], *R v Hannon*[80], *R v Pope*[81], and *R v Walden*[82]. It will suffice to say that in none of them were the injuries as severe as in the present case, nor the consequences of the delay as pronounced. There were no life threatening injuries, nor any that resulted in permanent incapacity. In the present case the delay caused permanent brain impairment, to a point where the child was in imminent danger of dying, and she has now been left with permanent severe intellectual and physical disabilities.

[124] The respondent also included references to a number of single judge decisions which, it was said, supported the sentence imposed on the applicant. The facts in them are not sufficiently close to make them useful.

[125] This Court has cautioned before, on more than one occasion, against treating comparable cases as though there is only one correct sentence. Thus Keane JA in *R v Dwyer*[83] said:

> "An approach which seeks to grade the criminality involved in such cases by a close comparison of aggravating and mitigating factors, as if there is only one correct sentence, is to be deprecated as involving the illusion of a degree of precision which is both unattainable, and, in truth, alien to the sentencing process."

[126] In the present case the applicant was aware that the child was suffering, though she may not have known the full extent or cause, for several days before she finally decided to seek medical assistance. During that time her de facto partner repeatedly suggested she take the child to a doctor, and a friend suggested the same thing. The child exhibited a number of symptoms that would have been worrying for anyone, let alone an experienced mother such as the applicant. These included the head becoming floppy, having a vacant stare with wide eyes, being non-responsive, vomiting, shallow breathing, a racing heart, stiff and wincing, sunken eyes, and eventually twitching of a limb.

[127] The applicant displayed no sense of urgency at any point over those days. She did not follow the various urgings to seek medical care, and left the child with a much less experienced person when the child was showing obvious signs of distress. When she eventually decided to seek medical assistance there was still no urgency.

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79 Sentencing Remarks, Martin SC DCJ, District Court, Ind No 2321 of 2011, 6 January 2012.
80 Sentencing Remarks, Chief Judge Wolfe, District Court, Ind No 1186 of 2005, 20 April 2009.
81 Sentencing Remarks, McGill SC DCJ, District Court, Ind No 685 of 2008, 26 May 2009.
82 Sentencing Remarks, Irwin DCJ, District Court, Ind No 63 of 2009, 15 September 2010.
83 *R v Dwyer* [2008] QCA 117 at [37].

She did not wish to go to the hospital because of some previous experience, but it seems she never thought to ring an ambulance. Instead she made an appointment with the doctor, not saying anything that would indicate the seriousness of the child's condition, and even did a little shopping while waiting for the appointment time to arrive.

[128] Over these days, and particularly in the last day or so, the child's brain injury from being violently shaken, was getting worse. By the time the applicant finally sought assistance the child was having seizures and would have likely died a short time later. The doctor did not take long at all to send the child by ambulance to the hospital where she was treated in intensive care for some time.

[129] The specialists, Dr True and Dr Edwards, both reported the catastrophic nature of the brain injuries, and the retinal damage. Both agree that the delay caused harm to the child, though it is not possible to quantify that harm precisely. But there is no doubt that the applicant's delay caused serious and permanent harm to the child, as well as pain and suffering. That harm involves brain impairment and sight loss that is permanent, and very disabling.

[130] In my respectful opinion the primary judge was right to find assistance in *PU*. I do not consider that the sentence imposed was excessive in all the circumstances. Reference to *WAO* and the sentence imposed on NRB provide further support for that conclusion.

Disposition

[131] For the reasons above I would refuse the application for leave to appeal.

Orders

[132] I would propose the following orders:

1. Leave granted to amend the indictment by adding, at the end, the words "when WAV knew or ought reasonably to have known that would be likely to cause harm to WI".

2. Application for leave to appeal against sentence refused.

[133] **BODDICE J**: I have read the Reasons for Judgment of Morrison JA. I agree that leave should be granted to amend the indictment in the terms set out in paragraph 21 for the reasons set out.

[134] I also agree with Morrison JA that the application for leave to appeal against sentence should be refused.

[135] The sentencing judge correctly identified the factual basis for the plea in the sentencing remarks. The sentencing judge also gave due and proper weight to the applicant's plea of guilty. The sentencing judge expressly acknowledged the guilty plea had saved time and resources, and spared witnesses from giving evidence at trial. The fixing of a parole eligibility date at one-third of the head sentence was entirely consistent with a recognition of the savings of time and resources as a consequence of the plea of guilty.

[136] The sentencing judge also had regard to the applicant's co-operation. As Morrison JA notes, there was no basis to contend that co-operation was the difference between

the applicant being charged, or not charged, with the offence. There was other evidence upon which the charge could properly be brought by the authorities.

[137] Whilst there is substance in a contention that many of the cases referred to at sentence provided little assistance by way of comparison from a factual point of view, the sentencing judge recognised this fact when acknowledging that *PU* was the most helpful of those comparable cases. As Morrison JA observes, there were significant points of distinction between the circumstances of *PU* and those of the applicant. Those points of distinction amply support a conclusion that *PU* provided no useful guide as to the appropriate head sentence in the present case. There is no basis upon which to conclude the sentence imposed was excessive in all the circumstances.

[138] I agree with the orders proposed by Morrison JA.