SUPREME COURT OF QUEENSLAND

CITATION:	*R v Watson; ex parte A-G (Qld)* [2009] QCA 279
PARTIES:	**R** **v** **WATSON, David Gabriel** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 153 of 2009 SC No 438 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 September 2009
DELIVERED AT:	Brisbane
HEARING DATE:	17 July 2009
JUDGES:	Chief Justice and Muir and Chesterman JJA Separate reasons for judgment of each member of the Court, the Chief Justice and Chesterman JA concurring as to the orders made, Muir JA dissenting
ORDERS:	**1. Appeal allowed.** **2. The sentence of four and a half years imprisonment suspended after 12 months for an operational period of four years is set aside.** **3. The respondent is to be imprisoned for four and a half years, suspended after 18 months for an operational period of four and a half years.** **4. The declaration as to time already served (23 days, from 13 May 2009 to 5 June 2009) is to remain in place.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEALS BY THE CROWN – where the respondent was convicted on own plea of guilty of manslaughter on the basis of criminal negligence pursuant to s 290 of the *Criminal Code* – where the respondent was sentenced at first instance to four and a half years imprisonment suspended after 12 months – whether the sentence imposed was so inadequate as to warrant the court's intervention

Criminal Code 1899 (Qld) s 290, s 669A

House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
R v Chard ex parte A-G (Qld) [2004] QCA 372, distinguished
R v Cramp (Unreported, Supreme Court of Queensland, White J, 30 January 2008), distinguished
R v Johnson ex parte A-G (Qld) [2007] QCA 76, distinguished
R v KU & Ors; ex parte A-G (Qld) (2008) 181 A Crim R 58; [2008] QCA 20, considered
R v KU and Ors; ex parte A-G (Qld) [2008] QCA 154, considered
R v Lacey; ex parte A-G (Qld) [2009] QCA 274, approved
R v Pesnak & Anor (2000) 112 A Crim R 410; [2000] QCA 245, distinguished
R v Streatfield (1991) 53 A Crim R 320, considered
R v Tientjes ex parte A-G [1999] QCA 480, distinguished

COUNSEL: W Sofronoff QC SG, with E Wilson, for the appellant
M J Burns SC, with P Morreau, for the respondent

SOLICITORS: Crown Law for the appellant
Roberts Nehmer McKee for the respondent

[1] **CHIEF JUSTICE**: The Honourable the Attorney-General appeals, under s 669A(1) of the Criminal Code, against a sentence of four and a half years imprisonment, suspended after one year (for an operational period of four and a half years) imposed in the trial division of this court on 5 June 2009, upon the respondent's plea of guilty to manslaughter. The respondent had been charged that on 22 October 2003 at the Yongala shipwreck near Townsville he murdered Christina Mae Watson. The Crown Prosecutor informed the learned primary Judge that the Crown accepted the plea to manslaughter in full discharge of the indictment.

[2] At the time of the offence, the respondent was 26 years old. He had no prior criminal history. He was 32 years old when sentenced.

[3] In late November 2007 a coronial enquiry was convened, in relation to the death of Christina Watson, who was the respondent's 26 year old wife. She died during a diving exercise. On 20 June 2008 the Coroner committed the respondent to stand trial for her murder. The respondent was then in the United States of America: he is a US citizen. He voluntarily returned to Australia on 13 May 2009. He was arraigned in this court on 5 June 2009 and it was then that the Crown accepted his plea to manslaughter.

[4] The basis of that plea was criminal negligence under s 290 of the Criminal Code, which provides:

> "When a person undertakes to do any act the omission to do which is or may be dangerous to human life or health, it is the person's duty to do that act, and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty."

The applicable maximum penalty was life imprisonment.

[5] Section 290 arose because the respondent, an experienced diver, had undertaken to act as the "buddy" of his wife, who was inexperienced: he failed to perform his duty towards her and thereby contributed to her death.

The facts

[6] A statement of agreed facts was tendered at the sentencing hearing. What follows is, however, taken substantially from the appellant's outline, while allowing for some additional aspects to which the respondent's Counsel have drawn attention.

[7] The respondent and Mrs Watson were married on 11 October 2003. This diving trip, aboard the dive boat "Spoilsport", was part of their honeymoon. The trip director or dive master, a Mr Singleton, for safety reasons assessed their respective diving qualifications and experience. Mrs Watson was classified as an inexperienced diver, whereas the respondent was classified as experienced. In summary, he had gained an open water certificate in May 1998, an advanced open water certificate in August 1998, a rescue dive certificate in April 1999, he had completed 55 dives including six at night time, and over the previous 12 months, he had completed 12 dives, the deepest being to 150 feet. Much of his experience had not been accomplished in open waters with strong currents, though there was no suggestion currents played any particular part here.

[8] Mr Singleton had recommended in the presence of the respondent that Mrs Watson should undertake a day time orientation dive with a professionally trained diver, but she declined on the basis she was comfortable diving with the respondent. On the morning of 22 October 2003 before the fatal dive, Mr Singleton again suggested to the respondent and Mrs Watson that Mrs Watson should participate in an orientation dive, but she again declined on that basis.

[9] As Mrs Watson 's dive "buddy", the respondent undertook responsibility to assist her in any difficulty. Prior to the dive, the participants were extensively briefed. The briefings included instruction that the divers and the buddies must rehearse necessary hand signals, and as to the procedures for raising an alarm in a "lost buddy" situation.

[10] Mrs Watson and the respondent dived together. There was nothing wrong with their equipment. The prosecution case was that in the sixth minute of the dive, Mrs Watson descended to the sea bed and the respondent ascended to the surface. A fellow diver, Dr Stutz, saw them together, and then separating in that way.

[11] Although the respondent subsequently gave varying accounts, over some five occasions, and not necessarily in complete detail, he consistently maintained that Mrs Watson indicated she was in difficulty when they were at a depth of approximately 15 metres, and that they then attempted to return to the access line. He was assisting her by holding her hand, and then her buoyancy compensation device. There was an incident where his mask and deregulator were dislodged, and Mrs Watson sank away from him: it was then that he decided to surface. It took him between one and three minutes to ascend.

[12] There was nothing in his various statements to suggest that the respondent was in a state of panic, notwithstanding he told Ms Schneider afterwards that he had made a "split second" decision whether to follow his wife or go for help. In his

submissions, defence Counsel described it as a case of panic, but the significance of that is diminished by the absence of such claims in the respondent's various accounts.

[13] The learned Judge summarized the matter as follows:

> "The deceased experienced difficulties during the dive. You made some attempts to assist her but these were unsuccessful. In the course of this, your face mask and deregulator were dislodged. However, you were able to replace your face mask and to get an alternative oxygen supply from what is referred to as a 'safe second'.
>
> When this happened, you could see that the deceased was sinking but you formed the view that there was nothing you could do and you swam away with a view to getting assistance."

[14] His Honour then remarked upon their comparative diving experience, saying to the respondent:

> "You were clearly a far more experienced diver than the deceased was … The dive at the Yongala was a significant challenge for a diver of the level of experience and competence of the deceased. On the other hand, you were a diver with substantial experience …"

[15] His Honour then set out particulars of the criminal negligence basing the plea and conviction:

> "The Crown alleges against you that you failed to carry out your duty to her in a number of significant ways. I accept that you failed to do so in the following respects: you failed to ensure that when the deceased had encountered difficulties she had a supply of oxygen available to her, and, in particular you failed to share your oxygen supply with her; having released the deceased to recover your face mask and oxygen supply, you did not then take hold of her again or stay with her, or follow her as she sank; you did not attempt at any time to inflate her buoyancy control device or remove the weights which divers often carry to assist them to descend. … you failed to make any reasonable attempt to take the deceased to the surface. I therefore accept that you are guilty of the very serious departure from the standard of care which was incumbent upon you with the result that your conduct is deserving of criminal punishment."

[16] Later in his remarks, the Judge noted the significance of the period during which difficulties were encountered, "of the order of two minutes from the time that the deceased first started to encounter difficulties until you surfaced". He referred to "the time within which you made your initial decision to leave her" as "obviously significantly less". Then he made these observations:

> "I suspect that once you had made that decision and decided to go to seek other assistance, there would have been difficulty in reversing your decision and turning back again to try to assist her. I accept, nevertheless, that there is a very serious departure in your case from the requirements of the duty of care which you had undertaken in the course of this dive."

The Judge's sentencing approach

[17] His Honour noted a number of additional considerations: the tragic consequences of the death of the deceased for other persons, especially those who provided the victim impact statements; the willingness of the respondent to return to Australia at a time when he was apparently facing a murder charge; the significance of the plea in the administration of justice, which the Judge also accepted was indicative of remorse; references attesting to the respondent's otherwise good character; one consequence of the delay in the prosecution of the case, which was that the respondent bore the burden of its hanging over his head (meaning, an unresolved allegation/charge of murder); the adverse position in which the respondent found himself because of extensive publicity in the interim; and his generally cooperative approach – notwithstanding some discreditable conduct in seeking falsely to blame others. (On 27 October 2003, five days after the death, he told police officers the crew had failed to offer his wife an orientation dive.)

[18] The Prosecutor submitted before the learned Judge that the appropriate sentence was of the order of six years imprisonment, before consideration of matters in mitigation. Giving full weight to those factors, including the respondent's voluntary return to Australia and plea of guilty, the moderated sentence should, it was submitted, be not less than five years imprisonment suspended after the serving of 18 months.

[19] The Judge made reference to *R v Pesnak* [2000] QCA 245. He determined upon a penalty of four and a half years imprisonment suspended after 12 months. He explained his decision to suspend the term on the following basis:

> "Because of the mitigating factors which I have identified and because I accept that for you in Australia time in prison will be harder than it will be for people who serve a sentence of imprisonment in their own country, I intend to fix a suspension date a little earlier than might otherwise have been the case."

A consequence of the suspension, presumably, is that the respondent will be deported from or able to leave this country after 12 months, rather than being subjected to a continuing parole regime locally.

The scope of this appeal

[20] The Attorney-General urges this court to approach the determination of the appeal on the basis of the unfettered discretion provided for by s 669A of the Criminal Code, as follows:

> "(1) The Attorney-General may appeal to the court against any sentence pronounced by –
> (a) the Court of trial; …
> and the Court may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper."

[21] That provision was amended in 1975 to add the word "unfettered". The court nevertheless continued to construe the section on the basis that to succeed in such an appeal, the Attorney-General must show error in the exercise of discretion by the

sentencing court, as covered in *House v The King* (1936) 55 CLR 499, and that should an appeal be allowed, the court would be constrained to impose a sentence towards the lower end of the appropriate range (cf. *R v Dinsdale* (2000) 202 CLR 321, 341).

[22] The appellant submitted that neither of those constraints applied to the discretion to be exercised under s 669A. The same submission was made in an appeal heard before a court constituted by five judges, on 15 and 16 July 2009: *R v Dionne Matthew Lacey; ex parte Attorney-General of Queensland* (CA 158 of 2009). The three judges comprising this court were also members of the court which heard the *Lacey* appeal.

[23] In the instant appeal, the same submissions were made in support of the appellant's contention as were made in *Lacey*.

[24] Counsel for the respondent, in the instant appeal, substantially adopted the submissions made by Counsel for the respondent in *Lacey*, with some additional submissions which substantially centred about the reference in s 669A to the imposition of a sentence which the court considered "proper".

[25] As those additional submissions ran:

> "It is implicit in the terms of s 669A(1) that the court will not be moved to 'vary' a sentence imposed below unless it is first satisfied that such a sentence was not 'proper' … If the sentence (imposed below) falls within the sound exercise of the sentencing judge's discretion, it will not be capable of being characterized as other than 'proper' … The cases speak with one voice to the effect that more than mere inadequacy is required to be shown; there must be an appreciation at least that the sentence below was not 'proper'."

[26] Those additional submissions do not warrant this court's taking a different approach, in relation to the scope of the appeal, from that adopted in *R v Lacey; ex parte A-G (Qld)*, in which judgment was given on 11 September 2009: see [2009] QCA 274.

The significance of the approach taken by the Prosecutor

[27] As I have mentioned, before the learned Judge, the Prosecutor submitted that a head sentence of six years imprisonment would be appropriate, before mitigating factors were taken into account, but that:

> "To give full weight to those mitigating factors, your Honour could reflect that in both the head sentence and the period of actual custody to be served. If your Honour reduces the head sentence to five years, then your Honour has the option of suspending the sentence but still mark the seriousness of the offending.
>
> It is, therefore, the Crown's submission that the moderated sentence, giving full weight to all mitigating factors, should be not less than five years suspended after serving 18 months. Your Honour, the benefits of a suspended sentence rather than a recommendation for parole for the accused are obvious. As I understand it, at the end of such a period, the accused would be deported."

[28] The appellant now submits that this court should vary that sentence by imposing a sentence of seven years imprisonment, with a recommendation of eligibility for parole after two to two and a half years. The appellant's concluding submission, in the written outline, reads as follows:

> "A criminally negligent killing of a human being should, in general, warrant a substantial period of imprisonment. A head sentence of four and a half years does not adequately reflect the community's justified revulsion at conduct admitted to be criminally culpable and by which the respondent killed a young woman."

[29] Counsel for the respondent emphasized these observations in the comparatively recent decision of *R v KU & Ors; ex parte Attorney-General* [2008] QCA 20, at paras 37 and 38:

> "… while it is true that the proper sentencing of offenders is always a matter of public interest … that interest will only exceptionally justify an appellate court entertaining an assertion on behalf of the prosecution that a sentence imposed in accordance with the prosecution's submission was not a proper sentence … the abiding reason for this constraint is that, in the administration of criminal justice, the interests of finality are, save in exceptional cases, of paramount importance as a protection of the individual from ongoing harassment by the State.
>
> … an arguably appellable error cannot, without more, constitute 'exceptional circumstances' such as would justify exposing an accused person to the additional jeopardy of a more severe sentence than that previously sought by the Crown."

That court subsequently held, on the substantive hearing ([2008] QCA 154, para 296) that the "errors, and the resulting miscarriage of justice, were [in that case] so serious, and the circumstances in which they occurred so extraordinary, as to warrant allowing the Attorney-General's appeals, even though the sentences which were originally imposed were essentially in accordance with the submissions put to the learned sentencing Judge by the prosecution."

[30] The question which arises in the present case is whether the sentence which was imposed was so inadequate as to warrant the court's intervention, notwithstanding its not substantial disconformity with the position advanced by the prosecutor before the sentencing Judge. In speaking of inadequacy of that order, I am specifically not suggesting that as a test for intervention on an Attorney's appeal against sentence, where the discretion is unfettered. I am advancing it as a circumstance which, if established, would warrant the court's intervening, notwithstanding the particular position advanced by the prosecution at the sentencing hearing, to ensure an appropriate penalty is ordered, with consequent maintenance of public confidence in the administration of the criminal justice system.

An appropriate sentence

[31] The learned Judge was referred by the Prosecutor to a number of cases involving criminal negligence. They were *R v Milini* [2001] QCA 424; *R v Pesnak* [2000] QCA 245; *R v Hile* [1999] QCA 17; *R v Streatfield* (1991) 53 A Crim R 320; *R v*

Cramp (Unreported, Supreme Court of Queensland, White J, 30 January 2008); and *R v Stott & Van Embden* [2001] QCA 313.

[32] The penalties imposed in those cases following pleas of guilty range from four to six years imprisonment. Some involved the discharge of a firearm which the offender believed unloaded, others involved the administration of drugs to willing recipients. They are not particularly helpful here, where the criminal neglect was based on omissions.

[33] *Pesnak*, to which the Judge expressly referred in his sentencing remarks, was unique. Those offenders were husband and wife who, together with the deceased, were adherents of the cult of "breatharianism". The deceased voluntarily commenced a 21 day spiritual cleansing program, supervised by the offenders, who it was accepted intended no harm and genuinely believed her difficulties were caused by a spiritual struggle and that she would come to no harm. The male offender, after a trial, was (on appeal) sentenced to four years imprisonment with a recommendation for parole after 18 months.

[34] This case is much more serious than one where the relevant risk was not appreciated. Here, that risk should have been appreciated, in light of the respondent's substantial qualifications and experience.

[35] This respondent had undertaken a duty to sustain the deceased, which he breached in a criminally negligent way. As put for the appellant:

> "Christina clearly trusted the offender as husband and buddy. He had much greater diving experience than her. The respondent took on the responsibility of being her buddy on this dive despite the recommendation that she undertake an orientation dive with a dive master. It was the respondent's level of experience that led the dive operators to allow her to participate in the dive with the respondent."

[36] The respondent's breach of duty was fundamental, and he must have appreciated that, because of his prior qualifications and experience, including the rescue dive certification. As submitted for the appellant in the written outline, "the consequences to the life of Mrs Watson as a result of his breach of duty were virtually guaranteed. He virtually extinguished any chance of survival by allowing her to sink to the sea bed. This case is therefore quite different from those cases where there is a small risk which an offender had not appreciated or hoped would not eventuate … at no point did the offender change his mind and go back to Mrs Watson and attempt to bring her back to the surface. His breach of duty was not merely a momentary one … it is almost inexplicable that he made the decision to leave her."

[37] The gravity of the breach may be summarized as did the Solicitor-General at the hearing of the appeal: the respondent undertook, in potentially serious circumstances, to shield from harm an inexperienced diver, whose inexperience had been declared before him, on the basis he would undertake a duty which a professional would otherwise discharge; the one thing he was called upon to do, to bring Mrs Watson to the surface, was simple to accomplish, and his failure to carry it out is unexplained; and there is no circumstance disclosed, eg panic, which would have explained it.

[38] There is no appellate decision on facts of comparable gravity.

[39] As observed in *Streatfield* (p 329), albeit by me in dissent:

> "One must be careful in assessing the applicant's crime not to excuse the result as accidental, because obviously to do that would be inconsistent with the verdict. He is to be sentenced for a criminally negligent killing, not an accident. Courts which impose minimal sentences for criminally negligent manslaughter may sometimes tend to ignore this: they may focus unduly on the offender, and overlook the horrendous consequences of his actions – in this case, the loss of a woman and child to be. Of course, one must in the end arrive at a sentence proportional to the crime, but those consequences should be given due weight."

Conclusion

[40] In determining upon a sentence of four and a half years imprisonment suspended after 12 months, the learned Judge was, in my respectful view, unduly influenced by circumstances personal to the respondent, and unfortunately distracted from a sufficient acknowledgement of the gravity of the crime.

[41] Allowing for the gravity of the respondent's offending in this particular case, it is my view that had the respondent not pleaded guilty and been convicted of manslaughter at a trial, a sentence of the order of six to seven years imprisonment would have been appropriate.

[42] Counsel for the respondent submitted such an approach would elevate this case to the level of deaths resulting from substantial violence (cf. *R v Tientjes; ex parte A-G* [1999] QCA 480; *R v Chard; ex parte A-G (Qld)* [2004] QCA 372; *R v Johnson; ex parte A-G (Qld)* [2007] QCA 076). It does not necessarily follow, however, that the penalty for a serious omission must be less severe than for actual serious violence.

[43] The respondent's plea of guilty to manslaughter obviously would warrant a moderation of a term of that order. So would his voluntary return to Australia, not only in recognition of his cooperation personally, but also to signal generally that the court will so respond – alleged offenders should be encouraged to return voluntarily in such situations without the need for extradition.

[44] These and the other mitigating circumstances to which the Judge referred would be appropriately and sufficiently reflected by leaving the term of imprisonment as that imposed by the learned Judge, four and a half years, but ordering suspension after one-half, that is, after two years three months, rather than after 12 months as ordered by the Judge.

[45] That position would be sufficiently different to justify this court in intervening, notwithstanding the Prosecutor's position at sentence, for the reasons previously expressed. Under this order, the respondent would have to serve two years three months, more than double that ordered by the primary Judge.

[46] Suspension should be ordered rather than the making of a recommendation as to parole eligibility, so that the respondent will be in a position to return to the United States following his release from custody. Being subject to parole would likely tie him to Australia for the full four and a half years, which would be unnecessarily consumptive of Queensland public resources, and unduly punitive for him as a US national.

[47] It must be emphasized that the respondent did not plead guilty to any intentional inflicting of harm. Some of the reported public reaction to this sentencing may have overlooked that. Nevertheless the respondent pleaded guilty not just to causing his wife's death negligently, but criminally negligently: a breach of duty of such substantial proportion as to attract sanction in the criminal court. That the respondent should, in those circumstances, have been required to serve but 12 months, was plainly unacceptable. While he was not to be sentenced on the basis of any malevolent intent, he caused a death in criminally derelict circumstances, and that warrants this court's at least doubling the penalty effectively visited upon him by the sentencing court. It is, ultimately, the gravity of so seriously contributing to the death of a fellow human being, which militated a much graver response than was made at first instance. Allowing for the point made at the beginning of this paragraph, that may be achieved by doubling the period the respondent must serve in actual custody. The four and a half year head term adequately allows for mitigating circumstances. The ordinary position should then apply, namely, parole eligibility or suspension after one-half, the latter being preferable because he is a US national.

[48] It is however the fact that of the other members of the court, Muir JA would dismiss the appeal, and Chesterman JA would allow it to the extent of ordering suspension of the four and a half year term after 18 months, not after one-half as I would propose. In these circumstances, to secure an operative order of the court, I am prepared to join in an order for suspension after 18 months.

Orders

[49] I would order:

1. that the appeal be allowed;
2. that the sentence of four and a half years imprisonment suspended after 12 months for an operational period of four years be set aside;
3. that the respondent be imprisoned for four and a half years, suspended after 18 months for an operational period of four and a half years; and
4. that the declaration as to time already served (23 days, from 13 May 2009 to 5 June 2009) remain in place.

Introduction

[50] **MUIR JA**: I gratefully adopt the Chief Justice's statement of relevant facts and concur with his reasons concerning the approach to be taken by this Court on an appeal pursuant to s 669A of the *Criminal Code* 1899 (Qld). I am also obliged to Chesterman JA for his exposition of the facts, which I also adopt.

[51] Williams JA in his reasons in *R v Bates; R v Baker*,[1] after observing that 'Sentencing for manslaughter is always difficult', explained:

> "It has often been said that the offence of manslaughter covers a wide variety of circumstances in which a person has been unlawfully killed. Because of that it is difficult to speak of a range of punishment applicable to the offence, and it explains why it is sometimes difficult to reconcile one sentence of manslaughter with another. Many crimes of manslaughter involve what could be described as a one on one situation. In many such instances there are

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1 [2002] QCA 174.

> complicating features such as provocation, excessive self-defence and a single blow (with or without a weapon) delivered in a highly emotional situation. Such cases can readily be distinguished from a planned gang attack on a relatively defenceless person in a remote locality. There is an even greater abhorrence generally in society when such an attack is carried out with retribution as its main object."

The nature and extent of the respondent's culpability

[52] As the facts of this case differ substantially from the facts of all the cases to which the Court was referred, it is desirable to identify the nature of the respondent's criminality and the sentencing principles which have particular relevance to his sentence. The approach of Thomas J, with whose reasons Cooper J agreed, in *R v Streatfield*[2] is instructive:

> "The first matter that needs to be considered is the nature of the criminality, and the extent to which it demands punishment or retribution. An observation made by Sir Owen Dixon in 'The Development of the Law of Homicide' (1935) 9 ALJ (Supp) 64 is I think pertinent:
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> 'There are two marked features of the growth of the English law of homicide. The slow but steady consistency with which it has pursued a single principle of development is its first and most obvious characteristic. For eight centuries the course of its very gradual evolution has been from an almost exclusive concern with the external act which occasioned death to a primary concern with the mind of the man who did the act.' "

[53] The 25 year old applicant in *Streatfield* was under the mistaken impression that his .22 rifle was unloaded. He pointed it at his young, pregnant, de facto spouse and pulled the trigger. She was killed instantly and her child was lost. The applicant's act was described as one of "'monumental stupidity' attended by a degree of arrogance and conceit.[3]"

[54] When further considering the matters which merited particular consideration, Thomas J[4] noted that the maximum sentence for both murder and manslaughter in Queensland was life imprisonment and observed: [5]

> "… in passing a sentence for the crime of manslaughter the court is vitally concerned with the mind and culpability of the offender.
>
> The absence of intention to harm must be a very significant factor, and is probably the primary factor in assessing the quality of the offender's act that amounts to manslaughter. In the present case stupidity is revealed rather than wickedness. Malice is nowhere to be found. In this respect the case must be less seriously regarded than the ordinary domestic killings where there is a distinct intention to harm, albeit a fleeting one which may have been provoked by the injured party."

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2 (1991) 53 A Crim R 320 at 326.
3 (1991) 53 A Crim R 320 at 329.
4 (1991) 53 A Crim R 320 at 326.
5 (1991) 53 A Crim R 320 at 326 – 327.

[55] The culpable conduct of the respondent was his failure to take appropriate and obvious measures to bring his wife promptly to the surface when she got into difficulty and sank to the ocean floor. Not to do so was to ensure her death. Shortly before the respondent decided to swim for help, he had been assisting his wife. He released his grip on her only when she dislodged his mask and regulator. As he was clearing his mask and placing his second regulator in his mouth, his wife started to sink. He started to descend after her but quickly decided to return to the surface for help.

[56] The evidence is unclear as to why the respondent made his flawed decision. His counsel on appeal submitted that he panicked. The respondent himself did not advance that explanation in any of his accounts of the incident but his counsel submitted that it was not surprising that he would not wish to advance an explanation which cast him in a poor light. If the respondent did not panic, it seems plain that, in the absence of a sinister explanation for his conduct (and no intention to harm or abandon the deceased is alleged) the respondent was unable to cope with the situation in which he found himself. A person who saw the respondent surface and signal for help observed that he was distressed. In the result, the respondent failed, catastrophically, to fulfil his duty and to heed what would surely be a basic human instinct: to go immediately, directly and with determination to his wife's rescue.

[57] The respondent, however, had no intention of harming his wife. He did help her initially. His reprehensible decision to swim for assistance was made in a hostile environment when he was under stress. That he acted as he did in an attempt to obtain help is relevant, even though any assistance from others would almost certainly have come too late to benefit the deceased.

Comparable sentences

[58] The respondent's sentence of nine years for criminal negligence in *Streatfield* was set aside and a sentence of five years, with a recommendation that the applicant be considered for parole after 18 months, was substituted.

[59] The primary judge was referred by counsel to cases including *R v Pesnak*[6] and *R v Cramp*.[7] The applicants in the former case were married. The male applicant was 61 years of age and the female 63. Neither had prior convictions and both had expressed remorse. It was said in the reasons of the Court that until the events in question, "they were considered exemplary members of the community." As "breatharians", they believed that the atmosphere contained an energy force, prana, which is scientifically undetectable but which replaces the need for normal minimal requirements of food.

[60] The deceased, a 53 year old woman, voluntarily commenced a 21 day spiritual cleansing programme conducted by the male applicant, assisted by the female applicant. After a few days of fasting the deceased's physical condition markedly deteriorated. The deceased spent most of the seventh day of her fast asleep and "was only able to mumble". On the eighth day "[s]he had urinary incontinence and was vomiting, mumbling and hiccupping; she required assistance to use the toilet, and was largely bed-ridden." On the ninth day she was "unable to speak properly,

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6 [2000] QCA 245.
7 Unreported, Supreme Court of Queensland, White J, 30 January 2008.

could not get up from a fall and was not alert. The male applicant telephoned a medical practitioner who was also a "breatharian" but did not ask him to visit or examine the deceased. The doctor and the male applicant agreed that the deceased's "disturbing symptoms" were signs of an internal spiritual struggle.

[61] On the tenth day "the deceased's right leg was weak; her loss of bladder control continued and she began to vomit black flakes." On the following morning the applicants noticed a black substance coming from her mouth, staining her face and bedding; she began hyperventilating, and by midday had difficulty breathing, her mouth being full of the black substance. She refused liquids and the applicants became seriously concerned for her health. Early in the afternoon the male applicant telephoned the doctor whom he had contacted earlier. The doctor was out. He left a message on the answering machine, "Can you help me? … would it be possible for you to come over after work and have a look at her, or, I don't know, for some advice or should I call the ambulance and what do I tell them?" Shortly afterwards the male applicant called triple 0 and the unconscious and severely dehydrated deceased was taken to hospital and placed on a life support system. She died about seven days later.

[62] The Court set aside the male applicant's sentence of six years and the female applicant's sentence of three years and substituted sentences, respectively, of four years imprisonment with a recommendation of eligibility for parole after serving eighteen months, and two years imprisonment with a recommendation for eligibility for parole after serving nine months.

[63] In the reasons of the Court it was said:[8]

> "The sentencing judge accepted the applicants were unlikely to reoffend. It is nevertheless important to impose a substantial term of imprisonment in the hope of deterring others from engaging in such objectively dangerous and unacceptable conduct whilst pursuing personal religious or spiritual beliefs. The deceased was in the applicants' care; she was plainly unable to look after herself or to make a free and informed decision whether or not to obtain medical attention and they failed to seek the required medical attention."

[64] As the Court pointed out, the conduct was "objectively dangerous and unacceptable". The applicants made no attempt to obtain assistance, despite the deceased's obviously grave and worsening physical condition, until it must have been apparent that her condition had deteriorated to such an extent that her death was a distinct possibility. Also, it was the view of the Court that it was important to impose a sentence which would satisfy the requirements of general deterrence. General deterrence is not a relevant consideration in this case. It is singularly unlikely that the sentence imposed on the applicant will bear in any way on the conduct of persons with the safety of others entrusted to their care.

[65] In *Pesnak*, the Victorian decision of *R v Vollmer & Ors*[9] is discussed as follows:

> "In *R v Vollmer & Ors*, Mrs Vollmer died during the attempts of the applicants to perform an exorcism upon her. She had a psychiatric illness which the applicants honestly believed was caused by

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8 *R v Pesnak* [2000] QCA 245 at [25].

9 [1996] 1 VR 95.

demons. The exorcism extended over a one week period. The applicants did not intend to cause her serious injury or death and were of prior good character. The cause of death was cardiac arrest brought about by compression of the neck which fractured the thyroid cartilage of the larynx. This occurred at the end of the exorcism period when the applicants attempted to physically remove the demons by squeezing and massaging the deceased's abdomen, chest and throat and by holding her tongue down. One applicant forced the deceased's mouth open to allow the demons to escape and during this process the deceased suffered cardiac arrest and died. The applicants attempted resuscitation and awaited her resurrection. The following day the police were called. Two applicants were convicted of manslaughter and false imprisonment; one was sentenced to 18 months and the other to 2 years imprisonment. Southwell J noted that the conduct which led to death took place over a short period and [the death] was totally unforeseen and that 'people must be discouraged from believing that in the name of religion, they can behave in the outrageous manner of the applicants.'" (footnote deleted)

[66] It was noted that the maximum penalty for manslaughter in Victoria at the time was 15 years and it was considered, by one member of the Court at least, that the sentence should reflect the need for general deterrence.

[67] *R v Clissett*[10] is another example of poor decision-making resulting in death. The applicant and his intellectually handicapped de facto wife had the care of the wife's three children. When the applicant was at work, his wife placed her 18 month old son into extremely hot water, causing third degree burns to 10 to 15 per cent of his body. Such burns required intravenous fluid replacement and careful monitoring. When the applicant arrived home from work, he found the child "literally howling in pain". The applicant cleaned the child, bathed him in cold water and applied antiseptic cream to the burns. He continued that process for the next few days but did not seek medical assistance. He was concerned that if he did so, his wife's disabilities would become known and the other children may be taken off her.

[68] The applicant was successful in preventing infection but the child died from dehydration. Had he received prompt medical attention, he would have lived. The applicant's sentence of two years imprisonment was set aside and a sentence of 12 months imprisonment with a non-parole period of six months was substituted.

[69] The facts of *R v Cramp*[11] are set out more fully in Chesterman JA's reasons. The applicant in that case left her three year old daughter in a comatose state for several hours after a fall during her evening shower without seeking medical assistance. The applicant, who was watching over her daughter, fell asleep at about 2 am. When she awoke at 4 am, her daughter had stopped breathing. She then sought assistance from neighbours but did not call an ambulance. The child died from a sub-dural haemorrhage. The sentencing judge found that had the deceased received timely medical intervention, she would have had reasonable prospects of survival. The applicant pleaded guilty and was sentenced to five years imprisonment with a recommendation for release on parole after 18 months.

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10 Unreported, Supreme Court of Victoria – Court of Appeal, Phillips CJ, Brooking and Kenny JJA, 15 October 1997.

11 (Indictment 611/2007; sentenced pronounced 30 January 2008).

[70] The respondent's conduct cannot be excused or condoned but, to my mind, it was less culpable than the conduct of the offenders in *Streatfield, Vollmer, Pesnak, Clissett* and *Cramp*. The conduct in the last three cases was protracted, with the offender having ample opportunity to cease it and prevent the death of the deceased person. The presence of the obviously suffering, or in the case of *Cramp*, comatose, person who ultimately died would have provided a continuing reminder to the offender of the need to perform his or her duty. The applicant in *Streatfield* did an act which took the life of his de facto wife and unborn child. The applicants in *Vollmer* also killed their victim. An omission which causes death is not, necessarily, less culpable than an act which causes death but, in my view, the nature of the respondent's omission and the circumstances in which it occurred make it less culpable than acts of the nature of those perpetrated by the offenders in *Streatfield* and *Vollmer*.

[71] The fact that the offenders in *Pesnak* and *Vollmer* entertained illogical and perverse beliefs concerning their conduct and its likely consequences does not seem to me to be a significantly mitigating circumstance or a reason for concluding that the respondent's conduct was more culpable than the conduct of the offenders. Unlike the respondent's conduct, their conduct was not the result of a spur of the moment decision made under pressure.

Conclusion

[72] To the extent to which these decisions are capable of providing useful guidance for the sentence to be imposed in this case, it seems to me that they support the head sentence imposed by the sentencing judge. In concluding as I have, I am mindful of the Chief Justice's (de Jersey J as he was then) admonition in *Streatfield*[12] that the respondent "is to be sentenced for a criminally negligent killing, not an accident."

[73] There were powerful factors in mitigation which the primary judge took into account. They are set out in detail in Chesterman JA's reasons. To my mind the matters of principal importance are: the respondent's lack of criminal history; his genuine remorse;[13] his voluntary return from America to face trial in a foreign country, obviating the need for expensive and lengthy extradition proceedings; and the fact that for a lengthy period of time, the respondent endured the opprobrium of facing the charge of murdering his wife.

[74] Those matters in combination justified the suspension of the sentence appreciably before the expiration of half of its term. Minds may well differ as to whether the suspension of the four and a half year sentence after 12 months was overly generous. However, the sentence imposed, in my respectful opinion, was not so substantially different from any sentence which ought to have been imposed as to warrant any variation of it.

[75] For the above reasons, I would order that the appeal be dismissed.

[76] **CHESTERMAN JA**: The circumstances which brought about this appeal and the facts relevant to it are set out in the judgment of the Chief Justice. I gratefully adopt his Honour’s recitation of them which makes repetition unnecessary.

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12 (1991) 53 A Crim R 320 at 329.

13 The sentencing judge's finding that the respondent "loved [his] wife and [was] devastated by her loss" was not challenged by the appellant.

[77] I apprehend that since the judgment in *R v Lacey; ex parte A-G (Qld)* [2009] QCA 274 the Court of Appeal, when considering an appeal against sentence brought by the Attorney-General, must itself decide what sentence should be imposed. It will do so having regard to such of the factors identified in s 9 of the *Penalties and Sentences Act* 1992 as are relevant to the particular case and by giving them such weight as the circumstances of the case require. The Court should also have regard to the sentence imposed at first instance and the reasons given for that sentence and the submissions of the prosecutor in the primary court as to the appropriate punishment. Any finding made by a primary judge on a question of fact relevant to the sentence should be disturbed only if plainly wrong. Having decided what the appropriate penalty is the Court may impose that sentence in place of the one appealed from. Although the discretion to vary the sentence is "unfettered" the Court should not, in my opinion, vary a sentence unless there is a substantial difference between the sentence of the primary judge and what the Court of Appeal thinks is proper.

[78] The respondent pleaded guilty to manslaughter on the basis that his actions or, more accurately, his inaction, constituted criminal neglect which is made an offence by a combination of s 290, s 291, s 293 and s 300 of the *Criminal Code*. By his plea of guilty the respondent admitted that he had undertaken to do an act, the omission of which was dangerous to his late wife's life and that her death was caused by his omission.

[79] It has often been pointed out that manslaughter is an offence which may be committed in a great variety of circumstances with the consequence that the criminal, and moral, blameworthiness of the person who caused the death may also vary enormously. Some cases of manslaughter are all but murder: others are all but pure accident. It is for this reason that sentences imposed for manslaughter may be as low as a fully suspended sentence or as high as life imprisonment. Because circumstances may differ so greatly from one case of manslaughter to another it is often difficult to find helpful comparisons to assist in deciding what is the appropriate penalty in a particular case.

[80] The task in this appeal is even harder because no case to which we have been referred is anything like it. It is not an exaggeration to describe the circumstances as unique. That consideration made the task of the learned primary judge difficult. It has the same consequence for this Court.

[81] It is important to identify the relevant omission which led to Mrs Watson's death. It was described by the prosecutor at first instance:

> "The (respondent) breached his duty because he failed to ensure that (the deceased) had a source of oxygen, particularly by not attempting to share his oxygen with her; secondly that he let go of the deceased at a time when it must have been apparent to him that ... she needed assistance; thirdly, at having let go ... he failed to take hold of her again and failed to remain with her or follow her to ensure he could take hold of her; fourthly, he did not attempt to inflate her BCD or remove her weights; and fifthly he failed to make any reasonable attempt to take her to the surface. By allowing her to descend alone at a time when it was clear that she was not capable of looking after herself (the respondent) was in serious breach of the duty he had undertaken as a buddy with fatal consequences."

[82] The description was repeated on appeal by the Solicitor General but it is wrong. Before dealing with the error another mistake, consequential on the first, should be noted. The prosecutor described the cause of death as:

> "... drowning. ... the deceased failed to receive sufficient oxygen whilst under ... water."

The deceased did not drown.

[83] Although the prosecutor identified five distinct breaches of duty, or omissions, it is readily apparent that there were only two. The first was not ensuring that the deceased had oxygen to breathe. The prosecutor's complaint was that the respondent should have shared his oxygen supply with his wife or given her his "safe second" supply of oxygen from his air tank.

[84] The second omission was not taking his wife to the surface when it was apparent that she was in difficulty and not breathing. The omission was subdivided by reference to the means by which the respondent might have got his wife to the surface but there is really only one omission, not taking her there. He could have done so by inflating her buoyancy device and/or removing her weight belt, or by inflating his own buoyancy device and floating to the surface while holding onto his wife.

[85] It emerged in the course of argument on appeal that the first omission relied on by the prosecutor, not providing oxygen, was not something the respondent failed to do.

[86] When the dive master from *Spoil Sport* found the deceased on the seabed her regulator was in her mouth. It was attached to her air tank by a hose and was in good working order. It must follow that throughout the dive, until she died, Mrs Watson had her own supply of oxygen and did not need the respondent to supply it, and he did not omit to do so.

[87] It follows also from the fact that the deceased maintained the regulator in her mouth that she did not drown. The cause of death was asphyxiation. For some reason wholly unexplained in the materials provided the deceased ceased to breathe.

[88] The respondent's criminal culpability lies in his failure to take the deceased to the surface when it was apparent she was in distress. He could, and should, have done so in the ways described by the prosecutor: inflating the deceased's buoyancy device and accompanying her to the surface or swimming to the surface himself with or without inflating his own buoyancy device and taking his wife with him.

[89] The respondent gave a number of accounts of what happened. They vary in detail and content and there are some inconsistencies between them. Given the circumstances in which the accounts were given and the respondent's evident and understandable distress at his wife's death I do not myself attach the same significance to the inconsistencies as did the prosecutor. To some extent the accounts deal with different aspects of the dive. One can ascertain from them an understanding of the respondent's omission.

Account to Singleton

[90] When the respondent and Mrs Watson had reached a depth of 45 feet they commenced to drift along the wreck. The deceased signalled she wanted to return

to the surface and the respondent noticed her eyes were "wide open". They turned and headed back, the respondent holding the deceased's hand to help her swim. She "appeared to relax and ... tried to grab (the respondent's) regulator and mask." He was unable to "tow" the deceased, let go and she sank quickly to the bottom. The respondent surfaced and called for help.

Account to Paula Snyder

[91] The deceased was too heavily weighted, knocked his mask off and tried to grab his regulator. The respondent attempted to have the deceased inflate her buoyancy device but she panicked and sank to the bottom. The respondent decided "in a split second" not to dive after the deceased but to surface and seek help.

Account to Operations Manager

[92] The respondent and deceased were swimming back to the descent line. The deceased stopped swimming. The respondent turned round and the deceased knocked his mask off and regulator out of his mouth. The respondent replaced his mask, cleared it of water, put his second regulator in his mouth, looked down and saw the deceased sinking, motionless. He swam after her but desisted because of pressure in his ears. He decided to surface and seek help.

Account given to police

[93] At about 30 yards from the descent line, over the wreck, the deceased indicated she wanted to return. They started to swim back side by side when the deceased started "to go down a bit". The respondent held the deceased and swam with her but "she stopped swimming and started sinking." The respondent swam close to the deceased and took hold of his buoyancy device inflator hose, indicating to the deceased that she should inflate her device. The deceased did take hold of her inflator hose but did not inflate it. The deceased continued to sink and the respondent realised "something was wrong". He took hold of the deceased's buoyancy device and started swimming back to the anchor line. The deceased dislodged his mask and regulator. He let the deceased go in order to clear his mask and put his second regulator in his mouth. When he had done this he saw the deceased five or ten feet below him, out of reach, sinking to the bottom. He swam down towards her "but ... realised there was nothing he could do".

[94] It may be thought that the account given to the police is likely to be the most accurate. It was a formal interview conducted when the respondent should have had time to recover some composure and collect his thoughts.

[95] It is apparent from the respondent's dive computer that he did not descend more than ten feet in the effort to reach his wife who had sunk after he released his grip on her equipment.

[96] What is common to the accounts is that the deceased became alarmed during the dive; was unable to swim herself to the descent line; in her distress dislodged the respondent's mask and regulator, causing him to let her go; when he recovered his mask and regulator he saw her sinking helpless to the sea bed. He did not attempt to rescue her.

[97] It is obviously right to designate the respondent's omission to assist his wife as serious, indeed grave. It is not just that the omission caused her death. It must have

been obvious to him that when he himself swam to the surface he was leaving his wife to die. He was her only means of survival and he turned away. He was capable of effecting her rescue, either by inflating his own buoyancy device or hers. He knew she was inexperienced and depended upon him for her safety. He knew she had declined an orientation dive because of her trust in his competence and capacity to protect her.

[98] Of the four purposes of criminal punishment: retribution, deterrence, denunciation and rehabilitation only denunciation is relevant here. The respondent is not in need of rehabilitation as that term is understood in the criminal jurisdiction of the courts. Punishment is not necessary as a deterrent, either to the respondent or anyone else. The offence is unlikely to be repeated. Nor is retribution important. Although I share the Chief Justice's scepticism that the respondent truly panicked, that account being given for the first time at his sentencing, it is I think likely that the respondent left his wife because when confronted with a novel, difficult and dangerous situation he lacked the qualities of character, and the skills, to deal with it. Such failures are not usually a reason for retribution. The punishment in this case, in my opinion, was to be imposed as a means of denouncing the respondent's behaviour in leaving his wife to die; he must have known as he did so that any help he could summon from the surface could not arrive in time.

[99] There are no truly comparable cases to help in the selection of an appropriate punishment. Cases dealing with the criminally irresponsible handling of guns or drug-filled syringes are not helpful because their subject matter is negligent actions involving objects of obvious potential danger. The respondent's case is one of omitting to provide assistance.

[100] There are only two cases of that type to which we were referred. One is *Pesnak* [2000] QCA 245 referred to by the learned primary judge and by the Chief Justice. The sentence there was one of four years' imprisonment with an eligibility for parole after serving 18 months. Pesnak was a 61 year old man who was intelligent and had a university education but, bizarrely, believed that the atmosphere contained a force which if harnessed by spiritual exercises could replace the body's need for sustenance. He assisted a woman who had the same beliefs to achieve independence from the physical necessities of life by depriving her of food and drink, and medical assistance when it was needed. She died 18 days into a 21 day fast, effectively from malnutrition. Pesnak was convicted after a trial of manslaughter on the basis that he failed to provide sustenance or appropriate medical attention for the woman in his care.

[101] There are obvious differences between this case and that but there are similarities. The respondent's case is more serious overall. Pesnak did not appreciate that his adherent was in danger until she was very ill indeed. He mistook her symptoms for evidence of a spiritual struggle. He did not turn his back on the woman and deny her help which he knew she needed. Such conduct is the gravamen of the respondent's offence.

[102] The second case is a judgment of White J, *R v Cramp* (indictment 611/2007; sentence pronounced 30 January 2008). Cramp pleaded guilty to the manslaughter of her three year old daughter who fell in the shower and died some hours later of a brain haemorrhage. Cramp did not seek medical attention for the child though she was unconscious from the time of fall until her death and a neighbour, whom she

consulted, advised her to call an ambulance. She did not do so because she had been a drug addict whose children were taken from her and put in care. She recovered sufficiently to persuade the authorities to return the children to her but was concerned that the youngest child's fall and injury might lead to their being taken from her again. Cramp gave her daughter what assistance she could. She made her comfortable and sat with her. She did not understand, though she certainly should have, the seriousness of the injury or apprehend the consequences if specialist medical assistance were not obtained. White J described the case as one of serious criminal neglect and imposed a sentence of five years' imprisonment. To reflect Cramp's personal difficulties which led her to behave as she did and her plea of guilty a parole eligibility date was fixed after 18 months.

[103] This case, too, is different. It is close in culpability but lacks the salient feature in the respondent's case, of conscious abandonment to obvious danger.

[104] *Pesnak* and *Cramp* are the only cases which are of any assistance as comparisons. Because the respondent's case is more serious they lead me to conclude that the sentence here should have been one of six years' imprisonment with parole at the usual halfway mark before taking into account mitigating factors in favour of the respondent.

[105] The appellant contended that a term of seven years' imprisonment was appropriate but I would reject this submission for the reasons given by Mr Burns SC who appeared with Miss Morreau for the respondent. Sentences of seven years' imprisonment for manslaughter have been imposed by this Court in cases where the homicide was the result of physical violence intentionally inflicted on the deceased, though without an intention to kill or cause grievous bodily harm. The cases referred to were *R v Tientjes ex parte A-G* [1999] QCA 480; *R v Chard; ex parte A-G (Qld)* [2004] QCA 372 and *R v Johnson; ex parte A-G (Qld)* [2007] QCA 76. Those cases are, by their nature, more serious. It is, I think, possible to criticise the sentences as being too moderate but unless and until the cases are reconsidered it must be accepted that cases of manslaughter by neglect will result in penalties of less than seven years' imprisonment.

[106] The mitigating factors were identified by the learned primary judge:

(i) The respondent has no criminal history and there is no suggestion that he might re-offend. There is, as I mentioned, no need for the sentence to have any deterrent aspect.

(ii) The respondent is a man of good character, well regarded by his community and given to selfless acts of charity. He was devastated by the loss of his wife whom he loved. Although the primary judge did not say so it is, I think, implicit that her death and his responsibility for it is a psychological burden that must weigh heavily on him. (The primary judge expressly found that the respondent was devoted to his wife and devastated by her loss. There was evidence to support the finding which the appellant did not seek to challenge. It must be said that this portrayal of the relationship between respondent and deceased is challenged in the victim impact statements provided by her family and friends. They are bitter in their hostility towards the respondent and are convinced of his malevolence towards the deceased. These statements were, however, provided at a time when those giving them had been led to believe that the respondent had intentionally killed the

deceased. One would expect that the statements have taken their colour from that belief.)

(iii) The respondent pleaded guilty very soon after the charge of murder was given up as having no substance and he was instead charged with negligently caused homicide.

(iv) The respondent voluntarily returned from America to face a charge of murder, thereby facilitating the administration of criminal justice and obviating expensive and protracted extradition proceedings.

(v) There was considerable delay in charging the respondent and bringing the case to trial. The delay appears unnecessary. The facts sufficient to charge the respondent with manslaughter were made known to prosecuting authorities within days of Mrs Watson's death. They were provided by the respondent himself in his descriptions of the offence. The delays seem to have been caused by the attempt to prosecute the respondent with murder.

(vi) The delay caused the respondent considerable anxiety. Throughout its five years the respondent faced the uncertainty of not knowing whether he would be charged and then the opprobrium of being accused of his wife's murder. The case was widely publicised and the respondent wrongly accused in the public eye of murder.

(vii) The respondent has no family or friends in Australia and imprisonment for him here will be a greater hardship than for those who can see and speak to loved ones.

[107] Of these factors, (iv), (v) and (vi) are of particular importance. That the respondent himself promptly provided the information which proved the case against him and that for years he has borne the unjust charge, made very public, of murder are factors requiring substantial amelioration in sentence.

[108] The learned primary judge gave careful thought to the appropriate sentence. The decision was as difficult for his Honour as it is for this Court. Recognising the difficulty, weighing and balancing the need to denounce the respondent's criminal conduct with the unique circumstances of the offence and the factors in mitigation, it is my opinion that a sentence of five years' imprisonment suspended after 18 months is proper. Suspension after 18 months rather than the usual period of half the sentence is justified by the strength of the case in mitigation.

[109] I would not regard the difference between five years, and four years six months, preferred by the learned primary judge by way of head sentence as a disagreement of such substance as to warrant interfering with that part of the sentence. The difference of six months in the actual time to be served in custody is, I think, substantial and justifies a variation. The reason I would impose the longer term is that 12 months' custody is an insufficient denunciation of the respondent's abandonment of his wife. He should have done something to effect a rescue and his failure in that regard deserves stronger censure.

[110] I would allow the appeal and vary the sentence imposed on 5 June 2009 by suspending the sentence of four and a half years' imprisonment after 18 months with an operational period of four and a half years. 23 days of pre-sentence custody from 13 May 2009 to 5 June 2009 be declared time already served under the sentence.