JURISDICTION	**:**	CHILDREN'S COURT OF WESTERN AUSTRALIA
LOCATION	**:**	PERTH
CITATION	**:**	STATE OF WESTERN AUSTRALIA -v- L (A CHILD)
CORAM	**:**	JUDGE REYNOLDS
HEARD	**:**	23 MARCH 2015
DELIVERED	**:**	23 MARCH 2015
FILE NO/S	**:**	CC 368 of 2011
BETWEEN	**:**	THE STATE OF WESTERN AUSTRALIA Prosecution AND L (A CHILD) Accused

Catchwords:

Criminal – Sentencing reasons – Manslaughter of infant son – Young offender 15 years and 10 months of age at time – Sentence of 10 years immediate detention

Legislation

Sentencing Act 1995
The Criminal Code
Young Offenders Act 1994

Edited transcript of reasons for sentence given by Judge D J Reynolds, President of the Children's Court of Western Australia (PCC) on 23 March 2015.

JUDGE REYNOLDS:

L, you've been sitting there patiently and quietly for a long time. You've heard lots of people do a lot of talking. Can I ask you to just continue to be patient, because now I need to explain to you, L, to the families of both you, and to everyone, how I've come about reaching the sentence that I have on this charge that on 15 February last year at Bunbury you unlawfully killed Y.

Also in the list there are some matters, three, which were the subject of a conditional release order for a term of nine months, made on 9 September 2013. That order was made prior to this offence of manslaughter, and as at the time that the offence of manslaughter was committed you were the subject of that order, and so you've breached it.

Can I start off by saying that my comments are going to be focussed on the manslaughter offence. Can I mention at the outset, L, in general terms, the things that I need to take into account in order to arrive at what I think is the appropriate sentence.

I need to have regard to the nature of the offence, that is one of manslaughter; the statutory maximum penalty, which is life imprisonment; the factual circumstances of the offence; the need for personal deterrence, general deterrence and also the protection of the community. And of course I need to also mention that your rehabilitation is clearly a relevant factor.

I need to take into account matters personal to you: your plea of guilty, your youth, record for the purpose of mitigation, and matters personal to you generally. Mr Sutherland has very thoroughly gone through your personal history and explained the environment that you were brought up in, and you being a product of that environment, and certain consequences of that.

You've been someone subjected to that environment through no fault of your own now and you have serious issues which can be said to have been caused by being brought up in that environment. So I need to have regard to all

of those things in combination and apply the objectives and principles in the *Young Offenders Act* to an overall consideration of everything that I've spoken about and then in that way arrive at what I think is the appropriate sentence.

Can I start off, L, by saying that the Criminal Code was amended with effect from 17 March 2012 so that the statutory maximum penalty for the offence of manslaughter was amended from 20 years' imprisonment to life imprisonment. Now, that was a recognition by Parliament of the fact that manslaughter is an offence which involves loss of life and sentences for manslaughter should reflect the value which our Parliament has properly placed on human life.

L, the laws of our State are there to protect everybody. That said, there are two categories of people in particular who need protection. They are the very young and also the very elderly. That is particularly so because very young and very elderly people are more vulnerable than others. I think it can be properly said that a healthy community takes proper care of its more vulnerable members.

L, whatever you did to cause the fatal injuries to your young infant son, was cowardly in the extreme. He was only 25 days old and so totally dependent and defenceless and, as has been said, he was at your mercy. While the seriousness and cowardice of whatever you did is so self-evident on the facts, I still need to briefly outline and comment on some of them.

Firstly, and in no order of priority, L, you were the biological father of the young deceased, your infant son. Further to that, it was only because of your relationship with him that you were allowed to be in the hospital and have access to him. Given your age at the time combined with your personal history which includes disconnection, aggression, personal violence, exposure to violence and substance abuse, it is surprising that your access to your young son was not conditional and/or supervised at all.

Secondly, L, I wish to expand on my comments on your young son being in hospital and only being 25 days old at the time that you did whatever you did in room 224. He was born on 21 January 2014 which was about six weeks premature. He was due on 5 March 2014. Therefore on 15 February 2014 when you caused his fatal injuries he was still about 19 days short of the due date of 5 March, that is about 19 days short of full term.

It was because he was so premature that he was required to remain in hospital and receive care to help nurture him to the point where he was fit and healthy and strong enough to be discharged into the care of an adult or adults in the community.

Between 21 January, when he was born, until 15 February, when you caused his injuries, you would have no doubt seen in the hospital nursing staff of the hospital and also Z (his mother) caring for him and attending to his personal needs to help him to develop to the point where he was fit and healthy and strong enough to be discharged. He was actually thriving and the plan was for him to be discharged from hospital on the Monday immediately after this weekend in question on 17 February 2014 into the care of both yourself and also Z.

It is very difficult to understand how it could have been thought that you were capable of properly caring for such a young child given your young age and matters personal to you. Anyway, that aside, the point that I wish to make, L, is that it is against that background of care and medical support for the young infant child, much of which you would have been aware of, both directly and indirectly, that you acted in a way completely contrary to that and caused the fatal head injuries which brought his short life to an end.

I make findings consistent with the following contents of the statement of material facts as outlined on behalf of the State and I will refer first to the medical - expert medical and forensic evidence.

A post-mortem examination was conducted by pathologist Dr Daniel Moss on 26 February 2014. Dr Moss ultimately determined that the cause of death was from complications of head injury. Further examinations were conducted by neuropathologist Dr Vicki Fabian. The brief explanation of findings from the post-mortem examination provided by Dr Moss set out:

> Post-mortem examination revealed bilateral parietal skull fractures as well as multiple areas of scalp haemorrhage. There was extensive subdural haemorrhage and severe brain swelling. There was patent foramen ovale, however, the deceased was an otherwise normally developed male infant.

Although I've mentioned it for completeness, the patent foramen ovale had no relevance to the cause of death. Dr Moss expressed the opinion that the findings at the post-mortem examination in relation to skull fractures and bleeding both over and within the brain were in keeping with the head injuries which happened on 15 February 2014.

He also expressed the opinion that it is unlikely that the two separate areas of fracture being on opposite sides of the skull were caused by one application of force. The only mechanism he can envisage involving one application of force would be the dropping of a baby directly onto the top of his head from a significant vertical height, but then injury would be expected on the vertex and that is absent in this case.

He also expressed the view that given the flexibility and mobility of the skull bones in an infant, the infant is much less likely to get a skull fracture than, say, an older child or adult. This has relevance to the opinion that there was more than one impact and as to the degree of force used. Also it was his view that the best explanation for the fractures in the deceased is that there were more than one impact, there was at least two.

Also he expressed the view that in order to fracture an infant's skull, considerable force is required. It would be more force than might result from bumping a baby's head on the way out of a room while holding the baby in

one's arm, which was an explanation given by you to the police. The normal day-to-day forces involved in child raising do not result in fractures.

And lastly, he expressed the view that the injuries in the deceased are all consistent with severe blunt force.

Dr Fabian has expressed the opinion that the injuries to the deceased are the most severe head/brain injuries she has seen in an infant. It follows that they are not consistent with trivial trauma.

Dr Fabian also expressed the following conclusions from additional material:

> The microscopic findings indicate that there was widespread reduction in blood supply to the brain resulting from the head injuries, which affected the entire brain, and also that;
>
> the changes in the brain were not compatible with shaking, that is excessive movement of the head. The subdural haematomas are too extensive and there are no ocular changes to support this finding of shaking.

In her view, the brain injuries were essentially caused by severe blunt force trauma. Having mentioned all of that medical and forensic evidence, can I say that I make the following findings from all of that and the direct evidence in the material that is before me

L, you removed the young deceased from his mobile cot that you had pushed from the nursery into room 224. Shortly after, and within a time frame of three to 10 minutes, you deliberately struck his head against a hard surface in room 224 with considerable force, and on at least two separate occasions, at least once on the right side of his head, and at least once on the left side, fracturing his skull on both sides, and causing severe and fatal brain trauma.

The only reasonable inference on the medical expert and forensic evidence, indeed it is irresistible, is that the fatal injuries were the direct result of at least two separate and deliberate physical actions by you, either propelling his

head into a hard surface or striking his head in some other manner with a hard object.

It may be that you struck his head against a wall or door frame, or the floor, of room 224. In my opinion, I do not need to be specific on what you actually did to cause the injuries. The general finding, as just mentioned, is adequate enough to properly sentence you. I wish to add that your account given in your recorded interviews with the police, that you accidentally knocked his head against the door frame, is implausible and inconsistent with the medical and forensic evidence. L, by your plea of guilty you clearly abandoned that explanation.

Of course your explanation to the police is not an aggravating factor at all in the sentencing consideration. I will refer to your explanation to the police, and also explanations that you have given later to the report writers, including in particular Dr Wojnarowska and also Ms Riordan, when I cover the issue of remorse.

When Z entered the room you were holding the young deceased with your arms crossed, saying, "Son, son." His breath had stopped and he was going pale. Z noticed a lump on his head on the right side near his ear. The lump was visible through his hair. The area was a little swollen and white.

Z took him from you and rushed him straight to the nursery in the mobile cot to get help. The resuscitation process was then commenced. As nursing staff commenced resuscitation, Z remained inside the nursery. You both went back to room 224 and she asked you what had happened, and you said, "He just stopped breathing." After making a phone call, Z returned to the room where you were sitting on the bed saying, "He stopped breathing." You followed Z around, saying, "I love you."

One further point that can be gleaned from all of that, L, is that, having done whatever you did in that room and the young infant being in the condition

he was, you didn't rush him off for urgent treatment. You remained in the room, and it was only after Z went into the room that the young infant was then taken to receive some assistance.

So in summary, L, by reference to all of that, you deliberately used considerable force on at least two occasions to a defenceless, totally dependent 25-day-old infant child, which resulted in head and brain injuries to the young deceased of such extreme severity, that they lead to his death.

L, they are the factual circumstances of the offence, which I need to weigh into the overall consideration of the proper sentence in your particular case. They are very serious. In my view, they put this case in the upper end of the range of seriousness for cases of manslaughter. That said, L, this case of yours is unique and your sentence will be decided on its own particular facts.

I need to make some comments on your plea of guilty. Section 9AA of the *Sentencing Act* makes provision for the reduction of a sentence by reason of the offender pleading guilty. The maximum discount is 25 per cent of the head sentence, if the offender had been found guilty after a plea of not guilty, and there were no mitigating factors.

The discount is to recognise the benefits to the State and to any victim of, or witness to, the offence resulting from the plea. The earlier the plea, the greater the reduction. There is now authority that the strength of the State case is a relevant consideration in assessing the benefit to the State and the extent of the discount. Remorse is not a relevant consideration in determining this discount. I will need to consider remorse and other subjective considerations separately. I will get to that in a moment.

The prosecution notice with the charge of murder was filed on 21 March 2014, and the first appearance by you in court was on 1 April 2014. Section 19B papers were ordered on that date. Now, those papers are the material to be relied on by the State in prosecuting the charge.

Manslaughter is a statutory alternative to murder. The prosecution notice did not expressly provide it as an alternative, but it nevertheless remained open to the court, if you went to trial on the charge of murder, depending on the court's view of the evidence. Between 1 April 2014 and 28 July 2014 there were about five appearances. And on 28 July 2014 the matter was listed for trial on 23 February this year, to last for two weeks.

At an appearance on 6 October 2014 the trial dates were confirmed. The matter came back before me on 8 December 2014, and then on 2 February 2015, for mention, to check whether the trial was going to proceed. On 2 February this year the trial was still scheduled to proceed, but negotiations between the parties, that is between the State and yourself via counsel, had resulted in the number of days being needed for the trial being reduced.

On 23 February this year, L, you will recall that you pleaded guilty to the charge of manslaughter on a new prosecution notice, after the parties had reached agreement that a plea of guilty would be made to that charge and be accepted by the State.

I appreciate that the charge of murder remained on foot until the new prosecution notice was filed shortly before trial. But it was open for a considerable period of time, both before and particularly after the matter was listed for trial, for the defence, you, to cause an approach to be made to the State in relation to a plea on a charge of manslaughter. The medical and forensic evidence was disclosed prior to the trial listing and it strongly supported at least manslaughter.

In the final analysis, the plea of guilty to manslaughter has come about very late in the proceedings and very proximate to the trial which had been listed for about six to seven months. In addition to all of that, on my assessment of the State brief, the State was in a position to present a very strong case in relation to manslaughter.

On my overall assessment of the late plea and the utilitarian value in this particular case, I fix the extent of the reduction for the plea of guilty by you, L, at 10 per cent.

L, I wish to talk about remorse. I need to make an assessment of your remorse, if any, and factor your remorse and the extent of it into the overall consideration in a favourable way. Of course, what weight I give it in the overall consideration will depend on the extent of your remorse when weighed against everything else in the case.

L, you have pleaded guilty to manslaughter. That shows remorse for what you have done. But on my overall assessment of what you told police, what you told the authors of the various reports, and having regard to the contents of those reports, and whilst still having regard to submissions made on your behalf, your level of remorse is minimal.

On my assessment of the two video-recorded interviews you had with police, and particularly the second, you were really only concerned about yourself and the predicament that you were in. I'm well aware that you did not have to answer any questions that the police put to you. But having agreed to engage in the interview, it's my assessment of what you said during the course of the interviews, particularly the second, that you did not want to say what happened in the room because you were worried that you would expose yourself to a charge of murder.

Since then you have continued to not give any account of what you did in room 224. Of course, it's your legal right not to give an account or explanation. But I'm saying these things in the context of considering your remorse, if any.

It is clear from the victim impact statement of Z, that she as the mother of the deceased would reasonably like to know what you did. The other selfish

reason for not giving an account of what you did is probably that you want to hold on to a relationship with Z.

As has been properly mentioned you put great focus on that relationship. And it's to be noted that it is a relationship that you were engaged in from the very early age of around 12 or 13 years of age. It was a relationship that you saw as giving you something that you didn't have in any other way, and it provided you with a relationship with a family which you felt that you didn't have, having a feeling of rejection and abandonment by members of your own family.

I must point out, L, and emphasise that this lack of remorse is not an aggravating factor at all for the purpose of sentence. Rather, when it comes to consider remorse it is minimal. And so there is only a minimal amount to be weighed in your favour because of it.

I also wish to add that in my view there are a number of factors which limit your remorse to being only minimal. They are first, your youth and in connection with that your immaturity, and secondly, your personal history, which includes long-term exposure to aggression and violence such that it is normalised in your mind.

In this regard you are a product and a victim of a dysfunctional environment through no fault of your own. I do not want it to be thought that I'm not appreciative of those factors. I will refer to them later and weigh them in your favour in my overall assessment.

There's another factor which needs to be considered and it's a significant one in your favour, L, and that is your youth at the time that the offence was committed. As has been properly mentioned by Mr Sutherland, you were only 15 years and 10 months of age at the time that you committed the acts which gave rise to the injuries. And under the *Young Offenders Act*, youth is a factor which must be taken into account. Indeed it is a significant mitigating factor.

It's not just biological age that's relevant. It's also other factors that go with that; for example, maturity or lack of maturity. So biological age is a factor under the Act, but the court looks to that factor in other ways as well so far as levels of maturity are concerned. And it's already been mentioned that you lack maturity.

Given your age, the principles in the *Young Offenders Act* apply. Those principles include rehabilitation, protection of the community and punishment. Each case requires all of those principles to be weighed in. It's a matter of what weight the court gives to each of them in an overall consideration. And that will obviously have regard to the nature and seriousness of the factual circumstances of the particular offence and the particular offender under consideration.

Clearly in a case such as this, L, whilst rehabilitation remains a relevant factor, the protection of the community and punishment need to be given significant weight as well. Indeed the protection of the community in my view is something that requires significant weight in your case, L, given the nature and factual circumstances of the offence, the seriousness of an offence involving manslaughter where it's the death of a young infant caused by deliberate and violent actions.

Also, L, it seems clear to me from your personal history, and also bearing in mind your record of convictions which contains an offence where you threatened Z with a knife at a train station, she ran away from you and you threw the knife at her and regrettably it contacted a woman who was at the train station, an innocent bystander to catch a train, and she received an injury which constituted bodily harm. That factual scenario in that particular case certainly is cause for concern. And you were relatively young when you committed that.

So there are deep-seated personal problems on views held by you in relation to aggression and personal violence. And I accept, as has been mentioned, that these views really arise from you being exposed to the

dysfunctional environment that you have been. But the point is that these views held by you will require very long-term rehabilitation and intensive programmatic interventions.

Can I make reference, L, to your record of convictions. At the time of the offence you were only 15 years and 10 months of age as I've mentioned, and so one would hope that you wouldn't have much of a record only being that age.

You did have a record of prior offending, relatively short but in my view significant. It includes prior offences of aggravated robbery, stealing of a motor vehicle, damage, with intent to harm doing an act which resulted in harm, also doing an act which resulted in bodily harm. And that's the offence that I've just referred to where you threw the knife at the train station which injured the innocent lady at the station.

There's also an offence of possession of cannabis and also one of burglary. L, I look at your record of offending not because it aggravates or adds to the severity of the sentence but rather to see whether it is favourable to you and would justify a discount in the sentence. L, your record does not justify any discount at all.

I need to refer to your personal circumstances. There are reports which set out your personal circumstances in detail and Mr Sutherland has very helpfully referred to some of the material contained within them this morning. You are under the care of the Chief Executive Officer of the Department of Child Protection and Family Services.

A protection order was made in 2011. I note that you were previously in care between six and 10 years of age. As Mr Sutherland has so properly and accurately stated, unfortunately you have suffered neglect, exposure to substance abuse and violence, transience and instability. Your young life is sadly characterised by layers of crises with, on top of all of that, the overlay of grief resulting from deaths in the family.

"Chaos" is a word that has been quite aptly used. As a result of all of that your school attendance has been poor. Your own substance abuse problem involves you abusing alcohol, cannabis and also amphetamine. It seems that your substance abuse problem has come about because of its normalisation in your environment and/or as a means of you escaping a hard reality.

In my view, this personal history provides significant mitigation because it is highly relevant to the level of your culpability and as Mr Sutherland has properly said, your dysfunctional environment provides the explanation for why your capacity to exercise proper judgment is distorted.

L, all of that said when assessing your culpability in this matter I'm also mindful of the opinion of Dr Wojnarowska that you do not present with any major psychiatric disorder.

There is material before me, L, which goes to provide some potential explanations for why you did whatever you did.

For example, Dr Wojnarowska in her report has said that your history of entering an intimate relationship at the age of 13 is relevant to the offence. It is possible that your immaturity and the need to be in an exclusive relationship with your partner caused you to view the baby as a rival for the love and attention that you have never received during your formative years. Her report, with respect, is very helpful.

So too is the very comprehensive report of Ms Riordan, a psychologist from Youth Justice Psychological Services. She set out in her report, that taken as a whole it is likely that the premature birth of your son resulted in a dramatic and unexpected shift in your relationship with Z in addition to your position and focus within her family unit such that you were now competing for the attention and affection of Z and her family.

Your feelings of inadequacy and powerlessness were likely exacerbated by fear of being scrutinised by the nursing staff at the Bunbury Hospital. These

frustrations occur against the backdrop of your own victimisation, poor attachment relationships and uncertainty about the future. Consistent with the aggression displacement theory, it is possible that your frustrations about your relationship and future culminated in you selecting to aggress against the most vulnerable victim, your infant son, that approximated the source of your frustration, Z and her family's focus on the newborn child.

Having referred to passages from the two reports by each of Dr Wojnarowska and also Ms Riordan, can I also mention what's contained in the victim impact statement of Z that the two of you separated a week before 15 February when you did whatever you did in room 224. And it seems to me that information may well relate back into what Dr Wojnarowska and Ms Riordan have said and provide some further support to what each and both of them have said.

There's another matter that arises from my observation and that is that 15 February was on the weekend immediately before the discharge into the community on Monday, 17 February. All very proximate and so perhaps on 15 February the point was reached where there was some tsunami of awareness on your behalf, L, that within a very short time you were going to have to bear the responsibility and expectations of being a young father in the community and that was something that you just couldn't come to grips with.

In any event, I don't need to provide any answer to why; I don't propose to speculate; I don't propose to speculate on why and I don't propose to speculate on how in particular. I've already given reasons, and in broad terms, findings can be made for sentencing to be carried out properly.

In addition to all of this material there is the victim impact statement before me of Z, and she asks the question, "Why?" She keeps asking that question and she keeps wondering why. And it's clear from reading her victim impact statement that, as one would reasonably expect, your actions leading to

the sad death of her son have produced very profound impacts, including nightmares on how the young child looked after it happened, and it's something that she says she will live with for her life.

That's also something that has caused problems within her own family as between her and other family members. So it's caused a great deal of pain to her as one would reasonably expect.

L, putting all of that together, it's my view that the nature of this offence, bearing in mind that it carries a statutory maximum penalty of life imprisonment, and also as I said at the outset that one needs to be mindful that when deciding the appropriate sentence for an offence of this kind that there has been a loss of a human life.

So given that in combination with the seriousness of the factual circumstances as I've outlined, it involving such deliberate and violent conduct on your part against such a defenceless child, only 25 days old, indeed your own son, and the need for personal deterrence, general deterrence and the protection of the community, all of those things in combination in an overall consideration significantly overwhelm the combination of your plea of guilty, youth and matters personal to you, in your personal circumstances that I've outlined, such that while applying the objectives and principles in the *Young Offenders Act*, only immediate detention and for a very long time is the appropriate sentence.

I'm very mindful that detention is the sentence of last resort, and that when it comes to the length of time, it needs to have regard to your sense of time as a young person - and you're now just short of 17 years of age - and I'm also mindful of the principle that it should be for the shortest necessary time.

Putting all of that together, L, it's my view that the appropriate sentence for this offence of manslaughter committed by you is 10 years immediate detention.

You'll be eligible for a supervised release order after serving half of that term, and the term can be backdated to commence from the time that you went into custody. And as I understand it, you've been in custody continuously since.

If I can be given that date?

H, MS: 16 February 2014.

REYNOLDS PCC: All right. The sentence is to backdate from that particular day.

In relation to these other matters, the three matters the subject of the conditional release order, those matters are a burglary committed in May 2013 at South Bunbury, possession of cannabis on 16 February 2013 at Perth, and also the act causing bodily harm to a person committed on 16 February 2013 at Perth, you were placed on that order, the conditional release order, for a term of nine months on 9 September 2013.

That's breached. The order is cancelled. And in its place there's a term of detention - immediate detention of six months.

Given the term that I've imposed in relation to the manslaughter, also bearing in mind that these offences, although committed on different days and a different date obviously to the offence of manslaughter, whilst it's arguable there could be something ordered to be served cumulatively, I'm of the view that, having regard to totality and also bearing in mind that these matters are on your record and so you don't get any mitigation from your record, I'm of the view that that sentence should be served concurrently with the sentence that I've just mentioned in relation to the manslaughter.

There's one other final matter and that's the one on the list that I said we'll deal with on another date. Perhaps for the moment if I just adjourn that to a date to be fixed, and the State and your counsel can communicate with my associate and a convenient date mutually convenient to all can be arranged and that can be put back before me.

I think that deals with everything.

WALTON, Mr: Yes, your Honour.

REYNOLDS PCC: All right. Thank you.