SUPREME COURT OF QUEENSLAND

CITATION:	*R v Randall* [2018] QSC 100
PARTIES:	**R** (prosecution) **v** **COLIN DAVID RANDALL** (defendant)
FILE NO:	BS No 909 of 2017
DIVISION:	Trial Division
PROCEEDING:	Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 May 2018
DELIVERED AT:	Brisbane
HEARING DATES:	16 April 2018, 20 April 2018, 24 April 2018, 11 May 2018
JUDGE:	Davis J
CATCHWORDS:	SENTENCE – UNLAWFUL KILLING OF A CHILD

Corrective Services Act 2006 (Qld) s 184
Criminal Code Act 1899 (Qld) s 576(1)
Criminal Law (Domestic Violence) Amendment Act 2016 (Qld)
Penalties and Sentences Act 1992 (Qld) ss 9, 12A(2)(a), 13, 15, 160C, 161B

Barbaro and Zirilli v The Queen (2014) 253 CLR 58, cited
Crump v New South Wales (2012) 247 CLR 1, cited
Hili v The Queen (2010) 242 CLR 520, cited
Markarian v The Queen (2005) 228 CLR 357, cited
Pickering v The Queen (2017) 260 CLR 151, cited
R v Aaron Baxter, Supreme Court of Queensland, North J, 21 November 2017, cited
R v Amato [2013] QCA 158, cited
R v Assurson (2007) 174 A Crim R 78, cited
R v Bojovic [2000] 2 Qd R 183, cited
R v Carlisle [2017] QCA 258, cited
R v Chard; ex parte Attorney-General [2004] QCA 372, cited
R v Everleigh [2003] 1 Qd R 398, cited
R v Goodwin; ex parte Attorney-General (2014) 247 A Crim R 582, cited

R v Hall; ex parte Attorney-General [2002] QCA 125, cited
R v Hutchinson [2018] QCA 29, cited
R v Kitson [2008] QCA 86, cited
R v Latemore [2016] QCA 110, cited
R v Matthew Lee Williamson, Supreme Court of Queensland, Atkinson J, 6 April 2017, cited
R v Maxfield [2002] 1 Qd R 417, cited
R v McDougall & Collas [2007] 2 Qd R 87, cited
R v Riseley; ex parte Attorney-General [2009] QCA 285, cited
R v Rogers (1996) 86 A Crim R 542, cited
R v Strbak [2017] QSC 317, cited
R v Todd [1976] Qd R 21, cited
York v The Queen (2005) 225 CLR 466, cited

COUNSEL: P J McCarthy for the prosecution
D Brustman QC for the defendant

SOLICITORS: Office of the Director of Public Prosecutions (Queensland) for the prosecution
Howden Saggers for the defendant

[1] Colin David Randall, you were charged on an indictment that you did murder Kye Braxton Randall. Your trial was to commence on 23 April 2018. On 20 April 2018, through your counsel, you asked to be arraigned before me on a charge of manslaughter, which is the natural alternative to murder under section 576(1) of the Criminal Code. You were then arraigned before me in the following terms: "Colin David Randall, you are charged that on the 28th day of June 2014 at Brisbane in the State of Queensland, you unlawfully killed Kye Braxton Randall." To that charge, you entered a plea of guilty. The plea of guilty was accepted by the Crown in discharge of the indictment charging you with murder.

[2] The deceased child was your son, Kye Braxton Randall. Kye was born on the 14th of April 2014, and he was 10 weeks old when you killed him.

[3] The sentencing submissions were made to me on 24 April 2018. A statement of facts relevant to the sentence was agreed between you and the Crown, and that agreed statement of facts became exhibit 5. In the course of these remarks, I will refer to some of the facts recited in exhibit 5, but not all of them. I have read the document carefully and taken it into account in its entirety.

[4] I will first turn to the circumstances under which, on 28 June 2014, you killed your son.

[5] On the morning of 28 June 2014, you were at home with your family. Your family then consisted of yourself and your then wife, who I will refer to as Ms Chambers, your daughter, and your infant son, Kye. Your daughter was born on 16 June 2010. She was, therefore, about four years of age at the time

you killed Kye. It was decided that your wife and daughter would go to the shops. They left the home, leaving you and Kye there. This was, it is agreed between you and the Crown, the first time that you had been left alone with Kye.

[6] It seems that Ms Chambers and your daughter left the home at about 11.40 am, arriving at the Victoria Point Shopping Centre at 11.48. Your daughter was not being cooperative with Ms Chambers, who sent you a text to that effect at 12.29. You responded at 12.32 pm with a message which included the information that you were then vacuuming the house.

[7] At 12.39 pm, about seven minutes after your text to Ms Chambers, you rang her and told her that Kye had gone limp and lifeless, and he was not breathing. It is clear that in the period of time between 12.32 pm and 12.39 pm you killed Kye. You did this by delivering a punch to Kye's stomach while he was in what is described as his rocker swing. Two photographs of the swing are in evidence before me as exhibit 9. One of these photographs shows a close-up shot of the swing. It is a structure consisting of a metal frame from which is suspended an area for the baby to lie upon. One side of that part of the swing is cushioned, obviously for the comfort of the baby. The other side is apparently a solid base. The fact that the other side is solid cannot actually be seen from the photographs that are exhibit 9, but I was told that by counsel in the course of the sentencing submissions, and it seems non-contentious.

[8] The rocker swing was on the floor and Kye was in it. It is sickening to imagine what then occurred. Kye, of course, was totally oblivious to what was about to happen. He was a 10 week-old baby and totally innocent of the world. He had no idea of life, death or the duty that you, as his father, had to protect and care for him. He also, of course, had no idea that you were about to breach that duty in a most horrible and violent way. You bent down and delivered a forceful punch to Kye's stomach in what must have been in a piledriving motion. That punch caused massive internal injuries, and was fatal. Before returning to the chronology of events, I will describe the medical findings. These were contained in exhibit 5.

[9] Kye was found to have broken ribs. It is accepted by the Crown that these injuries were consistent with having been caused by the administration of cardiopulmonary resuscitation, commonly called CPR. And that occurred after you had inflicted the fatal injury. The broken ribs were not inflicted by the fatal punch to Kye.

[10] Kye had a bruise to the lower left of his back and a further deep bruise over his coccyx. The bruising was caused from the force of the punch pushing the back of Kye's body violently against the hard base of the rocker swing. Those injuries help explain the circumstances in which Kye met his death, but those injuries were not fatal. The fatal injuries were to Kye's organs contained within the abdomen, with significant disruption within the upper abdomen in particular. The description of the injuries contained in exhibit 5 are these:

> *Dr Forde* [the pathologist who conducted the post-mortem] *discovered multiple fragments of his liver through the abdomen. The stomach wall had a defect in it through its full thickness (5 cm). An area membrane to the bowel wall was stripped with an area of defect and haemorrhage to the adjacent mesentery (which is the tissue attaching the bowel and other organs to the wall). Kye's liver was described as pulped, with significant lacerations to both the right (4 cm) and left lobe (4.5 cm) and associated bleeding. The pancreas was completely transected (divided transversely). Kye's spleen was also transected with the detached portion weighing 4 grams. Dr Forde discovered two tears in the abdominal aorta leading to the right renal artery and superior mysentery artery respectively. In summary, Kye had suffered severe abdominal injuries. The injuries were acute.*

[11] As I will explain in a moment, there were attempts to revive Kye, which failed. It is obvious that once you had delivered the blow to the defenceless baby's abdomen his death was inevitable. His liver was shattered. Other organs had been severely damaged, and his aorta ruptured. Once you had delivered the blow, no medical treatment could save him.

[12] Given that you were the only person in the house with Kye at the time Kye suffered his fatal injuries, and given that you must have known that Kye had been severely injured as a result of your punch, that being the only event that could explain his condition, you must have known, especially given your training as a police officer, that it was inevitable that the fact that you had fatally struck your infant son would be discovered. However, as will be seen from the chronology of events, to which I will now return, you instinctively lied about how Kye had died.

[13] When you telephoned your wife at 12.39 pm on 28 June 2014 to advise her of Kye's condition, she asked you whether you had called an ambulance. You said that you had not done so, and she told you to do so. You called triple O at 12.40. A recording of the triple O call is exhibit 6. That recording was played in court on 24 April 2018.

[14] The triple O call demonstrates that you were distraught. Of course, by this stage you had no doubt realised, or at least were coming to a realisation, of the enormity of what you had done. However, during the triple O call you told the operator only that your son was pale and effectively lifeless. You must had known at this point that his condition was related to injuries suffered as a result of the blow you inflicted upon him. There was no point in you seeking medical assistance if you were not going to disclose the true facts and enable an accurate diagnosis to be made and appropriate medical assistance rendered.

[15] During the triple O called you clearly preferred your own interests in self-preservation to the interests of Kye, which were to receive appropriate medical assistance.

[16] The lie that you told the triple O operator, at least by omitting to disclose what had occurred, was the lie you would develop and attempt to maintain until a few days before your trial for murder, a period of almost four years.

[17] However, the fact that you did not call triple O straightaway, that is, as soon as you punched Kye, is not something that I consider weighs against you. You were by then no doubt in a state of panic. You did seek help by calling your wife, and you did then call triple O when she instructed you to do so. The Crown Prosecutor, Mr McCarthy, concedes quite properly and fairly that any failure to telephone triple O immediately was due to panic and confusion.

[18] The triple O call consists in part of the emergency services operator instructing you to commence CPR upon Kye. It is evident that up until that point you had not commenced CPR. Mr McCarthy submitted that there was some significance in the fact that, as a trained CPR instructor, you had not already commenced CPR. I reject that submission. By the time you may had been expected to be contemplating administering CPR, you would have been in a state of panic as the realisation that Kye was badly injured was dawning upon you.

[19] Returning back to the chronology, Ms Chambers arrived home before the ambulance arrived. She found you on your stomach on the floor of the hallway of the house. Your arms were outstretched towards Kye, who was, by this stage, lying on his back on the tiled floor. Kye was not breathing, and he was cold.

[20] Ambulance officers arrived, and they, and later medical staff of the Redlands Hospital, attempted to resuscitate Kye, but to no avail. Both you and Ms Chambers were seen to be distraught at the hospital. You did not report to the ambulance officers or to any medical staff attached to the Redlands Hospital that you had forcefully punched your defenceless infant son. Instead, you persisted in the ridiculous story that you had told Ms Chambers. That story was to the effect that you had found Kye limp in the rocker swing. You then pretended that the injuries which were later found were caused accidentally by you, and perhaps by others, when applying CPR. This, of course, was complete nonsense. However, this was the story that you persisted in telling. You told this story to nurses at the Redlands Hospital, to police in a statement on 24 June 2014, again to police in an interview on 4 July 2014, to a social worker involved in the Family Court proceedings on 1 December 2015, and, perhaps most significantly, to Ms Chambers.

[21] In the agreed statement of facts, there is the following:

> *The defendant repeatedly informed Ms Chambers that he had pushed on Kye's stomach when doing CPR and he had done it wrong in attempting to explain the injuries that had been advised of by police.*

You later told her:

I was in a panic, trying to save my son's life. I was pushing down on his stomach. He is a little baby. I am 115 kilos, pushing down on a tiny baby that's this big. He didn't stand a chance.

[22] You were attempting to portray yourself to Ms Chambers as the unsuccessful rescuer, when, of course, at all times you knew that you were the perpetrator of the violence which killed Kye.

[23] This story, that Kye had suffered some spontaneous seizure of some critical health issue, and that his injuries were explicable as a result of the treatment he received, was persisted in by you until the week before your trial, when a plea of guilty to manslaughter was offered and accepted by the Crown.

[24] On 16 April 2018, only about a week before you pleaded guilty to manslaughter, the matter – which was then, of course, a murder trial – was mentioned before me. This was necessary because of an issue that had arisen as to whether it was appropriate for me to hear the trial, given that I had given some advice to solicitors acting on your behalf in 2014. That issue was dealt with, and counsel took the opportunity to raise other issues.

[25] Mr McCarthy, for the Crown, submitted that it would be prudent for me to empanel two reserve jurors in case any juror was overwrought by the horror of the evidence. Mr McCarthy said this to me on that occasion:

What I was going to inquire of your Honour is whether this is a case, given the nature of its content involving a very young child having been killed, involving many physicians giving fairly detailed evidence of the last moments of that child's life, whether it's one in which we, indeed, have two jurors if a juror becomes overawed, and, despite having with their best endeavour indicated to your Honour that they can sit through the entirety of the trial. Some of these matters become more confronting as the trial progresses.

[26] Mr Brustman QC, on your behalf, while agreeing that the empanelment of two reserve jurors was appropriate, said this:

Yes, save that perhaps the word "is killed" is perhaps a little preparatory. But other than that –

[27] Mr Brustman later submitted that any statement made by me to the jury on this topic ought to be neutral. It can be seen that objection was being taken by Mr Brustman to the term "killed", which term carries with it that someone caused the death of Kye. Your barrister's stance, taken on 16 April 2018, is consistent with your denials based on the concocted story that Kye had suffered some spontaneous health crisis and that the issues were suffered as a result of the application of CPR.

[28] Also on 16 April 2018, I learnt that your legal advisors had delivered a medical report which suggested that the hospital staff were responsible for a fairly significant life-threatening injury to Kye. That report was never

tendered before me, but I was told on 24 April that this report showed that one of the injuries could have been caused by the treatment.

[29] It can be seen, then, that your case, right up to your indication of the willingness to plead guilty to manslaughter, a week before your murder trial, was consistent with the lie that you had invented and told Ms Chambers, namely, that you had found Kye limp and lifeless.

[30] You were arrested and charged with murder, and had been in custody since 30 January 2016 in relation to the present charge and only in relation to the present charge.

[31] A relevant question on sentence is what caused you to kill Kye. It is accepted by the Crown that the blow was utterly spontaneous. Consistently with your plea of guilty to manslaughter and the Crown's acceptance of that plea in discharge of the indictment, there was no intention by you to either kill or do grievous bodily harm to the child.

[32] However, I do not accept that you did not intend to hurt him. The act of punching may not have carried with it the specific intention to kill or do grievous bodily harm to Kye. It may also have been spontaneous. However, it was a punch. It was a willed act of violence to a defenceless infant. Whatever was going through your mind at that moment, this was inescapably a violent act carried out and which was directed at Kye. A punch is an act which is intended to hurt. It is more pointed and is different from a shaking, which is sometimes seen in these types of cases. It must have been intended to hurt him in some way, but, of course, you have not intended to kill or do grievous bodily harm to him.

[33] The explanation in the agreed statement of facts for your conduct is as follows:

> *The offence occurred in the contextual background in which the defendant was feeling "intensely frustrated" on the day of Kye's death. That frustration was born of a number of matters, including for example the continued illness of family members, the circumstances of having to return to work at Wynnum police station with the failed transfer and consequential events and continued co-sleeping with children. The defendant was reacting to culminating pressures as he perceived them; not having received an expected transfer, working the night shift and returning to assist his ill wife in the preceding week, continued parental responsibilities (co-sleeping and feeding) whilst working in a job he resented.*

[34] In submissions by Mr Brustman it was also said that you were being bullied at the Wynnum Police Station. I find it difficult to fully understand how "frustration", albeit that you were "intensely frustrated", can explain how you, a mature, well-educated man of obvious intelligence, could punch a 10 week-old baby with such force as to "pulp" his liver.

[35] The reference to the "continued illness of family members" was explained to me as that Ms Chambers had the flu. In the agreed statement of facts, there is reference to "continued parental responsibilities", which are "co-sleeping [with] and feeding" children, and there is further reference to you perhaps being affected by a lack of sleep through working the nightshift. These are all routine, day-to-day issues encountered regularly by parents, especially those of young children. Of course, those pressures can at times become extreme. However, there is no evidence before me to suggest any health or psychological issue arising from lack of sleep or the other matters that I've just mentioned.

[36] What is, perhaps, out of the ordinary is the failed transfer from the Wynnum Police Station which is referred to in the statement of facts. That relates to your attempts to transfer to the Hervey Bay Police Station. As is recorded in the agreed statement of facts, you became infatuated with transferring to Hervey Bay. This fixation struck Ms Chambers as odd. This is contained in the agreed statement of facts:

> *The defendant informed her –*
>
> A reference to Ms Chambers:
>
> *...that he wanted to move to Hervey Bay as it would be better for the children and that they would be closer to family and friends. Ms Chambers knew that they did not have family and/or friends in Hervey Bay. Ms Chambers was still heavily pregnant with Kye at that time.*

[37] On 16 April 2018, I was told by both counsel that there was a dispute about the admissibility of the evidence of another police officer, Nicole Yetman, a Client Services Officer, which is an administrative position. At that stage, of course, the matter was still listed for trial. There is no reference to Ms Yetman in the agreed statement of facts. I was told on 16 April 2018 that the Crown's case on your trial for murder was to be that you had a sexual affair with Ms Yetman, and that your application to transfer to Hervey Bay was related to her in some way. I raised the issue of Ms Yetman with Mr Brustman, your barrister, on 24 April 2018, and was told by him:

> *It is almost an unthinkable thing to say that someone would, without intention albeit, kill their child in order to get a transfer.*

[38] Of course, that was certainly not suggested by Mr McCarthy, and any finding along those lines would be inconsistent with the Crown's acceptance of your plea to manslaughter.

[39] The point of my question, obviously, was that the agreed statement of facts referred to your preoccupation to transfer to Hervey Bay. The failed transfer was apparently a factor which led to you feeling intensely frustrated, which is the proposed explanation for you punching Kye. Therefore, if that preoccupation concerned Ms Yetman, that might be a relevant consideration on sentence.

[40] In response to my question on the topic, Mr Brustman tendered a statement of Ms Yetman made on 4 September 2014. That was admitted without objection, and became exhibit 12.

[41] Ms Yetman's statement provides some support for your assertion that you were pressured at work, and that any move to Hervey Bay was not related to any affair that you were having or had had with Ms Yetman. In particular, Ms Yetman said this, paragraph 51 of her statement:

> *Colin was very disgruntled with the Wynnum Station. From his perspective, he felt he had been badly bullied. I didn't see a lot of it. I saw some of it. Other Police would say things about him were not true to get an inflammatory response from him and get other Police on their side. I think he had just had enough.*

[42] Paragraph 52 of her statement:

> *I guess I took sympathy on Colin. I didn't understand why this bullying started or where it was coming from. I would work 2pm to 10pm shifts twice a fortnight and you would see more of the bullying during those shifts. All the bosses had gone home and there was only a skeleton crew.*

[43] Paragraph 53:

> *There was one officer in particular who just didn't like Colin. This officer was Matt Cootes, known as 'Coota'. He and Colin went to a job at the Manly Hotel, Col was the Senior Constable in the car, Matt was just a Constable. They had a First Year or a Recruit with them too. I don't know what was said, but Matt undermined Col at the disturbance at the Manly. It changed the whole demeanour of the incident; Matt degraded the senior member (Col) of the crew in front of 'grubs'. Apparently they came back to the station almost ready to have fisticuffs because Matt undermined and degraded Colin. Colin told me how upsetting the whole incident was, and it got that bad that he just wanted out. He wanted to go to Comms.*

[44] I know from experience that police regularly, and very unfortunately, refer to citizens that they, the police, think are undesirable as "grubs". The reference to "Comms" is a reference to another section of the police service.

[45] I find that you were having problems at work at Wynnum Station, and that could have affected you. I find that the pressure of work was a factor in your action in striking your infant son.

[46] Ms Yetman, in her statement, gives some detail of her connection with the Hervey Bay area and your attempts to be transferred there. While I have some suspicions that your preoccupation with achieving a transfer to Hervey

Bay may have had something to do with your attraction to Ms Yetman, I do not find that as a factor on this sentence.

[47] Ms Yetman's statement, though, is illuminating for other reasons. She said that she had a sexual relationship with you from about May 2013 to about January 2014, five or six months before the death of Kye.

[48] As already observed, Ms Yetman is a client services officer. She worked with you at the Wynnum Police Station. In about March 2011 you began flirting with her. This further escalated to you sending her text messages, saying that you wanted to have sex with her. This escalated to what Ms Yetman described as kissing, touching and groping in the locker room at the Wynnum Police Station. She described those incidents as follows:

> *These incidents in the locker room involved, kissing, touching and groping. He would put his hands in my pants. It would literally be a thirty to sixty second rush and then I would push him off me and say, 'get out of here'. These were quick flirtations because of where we were.*

[49] Over this time, you would exchange text messages with Ms Yetman. She says that on some occasions you would be at your home, watching pornographic material and masturbating, and ask her in the text, "What do you want me to watch? What do you want me to do?"

[50] Ms Yetman fell pregnant to her husband, and her daughter was born in August 2012. She returned to work in May 2013. The pair of you then exchanged further messages, including messages from you to her, where you would say things like, "I want to fuck you. I want to please you." Sexual intercourse occurred for the first time after Ms Yetman returned from maternity leave. She says in her statement that sexual intercourse took place on the first occasion at the Fort Lytton National Park, apparently near a tree. The text messages continued, as did sexual intercourse.

[51] Ms Yetman says that intercourse occurred on four or five occasions. Intercourse occurred at the Fort Lytton National Park, and on one occasion in the locker room of the Wynnum Police Station.

[52] The affair seems to have petered out by January of 2014. After Kye's death, you had a conversation with Ms Yetman, in which you said to her:

> *I'm going to have to tell Deb –*

a reference to Ms Chambers –

> *...about the affair. It's going to come out. I'm going to have to tell her I was having an affair with you, and I was sleeping with my ex-girlfriend. How's it going to look if she hears it all in court?*

[53] So it appears that at least up until the end of 2013 you were having an affair with Ms Yetman, and at the same time or later you were having an affair with an ex-girlfriend of yours.

[54] Of course, you are not charged with having extramarital sexual affairs, and that is obviously not a criminal offence. The fact that you were doing so is not an aggravating circumstance to the charge for which you are now convicted. However, it puts in some context, I think, the "intense frustration" that you said you were suffering at the time of Kye's death, even though the affair with Ms Yetman may have, by that point, ended. The affair evidences difficulties, at least from your point of view, in the relationship with Ms Chambers. Of course, associated with extramarital affairs is the threat of being found out and the associated consequences.

[55] I think it is highly likely that these things would have been playing on your mind in the lead up to you striking Kye. It also gives another reason why you might have wished to leave Brisbane for Hervey Bay, to escape the affairs, perhaps. I make no final finding about that.

[56] I turn now to your personal history. You were born on 5 May 1977. You were therefore 37 when you killed Kye, and you have just turned 41. You grew up and were educated in Toowoomba. You studied science, majoring in biology, when you left school, but then changed your biology major to one of physics. You graduated from your degree course, then completed a Diploma of Education and qualified as a high school teacher. You then taught at Toowoomba Grammar School, where you became a residential housemaster. You progressed well in your profession as a teacher.

[57] You had a serious relationship, which then ended, and you left teaching and enrolled at the police academy. You were sworn in as a police officer and posted to Slacks Creek Police Station and then to Beenleigh. It was over this time that you met Ms Chambers. You were then transferred to Wynnum Station. Ms Chambers commenced a day care business. Your daughter was born. You and Ms Chambers were married. You continued to work at Wynnum Police Station, progressing to the rank of senior constable. As I have already said, it appears that you weren't happy at Wynnum Police Station and that there were certain pressures upon you.

[58] Mr Brustman said that there were also events which occurred while you were at Wynnum Station which were upsetting. In 2013 you attended the scene of a drowning of a 12 year-old child, and later you performed a welfare check on a lady who later suicided in very gruesome circumstances. There is no medical evidence suggesting post-traumatic stress disorder. Mr Brustman submits, though, that those two incidents in particular affected you. Police are unfortunately often subjected to such things, and I accept that those two incidents in particular may have had some adverse impact upon you.

[59] You have no prior convictions. You have been in custody since early 2016. You have spent your time in remand in solitary confinement because of the danger that you will be attacked by other inmates. There are two reasons why

you are a target. The first is that you are a police officer, and then second is that your offence is one against a child. It is well documented that both of these features are ones likely to attract violence from other prisoners.

[60] Of course, your management and welfare and protection whilst in custody is a matter for the Executive and not the Court – see *Crump v New South Wales* (2012) 247 CLR 1. However, it has long been recognised that where a prisoner will, through some personal circumstance, find serving their sentence more onerous, that fact may be taken into account in sentencing. This was recognised at least as long ago in Queensland as *R v Todd* [1976] Qd R 21, which was a case concerning a blind prisoner. Here, the issue is that solitary confinement is a more onerous existence than in the mainstream prison. Mr Brustman referred me to *York v The Queen* (2005) 225 CLR 466 and, in particular, to *R v Rogers* (1996) 86 A Crim R 542, where Gleeson CJ– then the Chief Justice of New South Wales – said this:

> *When it is known that an offender being sentenced will serve the whole or a large part of his or her sentence on protection, a lesser sentence is sometimes imposed on that account alone.*

[61] That quote comes from page 547 of the report.

[62] I have taken into account in your favour the fact that you will serve your time in protection in the form of solitary confinement, and that will be onerous upon you.

[63] Mr Brustman has submitted that a positive feature in your favour is that you have been a good father to your daughter. If that is meant to mean that you have cared for her and nurtured her in a good and fatherly way until you were taken into custody, then I accept that and take that into account in your favour. That is borne out in the agreed statement of facts.

[64] However, there must obviously be two very significant qualifications to your claim to be a good father to your daughter. Firstly, you were unfaithful to her mother in relation to two other women. That always had the risk of destabilising the family unit in which she was growing up. Secondly, of course, you killed her brother. At some stage, of course, your daughter will come to realise that you were unfaithful to her mother and killed her brother, and that may make any future relationship that you have with her difficult. You future contact with your daughter and the terms of that contact are, of course, not matters for me.

[65] Mr Brustman submitted that you were genuinely remorseful. In this context, remorseful means genuinely accepting guilt and being sorry for the hurt that has been caused. Mr Brustman pointed to two things in support of his submission that you are genuinely remorseful.

[66] Firstly, Mr Brustman said that you did plead guilty. That is obviously correct, but Mr Brustman's submission that a plea of guilty is necessarily a sign of genuine remorse is incorrect. Under the ethical rules which presently

apply to legal practitioners, it is perfectly proper for a lawyer to be complicit in the entry of a plea of guilty where the accused, in fact, does not accept his guilt at all, but makes a tactical decision to plead guilty.

[67] Here, the plea was very late. Mr Brustman said of the plea:

We say it's neither early nor late, but not untimely.

[68] Whatever that submission may have been intended to mean, when pressed, Mr Brustman accepted that there had been no indication made on your behalf to the Crown of an intention to plead guilty to manslaughter until the week before the trial was to commence. Mr Brustman accepted that the Crown had an arguable case of murder. If there was to be a negotiated outcome where you pleaded guilty to manslaughter and not murder, then it was clearly necessary for an approach to be made by your legal representatives to the Crown. As I have already observed, that approach was made sometime during the week before the proposed commencement date of the trial. The only proper description of the plea is that it was very late.

[69] Further, the plea was offered in circumstances where manslaughter appears to be the best result that you could have hoped for on a trial. When one has regard to the shocking injuries sustained to Kye's organs, the medical opinion that those injuries were caused by blunt force trauma to Kye's stomach, and the fact that you were the only person present in the house with Kye when the injuries were suffered, a conclusion by the jury that you had applied force to Kye was, in my view, all but inevitable. Equally inevitable from that point would be that the jury would convict you of unlawfully killing Kye.

[70] It is for the Executive, through the Office of the Director of Public Prosecutions, to the decide whether to proceed against you on a charge of murder. It is not a matter for the Court. Mr McCarthy was therefore under no obligation to offer an explanation as to why the offer of a plea of guilty to manslaughter was accepted. He did, though, offer an explanation, which leads me to believe that the decision of the Director was a reasoned and responsible one. That, though, does not change the fact that the case against you for the manslaughter of Kye was very, very strong.

[71] As I have already observed, the offer of a plea to manslaughter came against a background of you previously consistently maintaining that the abdominal injuries suffered by Kye had occurred as a result of the application of CPR.

[72] Mr Brustman, in a detailed submission, offered not one single reason or explanation whatsoever as to why, after denying criminal involvement in Kye's death, you would, a week before trial, change your position and offer a plea except that there had been some discussion which had culminated in the agreed statement of facts, which is exhibit 5. I have assumed that the agreed statement of facts is what Mr Brustman referred to in argument as:

...the synthesis which was put before you.

Which, of course, is a reference to being put before me.

[73] I draw the inference that your motivation to plead guilty to manslaughter is the same motivation which led you to lie to Ms Chambers and then to the triple O operator (by omission) minutes after you had fatally punched Kye. The motivation is self-preservation. Facing a murder trial with a prospect of conviction at least of manslaughter were very high, and where you had already served a substantial term in prison, you have opted to avoid the risk of a sentence of life imprisonment.

[74] Your conduct in lying about the cause of Kye's injuries for almost four years leads me to the conclusion that the plea of guilty does not reflect genuine remorse.

[75] The second matter to which Mr Brustman points in support of his submission that you are genuinely remorseful is the triple O call. I have previously referred to the triple O call. Mr Brustman submits that during the triple O call, you are heard to be distressed, and that, Mr Brustman submits, is indicative of remorse. However, it is also indicative of fear upon the realisation of the consequences of your actions. And by consequences, I mean not only consequences to Kye, but consequences to you. As I already observed, you did not tell the triple O operator that you had punched Kye. You were more concerned to avoid consequences to yourself through the legal process than you were to avoid the health consequences to Kye by ensuring that he received proper treatment based on proper information.

[76] Your plea of guilty is late, and I do not find that you are genuinely remorseful. Your actions since you struck Kye are all consistent with self-preservation as motivation.

[77] Ms Chambers made a victim impact statement, which was read in open court by Mr McCarthy. The victim impact statement is exhibit 10. In her victim impact statement, Ms Chambers explains the impact on her of losing her infant son. Her statements are reasonable and, of course, completely understandable, and I accept them. She also speaks of managing hers and her daughter's well-being. That is obviously difficult for Ms Chambers, and the full effect upon your daughter of your act in killing her brother is unknown but is likely to be significant. Ms Chambers, in her victim impact statement, said this:

> *Last week,* [our daughter] *and I lit candles for Kye and celebrated a quiet moment for what would have been Kye's fourth birthday. The pain is just as unbearable today as it was the day I said goodbye to him.*

[78] There is no doubt that the death of Kye in these circumstances in particular will be a most significant adverse event in the lives of Ms Chambers and your daughter.

[79] Ms Chambers, in the victim impact statement, says that after Kye's death, you lied about the circumstances of Kye's injuries. For the reasons already explained, this impacts upon my assessment of your remorse or lack thereof. Ms Chambers also says that you treated her badly in relation to the winding up of the financial affairs of the marriage and in respect of the custody of Kye's ashes. She is clearly suffering from the breakdown of the family unit generally. While her statements about that aspect are understandable, they are not relevant to the charge of which you have been convicted, and I do not have regard to them on the question of sentence.

[80] It is necessary now to refer to various statutory provisions relevant to the imposition of sentence. Section 9 of the *Penalties and Sentences Act* 1992 (Qld) stipulates the governing principles which apply in Queensland upon the imposition of sentence. Section 9(1) sets out the purposes for which sentences may be imposed. I have had regard to those purposes.

[81] Section 9(2) then stipulates particular matters to which a Court must have regard when sentencing an offender. I have had regard to section 9(2). The remaining subsections of section 9 are a collection of provisions which add to or modify the operation of section 9(1). Of some potential importance here is section 9(10A). That is in these terms:

> *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.*

[82] There is then a legislative note in these terms:

> *Examples of exceptional circumstances:*
> *1 the victim of the offence has previously committed an act of serious domestic violence or several acts of domestic violence against the offender;*
> *2 the offence is manslaughter under the Criminal Code, section 304B.*

[83] That subsection was introduced by amendment via the *Criminal Law (Domestic Violence) Amendment Act 2016* (Qld). The subsection had operation from 5 May 2016. Consequently, the amendment came into force after the commission of the present offence.

[84] While the amending legislation did contain some transitional provisions, those provisions did not expressly make section 9(10A) retrospective in operation. However, in *R v Hutchinson* [2018] QCA 29, the Court of Appeal held that section 9(10A) applied to all sentencing from the time of commencement of the section, regardless of when the offence occurred; see in particular paragraph 43 of the judgment of Mullins J, with whom Fraser and Morrison JJA both agreed. It can be seen that section 9(10A) applies to a domestic violence. The present offence is a domestic violence offence as defined. It can also be seen that section 9(10A) does not apply in exceptional

circumstances if the Court considers treating the domestic relationship as an aggravating factor would be unreasonable. The note to the subsection gives an example of exceptional circumstances as when:

> *The offence* [being considered] *is manslaughter.*

[85] In some respects, that is curious. There are no reasons given in either the explanatory memorandum to the amending bill or in the second reading speech of the Honourable the Attorney-General and Minister for Justice and Minister for Training and Skills of the note or its significance.

[86] I cannot see here that it is unreasonable to treat the present offence as a domestic violence offence, and I treat that fact as an aggravating factor.

[87] However, that may not have any real and practical impact here. Section 9(2) provides that in sentencing an offender, the Court takes into account the nature of the offence and how serious the offence was. The last of a long list of considerations prescribed by section 9(2) is:

> *Any other relevant circumstance.*

[88] In many ways, section 9 statutorily embodies well-established sentencing principles. The sentencing Court taking into account the nature of the offence and how serious the offence was has always been a fundamental consideration in sentencing. Encompassed within the nature of the offence and how serious the offence was is an actual consideration of your relationship with Kye. You were his father. You were in a position where you ought to have been protecting him and nurturing him. The offence occurred in breach of that trust which arose from the domestic relationship between you and him. All those matters are relevant independently of section 9(10A).

[89] Section 13 of the *Penalties and Sentences Act* provides that the Court must take a plea of guilty into account, and, having taken the plea of guilty into account, there is then a discretion to reduce the sentence, having regard to the plea. By section 13(3), the Court must state that it has taken the plea into account, and by section 13(4), if there is no reduction of the sentence as a result of the plea, then the Court must state reasons for that course having been taken.

[90] In *R v Maxfield* [2002] 1 Qd R 417, Davies JA and Fryberg J, who formed the majority in the Court of Appeal, explained that section 13 does not require a sentencing Court to reduce the sentence upon a plea of guilty but does require the existence of reasons for failing to reduce the sentence for the plea. In *R v Corrigan* [1994] 2 Qd R 415, which was followed in *Maxfield*, the Court of Appeal determined that the making of a recommendation for eligibility for parole at a time earlier than the statutorily-provided halfway mark constituted a reduction of sentence for the purposes of section 13 of the *Penalties and Sentences Act*. This is often, of course, how any reduction is achieved.

[91] The offence of manslaughter is an offence which may be the subject of a serious violent offence declaration. By section 161B of the *Penalties and Sentences Act*, if the sentence exceeds 10 years imprisonment then the making of a serious violent offence declaration is mandatory, the consequences of which is that you serve 80 per cent of the sentence before being eligible for release on parole. If the sentence is five years or more but less than 10, then the making of a serious violent offence declaration is discretionary. Again, if a serious violent offence declaration is made, then you would serve 80 per cent of the sentence before being eligible for release on parole.

[92] A consequence of the mandatory requirement of a serious violent offence declaration being made if the sentence is 10 years or more is that any reduction of the sentence to reflect a plea of guilty cannot be achieved by making a recommendation for early release on parole. Any reduction must be from the head sentence. The complications which can be caused by the mandatory imposition of a serious violent offence declaration were explored in detail by Applegarth J sitting in the Court of Appeal in *R v Carlisle* [2017] QCA 258.

[93] Because the imposition of a serious violent offence declaration is mandatory where the sentence is 10 years or more, there can be somewhat of a distortion of the sentencing process. As already observed, if an offence attracts a sentence of more than 10 years, then allowance for mitigating circumstances such as a plea must be made by way of reduction of the head sentence. If the head sentence is reduced in order to reflect the plea, then the resultant sentence may be less than 10 years, bringing it into the territory where the imposition of a serious violent offence declaration is discretionary. Whether an offender falls just above or just below the 10-year boundary can have an enormous difference in time actually served.

[94] Section 160C of the *Penalties and Sentences Act* gives a discretion to the sentencing Court to set the date upon which a prisoner is eligible for parole. By section 184 of the *Corrective Services Act* 2006 (Qld), in the absence of any order made under section 160C of the *Penalties and Sentences Act*, your parole eligibility date will be the day after you have served one-half of the period of the imprisonment imposed.

[95] It is well established that the discretion vested in the court by section 160C of the *Penalties and Sentences Act* includes the authority to set a parole date beyond the halfway mark of the sentence.

[96] It has now been said in a number of decisions of the Court of Appeal that before a sentencing Judge makes a recommendation for release on parole beyond the halfway point of a sentence, the Judge must place the prisoner or counsel for the prisoner, as the case may be, on notice of the Judge's intention to consider taking such a course. In this respect, see cases such as *R v Kitson* [2008] QCA 86 and, more recently, *R v Latemore* [2016] QCA 110.

[97] During the course of hearing sentencing submissions, I put to Mr Brustman there were three questions that needed to be addressed by him in relation to your time for release:

(1) Should there be early release?

(2) Should there be a serious violent offence declaration?

(3) Should there be a delay in the release on parole beyond half distance?

[98] Mr Brustman then made submissions, the effect or which was that there ought to be a recommendation for release on parole before you have served less than half of the sentence. He submitted release at one-third.

[99] A number of cases in the Court of Appeal concern the considerations relevant to the discretionary making of a serious violent offence declaration. These cases included *R v Bojovic* [2000] 2 Qd R 183, *R v Everleigh* [2003] 1 Qd R 398, and *R v McDougall & Collas* [2007] 2 Qd R 87. I have had regard to those cases, but, for reasons which will become apparent, I need not discuss the principles here. In McDougall & Collas the Court of Appeal held that there must be "good reason" for the making of a parole eligibility date beyond the half distance of the sentence. The Court of Appeal said this at paragraph 20:

> *The considerations which may lead a sentencing judge to conclude that there is good reason to make a recommendation apt to bring forward the offender's eligibility for parole will usually be concerned with the offender's personal circumstances which provide an encouraging view of the offender's prospects of rehabilitation, as well as due recognition of the offender's cooperation with the administration of justice.*

[100] And at paragraph 21:

> *The considerations which may lead a sentencing judge to conclude that there is good reason to postpone the date of eligibility for parole will usually be concerned with circumstances which aggravate the offence in a way which suggests that the protection of the public or adequate punishment requires a longer period in actual custody before eligibility for parole than would otherwise be required by the Act having regard to the term of imprisonment imposed. In that way, the exercise of the discretion will usually reflect an appreciation by the sentencing judge that the offence is a more than usually serious, or violent, example of the offence in question and so outside "the norm" for that type of offence.*

[101] As already observed, it can be seen that in *McDougall & Collas* it was said that there must be good reason to delay parole eligibility. *McDougall & Collas* was considered in *R v Assurson* (2007) 174 A Crim R 78. That was a case where the offender had been convicted of trafficking in dangerous drugs.

There was a late plea. Without the plea of guilty, the sentence would have been between 12 and 13 years' imprisonment. The plea of guilty brought the sentence to nine years, and the sentencing Judge made a serious violent offence declaration. That aspect of the sentence was appealed successfully.

[102] The Court of Appeal allowed the appeal and removed the serious violent offence declaration, but made a parole release recommendation, being a date five and a-half years into the nine years sentence. That is beyond half distance. Justice of Appeal Williams, after setting aside the serious violent offence declaration and leaving a sentence of nine years, said this at paragraph 22:

> *If no further order was made, the applicant would be eligible for parole after serving half the sentence, that is after serving four and a-half years … As the sentencing judge pointed out, that represents too big a reduction for mitigation based on a relatively late plea of guilty. This Court in* McDougall & Collas *pointed out that a sentencing court could, for good reason, exercise the power conferred by legislation postponing eligibility for parole beyond the halfway point … The "good reason" for postponing the parole eligibility date is established by the extent of trafficking, the fact that more than one Schedule 1 drug was involved, the fact that the applicant was prepared to resort to violence to recover payment for drugs supplied, and the fact that he re-offended whilst on bail.*

[103] Of course, the factors which led the Court of Appeal to delay parole in Assurson's case – a drug case – are irrelevant here.

[104] However, I take from *Assurson* that "good reason", as referred to in *McDougall & Collas*, includes where the delay of parole eligibility is necessary in order to achieve a just sentence in all the circumstances, having regard not only to the head sentence, but time actually to be served in custody. *Assurson* demonstrates that in the right case it is appropriate recognise the plea of guilty in a reduction of the head sentence, but then, in order to achieve the purposes prescribed by section 9(1) of the *Penalties and Sentences Act*, the parole eligibility date can be postponed, thereby setting an appropriate sentence in all the circumstances.

[105] Before turning to the comparatives, I should note the respective positions adopted by the Crown Prosecutor and your barrister, Mr Brustman, on the sentence.

[106] Mr McCarthy, for the Crown, stated that he did not seek the imposition of a serious violent offence declaration. As to the fixing of a parole date, Mr McCarthy, during his submissions to me, said this:

> *I've provided your Honour with the authority of* R v Assurson *(2007) 174 A Crim R 78 and more specifically invited your Honour to consider the judgment of his Honour Justice Williams from paragraphs 13 to 22, as supported by his Honour Justice Keane, as he*

then was, at paragraph 27. It merely reflects the process in which there may be postponement of release in circumstances which do not necessarily require the declaration for a serious violent offence.

[107] I then said to Mr McCarthy:

There are a number of cases, aren't there, which say that both the jurisdiction to delay a parole recommendation and also the declaration of a serious violent offence is just – are just weapons in the armoury of – whereby one arrives at a just sentence?

[108] Mr McCarthy responded affirmatively. I took that exchange to mean that Mr McCarthy submitted that I ought give consideration to delaying eligibility for parole beyond the halfway mark of the sentence. During the course of Mr Brustman's submissions, I said to Mr Brustman:

So Mr McCarthy, as I understand his submission, says that in all of the circumstances of this case, not only would you not get the benefit of an early release at a-third, but there will be a consideration to delaying the release beyond the half-distance mark.

[109] I asked Mr McCarthy to confirm that was position, and Mr McCarthy said this:

Your Honour, and so it's to be fairly placed, Ms Strbak got a sentence of nine years to do four, which wasn't past the halfway, and my primary submission is it warrants some postponement of what eligibility would be for release.

[110] I then said to Mr McCarthy:

But where's your starting point: half-distance, which is statutory, or a-third, which is the horribly designated rule of thumb?

[111] Mr McCarthy said this:

Certainly that it warrants more than one-third in this case because of the circumstances of the late plea and some postponement. I don't – I wasn't necessarily working from the fixed statutory mark of halfway, but I am not suggesting that the postponement couldn't be past halfway, if I can answer it that way. There's such a broad discretion for your Honour in those circumstances, but this is not a case in which there has been an early plea given, and if there were any rule of thumb –

and Mr McCarthy went on to say other things that are not directly relevant. The reference by Mr McCarthy to Strbak is a reference to one of the comparatives to which I will refer shortly.

[112] While Mr McCarthy has not positively submitted that a recommended release date should be set later than the halfway mark of the sentence, his submission is perfectly consistent with what Fraser JA said in *R v Amato* [2013] QCA 158, where his Honour, at paragraphs 19 and 20, while recognising the practice of recommending release on parole after serving one-third of the sentence, restated the proposition that the discretion to fix a parole eligibility date under section 160C was effectively unfettered, and his Honour then concluded:

> *That being so, and since the significance for the just sentence of a plea of guilty varies according to the particular circumstances of each case, there can be no rule of thumb or arithmetical approach.*

[113] Mr McCarthy's position, therefore, seemed to be that any recommendation for release on parole ought to be beyond the one-third mark of the sentence, and postponing release beyond the halfway point is an option that is open.

[114] Mr McCarthy helpfully referred me to a number of comparative cases but did not submit a particular sentence or range. It is apparently the position of the Director of Public Prosecutions to avoid stipulating a range, at least in some cases, despite the amendment to section 15 of the *Penalties and Sentences Act*, which effectively reversed the effect of the High Court's decision in *Barbaro and Zirilli v The Queen* (2014) 253 CLR 58, which judgment prohibited submissions suggesting a range.

[115] Mr Brustman's submissions were to the effect that the sentence should be between eight and nine years, with a recommendation for release on parole after serving one-third or some time shortly thereafter. He submitted that a serious violent offence declaration ought not be made. Although not making specific submissions on the possible course of postponing parole beyond the halfway mark, such a course was contrary to other submissions made by Mr Brustman, so I understood that course was opposed by him.

[116] Turning to the comparative sentences, Mr Brustman relied heavily on a couple of comparative sentences in order to support his submissions on sentence. This raises, of course, the significance of comparative sentences in the sentencing process. The High Court, in *Barbaro*, considered whether there was a denial of natural justice when a sentencing judge refused to hear submissions as to the available range of sentences. Citing *Hili v The Queen* (2010) 242 CLR 520, French CJ and Hayne, Kiefel, as her Honour then was, and Bell JJ, said this:

> *…sentencing judges must have regard to what has been done in other cases. Those other cases may well establish a range of sentences which have been imposed. But that history does not establish that the sentences which have been imposed mark the outer bounds of the permissible discretion. The history stands as a yardstick against which to examine a proposed sentence. What is important is the unifying principles which those sentences both reveal and reflect.*

That was at paragraph 41.

[117] As already observed, aspects of *Barbaro* have been the subject of legislative intervention in Queensland, but the principle that I just read out remains untouched.

[118] In *R v Goodwin; ex parte Attorney-General* (2014) 247 A Crim R 582, Fraser JA, sitting in the Court of Appeal, after referring to *Barbaro*, said this:

> *Comparable sentences assist in understanding how those factors –*

namely, factors relevant to sentence –

> *should be treated, but they are not determinative of the outcome, and they do not set a "range" of permissible sentences. Whether or not a sentence is manifestly inadequate or manifestly excessive is not to be decided by reference to a predetermined range of available sentences, but by reference to all of the factors relevant to sentence. Because sentencing involves a case-by-case synthesis in which past sentences may be used only as guidelines and are not determinative, there can be no underlying range of available sentences for a particular case which may be narrowed or broadened over time by subsequent sentencing decisions.*

And that was paragraph 5 of his Honour's reasons.

[119] It follows, then, that there is a danger in categorising cases for the purposes of sentence. The offence here is manslaughter. The maximum sentence for manslaughter is life imprisonment. Manslaughter can be committed in a wide variety of ways, and therefore, the sentences vary significantly from case to case. This has been long recognised but was recently mentioned by the High Court in *Pickering v The Queen* (2017) 260 CLR 151. Having said that, there are a number of cases involving the unlawful killing of children which show the factors which have been regarded by sentencing judges as significant in such cases.

[120] It is not my function to reconcile all the comparative sentences. My function is to follow statements of principle laid down by appellate courts and to use comparatives as a "yardstick". I have had regard to all the cases cited to me as comparatives.

[121] It is possible to identify relevant considerations from those comparatives. The amount of violence is clearly a consideration, and an isolated act may be regarded as less serious than a series of prolonged acts of violence. Violent acts may be regarded as more serious than neglect. The immaturity of the offender has been a factor in some cases. Low intelligence or psychological problems suffered by an offender are relevant. An early plea of guilty is relevant. The vulnerability of the child is relevant. The fact that the offender may have acted out of tiredness or frustration has been a factor in some of the cases.

[122] It is necessary, I think, only to consider in detail four comparative decisions, being *R v Riseley; ex parte Attorney-General* [2009] QCA 285; *R v Heidi Strbak*, a decision of Applegarth J on 18 December 2017; *R v Aaron Baxter*, a decision of North J on 21 November 2017; and *R v Williamson*, a decision of Atkinson J on 6 April 2017.

[123] Riseley was 21 years of age. He had a criminal history which was regarded as irrelevant. The offender lived with the child's mother. When the child was only 19 days, he assaulted the child, causing skull fractures, associated subdural and subarachnoid haemorrhages and contusions throughout the length of the spinal column. The child also had a fractured leg and fractured rib, and the injuries were consistent with being severely shaken. He pleaded guilty after the committal proceedings. The offender had an unfortunate upbringing and was below-average intelligence. He was sentenced to eight years imprisonment, with a declaration that the offence was a serious violent offence. The Court of Appeal allowed the appeal to the extent of setting aside the declaration that the offence was a serious violent offence. In the course of giving judgment, Keane JA, as his Honour then was, said this:

> *Reference to this court's decisions in* Chard *and* Hall *suggests that a sentence of eight years imprisonment, even without a serious violent offence declaration, is a distinctly heavy sentence for this category of offence once mitigating circumstances such as the plea of guilty and the respondent's rehabilitation are taken into account.*

[124] That passage was relied upon by Mr Brustman.

[125] I do not take his Honour's comment to be a statement of principle, setting some range of sentences for the unlawful killing of infants. His Honour's reference to "this category of offence" has to be understood against the facts of the case then under consideration by his Honour. Those facts included, of course, that the offender was a young, unsophisticated man of limited intelligence. Interestingly, the case of *R v Hall; ex parte Attorney-General* [2002] QCA 125 referred to by his Honour was also a case involving an offender with intellectual deficits. Hall received a sentence of six years' imprisonment, but that was on an Attorney-General's appeal, determined at a time when the Court felt constrained to re-sentence at the bottom of the range.

[126] The other case referred to by his Honour is *R v Chard; ex parte Attorney-General* [2004] QCA 372, which resulted in a sentence of seven years' imprisonment for sustained cruelty to a child. He pleaded guilty.

[127] *R v Strbak* concerned the death of a child who was four years and three months old at the time of his death. The offender pleaded guilty, but contested the Crown's alleged facts of the offending. There was no prolonged neglect or violence. The offender punched her child in the stomach out of what was described by Applegarth J as frustration, and this caused peritonitis.

[128] There was a second punch to the stomach, which hastened her death. Notwithstanding that the child was sick, the offender did not seek treatment for him. The offender was 26 years of age at the date of the offence, and she had a difficult upbringing. She was sentenced to nine years' imprisonment, with a date set for eligibility for parole after four years.

[129] In *Baxter*, the offender inflicted a severe head injury upon his infant child, who was less than two months old. He was 24 years of age when he killed the child. Baxter subjected the child to a violent shaking. This caused damage to the brain and subsequent swelling. He was charged with murder, but was convicted at his trial of manslaughter. The trial judge found on medical evidence led at the trial that the offender had perpetrated violence on the child at least twice prior to the fatal shaking. His Honour accepted that the shaking occurred in circumstances where the offender was tired and frustrated. A term of imprisonment of nine years was imposed, with no recommendation for early release on parole.

[130] Lastly is *Williamson*. Williamson pleaded guilty to manslaughter, but contested the Crown's allegations of the circumstances of the killing. Justice Atkinson did not accept his evidence. The fatal injury was to the bowel, caused by severe blunt force to the abdomen. This led to chemical peritonitis. The injuries could have been successfully treated, but only if medical attention was obtained quickly, which it was not. The child had numerous other injuries, suggestive of abuse over a period of time.

[131] Significantly, there were injuries to her genitalia consistent with blunt penetrative trauma of at least moderate force. Her Honour thought that those injuries were caused by the insertion into her genitals of a large blue dildo that was found at the house. It seems, though, that her Honour did not find that Williamson had caused that injury. However, her Honour thought that the offender was:

> *...callously indifferent to protecting her from the commission of those sexual assaults.*

[132] The offender had kept the child locked in a room for many waking hours, had assaulted her over a period of many weeks, and then delivered a punch to her abdomen which caused her death. Williamson was sentenced to nine years' imprisonment, and the offence was declared a serious violent offence. The consequence of that was that he would serve 80 per cent of the sentence, just over seven years.

[133] In *Markarian v The Queen* (2005) 228 CLR 357, the High Court spoke of the sentencing process being one of "instinctive synthesis". This was explained by Gleeson CJ and Gummow, Hayne and Callinan JJ in these terms:

> *An invitation to a sentencing Court to engage in a process of "instinctive synthesis", as useful as shorthand terminology may on occasions be, is not desirable if no more is said or understood about*

> *what that means. The expression "instinctive synthesis" may then be understood to suggest some arcane process into the mysteries of which only judges can be initiated. The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts and the public. There may be occasions when some indulgence in arithmetical process will better serve these ends.*

[134] That was said at paragraph 39 of the judgment.

[135] Here, the mitigating circumstances, in my view, are quite limited. The circumstances of this present offence are serious, and the case is a serious example of manslaughter. In particular, firstly, the victim was a 10-week-old child. Secondly, you were the father of the child, and clearly owed the child duties of protection and nurture. Thirdly, Ms Chambers left you alone with the child. Fourthly, while the act which killed the child was described as spontaneous, and that might be accepted in the sense that it was premeditated, it was very deliberate. It was necessary for you to position yourself above the baby and then lean down towards the rocker swing, which was on the floor, and deliver the punch. Fifthly, the punch was a very significant blow. The exact force of it is unknown, but it was certainly not a slap or a glancing blow. It was a forceful punch delivered to the abdomen of the baby which pulped his liver. Sixthly, the punch evidences an intention, in my view, to hurt the child, even though you had no specific intent to cause any specific result.

[136] Your explanation for striking Kye is unconvincing in the sense of providing any real reason for striking the baby. You are not a person who was suffering from any disability or drug addiction. You are a mature, well-educated man of obvious intelligence, who was holding down a responsible job as a police officer. The "intense frustration" said to explain the blow really boiled down to normal domestic pressures of looking after children, together with two more unusual aspects. The first of those is the trouble you were having at work, and the second of pressures caused by your extramarital affairs.

[137] The domestic pressures are understandable, but, quite frankly, there is no real evidence to suggest that they were particularly significant. And the pressures caused by your extramarital affairs are matters of your own making. There are then the work pressures. I have taken those and all other features into account.

[138] I obviously take into account your good character and the fact that you have been a good parent to your daughter, but with the qualifications that I've previously mentioned. I have also had regard to the consideration that you must spend your time in prison in solitary confinement. I have generally had regard to all things that your counsel has said on your behalf.

[139] Your counsel's final submission, as I have said earlier, is that the appropriate sentence is between eight and nine years, with a recommendation for release on parole after a third of the head sentence. That will be a wholly inadequate

response to the unlawful killing of a completely vulnerable 10 week-old baby, in circumstances where you have inflicted horrific internal injuries through a willed act of punching.

[140] However, I do not consider that it is appropriate as part of the sentence to make a serious violent offence declaration.

[141] But for the plea, I would sentence you to a term of imprisonment of 11 years. In order to reflect the plea, I will reduce the head sentence. However, as I have described in some detail, I regard your plea of guilty with some cynicism, and it is certainly not an early plea. It was a very late plea, and did not, as I have found, evidence genuine remorse. Therefore, in order to ensure a sentence which is just in all of the circumstances and does not give undue credit to the plea of guilty, your eligibility for parole will be set beyond the halfway mark of the sentence.

[142] I record a conviction. I sentence you to a term of imprisonment of nine years. I order that you be eligible for release on parole on 30 January 2021, which is a period of five years of actual custody. I declare that you have been in custody for this offence and for this offence alone from 30 January 2016 to 10 May 2018, a period of 832 days. Pursuant to section 12A(2)(a) of the *Penalties and Sentences Act* 1992, I order that the conviction be recorded as a conviction for a domestic violence offence.