

The Queen v Club [2008] NTSC 50

PARTIES: THE QUEEN
v
CLUB, LAZARUS

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: ALICE SPRINGS

FILE NO: (20718359)

DELIVERED: 3 December 2008

HEARING DATES: 18 November 2008

JUDGMENT OF: OLSSON AJ

CATCHWORDS:

Manslaughter – Disputed of facts – Whether negligent or reckless manslaughter – Manner in which fatal injury inflicted – Offenders state of mind – Whether Crown proved that offender aware of risk of occasioning death from his conduct - Evidence established criminal negligence rather than recklessness

Evidence – Expert Evidence – whether injury caused by hand held or thrown object – Evidence of the injury – Implications of Expert medical evidence going to nature of conduct

Sentence – s82 (1) -Youth Justice Act – Whether to sentence under powers of Youth Justice Act – or powers of Sentencing Act – Matters taken into consideration – discussion of conflicting sentencing factors.

Sentencing Act (NT) s 82(1), s 103
Criminal Code (NT) s 43AK, s 160

Waye v The Queen [2000] NTCCA 5; *R v AEM* [2002] NSWCCA 58; *R v Gordon* (1994) 71 A Crim R 459; *R v Bloomfield* [2003] NTSC 9; *R v Kolmala (SC(NT))* Riley J, 17 June 2003) – Sentencing Remarks, cited.

REPRESENTATION:

Counsel:

Crown: S Da Silva
Accused: B Braithwaite

Solicitors:

Crown: Dr N Rogers
Accused: T Collins

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

The Queen v Club [2008] NTSC 50
No. (20718359)

BETWEEN:

THE QUEEN
Appellant

AND:

LAZARUS CLUB
Respondent

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 3 December 2008)

- [1] Lazarus Club (to whom I will refer to as “Lazarus”) was originally charged with the aggravated murder of his baby daughter on 2 July 2007 at Epennara Community. I will not refer to the name of the baby having regard to cultural sensitivities. She was only about three months old when she died.
- [2] On his arraignment, Lazarus pleaded not guilty of murder, but guilty of manslaughter. That plea was accepted by the Crown in full satisfaction of the indictment in this matter. I therefore record a conviction against him of the offence of manslaughter.

- [3] It was indicated by counsel, on the acceptance of the plea, that there would need to be a disputed facts hearing to resolve certain narrative facts as to which the prosecution and the defence were not in agreement.
- [4] Counsel held ongoing discussions at my request following the plea with a view to attempting to narrow any factual matters remaining in contention between them. The principal matter initially in contention essentially focused on the evidence as to precisely how it was that, on the relevant occasion, the baby came to receive the injuries that caused her death.
- [5] In the event, it proved unnecessary to call oral witness evidence other than limited testimony from Emeritus Professor Green. Counsel were able to agree upon what documentary material ought properly to be placed before me and they then made detailed submissions as to what inferences I ought to draw from that material read in conjunction with Professor Green's evidence.
- [6] Much of the contextual narrative material was not in dispute. The main areas of difference related to the events that immediately preceded and culminated in the infliction of the relevant fatal injury upon the baby.
- [7] I first embark upon a resume of the pertinent background facts as they emerge from the material presented to me.
- [8] Lazarus was born on 10 February 1990. He is thus just approaching 19 years of age at the present time. His parents are still alive, but appear to

have separated at some stage. He grew up in the Neutral Junction and Utopia areas and seems to have largely been brought up by his grandmother. He was married, in the aboriginal way, to Natalie Morton (“Natalie”) in Alice Springs some time in mid 2006. Natalie is currently about 17 years of age.

- [9] Natalie said that, following the marriage, she and Lazarus initially lived together in Alice Springs. Neither of them drank alcohol to any significant extent and they had a quiet and happy relationship. There was no contention or violence between them.
- [10] Sometime late in July 2006, the two of them moved to Epennara Community to be with Natalie's family. They moved into her family's house at the Community (“the blue house”).
- [11] Natalie fell pregnant to Lazarus, not long after their arrival there. She says that Lazarus was happy about the pregnancy and that he cared for her during the continuance of it. Because of some health concerns, she was taken to the Alice Springs Hospital for the birth of the child. That birth occurred on 4 April 2007. The baby was born prematurely and Natalie and her infant daughter had to remain in Alice Springs for a time until the baby was deemed sufficiently strong to go home.
- [12] Natalie says that, upon her return to Epennara Community with the baby, she resumed her former happy relationship with Lazarus. He would cook for her

whenever she was breast-feeding and would also assist with washing clothes. Once again, the relationship was, she said, placid -- there was no violence and Lazarus was not drinking.

- [13] Natalie states that, on the evening of 2 July 2007, she was at home in the bedroom of the blue house where she was living with Lazarus. She says that he was fully sober and had not been drinking. He commenced to tease her about girls in a movie that he had been watching, saying that they were his girlfriends. The baby was sleeping in the next room at the time.
- [14] Natalie did not care for the teasing. She stated that she left the bedroom and went outside for a short while. After a time, she returned to the house. She and Lazarus commenced to watch a Kung Fu movie together. Her cousin Adelida (aged eight) and other family members were also present, watching the movie.
- [15] According to Natalie, Lazarus commenced teasing her, saying that she was jealous for her little sister. She did not know why he did so and did not like it. She says that she got up and brought the baby back into the bedroom to change its nappy and feed her. Having done so, she returned the baby to the other room and came back into the bedroom.
- [16] This witness stated that Lazarus resumed his teasing and this caused her to argue with him and tell him to stop being silly. She says that she yelled at

him, following which he walked out of the bedroom and went off to another house.

[17] Natalie says that, at some point, she went out into the back yard. Whilst she was there her auntie Theresa brought the baby outside and gave her to Natalie's mother (Una Beasley) to carry. The baby was crying.

[18] Natalie later observed Lazarus coming back from another house to which he had gone. She says that she saw him bend over and pick up a bottle off the ground. It looked like a cooking oil bottle. At the time, Natalie was outside the back of the blue house near a green water tank. Her mother was somewhere behind her, nursing the baby.

[19] Natalie asserts that she saw Lazarus throw the bottle at her. However, she says that it missed and hit the tank instead. She related to the police that she heard it smash and that some of the smashed glass bounced off the tank and hit the baby on her head. She related that her mother had been holding the baby with its head towards the tank.

[20] Natalie stated that the baby commenced to cry and seemed to be having trouble breathing. She could feel little pieces of glass in its hair and there was a little bit of blood coming from the baby's head. Natalie's mother took the baby to the nurse's house and was followed there by Natalie shortly thereafter. She was in a distraught state. Lazarus came to the clinic as well, but stayed outside. He appeared to be really worried and was crying a lot.

- [21] The baby was eventually evacuated to the Canteen Creek Clinic, where a doctor pronounced her dead.
- [22] In her statement Natalie said that she did not want Lazarus to get into trouble for this. It was a mistake that the baby was hurt.
- [23] The statement made by Natalie as to how it was that the baby came to be injured diverges in various respects from the narratives of other witnesses.
- [24] Meralda Morton, who is Natalie's elder sister, states that, some time after 7 p.m., she became aware that Natalie and Lazarus were arguing in their bedroom at the blue house.
- [25] This witness was present in the house at the time. After a while she walked out of the back door to go home. She heard Lazarus come out shouting. On turning around, she observed Lazarus just over the fence from the blue house backyard, whilst Natalie was standing in the back yard of the house. Both were yelling at one another.
- [26] Meralda says that she saw Lazarus pick up an old flour drum from next to the fire pit in the house next door and then throw it over the fence at Natalie. It missed her, but she ran over and hit him. Meralda did not see where the drum landed. I take it that the drum was of the nature of that which comprises exhibit P3.

- [27] Rebecca Morton, also a sister of Natalie, said that, after the Kung Fu movie concluded, Natalie came into her room crying and was chased out by Lazarus. She subsequently saw Natalie chasing Lazarus outside in the yard. He started throwing stuff at her, but Rebecca could not see what it was.
- [28] The witness Theresa Morton is Natalie's aunt. On the night of 2 July 2007 she was sitting outside on the veranda of the blue house. She says that she heard Lazarus and Natalie yelling at each other and went inside to try and stop them. Theresa saw both of them run outside into the back yard. She herself walked back outside and saw Una Morton standing in the backyard holding the baby. Rebecca Morton was standing with Una.
- [29] This witness then decided to take her two young children next door to Peter Morton's house. As she went to do so she saw Lazarus pick something up and throw an object at Natalie, who was then running in front of her. Theresa Morton did not know what the object was, but thought that it might be a rock or a bottle. She could not see whether the object hit Natalie because it was dark, but then she heard Una scream. Theresa subsequently assisted in taking Natalie's baby to the nurse.
- [30] Una Beasley, who is Natalie's mother, gave several statements to the police. She says that, after the Kung Fu movie, she could hear Natalie yelling at Lazarus outside. She walked outside carrying the baby and stood by the green water tank. It was dark in that location.

[31] She heard the two of them yelling at one another and then saw Natalie running towards the tank. Lazarus was throwing stuff at her. Una heard something hit the baby, but couldn't see who threw it or what it was, because it was too dark. She said that she felt an object hit her arm a little bit and it felt like it hit the baby in the head.

[32] I here pause to make two comments;

First, it is to be noted that no oil or other relevant bottle was found by the police in the vicinity of the tank where Una was said to have been standing with the baby. Nor were any glass fragments found in that area.

Second, none of the medical witnesses noted the presence of any glass fragments or other foreign bodies on the head or in the hair of the baby immediately following the injury to it. This is in contrast with the evidence of Natalie. It is to be seen from the photographs of the baby's body annexed to the declaration of senior Constable McDonnell that the child had a quite well developed head of hair.

[33] I next turn to consider the substance of the evidence of certain other witnesses;

[34] Faye Moore is Lazarus' mother. She says that she visited him at Aranda House in Alice Springs in mid-2007. He volunteered to her that, on the night in question, he was having an argument with Natalie. They were outside. It was dark and he couldn't see. In her declaration to the police

this witness described the relevant portion of her conversation with Lazarus in these terms:

“He said to me 'I didn't know they brought that baby outside, when she was sleeping inside. We was having an argument by ourselves'. He said it was at night, not much light was around, and he couldn't see. He said he tried to hit Natalie with that thing. He said the thing was an iron. He said it happened at his house, outside the house. He said they was having an argument by themselves, but the grandmother took that baby outside when they was having the argument. He tried to hit Natalie with that iron, but Natalie put the head down, that she ducked down, and the grandmother was standing behind. The grandmother was standing behind holding the baby, it was dark, and Lazarus didn't know. That's when he hit the baby. He reckoned he just heard the crying now, he was just shocked. He didn't know he hit the baby”.

[35] Ms Moore went on, in her statement, to say that Lazarus told her he threw a bucket at that girl, at Natalie, when he was inside. After that, he tried to hit that iron at that girl, but hit the little one. She said that Lazarus was crying and he told her that he wanted to kill himself, because he didn't know, he hurt his own daughter by an accident.

[36] I note from Ms Moore's statement that it was said by Lazarus that, following the realisation that the baby had been badly hurt, Una Beasley hit both Natalie and Lazarus and Lazarus ran away. The family later helped to locate him and bring him back.

[37] The witness Derek James Tasker is a youth worker employed at the Alice Springs Juvenile Holding Centre. He was on duty on 7 July 2007 and had the oversight of Lazarus, who was in custody at the Centre.

[38] During the morning Tasker became concerned at the apparent emotional state of Lazarus. He entered his cell and asked Lazarus “Is everything all right?”, to which Lazarus responded that he was very worried and very sad.

[39] Lazarus continued “I’m very worried about my family, they are not going to like me any more”.

[40] The witness McAllan also entered the room at about that point.

[41] Tasker expressed what then occurred in these terms:

“Again, Club told us that he was very worried about his family, that they would not like him any more, and I clearly recall him telling me that what he had done was an accident. He told me ‘I was going for my wife with the iron bar, because she was teasing me a lot’. As soon as he told me this, I interrupted him and suggested that he take a shower.”

[42] McAllan's memory of what occurred on this occasion was expressed by him as follows:

“He expressed his concern that his family would no longer like him because of what he had done. He then went on to talk about his wife, and the fact that she had been teasing him ‘a lot’ about his young sister-in-law. He mentioned that he believed his young sister-in-law is about 12 or 13 years old. He said his wife had accused him of fooling around with her, and she was acting very jealously. He told us that he lost his temper, and that he picked up an ‘iron’. I asked him ‘do you mean an iron bar or pipe?’ And he clarified ‘An iron bar’. He told me that he was trying to hit his wife with the iron bar but that he missed and hit his daughter accidentally. He then said that his daughter had been asleep in another bedroom, and when he and his wife had started fighting, the grandmother got the baby from the bedroom and brought her out to where the fighting was going on”.

- [43] It is at once apparent that there is a marked divergence between the evidence given by Natalie and her close family members on the one hand and the evidence of the witnesses Moore, Tasker and McAllan, on the other.
- [44] In my opinion the resolution of that conflict, *inter alia*, requires a careful consideration of the evidence and opinions of the various medical experts.
- [45] As to this, a convenient commencement point, is a review of the findings of Dr Sinton at autopsy.
- [46] That autopsy was carried out on 3 July 2007 and Dr Sinton's report is to be read in conjunction with the somewhat graphic photographs of the baby's body that were taken at the time of the autopsy procedure, as well as the additional photographs comprising exhibit D1, tendered during the course of the cross examination of Professor Green.
- [47] Doctor Sinton said that he had practiced as a forensic pathologist for some 10 years, during which he would have examined something of the order of 100 young babies in relation to head injuries.
- [48] Dr Sinton recorded that the scalp showed extensive and severe haemorrhage over both parietal bones and the occipital bone. As well, there was moderate oedema of the scalp itself.
- [49] The skull was normally developed, but had been severely fractured. A punctate impact fracture through both tables of the left parietal skull was

identified, immediately deep to the left parietal scalp wound. Additionally, there was a ragged fracture extending from just above the right upper orbital margin, passing vertically through the right frontal bone, crossing the coronal suture, onto the left parietal bone and continuing posteriorly to the left of the sagittal suture, medially to the impact fracture.

[50] At a point approximately 1 cm medial to the midpoint of the sagittal suture, the left parietal fracture diverged into two extensions, each running posteriorly to cross and terminate on the posterior regions on both left and right parietal bones. From the right orbital margin to the posterior surfaces of the parietal bones, the fracture ran for a distance of approximately 8 cm. A further extension of the left midpoint parietal fracture had passed coronally to the right, crossing into the right parietal bones for a distance of approximately 2 cm.

[51] The shape and locations of the foregoing fracture lines, as well as the location of the punctate impact site, are illustrated diagrammatically in the sketch forming exhibit P2.

[52] The external surface of the brain showed widespread subdural and subarachnoid haemorrhage over both left and right cerebral cortices. As well, there was a large collection of subdural blood present at the base of the brain, around the brain stem and the upper part of the cervical cord.

[53] Unsurprisingly, Dr Sinton's conclusion was that death was due to acute head trauma.

[54] He considered that the injury was the consequence of a single impact on the head. That impact was likely to have been somewhere between the moderate to severe range.

[55] In the course of his cross examination at the committal proceedings Dr Sinton made the point that a child's skull is extremely resilient, as it is designed to be. He said that it takes an immense amount of force to actually fracture that to anything like the extent seen at autopsy. For that reason he considered the injury to be very likely to be a direct impact from a blow administered with a lot of force. He described what he found as being a most unusual injury. It was one that would necessarily have taken a large amount of force to produce, such as a direct blow.

[56] He testified that the punctate wound looked like a little spot about 4 mm in diameter and was the sort of wound produced by some form of either sharp point on an implement or a sharp implement itself directly impacting in that location. Associate Professor Hilton agreed that the baby's head had been impacted by an object that had a protuberance of four to 5 mm in diameter, which had produced the localised depressed fracture. I did not take Professor Byard to dissent from such an assessment. I will shortly refer to Professor Green's evidence on this topic.

[57] There was no external evidence of a linear track component to the impact area found at autopsy. However, as Professor Green indicated by reference to exhibit D1, the nature and shape of the depressed fracture line near the punctate wound site, was consistent with some degree of lateral impact force at that point.

[58] This brings me to the report of Professor Green.

[59] This expert witness has been involved in the practice of forensic pathology for nearly 40 years and has maintained a particular interest in sudden death and injury in children. He has carried out research in areas related to those aspects. He testified that he had performed over 12,000 coronial autopsies, of which 800 were homicides and 1200 related to investigations of suspicious deaths. He indicated that he, personally, has carried out autopsies in about 300 - 350 cases of homicide in the first year of life and has supervised about another 300 of such autopsies.

[60] The Professor was consulted on behalf of the prosecution on 25 July 2007 and perused both the then provisional autopsy report and also the photographs taken during the autopsy.

[61] Professor Green pointed out that the material before him indicated that the fractures to the baby's skull were extensive, running across from the right eye to the region of the left side of the back of the head, with accessory fractures running into the right parietal bone also. He noted an area of

apparent impact on the left side of the top of the head beneath a full thickness skin injury that was clearly shown in the photographs. He observed that the depressed area shows that the upper and inner margin of the fracture had been forced downwards by a distance of several millimetres.

[62] Given that the baby was said to have been held in the arms of an adult at the time, the doctor was of opinion that considerable force would have been required to inflict a fracture of the extent noted and with the degree of depression observed at the impact point. He felt that the injury was consistent with a single blow with an implement with the baby's head relatively fixed, so that it was not able to "ride" the impact.

[63] In the course of his oral evidence, Professor Green emphasised that a baby's skull is composed of separate pieces meeting along so-called suture lines (depicted in exhibit P2). These are initially un-fused, so as to permit natural growth. They usually become fused by about the age of 20.

[64] The Professor explained that, because the skull bones can move relative to one another, they have a natural springiness, rather like a ping-pong ball. It is possible to depress a section of bone and for it to spring back.

[65] I took him to emphasise that where, as here, fracture lines actually cross the natural suture lines and travel on to other sections of the skull, such a situation is indicative of the application of a significant degree of force.

Such a conclusion is consistent, he said, with what is written in standard textbooks in which blows to the skull are discussed.

[66] Both this witness and Dr Sinton were asked to express opinions as to whether it was likely that the injuries noted could have resulted from some thrown object. Both of them considered that such a scenario was unlikely.

[67] Professor Green considered that the injury seen was consistent with having come from an iron bar with the tip of it striking in the small depressed area noted, albeit with some degree of lateral impact rather than directly end on. He accepted that a severe fracture could also be made by an item such as a beer bottle, although the depression in the injury in this case is more likely to have been caused by the end of something.

[68] The evidence of the Crown experts falls to be contrasted with that of experts put forward on behalf of Lazarus.

[69] Mr Braithwaite, of counsel for Lazarus, tendered reports from Professor Roger Byard and Associate Professor John Hilton, two highly experienced forensic pathologists. These were principally directed to the issue as to whether it could fairly be said that the injuries sustained by the baby were more consistent with its head having received a directed blow from a hand-held object, by way of contrast with the receipt of a blow from a thrown object.

- [70] Both of these expert witnesses were of the opinion that, given the autopsy results, it was impossible to say with confidence which of the two scenarios was more likely.
- [71] There was, they said, no known research material that was helpful in making such a determination. I took them to join issue with any thesis that would suggest that a thrown object was incapable of having transferred sufficient energy to produce the injuries observed by Dr Sinton.
- [72] These two witnesses drew on their own experiences in the far North to support a proposition that the injuries could, indeed, have resulted from the impact of a suitable thrown object. Associate Professor Hilton instanced, for example, the resultant energy of thrown spears, throwing sticks and other hand propelled missiles traditionally used in hunting.
- [73] I took each of these experts to accept that the injuries sustained by the baby were consistent with the impact on its skull of an object having a small diameter striking the skull more or less at its end. Thus, it was quite feasible to postulate that the damage noted could have been the outcome of an object such as a modest diameter iron bar having been thrown with force and striking the baby's skull more or less end on, although Professor Byard seems to have accepted that it could equally have been caused by the tip of a held item of appropriate profile.

[74] Certainly each of these experts appears to have accepted that, whatever may have been the cause of the trauma, the resultant injuries indicate the application of considerable force to the baby's skull.

[75] Some time was occupied at the hearing in a debate as to the vexed ultimate question of whether the injury noted at autopsy was a consequence of the impact on the baby's skull of a handheld or a thrown object.

Mr Braithwaite, of counsel for Lazarus, contended that it had not been shown that there was any recognized field of organised knowledge that permitted the expert pathologists to express an opinion on this topic.

[76] I consider that it has not been demonstrated that the ultimate question of what, in fact, caused the relevant fatal injuries is a matter that is the proper subject of a concluded expert opinion. However, I consider that, given the extensive demonstrated experience of the expert witnesses concerned, they are qualified to express views as to whether the injuries apparent at autopsy were or were not consistent with particular types of trauma. They were certainly shown to be qualified to speak of both the type of object profile and relative force that would be required to produce the observed injury pattern.

[77] I took all of the relevant witnesses to be of the view that the possibility of infliction of the injuries noted as a result of the impact of a thrown object of appropriate profile could not be excluded, given that the object would need to be of such a mass and velocity at impact as to strike the baby's skull with

considerable force. As a matter of common logic that would, as Professor Green pointed out, presuppose an object of significant mass, hurled with considerable force over a fairly short trajectory.

[78] That said, I understand the views of both Dr Sinton and Professor Green, based on considerable experience with traumatic injuries to young children, to be that the injuries sustained by the baby were more consistent with an impact force imparted by a delivered blow from an appropriate object.

[79] Those views have the attraction of common sense and logic and accord with my own assessment of the whole of the evidence. I regard some of the theses explored with these witnesses as verging on the fanciful, having regard to the injury nature and pattern, including the size and location of the punctate wound and the depressed fracture immediately associated with it.

[80] Having so summarised the evidence before me, I now embark upon the task of making specific findings of relevant fact from that material.

[81] It is common ground (and I find) that the baby's death resulted from the effects of forceful blunt trauma to its skull on the evening in question. Furthermore, it is beyond dispute that this occurred in the rear yard of the blue house at Epennara Community on what was a dark night, which rendered visibility quite poor.

[82] The trauma occurred in the course of ongoing anger and aggression exhibited by Lazarus and Natalie toward each other, over what appears to

have been an initially trivial exchange of words and the subsequent generation of an argument that rapidly escalated out of control. There is no suggestion that either of them was intoxicated when this occurred.

[83] It is not in dispute that, at the relevant time, the baby was being held in the arms of Natalie's mother, who was immediately behind her near the green tank.

[84] As I have indicated, there are multiple versions of what actually occurred as between Lazarus and Natalie. Nevertheless, it is clear from the eyewitness evidence, particularly that of Una Beasley, that, at the time of the critical incident, their positions were not static. Both of them were said to be moving at the time. Indeed, it is said by some witnesses that they were chasing one another.

[85] I do not consider that the somewhat differing versions of what occurred on the night in question, as related by the various eyewitnesses, were necessarily the product of any concoction on the part of those concerned. The relevant incident erupted suddenly in a dark area, was traumatic in its end result and occupied only a very short space of time. A fair degree of confusion seems to have reigned at that point.

[86] These witnesses clearly observed what transpired from differing locations and with differing degrees of at least initial concentration. There was obviously a good deal of discussion amongst family members immediately

following the incident. It is no surprise that seemingly inconsistent narratives have emerged, some of which, I consider, are tinged with obvious *ex post facto* rationalisation.

[87] Having said that, I am satisfied that, for some reason, Natalie's version is simply not accurate as to what struck her baby.

[88] I reject the suggestion that the injuries to the baby were occasioned by the throwing by Lazarus of a bottle, as asserted by Natalie. I do so for the following reasons:

- No bottle of the nature of that referred to by Natalie nor any fragments of such a bottle were found in the vicinity of the tank by the police subsequent to the incident;
- None of the medical witnesses noted the presence of glass particles in the baby's hair or on its head, of the nature of those referred to by Natalie;
- The size and nature of the punctate impact injury was not, on the face of it, consistent with the impact profile of a bottle such as that described. The expert medical evidence suggests that the area of initial impact was of quite small diameter.

[89] There is some evidence to support a thesis that, at one point, Lazarus threw an old flour drum towards Natalie. However, I also discount any suggestion that this action may have caused the relevant injuries.

[90] Neither Natalie nor her mother speak of such a large object, none was found by the police at the immediate crime scene and, once again, the injuries sustained do not, on the medical evidence, seem consistent with an impact by an object of that type.

[91] In my opinion, the evidence overwhelmingly points to a causation of the baby's injuries by an object having a profile like that of some sort of iron bar. Not only did Lazarus volunteer to his mother that he tried to hit Natalie with an iron, but he also told his mother that she ducked down and he unintentionally struck the baby with it instead. He further told her that he had thrown a bucket at Natalie, but that this was when they had been inside the house.

[92] That account is consistent with what Lazarus told the witnesses Tasker and McAllan. He volunteered to them that he had been trying to hit his wife with an iron bar, but had missed and hit his daughter accidentally.

[93] I consider the expert debate concerning whether any iron bar might have been thrown, by way of contrast with having been hand-held at impact, is largely academic. The admissible evidence before me to which I am prepared to attribute weight is virtually all one way. On his own statements, repeated on two separate occasions, Lazarus spoke in terms that were apt to describe striking at Natalie with a hand-held iron bar. Such a scenario is entirely consistent with the findings at the autopsy.

- [94] True it is that the words used by Lazarus could, on their widest possible interpretation, be taken to include hitting by throwing, but the tenor of his statements by no means suggests that this was what he was attempting to convey. To say that he was “*going for*” his wife with an iron bar or “*trying to hit*” her with such an object does not normally imply a mere “*one-off*” throw of it.
- [95] I find that the Crown has proved beyond reasonable doubt that, at the relevant time, Lazarus was attempting to strike Natalie with a hand held iron bar, that she ducked, and that the end of the iron bar unintentionally struck the head of the baby as it was being held by Natalie's mother in a location immediately behind Natalie.
- [96] In so concluding I by no means ignore the point made by Mr Braithwaite to Professor Green as to the improbability of a delivered blow with an iron bar primarily aimed at Natalie striking the baby's head a short distance behind her when she may have ducked. It seems to me that the short riposte to that point is that the proposition put essentially presupposed the delivery of a blow whilst Lazarus remained stationary at the time of delivery. The evidence strongly suggests to me that this was not the situation.
- [97] The eyewitness evidence indicates that, for the most part, neither Natalie nor Lazarus were static. On the contrary, the picture that emerges is of them both moving around in the dark. The description given to Tasker of going for his wife with the iron bar coupled with the witness observations of

Lazarus and Natalie chasing one another strongly suggests that Lazarus was, in some fashion, lunging at or moving towards her.

[98] Against such a background, the prosecutor and Mr Braithwaite were not *ad idem* as to the conceptual basis upon which sentence ought to be imposed.

[99] The first point to be addressed prior to coming to that issue is as to whether Lazarus ought to be sentenced under and in accordance with the provisions of the Youth Justice Act or whether he should be dealt with pursuant to the Sentencing Act.

[100] It is necessary for me to elect, pursuant to subsection (1) of s 82 of the Youth Justice Act, whether to either exercise the disposition powers conferred by that statute or to proceed in accordance with the powers conferred by the Sentencing Act. (cf *The Queen v Gurruwiwi* [2008] 154 NTR 1).

[101] As at the date of the offence Lazarus was 17 years and five months of age. He was in a stable marital relationship and was the father of a child of that relationship. He was living as an adult in an adult environment. I accept Dr Rogers' point that he and Natalie had been allocated a room in the blue house as their own, by way of their own domestic residence and not because it was considered that, due to immaturity, they required adult supervision.

[102] I consider that the inherently serious nature of the offence, coupled with the facts that Lazarus was in the settled adult type relationship involving

parenthood to which I have referred, that the relevant act was performed whilst he was sober and that he was then little short of 18 years of age combine to indicate that it is appropriate to deal with this matter pursuant to the Sentencing Act. I elect to do so.

[103] I now come to the issue as to the footing on which I should deal with this matter, having regard to the provisions of s 160 of the Criminal Code.

[104] That section recognizes that the performance of an act (i.e. conduct) causing death can lead to a conviction for manslaughter by either one of two separate routes. That is to say, manslaughter by reason of conduct that is reckless or manslaughter as a consequence of conduct that is negligent.

[105] The former route contemplates the existence, at the time of the relevant conduct, of awareness by the offender of a substantial risk that death will result from such conduct either to the actual victim *or another person* and also that, having regard to the circumstances then known to the offender, it was unjustifiable to take that risk. It is fair to say that the most culpable forms of manslaughter will normally be of that category.

[106] The second route focuses on death that results from conduct involving such a great falling short of the standard of care that a reasonable person would exercise in the relevant circumstances *and* such a high risk that death will occur, that the conduct merits criminal punishment.

[107] The concept of recklessness necessarily directs attention, in part, to the subjective state of mind of the offender. It must be demonstrated beyond a reasonable doubt that such person actually possessed an awareness of the existence of the relevant risk, to which an objective test as to justification for taking it must then be applied.

[108] In the present case, there is no positive evidence that Lazarus ever directed his mind to the existence of any risk attendant on his conduct, much less that there was a substantial risk of death being occasioned to anyone as a consequence of what he was doing. He appears simply to have been focused on meting out punishment to Natalie, albeit, having regard to the use of an iron bar, a potential level of punishment that was quite disproportionate to the circumstances as he must have perceived them. He had plainly lost his temper.

[109] No doubt it must have been apparent to him that his conduct might well have inflicted some serious harm on Natalie, but that is a far cry from saying that the only reasonable inference is that he must have been aware that such conduct necessarily carried with it a positive awareness (albeit one that was, perhaps, even virtually spontaneous) of the risk of causing death to anyone. Other reasonably possible degrees of awareness necessarily remain extant.

[110] In my opinion the Crown evidence falls short of proving manslaughter by reason of conduct that was reckless beyond reasonable doubt.

[111] Having said that, I am in no doubt that Lazarus' conduct has been shown to constitute that which was negligent in the sense adverted to by s 160 of the Criminal Code.

As to this, the pertinent considerations are:

- (1) Lazarus was in an angry, uncontrolled mood and wielding what must have been a substantial iron bar or similar object;
- (2) He was intent on meting out punishment to Natalie and it is stating the obvious to say that forceful contact by such an offensive object with the body of a person carried with it a high potential to inflict serious injury, that could well have had fatal consequences, dependent on its nature and point of impact;
- (3) The evidence unequivocally establishes that the relevant events were taking place in a quite dark location and it must have been obvious to Lazarus that there were persons other than Natalie present in the general area;
- (4) On his own statements to his mother, Lazarus acknowledged that, due to the poor light, "he couldn't see"; and
- (5) On any view, there was, in the circumstances, a high risk that wielding the iron bar with force toward the upper portion of Natalie's body in such a situation could cause the death of some person, as indeed it did.

[112] Viewed objectively, the conduct of Lazarus, on the occasion in question, fell far short of the standard of care that a reasonable person would exercise in the circumstances and there was such an attendant risk that death would occur that it manifestly merited criminal punishment. I conclude that Lazarus falls to be sentenced on that basis.

[113] In arriving at that conclusion I am prepared to accept that it may well be the case that Lazarus did not know and, due to the dark locality, could not see that Natalie's mother was immediately behind her, holding the baby. However, he certainly must have been aware that other persons were in the general vicinity at the relevant time and that there was a clear and obvious risk that some person other than Natalie might be struck as a result of his actions.

[114] I now turn to his personal circumstances.

[115] I have already recited that he is a very young man whose wife still supports him, despite the terrible outcome of his conduct. He remains in an apparently stable and, despite the intemperate behaviour of both parties on the relevant occasion, caring relationship.

[116] It is to the credit of Lazarus that he has readily conceded his guilt by entering what I regard as a timely plea, for which he must receive due allowance. He has already spent a substantial period in custody and it is common ground that any sentence served should run from 22 February 2008.

[117] He presents as a young, clean cut man who has no antecedent record. He has no history of alcohol or drug abuse and it is plain that he is deeply contrite concerning his foolish conduct. I consider that his prospects of rehabilitation -- to the extent that rehabilitation may be necessary -- are good.

[118] Lazarus appears to have strong, ongoing family support, despite the sense of loss referred to in the Victim Impact Statements. It is certified by Correctional Services, pursuant to the provisions of s 103 of the Sentencing Act, that he is suitable for supervision.

[119] The arrival at a sentencing disposition in this matter is no simple task. There are a series of important, powerful and, to some extent, potentially conflicting considerations to be taken into account.

[120] As is indicated by the maximum penalty provided by the Criminal Code, the taking of a human life ranks amongst the most serious crimes in the criminal calendar. Having said that, I immediately recognize that there is not and cannot be any set sentencing tariffs for offences of manslaughter.

[121] Circumstances giving rise to such offences vary enormously. In practical terms, they can span what is no more than a wide range of criminal negligence scenarios of varying degrees of culpability to situations involving serious recklessness exhibiting degrees of culpability approaching

very close to murder. Sentences imposed must necessarily reflect the level of criminal culpability relating to the individual circumstances.

[122] Nevertheless, the inherent seriousness of an offence of homicide with the associated requirement for a retributive sentence in recognition of it always remains an important factor for consideration.

[123] Equally, particularly in relation to offences involving violence in aboriginal communities, this Court has repeatedly made it plain that factors of general and personal deterrence and its overall protective function must loom large as considerations, especially where the violence is directed towards women or other vulnerable persons.

[124] To paraphrase what was said by the Court in *Waye v The Queen*,¹ to some extent subjective mitigatory factors must take a back seat to the need to recognize the factors to which I have referred.

[125] As against that, it is well settled that, in the case of young offenders -- particularly young first offenders -- a very important consideration must be rehabilitation. However, as was pointed out in *Waye*,² those who commit very serious offences must be left in no doubt that, regardless of their youth and prospects for future rehabilitation, they are likely to be required to forfeit their liberty for a very considerable period.

¹ [2000] NTCCA 5

² [2000] NTCCA 5

[126] The reasoning of the Court in *Waye*³ was, of course, a reflection of the comment of Martin CJ in *Bloomfield* to the effect that there is a point at which the inherent seriousness of an offence necessarily overrides the mitigating factor of youth. It also mirrored what was said by the New South Wales Court of Criminal Appeal in *R v AEM*⁴ at paragraphs 96 - 100 and in *R v Gordon*.⁵

[127] I, of course, recognize that there are some quite unusual features of this case that must be taken into consideration.

[128] Unlike so many other offenders who come before this Court, Lazarus is a young first offender who has no history of substance abuse. It could not fairly be said that, on any view, he ever consciously intended to inflict serious harm on anyone, least of all his own infant child, notwithstanding that his relevant actions were inherently dangerous. His behaviour on 2 July 2007 was manifestly out of character and there can be no doubt of his present genuine remorse and contrition.

[129] It must be recognized that, given his obvious failure to achieve an awareness of the inherent danger attendant on his actions and the fact that, had the relevant object wielded by him actually struck Natalie instead of the baby, she might well have sustained very serious or even fatal injury, his conduct was inexcusable.

³ [2000] NTCCA 5

⁴ [2002] NSWCCA 58

⁵ (1994) 71 A Crim R 459 at 469

[130] Nevertheless, at the end of the day, what actually occurred was certainly unintended and obviously devastated both Natalie and himself.

[131] I think that important features are the facts that Natalie remains supportive of Lazarus and apparently wishes to continue their relationship. Further, the families of both Natalie and Lazarus also appear to remain supportive of him. It is my understanding that there is no impediment to Natalie and Lazarus resuming cohabitation in an appropriate family setting when he is free to rejoin her.

[132] An additional important consideration is that, to date, Lazarus has already been in custody for an aggregate period of the order of about nine months and has had ample opportunity to reflect on the enormity of what he has done. The evidence indicates that he actually achieved such awareness at a fairly early stage. I do not consider that he is likely to re-offend.

[133] Without in any way minimising the seriousness of what occurred, I have concluded that I am justified in adopting a sentencing strategy in relation to Lazarus that would be unthinkable in cases such as *Waye*,⁶ *Bloomfield*⁷ and *Kolmala*,⁸ in which the young offenders involved perpetrated extremely serious crimes that were either opportunistic or at least to some extent premeditated and plainly intentional, resulting in predictable serious end

⁶ [2000] NTCCA 5

⁷ [2003] NTSC 9

⁸ *R v Kolmala (SC(NT))* Riley J, 17 June 2003)

results to their victims. Moreover, in two of those cases, the offenders had significant prior records of offending.

[134] It is inevitable that a substantial custodial head sentence be imposed in recognition of the inherent seriousness of this offence. However, I assess that offence, in terms of its culpability, to be towards the lower end of the spectrum of offences of manslaughter. I have found that it reflects culpable negligence rather than recklessness, as contemplated in terms of s 43AK of the Criminal Code.

[135] I take as my commencement point head sentence of five years imprisonment as appropriate to the circumstances. I reduce that by 25 percent to a sentence of three years and nine months in recognition of the timely plea of guilty entered by Lazarus. That sentence will run from 22 February 2008.

[136] Having particular regard to the circumstances generally and, specifically, Lazarus' young age, lack of antecedent record, contrition and excellent prospects of rehabilitation, I have decided to suspend the sentence after service of 12 months from 22 February 2008 with an operational period of three years from his date of release.

[137] He should understand that if he is convicted of an offence punishable by imprisonment within that period, he will be brought back before the court to be dealt with under the Sentencing Act and may have the sentence that I have imposed restored, as well as being dealt with for any further offence.

[138] A condition of the suspension will be that, during the period of operation of the suspension, Lazarus be subject to supervision by Correctional Services and comply with all reasonable directions of that service including directions as to residence, employment and participation in rehabilitative programs and services.
