SUPREME COURT OF QUEENSLAND

CITATION:	*R v Fisher* [2022] QSC 189
PARTIES:	**THE KING** (prosecution) **v** **DIQUAN ERWIN LLOYD FISHER** (defendant)
FILE NO/S:	Indictment No. 911 of 2022
DIVISION:	Trial Division
PROCEEDING:	Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 September 2022
DELIVERED AT:	Brisbane
HEARING DATE:	2 September 2022
JUDGE:	Burns J
CATCHWORDS:	CRIMINAL PRACTICE AND PROCEDURE – SENTENCING – MANSLAUGHTER – INFANT VICTIM *Corrective Services Act* 2006 (Qld), s 182 *Criminal Code* (Qld) s 302, s 305, s 310 *Penalties and Sentences Act* 1992 (Qld), s 3, s 9, s 11, s 13, s 161B *Director of Public Prosecutions (Vic) v Dalgliesh (a pseudonym)* (2017) 262 CLR 428, cited *Elias v The Queen* (2013) 248 CLR 483, cited *R v Ali* [2018] QCA 212, followed *R v JV* [2014] QCA 351, distinguished *R v O'Sullivan; Ex parte Attorney-General (Qld); R v Lee; Ex parte Attorney-General (Qld)* [2019] QCA 300, followed *R v Randall* [2019] QCA 25, cited *R v RBE* [2021] QCA 146, cited *R v Riseley; ex parte Attorney-General (Qld)* [2009] QCA 285, distinguished *R v Ross* [1996] QCA 411, distinguished *R v Smith* [2019] QCA 33, distinguished *R v Smith* [2022] QCA 89, followed *Wong v The Queen* (2001) 207 CLR 584, cited
COUNSEL:	D Nardone for the prosecution C Martinovic for the defendant
SOLICITORS:	Office of the Director of Public Prosecutions (Qld) for the prosecution Cridland Hua for the defendant

[1] Diquan Erwin Lloyd Fisher, on 30 May 2022, you pleaded guilty in the Magistrates Court at Brisbane to one charge of manslaughter with a circumstance of aggravation, that is to say, that the offence was a domestic violence offence. You were committed for sentence to this court.

[2] An indictment was presented on 22 July 2022 and then promptly listed to proceed as a sentence on 2 September 2022. At the conclusion of submissions on that day, the hearing was adjourned to allow the court to consider the appropriate sentence to be imposed in your case.

Overview

[3] You were 18 years old at the time of this offence and living in a residential unit at Corinda with the mother of the victim, a baby who was only 11 months old when she died on 5 February 2020. You first met the baby's mother about a year earlier and formed a relationship of sorts, described in submissions as an "on and off again" relationship because there were periods throughout the preceding year when you were not in a relationship and living apart. You were not the baby's father.

[4] By all accounts, the baby was a happy, functioning child up until the evening of 1 February 2020 when her mother left her in your care for a short time. Angered by the baby not settling to sleep, you picked her up around the waist and shook her so vigorously that the acceleration and deceleration forces you generated caused a fatal combination of head, spinal cord and intraocular injuries from which she never recovered. She died four days later.

[5] On several prior occasions when her mother was absent, you minded the baby. On some of those occasions, you became frustrated when you were unable to settle her but you had never before directed any violence towards her. Although the baby was teething and regarded by her mother as a "little bit sooky" in consequence, you were no stranger to upset infants, having helped care for your younger siblings in, it must be said, a dreadful home environment marked by domestic violence and instability. Indeed, you well knew how to cope if you were unable to settle the baby because, on all such prior occasions, you simply walked away.

The offence

[6] Sadly, in the early evening of 1 February 2020, you did not walk away. The baby's mother lay her down on a mattress in a downstairs living room area of the unit and she fell asleep about 10 or 15 minutes later. Her mother decided to go to a supermarket carpark to collect "dumpers" [used cigarettes]. She was only gone for a short time – about 5 to 10 minutes – but when on her return she walked through the gate to the unit, you ran towards her holding the baby. You told her that something was wrong and that the baby was not breathing. You said that when you heard the baby coughing you ran to her and picked her up after which she vomited. You added that she had what you described as "mucous milkie stuff" coming from her nose and mouth.

[7] At around the same time, neighbouring residents heard "desperate yelling" for help. Emergency services were telephoned, and the operator provided directions on the performance of CPR while an ambulance was dispatched. You attempted CPR as those directions were relayed to you. The first ambulance officer at the scene also

engaged in resuscitation efforts but could not feel the rise or fall of the baby's abdomen or any heartbeat. Critical care paramedics arrived about 10 minutes later to assist and, within 15 minutes of their arrival, there was a return of spontaneous circulation. Once that point was reached, the baby was taken to the Queensland Children's Hospital.

[8] A number of ambulance officers noted bruising to the baby's lower abdomen. They were spotty and scattered in nature and likened to thumb-size injuries. There were many such bruises. No external signs of injury were observed to the baby's head or neck.

[9] On arrival at the Queensland Children's Hospital, the baby was unable to breathe on her own, was unconscious and completely unresponsive to voice, touch or painful stimuli. She was stabilised and transferred to the Paediatric Intensive Care Unit but remained intubated and ventilated and required medication to assist her heart function. Eventually, she was weaned from sedation and remained unconscious with no breathing effort of her own. A brain perfusion scan on 3 February 2020 confirmed the absence of blood flow to her brain and a diagnosis of brain death was made at 3:00 pm that day. After consultation with the baby's mother and other family members, all medical support was withdrawn and she died at around midday on 5 February 2020.

The prisoner's versions

[10] After police attended at the unit on 1 February 2020, you told one of the officers that you had given the baby a bottle and that she slept for about five minutes before coughing or choking. You patted her on her back and could feel her heart beating "very fast" before "her body went limp". You said that you blew into her mouth, tilting her head to the side causing milk to come out of her mouth and nose. You said that when the child's mother returned she pushed you to one side and, with that, you ran outside calling for help.

[11] At the Hospital that night, the same police officer overheard you saying, "I don't know she just went limp". She also heard you say that you had used a "bong" to smoke cannabis earlier in the evening.

[12] The next day, your mother attended the Hospital. You told her that you tried to save the baby by giving her "mouth to mouth". You said that she had been crawling on the floor when you heard her choking, so you grabbed her and patted her. You added that the baby's heart was beating "really fast and she went all blue" and then "went all jelly" in your arms, so you started doing mouth to mouth and used your hands to do so. A couple of days later, you gave your sister much the same version.

[13] After the child died on 5 February 2020, police sought to formally interview you but, after being provided with your rights and warnings, you declined to answer any questions. You were subsequently charged with murder.

[14] Not long after, you submitted to a forensic procedure as part of the police investigation. This included measuring and photographing your hands. The police officer who did so asked you whether you understood why that was necessary. You indicated that you did not. He told you that it was so they could compare the size of your hands and grip to the marks and bruises on the baby. The officer then went on

to say, "When we conduct the autopsy on [the baby] that will be more prominent. Is it fair to say that your hands are going to match all the marks and bruises on her body?", to which you replied, "Yeah".

[15] On 6 February 2020, you spoke with a clinical nurse consultant in mental health employed by the Inala Indigenous Health Services. You told the nurse that the baby choked and that you picked her up with a hand on either side and shook her to see if she was breathing. The next day, you spoke to a doctor, and said again that the baby was choking but you made no reference to having shaken her.

[16] A record of interview was conducted by police on 22 February 2020. You denied inflicting any injury on the baby. You told them that you were watching television when the baby's mother briefly left the house. You heard her coughing, making a sound like she was choking. You picked her up to try to help her. You felt her heart beating very fast before she went limp in your arms and began to turn blue. When her mother returned, you told her that her baby was not breathing.

[17] The next day, there was a conversation between you and a law enforcement participant in the cells of the Brisbane City Watchhouse. Initially you provided an account consistent with the earlier versions you had given the police. However, a few hours later, there was another conversation during which you dropped your head and lowered your voice before becoming emotional. After being encouraged by the law enforcement participant to "come clean", you said this:

> "I was just, I lost my shit and grabbed her … I just grabbed her then I just shook her … that's what I done, I just shook her … I just snapped … she was at the end of the couch."

[18] You then cried before saying, "I just grabbed her, and I shook her and told her to be quiet".

[19] In answer to questions from the law enforcement participant, you told him that you grabbed the baby in the region of her waist "near her stomach" and shook her. You said that, afterwards, you "freaked out" when she "went all loose in [your] arms". You described the baby as having gone "limp and blue" after you shook her. You denied having shaken the baby before and said that you acted in this way because of the stress you were under. You told the law enforcement participant that, normally when the baby cried, you would "just walk away", but, this time, you did not.

[20] You gave the clinical psychologist who assessed you on 1 August 2022 for the purpose of this proceeding, Ms Sara Jones, a similar version. According to her report, you told her that the baby was inconsolable and as your own agitation increased, and out of frustration, you "shook her and she went limp".

Factual and legal basis for the sentence

[21] The factual basis for your plea of guilty is based on the account you gave the law enforcement participant.[1] It is also supported by the findings of a post-mortem examination carried out on 7 February 2020 by a forensic pathologist. This established that the baby sustained a combination of significant head, spinal cord and intraocular injuries (subdural haemorrhage, subarachnoid haemorrhage, cerebral

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1 Transcript, 1-5.

contusions and interocular haemorrhage) which were caused by substantial acceleration/deceleration forces that had been generated by "vigorous shaking of an unsupported infant head".[2] The extensive bruising on the baby's abdomen was also consistent with the description you gave the law enforcement participant as to how you held the baby when shaking her although some of this bruising may have been sustained during the subsequent attempts to perform CPR.[3]

[22] After you were charged with murder on 5 February 2020, that charge proceeded to a committal hearing in the Magistrates Court at Brisbane on 19 April 2022. Prior to the hearing, a submission was made on your behalf to the prosecution indicating that you would enter a plea of guilty to a charge of manslaughter. It was however decided by the prosecution to await the conclusion of the committal hearing before making a decision on the submission. Two witnesses were cross-examined at the hearing, including the pathologist. At the conclusion of their evidence, the hearing was adjourned to allow the prosecution time to consider your submission in the light of that evidence. In the result, your submission was accepted and, so, when the case returned to the Magistrates Court on 30 May 2022, a fresh bench charge sheet charging manslaughter was presented in substitution for the bench charge sheet charging murder. You immediately entered a plea of guilty to the manslaughter charge and were, as I have already said, committed for sentence to this court.

[23] This decision on the part of the prosecution not to pursue the charge of murder and, instead, accept your plea to the charge of manslaughter is significant.[4] It means that the prosecution does not allege that, when you shook the baby, you intended to cause death or grievous bodily harm. [5] It also means that the prosecution does not allege that your act, that is, shaking the baby, was an act done with reckless indifference to human life.[6] A person who unlawfully kills another under either of the circumstances – that is to say, with an intention to cause death or grievous bodily harm or by an act done with reckless indifference to human life – will be guilty of murder but where neither allegation is advanced by the Crown, the unlawful killing will amount to the lesser offence of manslaughter. In consequence, the punishment will also be different because a person who commits the crime of murder must be sentenced to a mandatory term of life imprisonment[7] whereas a person convicted of manslaughter, although liable to a maximum penalty of imprisonment for life,[8] must be sentenced in accordance with a statutory regime that requires the sentencing judge to properly take account of, amongst other things, factors personal to the offender.

The sentencing task

[24] It should therefore come as no surprise that, in a case such as this, the sentencing discretion does not fall to be exercised in a vacuum. Rather, it must be exercised in accordance with the governing legislative regime and, further, in accordance with

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2 Ibid.
3 Transcript, 1-6.
4 The court plays no role in these decisions. It is solely within the Crown's prerogative to decide what charge is brought (or maintained) and what allegations are advanced in support of the charge. See *R v RBE* [2021] QCA 146, [23]
5 See *Criminal Code* (Qld), s 302(1)(a); Transcript, 1-8.
6 See *Criminal Code* (Qld), s 302(1)(aa); Transcript, 1-8.
7 *Criminal Code* (Qld), s 305(1).
8 *Criminal Code* (Qld), s 310(1).

established principles regarding a whole range of matters including what the Court of Appeal has determined to be appropriate sentencing levels for this type of offending.

[25] The legislative regime is, for the most part, to be found in the *Penalties and Sentences Act* 1992 (Qld). The express purpose of that statute is not merely to set out the general powers of courts to sentence offenders; it is also intended to provide a sufficient range of sentences for the appropriate punishment and rehabilitation of offenders and, in certain specified cases, for ensuring that protection of the Queensland community is a paramount consideration.[9] The Act also sets out a number of sentencing principles to be applied by the courts which have the objective of promoting consistency of approach in the sentencing of all offenders.[10]

[26] The only purposes for which sentences may be imposed on an offender are: to punish the offender to an extent or in a way that is just in all the circumstances; to provide conditions in the court's order to help the offender to be rehabilitated; to deter the offender or other persons from committing the same or a similar offence; to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; to protect the Queensland community from the offender; or a combination of two or more of those purposes.[11]

[27] In sentencing a person for an offence such as this, the court *must* have regard to: the maximum penalty prescribed for the offence; the nature of the offence and how serious the offence was; the extent to which the offender is to blame for the offence; the offender's character, age and intellectual capacity;[12] the presence of any aggravating or mitigating factors concerning the offender; the prevalence of the offence; the time spent in custody by the offender for the offence before being sentenced; and any other relevant circumstance.[13]

[28] Further, in sentencing an offender for an offence that involved the use of violence against another person, the court *must* give primacy to: the risk of physical harm to any members of the community if a custodial sentence were not imposed; the need to protect members of the community from that risk; the personal circumstances of the victim; the circumstances of the offence, including the death of the victim; the nature or extent of the violence used in the commission of the offence; the past record of the offender, including any attempt at rehabilitation and the number of previous offences of any type committed; the antecedents, age and character of the offender;[14] the remorse or lack of remorse of the offender; any medical, psychiatric, prison or other relevant report in relation to the offender; and anything else about the safety of members of the community that the sentencing court considers relevant.[15]

[29] Also, of relevance to this case:

(a) The court must take your guilty plea into account and may reduce the

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9 *Penalties and Sentences Act* 1992 (Qld), s 3(b).
10 *Penalties and Sentences Act* 1992 (Qld), s 3(d) and (f).
11 *Penalties and Sentences Act* 1992 (Qld), s 9(1).
12 *Penalties and Sentences Act* 1992 (Qld), ss 9(2) and 11.
13 *Penalties and Sentences Act* 1992 (Qld), s 9(2).
14 *Penalties and Sentences Act* 1992 (Qld), ss 9(3) and 1.
15 *Penalties and Sentences Act* 1992 (Qld), s 9(3).

sentence that would have been imposed had you not pleaded guilty. The reduction may be made having regard to the time at which you pleaded guilty (or informed the relevant law enforcement agency of your intention to plead guilty) and, where the court does not reduce the sentence because of a plea of guilty, reasons must be expressed for not doing so;[16]

(b) Voluntary intoxication of an offender by alcohol or drugs is not a mitigating factor for a court to have regard to in sentencing the offender;[17]

(c) In determining the appropriate sentence for an offender convicted of the manslaughter of a child under 12 years, the court must treat the child's defencelessness and vulnerability, having regard to the child's age, as an aggravating factor;[18] and

(d) In determining the appropriate sentence for an offender convicted of a domestic violence offence, the court must treat the fact that it is a domestic violence offence as an aggravating factor, unless the court considers it is not reasonable because of the exceptional circumstances of the case.[19]

[30] It should therefore be seen that many factors, where relevant, must be weighed in the balance by a sentencing judge. To the point of this case, the undoubted seriousness of the offending, aggravated as it is by the defencelessness and vulnerability of the victim and the feature that it is a domestic violence offence, must be balanced with the factors in mitigation such as your youth, the absence of any prior convictions, the contents of any psychological report concerning you and the feature that you have co-operated in the administration of justice by entering an early plea of guilty. It is only in this way that the court may arrive at a single sentence that is just in *all of the circumstances*. This, it should be emphasised, is not merely a question of approach to be decided by individual judges according to their preference; it is a duty mandated by the governing legislation.

[31] The sentencing task is accordingly often complex and requires the judge to not only have regard to all relevant factors but to do so when some of those factors "may pull in different directions" and others which may be plainly inconsistent.[20]

[32] In addition to these fixed requirements of all sentencing judges, the Court of Appeal performs an important role as the forum for the correction of errors in the exercise of the sentencing discretion at first instance (including where a sentence has been imposed that is manifestly inadequate or excessive). Also, applications for leave to appeal by prisoners who complain that their sentences were manifestly excessive or appeals by the Attorney-General contending that a particular sentence was manifestly inadequate provide an opportunity for that Court to review the sentence in question by reference to sentences imposed in other, similar cases and, thus, to correct inadequacy or excess where appropriate. In that way, the statutory objective of consistency in approach to the sentencing of all offenders for that particular type of offence is achieved. Also, on occasion, the Court of Appeal may decide that the

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16 *Penalties and Sentences Act* 1992 (Qld), s 13.
17 *Penalties and Sentences Act* 1992 (Qld), s 9(9A).
18 *Penalties and Sentences Act* 1992 (Qld), s 9(9B).
19 *Penalties and Sentences Act* 1992 (Qld), s 9(10A).
20 *Wong v The Queen* (2001) 207 CLR 584, 611; *Elias v The Queen* (2013) 248 CLR 483, [27]; *Director of Public Prosecutions (Vic) v Dalgliesh (a pseudonym)* (2017) 262 CLR 428, [4].

sentencing levels established by past decisions of that Court for the type of offence under consideration are too low and, because of that, the bar will be reset. As it happens, the Court of Appeal did precisely that in 2019 when deciding *R v O'Sullivan; Ex parte Attorney-General (Qld); R v Lee; Ex parte Attorney-General (Qld)*,[21] concluding that the range for appropriate sentences for the manslaughter of a child established by previous decisions could no longer be regarded as useful for the purposes of comparison.[22] I will return to this decision shortly.

[33] Lastly, mention must be made of what has been aptly described by Applegarth J as the "distorting effect of the SVO regime" under the governing legislation.[23] Where the appropriate head sentence is one of less than 10 years in the absence of a guilty plea, an early or timely guilty plea is typically taken into account by granting parole eligibility after around one third. This is no more than a rule of thumb but, when applied, the actual custodial portion of the sentence will be the period of time served until released on parole with the balance of the term of imprisonment to be served in the community under parole supervision. However, where the objective seriousness of the offence requires a notional head sentence of 10 years or more in the absence of a guilty plea, the plea is taken into account "at the top". This is because any sentence of 10 years or more will carry with it a Serious Violent Offence declaration requiring the offender to serve at least 80 per cent of that sentence before becoming eligible for parole.[24] So, in those cases, the notional head sentence will have to be reduced to take into account factors personal to the offender that mitigate the sentence (such as an early plea, youth, absence of prior convictions, rehabilitation and the like). That is the only way to reflect those factors, as the sentencing judge must, so as to arrive at a single sentence that is just in all of the circumstances.[25] The effect is "distorting" because the notional head sentence will often be much higher than the head sentence which is actually imposed. Consequently, the public face of that sentence will not infrequently be misunderstood, if not openly criticised, because regard is only had to the bare facts of the offending and the ultimate sentence that is imposed without any consideration being given to how the sentencing judge arrived at that outcome.

Personal factors

[34] You are 21 years of age and, as earlier noted, 18 years old at the time of the commission of this offence. You are of indigenous Australian descent. Your criminal history is of no real consequence, consisting of a solitary bail breach.

[35] You were born in Brisbane and you are the second eldest among seven children. Your father was incarcerated prior to your birth and, after this, your mother "went off the rails". You had a difficult childhood, being frequently a witness to acts of domestic violence perpetrated against your mother and your sister by your stepfather. At times, you were also a victim. You moved between your mother's home and your grandmother's home on multiple occasions and at the age of six, relocated to Murgon. By age 10 you had fallen into a pattern of regular use of alcohol and cannabis and, by the age of 14, you started using heroin.

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21 [2019] QCA 300.
22 Ibid, [110].
23 *R v Smith* [2022] QCA 89, [87].
24 *Penalties and Sentences Act* 1992 (Qld), s 161B; *Corrective Services Act* 2006 (Qld), s 182.
25 *R v Ali* [2018] QCA 212, [28].

Unsurprisingly, you left school prior to the end of year 10. You relocated to Broome in Western Australia where you stayed away from drugs and worked on a cattle station for about 11 months but left due to ongoing racism from the head stockman. By age 17, you were back in Murgon and later you relocated to Inala with your mother. Your abuse of illicit substances increased throughout this period, with the resumption of your abuse of heroin, alcohol and cannabis and your introduction to another drug, methylamphetamine. It was at around this time that you met the baby's mother. You remained a heavy user of methylamphetamine which you consumed intravenously, with your use escalating to approximately 3.5 grams per day in the period leading up to the commission of this offence.

[36] The report from the clinical psychologist to which I have already referred was tendered without objection and none of the opinions expressed by the author were challenged. I am required to take it into account. In the course of assessing you, Ms Jones administered a number of psychometric tests and the results of those tests, along with her clinical assessment of you, form the basis for the opinions which she has expressed. Relevantly to the sentencing task, Ms Jones reported that your exposure to severe domestic violence as a child left you more predisposed than others to "behavioural outbursts in response to stressors" and "desensitized to the use of violence". Ms Jones also expressed the opinion that you currently meet the criteria for a range of disorders – Conduct Disorder Childhood-onset type; Persistent Depressive Disorder (Dysthymia), with intermittent Major Depressive Episodes, Moderate; Alcohol Use Disorder, Moderate, in early remission; Amphetamine-type Use Disorder, Moderate, in early remission; Cannabis Use Disorder, Moderate, in early remission; and Opiate Use Disorder, Moderate, in sustained remission.

[37] As I earlier recounted (at [11]), you were overheard by a police officer at the Hospital telling someone that you smoked cannabis earlier on the night in question. You told Ms Jones that you had consumed alcohol. The effect on you of alcohol (at least) was considered by Ms Jones who expressed the opinion that your executive functioning may have been impaired in consequence, but voluntary intoxication on the part of an offender by alcohol or drugs is not a mitigating factor to which the court can have regard when sentencing you.[26] However, Ms Jones reported that your level of substance abuse leading up to the commission of the offence, and the level of stress you were reportedly under, made it likely that your ability to understand and comprehend certain situations, especially in circumstances of complexity, including the gravity of your actions, would have been poor. She opined that you would have been "likely to become overwhelmed, and unable to comprehend, and act impulsively". As to your overall risk of reoffending, Ms Jones assessed this to be within the moderate risk/needs risk range on one of the psychometric tests she administered.[27] She believes that a "scaffolded approach" to rehabilitation is likely to be required on your release and that you will need the immediate services of social work, psychology and allied services to assist you to avoid returning to your previous pattern of drug use. Access to services to support you in completing your education, seeking out gainful employment and obtaining social support (such as engagement with local elders or community members) will enhance your prospects of success. To the point, Ms Jones stated:

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26 *Penalties and Sentences Act* 1992 (Qld), s 9(9A).

27 The Level of Service Inventory - Revised (LSI-R).

> "If appropriately diagnosed, treated and subject to a parole or community-based order, and he has an increased level of contact and support with mental health, social work and forensic professionals [which] is ongoing across time and monitored for compliance and attendance, then he does have the potential to successfully rehabilitate himself within the community and could remain in the community.
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> …
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> If granted a custodial sentence, it is likely that he will continue to have limited access to the service that he requires to make changes in his life. If a continuation of his custodial sentence is granted, it is likely that any pro-criminal attitudes from [those] that he is seeking guidance from (who are also incarcerated) may become a negative influence for him, and pro-social opportunities he may have in the community (such as participating in pro-social group participation, gaining employment and continuing with studies), will be [prolonged] further for him."

Exercise of the sentencing discretion

[38] In the assessment of the nature and seriousness of this offence, you must be sentenced on the basis that, when you shook the baby, you did not intend to cause death or grievous bodily harm and nor did you act with reckless indifference to the baby's life. Nonetheless, you deliberately subjected the baby to forces of such severity that they caused the fatal injuries. Furthermore, if you had given it a moment's thought, you would surely have appreciated that shaking the baby so vigorously in the manner that you did and without any support for her head could well end in tragedy. She was in your care, completely defenceless and, just as completely, vulnerable.

[39] Your offending is also aggravated by the feature that this is a domestic violence offence, and no submission was made to the effect that it is not reasonable to treat the fact that it is a domestic violence offence as an aggravating factor because of any exceptional circumstances.

[40] Of course, it must be remembered that this is not a case involving sustained physical abuse over a period of time. You lost control and acted out of anger on impulse. Once you realised the gravity of what you had done, you tried to assist the baby as well as the resuscitation efforts which ensued as much as you could, although you persisted in a false account to cover up your offending until the first crack appeared during the forensic procedure before the truth fully emerged weeks later in the watchhouse.

[41] In your favour are a number of factors in mitigation which I must take into account. For a start there is your youth, your lack of any prior criminal history and your cooperation in the administration of justice by the entry of an early plea to this offence.

[42] In addition, on any view of the material before the court you are the product of a highly prejudicial upbringing. It is likely that this contributed in no small way to your early and continued use of illicit substances. Both factor in the development of the range of disorders diagnosed by Ms Jones. I accept that, at the time of this offence, your capacity to maintain self-control may have been compromised to some degree by the presence of these disorders.

[43] I accept also that you are genuinely contrite. Ms Jones expressed the opinion that you are remorseful, if not positively ashamed and you asked your counsel to inform the court that you are "deeply ashamed, remorseful and apologetic". Having observed you in the dock during the course of the sentence hearing one week ago, I have no doubt that your apology was sincere.

[44] You appear also to have a proper degree of insight into your offending coupled with appropriate plans for a drug-free, and lawful, existence on your release from custody. Whether you succeed in remaining abstinent will determine I think whether you reoffend. As Ms Jones stated, you will require a great deal of professional assistance not to fall back into what was chronic, hard drug abuse prior to this offence, and to treat your disorders. Rehabilitation for you will be challenging.

[45] During the course of submissions your counsel relied on a number of decisions of the Court of Appeal which, it was contended, justified the conclusion that an appropriate sentence in this case was one of eight and a half years imprisonment with parole eligibility after you have served one third of that head sentence. They were *R v Ross*,[28] *R v Riseley; ex parte Attorney-General (Qld)*[29] and *R v JV*.[30] Reliance was also placed on two decisions of that Court which were also referred to by the Crown, *R v Randall*[31] and *R v Smith*.[32] The problem with reliance on any of these decisions is that they pre-date the decision of the Court of Appeal in *R v O'Sullivan; Ex parte Attorney-General (Qld); R v Lee; Ex parte Attorney-General (Qld)*.[33] As markers set by the Court of Appeal for sentencing levels for this type of offending, they are no longer useful. As the Court explained, many of those sentences were imposed under a different statutory regime which has since been amended by successive legislative changes.[34] However, I have reviewed those cases because they do assist to highlight the difference of approach taken to cases involving protracted, cruel harm to an infant child and those where, as here, the offender acted more or less spontaneously.

[46] For the Crown, it was submitted that when proper regard is had to *R v O'Sullivan; Ex parte Attorney-General (Qld); R v Lee; Ex parte Attorney-General (Qld)*,[35] the objective seriousness of this offence warrants a notional head sentence in excess of 10 years but that the various factors in mitigation should be reflected by a reduction in the head sentence to nine years with parole eligibility postponed beyond the halfway mark.

[47] In my view, a notional head sentence substantially in excess of 10 years is required to reflect the objective seriousness of your offending and meet the needs of general and personal deterrence, denunciation and protection of the community. For the reasons I have already explained (at [33]), that notional sentence must be reduced to take account of the factors personal to you which operate in mitigation of the overall penalty. That is the only way to reflect those factors, as I must, so as to arrive at a

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28 [1996] QCA 411.
29 [2009] QCA 285.
30 [2014] QCA 351.
31 [2019] QCA 25.
32 [2019] QCA 33.
33 [2019] QCA 300.
34 *R v O'Sullivan; Ex parte Attorney-General (Qld); R v Lee; Ex parte Attorney-General (Qld)* [2019] QCA 300, [110].
35 [2019] QCA 300.

single sentence that is just and in all of the circumstances.

[48] I see no justification though for increasing the severity of the sentence by postponing your statutory parole eligibility date.

The sentence

[49] The sentence of the court for the offence of manslaughter to which you have pleaded guilty is that you are convicted and imprisoned for nine years.

[50] I make no order with respect to parole eligibility. This means that you will become eligible to apply for parole after you have served one half of your sentence, that is to say, after you have served four and a half years imprisonment.

[51] I declare that the time you have spent in presentence custody between 22 February 2020 and today, a total of 930 days, to be time served with respect to the term of imprisonment I have just imposed.