

Transcript of Proceedings

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SUPREME COURT OF QUEENSLAND

CRIMINAL JURISDICTION

P LYONS J

Indictment No 438 of 2009

THE QUEEN

v.

DAVID GABRIEL WATSON

BRISBANE

..DATE 05/06/2009

..DAY 1

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

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MR CAMPBELL: Your Honour, for the record I am B G Campbell, Crown prosecutor and I appear for the prosecution. 1

HIS HONOUR: Yes, Mr Campbell.

MR ZILLMAN: I'm just waiting for Mr Watson to enter the Court, but Zillman's my name, your Honour, spelt, Z-I-L-L-M-A-N. My initials are S W. I'm instructed by Roberts Nehmer McKee Solicitors. I appear for Mr Watson. 10

HIS HONOUR: Thank you, Mr Zillman. Mr Campbell.

MR CAMPBELL: Yes, your Honour. Your Honour, perhaps the first matter to mention is that there is an indictment charging David Gabriel Watson on one count of murder currently before the Supreme Court in Townsville. I ask firstly that the matter be transferred to Brisbane. I understand that is not opposed.

MR ZILLMAN: That's so, your Honour. 20

HIS HONOUR: All right. I direct this matter be transferred to Brisbane.

MR CAMPBELL: And I ask that he be arraigned upon that indictment.

HIS HONOUR: Mr Associate.

ASSOCIATE: David Gabriel Watson, you are charged that on the 22nd day of October 2003 at the Yongala Shipwreck near Townsville in the State of Queensland you murdered Christina May Watson. David Gabriel Watson, how do you plead, guilty or not guilty? 30

DEFENDANT: Not guilty to murder; guilty to manslaughter.

ASSOCIATE: Not guilty to murder; guilty to manslaughter.

MR CAMPBELL: Your Honour, can I formally indicate that the Crown accepts that plea to manslaughter in full discharge of this indictment and I ask that he be called upon in relation to the charge of manslaughter. 40

HIS HONOUR: Certainly. Mr Associate, call upon Mr Watson.

ASSOCIATE: David Gabriel Watson, you have been charged on your own plea - sorry, you have been convicted on your own plea of guilty to manslaughter. Do you have anything to say as to why sentence should not be passed on you? 50

DEFENDANT: No.

ASSOCIATE: No, your Honour.

HIS HONOUR: Thank you. Mr Zillman, I should say that I've been provided with a folder of material on behalf of the Crown and I suspect you've also been provided with a copy of that.

Is there any difficulty about my having referred to the folder?

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MR ZILLMAN: None at all. Perhaps, of course, by consent and there is no difficulty at all.

MR CAMPBELL: Your Honour, it is proposed to proceed to sentence at this time. I understand that there is another matter that some of my learned friends would wish to mention very briefly.

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HIS HONOUR: Certainly.

MATTER INTERPOSED

MR CAMPBELL: Your Honour, could I hand up now a statement of facts in relation to the matter, and your Honour was provided with a copy of this document. I formally tender it.

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HIS HONOUR: Statement of facts will be Exhibit 1.

ADMITTED AND MARKED "EXHIBIT 1"

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MR CAMPBELL: And if I can start firstly with the prisoner's antecedents. I understand that he was born on the 5th of March 1977 and was therefore aged 26 at the time of the offence and is currently aged 32. He has no criminal history. I understand he has since remarried.

HIS HONOUR: Yes, thank you.

MR CAMPBELL: Your Honour, perhaps if I can start with a very brief overview and then touch upon the circumstances of the plea of guilty and his time in custody. Christina, or as she was known to her family, Tina May Watson nee Thomas, who I shall refer to as the deceased, died on the 22nd of October 2003 while diving on the Shipwreck Yongala 48 nautical miles east of the Port of Townsville. There then followed an extensive police investigation. A coronial inquiry was held in Townsville to the death in late November 2007 and in 2008. On the 20th of June 2008 the Coroner committed the prisoner to stand trial on a charge of murder and issued a warrant for his arrest.

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The accused did not attend that coronial hearing, although he was represented. He declined to give evidence before the hearing. On the 28th of November 2008 the Crown presented an indictment charging the prisoner with murder in the Supreme Court in Townsville. On the 13th of May 2009 the prisoner voluntarily returned to Australia and was arrested at the

Brisbane International Airport. In relation to the warrant issued to the Coroner the matter was mentioned before the Supreme Court in Brisbane later the same day and the prisoner was remanded in custody. He has remained in custody since that time, which is a total of 23 days and that should be declared as time served.

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Obviously his voluntary return is an important matter, and it's also important to note that if he had been the subject of extradition proceedings, that may well have involved the accused spending significant time in custody in the United States while the process was completed.

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Your Honour, the prisoner's plea of guilty to manslaughter is accepted in full discharge of the indictment. The basis of that can be very simply stated. The prisoner had undertaken to act as the deceased's buddy during the fatal dive. The prisoner, pursuant to section 290 of the Criminal Code, is held to be criminally responsible for her death as he failed to perform his duty in respect to her. He had undertaken the duty to act as her buddy. The importance of that role is obvious when scuba diving. The recognition of the dangers and the potential risks is precisely why a buddy system is in place and the accused had undertaken that responsibility.

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Your Honour, that in essence is the - or was the Crown contention in relation to the statutory alternative charge of manslaughter. At the time of the presentation of the indictment that alternative basis was indicated to the defence and that was really the first opportunity for the accused to plead to manslaughter on that basis. The accused voluntarily returned to Australia, thus avoiding the need to pursue extradition proceedings, and his offer to plead guilty to manslaughter on that basis of the breach of the section 290 duty which the Crown has now accepted, are therefore both substantial matters in litigation and should properly be given weight.

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It must, of course, also be taken into the mix for your Honour's consideration that in his previous accounts, his previous accounts had involved falsehoods and attempt to wrongly shift blame. However, in the end it would be my submission that there are serious aggravating features, and the circumstances of the offending are such that a significant custodial sentence is required, that even taking into account all of the mitigating factors, a sentence of not less than five years' imprisonment requiring him to serve not less than 18 months in actual custody is required.

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Your Honour, if I can then deal with the circumstances commencing with the location of the dive site where this tragic death occurred. The Yongala Dive Site is an internationally recognised dive destination for scuba divers situated at the wreck of the SS Yongala. The wreck is protected under the Historic Shipwrecks Act of 1976; that's a Commonwealth legislation. Divers are not permitted to penetrate the wreck, however provision has been made for divers to descend into the water and view the wreck.

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Various scuba diving companies have been granted permission to lead scuba diving expeditions to the site and moor their boats near the wreck. For that purpose there are a number of designated mooring spots. I can hand up a diagram which indicates where those mooring sites are in relation to the wreck. On this particular day the current was flowing from - as we look at the plan, from the top access diver point to the bottom access diver point, so of course the boats at their mooring would have also been in that same direction. I'll tender that document, your Honour.

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HIS HONOUR: I think a copy was in the bundle given to me, Mr Campbell. That will be Exhibit 2.

ADMITTED AND MARKED "EXHIBIT 2"

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MR CAMPBELL: Your Honour, that diagram also shows that there are diver access points above the bow and stern of the wreck. These consist of a buoy and an anchored line to allow divers to descend - and descend down to and from the wreck. The wreck lies in about 30 metres of water and the top decks of the wreck are approximately 16 metres below the water surface. These depths are within safe recreational limits for experienced divers. However, the dive site is classified as advanced because of potential for strong currents. On the day of the fatal dive the site was rated as advanced.

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Your Honour, if I can then deal briefly with the deceased, Tina Watson, and I should indicate that Tina's parents - sorry, Tina's father, her sister and a best friend, Amanda Phillips, have all travelled from the United States and are present in Court. Victim impact statements have been prepared and I will deal with those in due course, but it is obvious that she was a dearly loved and greatly - and is greatly missed by them.

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The deceased was born on the 13th of February 1977 and was therefore 26 years old at the time of her death. She was a citizen of the United States of America and lived in Hoover, Alabama. She married the prisoner on the 11th of October 2003. The deceased and the prisoner were on their honeymoon at the time of her death. They married in Birmingham, Alabama in the United States and left for Australia on 13 October 2003, arriving in Sydney on the 17th and then travelled to Townsville on the 20th to commence the dive trip the next day.

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Your Honour, if I can now talk a little bit about the intended dive - intended trip and how it came about. The prisoner was the more avid diver. It seems the deceased completed her dive training and engaged in the sport at the prisoner's request and the desire to do something that he enjoyed. On the 21st of May 2003 the prisoner, whilst still in America, booked a seven-day dive trip aboard the Spoil Sport as part of their

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honeymoon. The Spoil Sport is a charter boat run by Mike Ball Diving Expeditions. The planned trip included dives at the Yongala Wreck, the Great Barrier Reef and Coral Sea. The prisoner and the deceased boarded the Spoil Sport at about 8 p.m. on the 21st of October and the vessel departed at about 9.30 for the Yongala site.

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It arrived there at around about 2 a.m. As part of the preparation and booking for the trip the prisoner was in contact with Mike Ball Diving Expeditions by email. On one occasion he inquired - and this is obviously included in the statement of facts, your Honour - "Would also like to know about the Yongala Dive. I have up to my Rescue Cert, however Tina only has her Beginner Cert. I noted on the booking form it says, "Anyone with less than 15 log dives in the past 12 months must pass a wreck orientation." Is this something you guys do on the trip so she would be able to dive it?"

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An email was sent in response and the accused was told, "With regards to the Yongala Wreck, should we visit the Yongala Wreck on the way out to the Coral Sea, Tina may need to sit out the first or second dive if she has not done enough dives to qualify her to dive on the wreck. We do sometimes return to the Yongala Wreck at the end of the expedition depending on weather and most often we do get there." Your Honour, that in particular is very significant because from an early stage the accused knew that the deceased may not have been sufficiently experienced to dive at this particular site.

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If I can then deal briefly with the relevant qualifications and experience of the deceased and the prisoner. Your Honour, as part of the procedures on the Spoil Sport, divers are assessed concerning their qualifications and experience. This is done to assess a diver's ability to conduct particular dives and a level of supervision required by the dive masters. The assessments were completed by the trip director for that particular trip, Mr Wade Singleton, and it was done on board the Spoil Sport on the 21st of October. The prisoner and the deceased were together for this interview.

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The deceased had an Open Water Certificate. That is the very basic entry-level qualification and was completed on or about the 8th of June 2003; that is that she completed that basic training after she became engaged to the accused and only four months prior to this trip. During her training there was an incident where she had panicked and ascended rapidly, however she subsequently competently completed the course.

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She advised Singleton that she had completed 11 dives in the previous 12 months with the deepest dive being 50 feet. The deceased was therefore classified as a relatively new diver or inexperienced diver. Singleton states that he recommended to the prisoner and the deceased that she do an initial orientation dive; that is, she would be accompanied by a dive master during the course of the dive, and also a night orientation dive. The deceased agreed to the night orientation dive, indicated she was comfortable diving with

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the prisoner and did not wish to do a daytime orientation
dive.

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The prisoner, on the other hand, held an Open Water
Certificate - that's the basic entry level. That was
completed in May of '98; an Advanced Open Water Certificate
completed in August of '98; and a Rescue Diver Certificate
completed in April of '99, and that's the qualification he
referred to in that email to Mike Ball. The Rescue Diver
Course completed over two days involved practical and
theoretical components, including how to search for and deal
with panicked and distressed divers and divers in difficulty.

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The training included practical training and role playing in
simulated emergency situations and a practical component
involving the sharing of an oxygen regulator. The prisoner
told Singleton he had completed 55 dives, including six night
dives. He said he had done 12 dives in the previous 12
months, the deepest being 150 feet. The prisoner was
classified as an experienced diver.

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On the morning of the 22nd and before the fatal dive,
Singleton says he again suggested to the prisoner and the
deceased that the deceased participate in an orientation dive.

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The deceased and the prisoner indicated that she was comfortable diving with the prisoner, and again the orientation dive offer was declined.

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Your Honour, in accordance with the usual practice in recreational diving a buddy system was insisted upon on the Spoil Sport. That is that divers remain in pairs. The need for that is obvious. The prisoner was to be the deceased's buddy. Factors which influenced Singleton to allow the deceased to dive with the prisoner rather than on an orientation dive included that she was partnered by the prisoner, who had rescue diver certification, and also that they said that they had been comfortable during their previous dives together. They also said they only intended to dive to approximately 15 metres. That is above the deck of the wrecks.

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And if I can then turn to the fatal dive itself. Prior to any diving occurring there were extensive briefings given to the divers concerning the nature of the dive site, what divers could expect to see, safety issues and indeed the buddy system. The necessity for buddies to go over their hand signals together was emphasised, as was the requirement for buddies to stay together. The procedures for raising an alarm in a lost buddy situation was also covered.

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The trip director's directions in relation to this particular dive were for the divers to travel to the access point from the bow - above the bow of the wreck by tender from the charter boat itself and then to descend from that access point and then drift along the length of the wreck to the stern and then ascend on that access rope. Divers would then be collected by tender and returned to the Spoil Sport. Appropriate checks were conducted on the equipment of the deceased and the prisoner and the equipment was functioning properly.

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Your Honour, the deceased's equipment included, as is standard, a buoyancy vest or buoyancy compensation device known as the BCD. This is a vest worn by the diver which is connected to the air supply. The diver can then inflate or deflate the device to adjust their buoyancy. Typically a diver will carry weights so that they are slightly overweighted and will have negative buoyancy. This assists the diver to ascend more easily. Once the diver has reached the desired depth they inflate the BCD sufficiently to gain neutral buoyancy. That is the diver does not ascend or descend unless they swim in that direction. When the diver wishes to ascend they increase the inflation of the BCD causing them to rise. The deceased's BCD also incorporated a second regulator as a safety backup.

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The prisoner and the deceased travelled to the access point and commenced to dive and only descended to a depth of less than two metres. They then returned to the line and were collected by the tender and returned to the Spoil Sport. The prisoner indicated he had a difficulty with his dive computer which he was able to correct on board the Spoil Sport. The

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deceased also apparently had a problem with being underweighted. That is, she had difficulty in descending, which she also corrected. It is noted by one witness that whilst on board the Spoil Sport the deceased appeared flushed, wide eyed and anxious, although the tender diver noted they were both relaxed.

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The prisoner and the deceased returned by tender to the access point in that the tender with them was Singleton, the trip director, and two divers that he was taking on an orientation dive as well as a volunteer diver who was to be part of Singleton's group, such there were four with two sets of buddies. At the access point all the divers disembarked and the deceased and the prisoner descended the line first. It was then about 10.30 that morning. Singleton then descended with his group but he did not see the prisoner and the deceased as he was concerned with his group. The tender diver, Mr Haslett, returned to the Spoil Sport, collected the last two divers and transported them to the access point above the bow. These divers entered the water and then Haslett began to return to the Spoil Sport.

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Your Honour, the Spoil Sport was moored at 0.905 which is demonstrated on that diagram. A number of other vessels were also moored at the site. That included the Jazz II, which was at 0.904. As Haslett let was returning to the Spoil Sport and near to the wreck - near to the deck of the Jazz II he saw the prisoner come to the surface of the water approximately six metres away. He observed the prisoner to be distressed and was signalling for help. Haslett went to him as quickly as possible. He asked where his buddy was and the prisoner said, "She's gone to the bottom and she's disappeared. She's in trouble." Haslett then sought assistance from the Jazz II, which was about 15 metres away, and also from the crew on the Spoil Sport.

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Your Honour, from the data on the prisoner's dive computer it is possible to estimate the time that the prisoner surfaced. The computer records - sorry, the computer records when there are particular changes in depth in feet. This was a more - calibrated imperially and it notes the minute in which that occurred. The computer indicated that the prisoner passed through the 10 foot mark and the three foot mark on his ascent during the 8th minute of his dive so that the dive in total had taken seven minutes and some seconds, but less than eight minutes. Divers aboard both the Jazz II and the Spoil Sport prepared to dive and search for the deceased. Haslett brought the prisoner onto the tender and returned him to the Spoil Sport. As Haslett was taking the rescue divers to the access point Singleton surfaced with the deceased. That was approximately two and a half minutes after the prisoner had surfaced.

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If I can then deal with Singleton's attempts to rescue the deceased. Singleton in his group had descended to the bow of the wreck and proceeded to go along its side. They proceeded about 30 metres along the side of the wreck and down to a depth of about 25 metres when Singleton noticed a diver on the

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sea bed. He initially thought the diver was looking up observing something, however, he then noticed the diver was not moving, had no bubbles coming from the regulator and he could not see the diver's buddy. Singleton swam towards the diver. As he approached he recognised it was the deceased. He was unable to locate the prisoner.

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Your Honour, that process was actually and coincidentally captured by photograph by a photograph taken by other divers. I'll tender that. It shows a diver in the foreground, but behind him it shows Singleton descending towards the deceased and it shows the deceased on the sea bed.

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HIS HONOUR: The photograph will be Exhibit 3.

ADMITTED AND MARKED "EXHIBIT 3"

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MR CAMPBELL: Your Honour, Singleton could not get a response from the deceased. He noted her eyes were open, her mask was in place and her regulator still in her mouth. She was not breathing. Singleton took hold of her and commenced to ascend to the surface. He dropped his own weight belt and inflated her BCD. During the ascent he purged her regulator a number of times; that is to force air into it. That he was able to inflate the BCD and purge the regulator indicated that there was air in the deceased's tank and that her equipment was working.

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Once on the surface with the assistance of the captain of the Jazz II the deceased was taken aboard the Jazz II and resuscitation attempts were commenced. A doctor specialising in emergency and trauma medicine was a passenger on the Spoil Sport and went over to the Jazz II and took control of that resuscitation attempt. Another doctor, a passenger from the Jazz II who had been diving at the time, ascended and gave assistance. Radio communication was established with the Townsville Base Hospital and advice was given to the people involved in the resuscitation attempt, however, after consultation with the hospital at 11.21 a.m. resuscitation efforts were ceased and life was declared extinct.

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During that resuscitation attempt the accused remained on the Spoil Sport, unlike what he had subsequently said to the deceased's family.

Your Honour, if I can then deal with the post-mortem findings and examinations of the equipment. A post-mortem examination was conducted by Dr Williams on the 23rd of October 2003. The cause of death was assigned as drowning. In essence the deceased failed to receive sufficient oxygen whilst under the water. The post-mortem was unable to determine why the deceased was deprived of oxygen, however, there are a number of possible explanations which include the deceased being in difficulty as a result of natural phenomena. An examination

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of the deceased's diving equipment has not revealed any defects. The deceased was not excessively weighted.

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If I can then turn to data which has been able to be retrieved from the various dive computers. The deceased and the prisoner both had dive computers for this particular dive. Those devices are designed to assist the diver to remain within safe diving parameters, depth and time of dive, air remaining, list of nitrogen narcosis, et cetera. They are not designed for subsequent forensic analysis. However, from the data from those computers suggest that the prisoner and the deceased were conducting their dive as indicated to Singleton; that is exploring the wreck to the depth of about 15 metres. It is the Crown allegation that during the 6th minute of the dive the deceased descended towards the sea bed and the prisoner ascended towards the surface. The prisoner's computer indicated that during the 6th minute of the dive he descended through the 50 foot mark achieving a maximum depth of 54 feet. In that same minute he then ascended through the 41 foot mark. He passed through the 31st foot mark and the 19th foot mark during the 7th minute of the dive and then, as I've indicated, the 10th and three foot marks during the 8th minute before surfacing.

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There is only one witness who purports to see the deceased and the prisoner at about the time they separated. That is Dr Stutz who was a passenger on the Jazz II. He was descending down to the bow access line when he saw the deceased and the prisoner in physical contact. He saw that they then separated with the prisoner ascending and the deceased sinking to the sea bed. Dr Stutz completed his dive and exited the water. He then proceeded to assist in the resuscitation efforts on the deceased.

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Your Honour, if I can then turn to the prisoner's explanations. The prisoner provided explanations of what had occurred under water to a number of people, including Singleton, the trip director, and police. Some of those versions did not necessarily purport to be a complete detailed version and there are significant variations in the versions over time. However, the prisoner has consistently claimed that the deceased indicated that she was in difficulty at a time when they were at a depth of about 15 metres and that they then attempted to return to the access line. He was assisting her by holding her hand and then her BCD. There was an incident where his mask and regulator were dislodged and the deceased sank away from him and he then decided to surface.

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Specifically Singleton spoke to the prisoner a short time after the deceased's death. That was in the prisoner's cabin. The accused stated that he reached 45 feet and they commenced their drift along the ship wreck. At some stage the deceased signalled that she wanted to turn around and head back and the prisoner saw that her eyes were wide open, which can be a sign of anxiety. They turned around and started heading back. On this version to Singleton the prisoner stated he grabbed the deceased's hand to help her swim. While swimming the deceased

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appeared to relax - sorry, whilst swimming the deceased appeared to relax and shortly after the deceased tried to grab his regulator and mask. He told Singleton that he was unable to tow the deceased, released the deceased and she sank quickly to the bottom. The prisoner ascended and told the crew in the tender the situation.

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He also gave a version to Paula Schneider. She was a diver on the Spoil Sport. He told her that the deceased panicked, was too heavily weighted, that she knocked his mask off and tried to grab his regulator and he tried to get her to inflate her buoyancy jacket before she panicked. The prisoner told Paula Schneider the deceased was sinking, her arms were outstretched upwards, she was looking up and he was looking into her eyes. He told Schneider that he hoped the deceased didn't think he was leaving her there to die and knew he was going to get help. The prisoner stated he had to make a split second decision to follow her or go for help and that he left her and went for help.

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The next version I'll refer to is given to Mr Stephen, who is the operation manager for Mike Ball Expeditions. He met the prisoner on the evening of the death. The prisoner told Stephen he was swimming back with the deceased to the descent line. He told Stephen that the deceased was no longer swimming and as he turned around the deceased knocked his mask off and regulator out. The prisoner said he cleared his mask, put his alternate in - that is the safe second - looked down and saw the deceased falling backwards, arms extended, not moving. The prisoner said he started swimming after the deceased, had felt pressure in his ears and was unable to clear or equalise his ears. That is really a very minor concern considering the risks that were then facing her.

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The prisoner told Stephen he was concerned that if he went to the bottom he would not be able to bring her to the surface. The prisoner decided the best thing to do was to go to the surface for help. Your Honour, obviously the police became involved after the Spoil Sport carrying the deceased arrived back at the Port of Townsville. Detective Senior Constable Kevin Gehringer obtained a typed statement from the prisoner on the day of the deceased's death. The process was also recorded on a C90 tape-recorder, and a copy of that statement was attached to the material provided to your Honour, and I tender a copy.

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HIS HONOUR: Mr Watson's statement will be Exhibit 4.

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ADMITTED AND MARKED "EXHIBIT 4"

MR CAMPBELL: Your Honour, the prisoner stated he held a search and rescue dive certificate, however, stated to obtain that certificate he undertook training in navigation, the use of lift bags, recovery of persons on the water surface. He

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did not disclose any training or ability to bring a diver to the surface from below the water, although it is noted that this had been specifically covered as part of the rescue diver course. The prisoner stated that he and the deceased left the descent line at about 40 feet and headed out over the dive site. About 30 yards from the descent line and right over the top of the wreck the prisoner felt the current was strong and the deceased indicated she wanted to go back up. The prisoner stated that he and the deceased started to swim back to the rope side by side when the deceased started to go down a bit. The prisoner began pulling the deceased and at some stage she stopped swimming and started sinking. The prisoner turned towards the deceased and grabbed his inflator hose, motioning for her to do the same. The prisoner said the deceased grabbed her inflator hose and the BCD and squeezed the hose, but he didn't think she'd put any air into it. He didn't know if she hit the wrong button. It is noted, your Honour, that Singleton was able to inflate the deceased's BCD.

The prisoner stated that the deceased continued sinking and he realised something was wrong. He said he grabbed hold of the strap of her BCD and started swimming back to the anchor line. The prisoner towed the deceased who was not assisting. The deceased's hand then came across his face, grabbed his mask and pulled it back causing it to fill with water. The prisoner stated he let go of the deceased to clear his mask. He then realised that his regulator was not in his mouth. He grabbed his safe second - that is the backup regulator attached to his BCD - and turned around and observed the deceased five to 10 feet below him but out of arm's reach. The prisoner said he had enough air still in his lungs to clear his mask.

The prisoner described that the deceased grabbed a hold of the mask "like someone might do if they ran out of air and they were grabbing for a regulator". The prisoner's failure to assist the deceased with a source of action again, particularly by sharing his air supply, was a significant failure to perform his duty as a buddy.

The prisoner said he saw the deceased sinking to the bottom, saw her eyes opened but the deceased was not moving at all. Specifically the prisoner said she was not flailing her arms or kicking. She therefore presented no danger to the prisoner. The prisoner said he swam down to grab her or do whatever he could but then realised there was nothing he could do. It is the Crown allegation the prisoner could have easily reached the deceased if he attempted to do so. Even if she was sinking away from him the deceased would have been - not have been sinking rapidly. The prisoner stated that he swam back over to the anchor rope and started going up. At around about 20 feet he saw other people hanging onto the rope. He tapped them to gain their attention and pointed in the direction of the deceased, however, he had no way of telling them what he needed. The Crown allegation is that the prisoner did not approach anyone on the line. His point of surfacing was inconsistent with being on or close to that access line. He had also not sought assistance from Singleton

who had entered the water just behind him.

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Your Honour, the accused was interviewed again on the 27th of October and that all came about in these circumstances: on Friday the 24th the prisoner and his mother, who by that time had flown out from the United States, attended the Townsville morgue to view the deceased's body. At the conclusion the prisoner informed Detective Gehringer and Senior Constable Lawrence that he wished to clear up matters in relation to the occurrence and an article he had read in the Townsville Daily Bulletin about the incident. As a result the prisoner and his mother attended the Townsville Police Station again on the 27th.

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During the interview with Lawrence and Gehringer the prisoner clarified that he was 25 or 30 feet - 25 or 30 feet away from the anchor line over the wreck and not 30 yards as stated in the statement given on the 22nd. It is noted that the prisoner made this alteration after having read that the visibility of the Yongala site was at best 15 metres. The Crown alleges that the change was therefore to explain how he could see people on the access line. It is noted that his original estimate of 30 yards is more consistent with the estimated position where Singleton found the deceased.

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The prisoner stated he considered the Yongala was not a drift dive but rather a severe current. Your Honour, it's noted that while estimates of current strength are a matter of impression and experience, the divers who were in the water at about the same time as the prisoner and the deceased have given a variety of estimates of current strength from virtually nil to very strong. None of them considered the current at the time was in the severe category, although one diver, who had dived some hours earlier, described the current at that time as very strong and savage.

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During this interview the prisoner stated that after he had cleared his mask and accessed his safe second that the deceased was below him sinking. He said he upended and began his descent by kicking and reaching out, thinking he would grab hold of the deceased. He told police he considered other options such as removing the deceased's weights, inflating his - inflating her BCD and ascending. This illustrates that he knew appropriate actions to take in such circumstances. The prisoner stated that as fast as he could kick down the deceased was sinking just as fast.

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Your Honour, the prisoner's dive computer does not record this descent, however, it is possible that the prisoner descended less than 10 feet. It is the Crown contention that the prisoner by swimming down should have been able to reach the deceased. By not remaining with the deceased or following her as she was sinking meant that the prisoner was not in a position to assist her with oxygen or assist her to the surface. This again is a significant breach of his duty as a buddy. The depth of the sea bed was well within the experience of the prisoner.

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During this interview the prisoner - with the police the prisoner raised concerns about the quality of the brief - of the briefing given by the Spoil Sport crew and criticised the failure by the crew not to offer the deceased an orientation dive. It is the contention of the Crown that the deceased and the prisoner were offered an orientation dive but they declined the offer. It is the Crown's contention that this was an attempt by the prisoner to deflect blame for the death onto the crew of Spoil Sport.

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Your Honour, if I can next turn to a deposition which the prisoner gave. The prisoner became involved in litigation in the United States against his travel insurer. As a result he took part in a deposition on the 4th of April 2006 in Birmingham, Alabama. The prisoner's deposition was sworn under oath. During that deposition the prisoner again criticised the crew of the Spoil Sport. He also described that the training for his rescue diver certificate involved the use of lift bags, under water navigation, surface rescue and how to deal with a panicked diver.

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Your Honour, as the deceased buddy the prisoner was duty bound to do what he reasonably could to assist the deceased if she encountered any difficulty and to ensure the safety of the deceased. The prisoner was aware of the deceased's relative inexperience. The prisoner breached his duty because he failed to ensure that she 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 - that she needed assistance; thirdly, at having let go of her 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 prisoner was in serious breach of the duty he had undertaken as a buddy with fatal consequences.

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The length of time it would necessarily take for anyone else to be able to find and retrieve the deceased virtually extinguished any chance of survival or resuscitation. The prisoner's breaches of his duty deprived her of a chance of survival and contributed to her death. The prisoner was therefore to be held criminally responsible for her death. Your Honour, I've taken the liberty of preparing a short - a very brief summary of my outline - an outline of my submissions and I will hand up a copy of that.

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HIS HONOUR: A copy was included in the bundle provided to me, I think, Mr Campbell. I might have read it. Do you wish me to have it placed with the file or made an exhibit?

MR CAMPBELL: Yes, your Honour.

HIS HONOUR: I'll have it placed with the file.

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MR CAMPBELL: Your Honour, there are therefore a number of very serious features to the accused's offending. As your Honour is aware, to be guilty of manslaughter in these circumstances involves a very serious breach of the duty owed. I take this really from the Bench Book directions which would be given to a jury if the matter proceeded to trial on the - which, of course, would have included the alternate charge of manslaughter. If the matter had proceeded to trial the jury would have been told that to convict the breach of duty - to convict of manslaughter on the basis of a breach of duty the breach must be much more than would suffice in a civil case, that the breach so far departed from the standards of care incumbent upon him as to amount to conduct deserving of punishment. The jury would have been told since we're in a criminal Court we are concerned with whether there was a departure from those standards which is serious enough for the State to intervene and punish the person on the basis that he behaved with so little regard for the safety of others that he deserves to be punished as a criminal, not merely made to pay compensation. It must be in a category of behaviour that the only adequate punishment is for - is for his lack of care to be branded as a criminal and for him to be punished by the State for it.

There is therefore inherent in the charge itself that it was a very serious breach of the duty he owed. The other aggravating features include, firstly, that the consequences to the life of the deceased as a result of his breach of duty were virtually guaranteed. He virtually extinguished any chance of her survival. This case is therefore quite different from those cases where there was a small risk which the offender either had not appreciated or hoped would not eventuate. Here the risk to her life was almost certain and it must have been known to the accused that when he left her she would almost certainly die. The accused's comment to Paula Schneider, which I refer to in paragraph 32 of that statement of facts, reflect his recognition of the risk to her life.

Your Honour, this is a case where the sentence must reflect the very serious obligation that a person undertakes as a buddy. It is a case that calls for a deterrent sentence, in this context reinforcing that persons must take their responsibilities as a buddy very seriously. The second particular aggravating feature is that at no point did the accused change his mind and go back to her and attempt to bring her to the surface. That is the breach is not just an instantaneous one, rather it continued for a significant time. The accused descended during the 6th, 7th and 8th minute of the dive. In that same context Singleton, having seen the deceased, descended to the sea bed and ascended with her over about twice the distance in about half the time. The accused clearly had a much greater level of experience - This is the third particular aggravating feature: the accused clearly had a much greater level of experience than the deceased.

No doubt it was her trust in him as her husband and her buddy that would have overcome any fear or reluctance to undertake

this dive, particularly in the context where she was being told that she should take an orientation dive. Indeed, it was the accused's level of experience that led to the dive operators allowing her to dive with the accused. That must be seen in the context that the accused knew from the emails that his level of experience - sorry, that her level of experience was such that she might have to sit out this particular dive. No doubt the deceased was therefore placing great trust in the accused and the accused had a heightened level of responsibility toward her.

Fourthly, the breach of duty in this case was gross, fundamentally failing the well recognised duties of a buddy. Coupled with that the fact that he was the husband of 10 days it is almost inexplicable that he would make the decision to leave her. The breach of his duty in those circumstances could only be viewed as extremely serious. Fifthly, there is also the feature that he had the rescue diver qualification involving training and precisely the sort of skills required in this situation. Sixthly, the accused's subsequent behaviour, particularly in attempting to shift blame on to the dive company and wrongly suggesting that they were not offered the orientation dive, for example, and seventhly, the consequences to the deceased's family have been devastating.

Your Honour, I do have victim impact statements from her father William, more commonly known as Tommy Thomas, her mother - that's Cindy Thomas - sister Alanda Thomas, and I also have a statement which has been prepared by her friend who is also in Court, Amanda Phillips. Your Honour, I understand that there are some issues with the statements that my learned friend wishes to raise. Can I propose this: can I present those victim impact statements and the statement from Ms Phillips, who is, as I've indicated, a very dear friend of the deceased and her family? I understand my learned friend may be objecting to either the entire statements or part of the statements. What I'm proposing is to provide them to your Honour and my learned friend can indicate what he objects to, and your Honour can then consider and take into account that which your Honour considers is relevant. Could I say that in my submission they should be relevantly and importantly before the Court because of a number of features. Firstly, the victims, and that includes the - pursuant to the definition under the Criminal Offences Victims Act, the immediate family of the deceased have a right to have their voices heard. That is indeed the purpose of the Criminal Offences Victims Act, and I can hand up a copy of section 14 of the Act, your Honour.

HIS HONOUR: Thank you. Just give me a moment, please, Mr Campbell. Yes.

MR CAMPBELL: Can I also refer your Honour to section 9 of the Penalties and Sentences Act which is included in volume two of Carter?

HIS HONOUR: Yes.

MR CAMPBELL: If I can refer your Honour particularly to section 9(2)(c). And----- 1

HIS HONOUR: Just a moment. It refers to harm to a victim.

MR CAMPBELL: Sorry, your Honour?

HIS HONOUR: That refers to harm to a victim.

HIS HONOUR: Yes. 10

MR CAMPBELL: And your Honour, can I also refer to 9(2)(r)?

HIS HONOUR: Yes.

MR CAMPBELL: And make the submission that that section is broad enough to include not only the statements of the direct family but also the statement of Ms Phillips. While I'm referring to the Penalties and Sentences Act, can I indicate that section 9(3)(b) would apply, and therefore 9(2)(a) does not? 20

HIS HONOUR: Yes.

MR CAMPBELL: And that the factors in 9(4) would apply. Your Honour, in my submission-----

HIS HONOUR: Well, sorry, in principle they would, yes.

MR CAMPBELL: Your Honour, in my submission this material is properly before the Court to enable the Court to understand the devastating loss that they have suffered. To do so it is necessary to give an understanding of the nature of their relationship, not just biological with the deceased but also the nature of it, and that obviously includes their perceptions of her relationship with the accused, because they have not just lost a daughter or sister. She was unlawfully killed by the man who had married her 10 days earlier. That fact has a significant impact on how it affected them and therefore their perceptions of him and their relationship is important to the impact of her death upon them. Similarly, how they perceive he has behaved subsequently has a very real impact on the way they have been affected by the offending, and that is also relevant to the question of remorse. Therefore, it is my submission that the statements are to be appropriately received by the Court because in the end the accused's unlawful killing of the deceased has had a devastating consequence for the family. 30 40

Your Honour, shall I say they are the statements as I have received them and I'll hand up for your Honour's consideration, firstly, the statement of Mrs Cindy Thomas, then Alanda Thomas and then Amanda Phillips and then Mr Thomas, because there are some things I need to point out to your Honour about them because there are some matters referred in them that your Honour should not place weight upon. 50

HIS HONOUR: I'm grateful to you for that, Mr Campbell. Mr Zillman, I take it that there are objections you wish to make to some or all of these documents, so I won't formally receive them as exhibits until I have heard from you.

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MR KIDSTON: Thank you, your Honour.

MR CAMPBELL: Your Honour, can I highlight those points that your Honour shouldn't be concerned about? Sorry, that the Crown says you shouldn't place weight upon?

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HIS HONOUR: All right. You've given me a single copy of these documents. Do you have an extra copy, because what I may do is use one set as a working set if I have an extra set? If not we'll just proceed.

MR CAMPBELL: Thank you, your Honour. Unfortunately I don't. I have my copy which has the highlighting I'm about to refer to. If I can deal firstly with the statement of Cindy and take your Honour to the first page, the 4th paragraph.

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HIS HONOUR: Just a moment, please. It commences, "My little girl".

MR CAMPBELL: Yes, "My little girl". It's the - at the end of the second line you'll see there is a suggestion that the accused played cards. That was a suggestion which was contained in some of the initial statements. It was not supported in evidence at the coronial inquiry.

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HIS HONOUR: Thank you.

MR CAMPBELL: Your Honour, there are also a number of references to murder.

HIS HONOUR: Yes, in view of the Crown's position I should ignore that.

MR CAMPBELL: Yes. Your Honour, the authors are firmly convinced that the accused murdered the deceased. That is reflected in the statements, and it would be artificial to expect them to write their statements from any other perspective. Your Honour is not being asked to sentence on that basis. Your Honour is to sentence on the basis that the accused unlawfully killed the deceased, but that distinction does not in any way affect the impact of her unlawful death upon her mother, father, sister and friend.

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HIS HONOUR: I can understand the submission about the depth of the effect on them, but their perceptions about the accused may be affected by their view of the nature of the offence.

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MR CAMPBELL: Yes. And your Honour must take that into account when reading it.

HIS HONOUR: Thank you.

MR CAMPBELL: It would be artificial to ask them to draft these documents in any other way.

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HIS HONOUR: I well understand that.

MR CAMPBELL: Your Honour, can I make the same comment about the penultimate paragraph on page 2 from line 4?

HIS HONOUR: Just one moment. The line commences, "Not being a line".

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MR CAMPBELL: Yes. It's really from part of the evidence, and I make the same comments.

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HIS HONOUR: Just a moment - just a moment please. In effect you say that - that paragraph is affected by their view on the offence. 1

MR CAMPBELL: And more than that, her views about that are not relevant to your Honour's consideration-----

HIS HONOUR: Thank you. All right.

MR CAMPBELL: -----of the appropriate sentence for unlawful killing. 10

HIS HONOUR: So I should disregard the balance of that paragraph?

MR CAMPBELL: Yes.

HIS HONOUR: Thank you for that.

MR CAMPBELL: In relation to Elanda's statement, that is the statement of Elanda Thomas, on the 7th page which is the second last, the references to murder in the third and fourth paragraph should be dealt with in the same way. And the last sentence of the last paragraph on page 8, should also be dealt with in the same way. 20

In the statement of Amanda Phillips, in the last paragraph of the second page, her views - it's really the first sentence of that, her views about that are conjecture, and then the last six lines should also not be regarded from - I beg the Court. 30

HIS HONOUR: Yes, thank you.

MR CAMPBELL: And if I can take your Honour to the statement of Mr Thomas, which is the lengthiest of the statements.

HIS HONOUR: Yes.

MR CAMPBELL: It's the fifth - fourth paragraph. The paragraph starting "One Friday". 40

HIS HONOUR: Sorry, what page?

MR CAMPBELL: It's the fifth page.

HIS HONOUR: The fourth paragraph, thank you.

MR CAMPBELL: "One Friday". Whilst it's part of his narrative, it is no part of the Crown case that----- 50

HIS HONOUR: Yes.

MR CAMPBELL: What's referred to there is not part of the Crown case that he unlawfully killed her-----

HIS HONOUR: I'd assumed that already, yes, thank you-----

MR CAMPBELL: Yes, pursuant to the section 290 breach. And then if I can take your Honour to the final page----- 1

HIS HONOUR: Just bear with me. Yes?

MR CAMPBELL: The first paragraph is essentially conjecture. And I should say the suggestion in relation to my office is unfounded.

HIS HONOUR: Yes. 10

MR CAMPBELL: The important issue from that material is that the death had a devastating effect upon those persons. And your Honour perhaps if it's convenient for my learned friend to indicate his position on it.

HIS HONOUR: Mr Zillman, do you object to the reception of all of the documents or to some parts beyond those identified by Mr Campbell a moment ago? 20

MR ZILLMAN: I'm objecting to some parts beyond those referred to by the learned Crown Prosecutor.

HIS HONOUR: I haven't read anything except the short passages I've been referred to. Do you wish to proceed immediately or do you prefer me to read?

MR ZILLMAN: Yes, if I can have your Honour make the appropriate markings so you can consider it in due course. Before however I pass to the passages, could I make this submission, that your Honour would of course be principally guided by section 14 of Criminal Offence Victims Act, and you have already been referred to that. 30

HIS HONOUR: Yes.

MR ZILLMAN: At sub-section 1, relevantly provides that the Court ought be informed of the appropriate details of the harm caused to a victim by the Crown. Now I also want to refer your Honour to a matter of Queen v Singh which is a matter of the Court of Appeal of Queensland. The citation is the Queen v. Singh (2006) QCA 71. Can I hand to your Honour a copy of that case, and draw your Honour's attention to the judgment of his Honour Justice Fryberg and the remarks that he made with respect to Victim Impact Statements at page 8. 40

I know of no other consideration by the Court of the use that might be made of Victim Impact Statements beyond that passage in Justice Fryberg's judgment. 50

HIS HONOUR: Mr Campbell hasn't referred me to any either.

MR CAMPBELL: No.

HIS HONOUR: Just bear with me a moment please. I've read the passage.

MR ZILLMAN: Yes, the passages that I particularly rely upon are these, and there are three of them. The first commences about eight lines down, "Sentencing Judges". 1

HIS HONOUR: Sorry, the note that the other members of the Court, at least Justice Williams certainly because - Justice Fryberg "Your Honour the President" - I'm not sure whether she commented on - at least I take it Justice Williams did.

MR ZILLMAN: Yes. 10

HIS HONOUR: "Your Honour, the President seems to have agreed with Justice Fryberg" "Yes I----"

MR ZILLMAN: Yes, implying - indicating that he would give the judgment.

HIS HONOUR: Yes, thank you.

MR ZILLMAN: Yes, the three passages I particularly rely on are as follows: The passage commencing with "The sentencing judges" which is about eight lines down. 20

HIS HONOUR: "should be very careful"?

MR ZILLMAN: Yes.

HIS HONOUR: Through to?

MR ZILLMAN: The end of that sentence. 30

HIS HONOUR: Yes.

MR ZILLMAN: Next is the sentence commencing a little over halfway down that paragraph "However, if they contain material".

HIS HONOUR: Yes.

MR ZILLMAN: Through to the conclusion of that sentence. And then I also rely on the last sentence of the paragraph commencing "It is unfair". So those are the three passages that I particularly rely on. 40

HIS HONOUR: The issues that this raises is not the reception of the statements but the way that they are dealt with in the course of fixing the sentence.

MR ZILLMAN: Well I suppose, with respect, that's correct. It's the use that's to be made, and I'm objecting to perhaps the use rather than the reception. 50

HIS HONOUR: Yes, in the way that his Honour has identified. All right?

MR ZILLMAN: It's noteworthy, your Honour, that a great deal of the materials contained in those statements, while it was known to the Crown, formed no part of any submission by the Crown that it ought to be relied upon. In other words, those persons who provided statements at an early time, which were received by the Coroner, and much of what appears in these victim impact statements, also appears in those statements and so those were matters known to the Crown.

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The importance of that is that the Crown has not sought to refer to it in the case of their submissions and ask your Honour to rely on in some way adverse to my client.

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HIS HONOUR: I haven't yet heard from Mr Campbell about what he says I should do with material in these statements though today.

MR ZILLMAN: No, I suspect that.

HIS HONOUR: The objection is to the reception of them, not a discussion of the use as you first raised, I mean?

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MR ZILLMAN: That's true. I refine my submission. It really is just to the use that might be made of them. So I can shortly go to these statements and take your Honour through the parts that I'm - on behalf of my client concerned-----

HIS HONOUR: Mr Zillman, I'm technically happy to do that but if, on reflection, the objection isn't to the reception, but a response - but a submission about the use to be made of passages, is it perhaps better to hear the conclusion of Mr Campbell's submissions first, or would you rather speak now about these matters?

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MR ZILLMAN: Well, it might be but as we speak, I'm reflecting on those matters. I suppose it might be said there's a mixture; that is an objection to reception and to the use for the reason that Section 14 allows the reception of the material on the basis that it details harm caused by the crime.

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HIS HONOUR: Well, it caused to a victim by the crime?

MR ZILLMAN: That's right. To a victim by the crime and I'm not taking issue that these people may not appropriately place materials before you, but it's what in the materials.

HIS HONOUR: Do you accept that they are in the category of victim-----

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MR ZILLMAN: Yes.

HIS HONOUR: -----for the purpose of Section 14?

MR ZILLMAN: That's right.

HIS HONOUR: All right. Thanks.

MR ZILLMAN: So I don't know where we perhaps go from here, whether it's back to the Crown----- 1

HIS HONOUR: Well, if you wish to pursue at least in some respects a submission about reception even of some passages-----

MR ZILLMAN: All right.

HIS HONOUR: -----or if even if you think you would rather speak about your concerns about the passages now since this course has been embarked on; I'm content to do either. 10

MR ZILLMAN: I'll take that course, your Honour. That's the latter course to proceed with. Dealing with them then, I think in the order with which they were dealt with by the Crown, the statement of Mrs Thomas, Cindy Thomas.

HIS HONOUR: Yes.

MR ZILLMAN: The passage just after the reference to cards, commencing----- 20

HIS HONOUR: I'm sorry, the passage, yes?

MR ZILLMAN: -----just after that, commencing, "He left her" and concluding, at the end of that sentence, "two weeks." And might I generally say, these and most of what I'm dealing with, are assertions of fact as against the impact of the crime upon these people? Furthermore, it's in the nature of things that these are only supplied at the last minute. Now, these----- 30

HIS HONOUR: They're dated today?

MR ZILLMAN: Yesterday. I received them yesterday anyway. They might be - I beg your pardon, I got them in draft form yesterday. They were signed this morning but we have extremely limited means of obtaining instructions on thousands of words which appear in the documents. 40

HIS HONOUR: Yes, I understand that.

MR ZILLMAN: It may be that Mr Campbell overlooked drawing your attention, particularly to the last few words on that page, but it certainly fits in that category that he raised with you.

MR CAMPBELL: And I did indeed mean to refer to that one, your Honour. 50

HIS HONOUR: Thank you, Mr Campbell.

MR ZILLMAN: Otherwise I have nothing further to say about that statement.

HIS HONOUR: I'm sorry, I don't quite understand the first point you - the first sentence you draw attention to and-----

MR ZILLMAN: Well, that's an assertion - I beg your pardon? 1

HIS HONOUR: -----the effect-----

MR ZILLMAN: Yes.

HIS HONOUR: -----it's an assertion of fact?

MR ZILLMAN: That's right. 10

HIS HONOUR: And what is your submission about it?

MR ZILLMAN: Well, the assertion is not accepted as a matter of fact and it doesn't, in any event, fall within Section 14.

HIS HONOUR: It would appear on its face to be speculation, possibly based on media reports which leave the accuracy of which one doesn't really know. 20

MR ZILLMAN: Or rumour. There's been a-----

HIS HONOUR: I was putting it gently.

MR ZILLMAN: -----great deal of it in this case so that's correct. I accept-----

HIS HONOUR: Should we deal with these points one at a time because sometimes it's difficult to revert? 30

MR ZILLMAN: Yes.

HIS HONOUR: Mr Campbell, am I correct in suspecting that the sentence in paragraph 4 has the character which I raised?

MR CAMPBELL: Yes, and if-----

HIS HONOUR: Yes, thank you, and that's probably sufficient to deal with it, thank you. 40

MR ZILLMAN: The other objection I had in that statement has already been accepted by the Crown prosecutor so there is nothing further to be added.

HIS HONOUR: Well, in view of that and bearing in mind what's been said about it, shall I now receive the statement of Ms Thomas as an exhibit?

MR ZILLMAN: Yes. 50

HIS HONOUR: I'll make that Exhibit 5.

ADMITTED AND MARKED "EXHIBIT 5"

HIS HONOUR: Thank you. 1

MR ZILLMAN: The next one I might refer your Honour to is the victim impact statement of Alanda.

HIS HONOUR: Yes.

MR ZILLMAN: There are a lot of passages here that I'm taking issue with. 10

HIS HONOUR: Do they have a common character, or-----

MR ZILLMAN: Yes-----

HIS HONOUR: All right.

MR ZILLMAN: -----they, generally speaking do. They commence at the bottom of the first page in the last - that is the last paragraph, the second sentence commences, "The longer." 20

HIS HONOUR: Yes.

MR ZILLMAN: So-----

HIS HONOUR: Just bear with me a moment?

MR ZILLMAN: Yes.

HIS HONOUR: Through to the end of that paragraph at the top of page 2? 30

MR ZILLMAN: Yes. Yes, and throughout all of the second page.

HIS HONOUR: Just let me finish reading.

MR ZILLMAN: Yes.

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HIS HONOUR: I've read to the end of the paragraph which runs from the bottom of page 2 to the top of page 3. Should I continue through to where? 1

MR ZILLMAN: To the end of the penultimate paragraph, that is concluding with the words, "He was/is".

HIS HONOUR: All right. Yes, I've read that.

MR ZILLMAN: I have no objection to the last paragraph on that page. 10

HIS HONOUR: That's a fairly substantial part. I suspect your objection really is to the weight to be attributed to the material from the bottom of page 1 to the bottom of page 3 in view of its nature and in view of the view the family takes of the offence.

MR ZILLMAN: Well, it is beyond that, I'm not simply addressing my submissions on the question of weight, but whether or not it properly falls within section 14 and therefore has any relevance. Bearing in mind these are assertions of fact which of course cast him in an unfavourable light. And might I say this much----- 20

HIS HONOUR: It doesn't seem to be to me at least, subject to hearing from Mr Campbell, at best seem to address the issue raised by section 14 subsection 1.

MR ZILLMAN: In fact most of my submissions concerning this matters are on that same basis. 30

HIS HONOUR: This is not a personal criticism I might add of the authors of the statement. One well understands why they wish to express and have me know what their views are. But the real question is whether it was material properly to be relied on in establishing a sentence. Do you want to say more about that part of the statement of Amanda Thomas, Mr Campbell? 40

MR CAMPBELL: Yes, your Honour. My submission is really based upon 14 and 9A in particular, because the impact upon the particular person has to be assessed in the circumstances, and that includes the nature of their relationship to the deceased and that obviously includes her relationship with the accused because as I indicated earlier, he was also her husband of ten days, and that is a relevant factor into the fact of her death having an effect upon them. It cannot be divorced from the circumstances. 50

Their perceptions of the relationship between the accused and the deceased therefore is a factor in how the death affects them, and they have properly set out their perceptions of that relationship. In this particular case I'm talking about Yolanda.

HIS HONOUR: Yes. My difficulty is in appreciating the relevance of this material to the determination and the

sentence to be imposed, because it does not sit comfortably with the view that's been taken by the Crown in accepting the plea in some respects.

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MR CAMPBELL: If I may, your Honour, it very much affects the effect it has upon the victim on the basis that he has unlawfully killed her. That is the relevant consideration that the unlawful killing of in this case, Alanda's sister, has had this very dramatic affect upon her. She sets forth, therefore, the circumstances, and that includes her perception of that relationship because that is a factor as to how the death has affected her, and in the end, your Honour should take the view that the affect upon the family, upon Alanda, has been devastating.

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HIS HONOUR: But if it's been devastating and the devastation is increased because the family takes a view of the offence which the Crown doesn't share why should that affect the sentence?

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MR CAMPBELL: It goes beyond the view of the circumstances, sorry the view of the basis of the criminality. It goes to her perception of that relationship and therefore the unlawful killing has an effect. This does not refer to a murder rather than a manslaughter, this refers to the nature of the relationship between the deceased, the accused and indeed Alanda. It's in that context that your Honour can assess how the unlawful killing has affected her. Her perception of that relationship is a relevant factor in how much effect it had upon her and it's in that context that I put it before the Court because in my submission the victims have a right to have their voice heard in this way.

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HIS HONOUR: Mr Campbell, why is it not correct to take this view of that material to the extent it deals with the relationship between the author of the statement and the deceased it's admissible because it demonstrates a close relationship. But beyond that, the fact that at times the relationship between the deceased and Mr Watson was less than perfect is a little difficult to give any role in determining a sentence.

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MR CAMPBELL: In her perception, because it is not just anyone who killed her, it was the man who married her sister ten days before. So it must be a factor that affects - the effect that the killing had upon her. And from her perception there were these features.

HIS HONOUR: I propose to receive the material, and if you wish to say more in light of what I've indicated about the basis on which I'll initially receive it, feel free to do so. But my present view is as indicated.

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MR CAMPBELL: Your Honour, I've made my submissions.

HIS HONOUR: I said that without giving you the chance to reply Mr Zillman, was there more you wished to say before I'm finally committed to that position.

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MR ZILLMAN: No, I'll close my submission.

HIS HONOUR: I'm not going to rule it out and I certainly regard it as relevant to establishing the relationship between the deceased and her family, her immediate family. Beyond that subject to hearing something more persuasive about particular matters, I find it rather remote in terms of establishing matters relevant to the determination of a sentence.

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MR ZILLMAN: It might be best then that I truncate the detail of my submission because it is-----

HIS HONOUR: Similar in character.

MR ZILLMAN: Self evident when one goes through it but that is and each of the others, but that's the basis of my complaint.

HIS HONOUR: Are you content to leave things there or would you like to indicate particular passages?

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MR ZILLMAN: No, I'm content to leave it there because there's many passages beyond those which I've already raised and it will take a long time to go through them, so I can put it on the general basis that I have. But can I also indicate this. Generally with respect to the statements and the position of Tina's family there can be no question of their feelings and their grief, and doubtless of their anger towards my client and I certainly don't take issue with those matters.

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HIS HONOUR: No.

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MR ZILLMAN: The devastation to them is obvious.

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HIS HONOUR: Of course. Thank you for that. I'll make the victim impact statement of Alanda Thomas, subject to the matters that have been raised previously, Exhibit 6.

ADMITTED AND MARKED "EXHIBIT 6"

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MR ZILLMAN: Now, as I indicated, I didn't propose then to go through the others, because the objections are exactly the same with respect to the others. But you'll see it as you read them.

HIS HONOUR: I'll make the victim impact statement of Christina - sorry, of Amanda Phillips Exhibit 7 and the victim impact statement of Mr Watson-----

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MR ZILLMAN: Thomas.

HIS HONOUR: Thomas, sorry, pardon me, Exhibit 8, again subject to the matters raised earlier.

ADMITTED AND MARKED "EXHIBIT 7 AND 8"

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HIS HONOUR: Right. Mr Campbell?

MR CAMPBELL: Your Honour, if I could then return to my submissions or would your Honour wish or not to need to read those?

HIS HONOUR: I'm in your hands. I'm happy to read them if you wish me to.

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MR CAMPBELL: Yes, and I'm happy to proceed with the rest of my submissions, your Honour, and your Honour can perhaps read them following that. Now if I can then turn to some matters that might be of assistance to your Honour in determining the appropriate sentence, and I have provided copies of some of these cases to your Honour. Can I say that there is no case which I have been able to find which is directly comparable? These cases are cases dealing with persons who have been convicted of manslaughter on the basis of breaches of particular duties where the circumstances are quite different but they might be able to provide your Honour with some degree of assistance. If I could commence with the matter of McKenzie, which is [2000] QCA 324?

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HIS HONOUR: Yes.

MR CAMPBELL: Your Honour, I can hand up another copy but I did provide your Honour with a copy last evening. 1

HIS HONOUR: You've already provided me one, thank you.

MR CAMPBELL: Your Honour, it's my submission that this is a more serious case than McKenzie. She was convicted of manslaughter on her own plea of guilty on the basis of criminal negligence although I should say there was an attempt to withdraw that plea on appeal, and in the Court in the end considered that that course did not affect the remorse that she demonstrated. She was originally sentenced to eight years' imprisonment with parole eligibility after three years. Your Honour will see, in paragraph 8, that she was 62 and had been married to the deceased for 39 years. 10

That particular accused was the subject of protracted domestic violence, which was considered to be a significant mitigating factor, particularly by your Honour Justice Dutney, and that is a factor that is not present here. She was also suffering from a major depressive episode, again a factor not present here. The paragraph 10, the circumstances are set out, "On the day there was violence by the deceased to the accused and both were drinking. She then went and got a shotgun, believing it was unloaded; returning towards the deceased, she tripped on the stairs, it discharged and killed him. There was instant distress and remorse." 20

She was a retired schoolteacher, had excellent character and references. There the sentence was reduced to five years with a recommendation of parole after 12 months. Now, that was subsequently changed on the second judgment to five years suspended after 12 months, for reasons that are not now relevant. Your Honour, I should note that his Honour Justice McPherson dissented in relation to the sentence considering that six years for parole after eligibility for two years was more appropriate, and that's in paragraph 60, but the Court in majority, in the end, imposed five years suspended after 12 months. 30

The Court referred to a number of decisions, included Streathfield, which is S-T-R-E-A-T-H-F-I-E-L-D, also a case where the offender believed the gun was unloaded. His Honour Justice McPherson considered the appropriate sentence in Streathfield on, after a trial, was in the order of seven years, and that an effective sentence of six years with a recommendation of parole after years was imposed. Can I reiterate that in my submission the current case is more serious than McKenzie. This accused did not have the mitigating circumstances of the long abusive relationship. In McKenzie the killing occurred as a result of a trip or stumble although, of course, the real gravamen was that she went and got the gun and McKenzie like Streathfield believed the gun was unloaded. 40 50

Here the accused made an appalling, gross error which had inevitable consequences. The accused cannot rely on the

mitigating factors of mental health issue, the mental health issue that Mrs McKenzie had. That was also a factor which was present in Milini, M-I-L-I-N-I, which is [2001] QCA 424. He fired a gun, believing it contained a blank cartridge, killing a 28-year-old woman who was then pregnant. On appeal, he was sentenced to five years, suspended after two years, but it's noted that he had an IQ of only 84. He pleaded guilty to manslaughter on the basis of criminal negligence; he was originally sentenced to seven years but that was reduced on appeal.

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The paragraph 9 of the judgment, your Honour will see that the matter was referred to the Mental Health Tribunal and he was found to be of diminished responsibility, therefore the murder charge was discontinued but as it turned out he actually pleaded on the basis of criminal negligence. Your Honour, can also refer to the matter of Stoughton van Emdem, which is reported in 2002, two Queensland reports 313. I did not supply a copy of that because it's really only concerned with the conviction point. Those accused were convicted of manslaughter after they either injected or supplied a dose of heroin which caused death. The deceased was a willing recipient of the heroin. They also dumped the body. I refer to it because the sentence, in fact, imposed was five years' imprisonment.

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I can refer to the matter of Hile, which is H-I-L-E, [1999] QCA 17. That offender pleaded guilty to manslaughter and was sentenced to six years, with parole after two and a half; it was not disturbed on appeal. That accused injected an irregular user of heroin with very high-grade heroin at the deceased's request. She began to convulse and the accused administered CPR while the ambulance were called. There were initial denials of administering the dose and then full admissions. At page 4, it's clear that he believed he was injecting her with a relatively small dose, which did not place her at risk. Others had consumed apparently without difficulty. I should indicate that his Honour Justice Pinkus dissented and at page 13 and 14 he would've reduced the sentence.

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Your Honour, there are some other cases which I can refer your Honour to which, in my submission, are also less serious, but I place them before your Honour for completeness. They include the matter of Pesnak and Pesnak, which is [2000] QCA 245, sometimes referred to as the Breatharians case. There a husband and wife were convicted of manslaughter after trial. Your Honour will see in paragraph 2 that the accused, both accused and the deceased were all adherents of Breatharianism. At paragraph 3, your Honour will see the deceased voluntarily commenced a spiritual cleansing program which involved, in essence, 21 days without food. The predictable occurred and your Honour will see from paragraphs 4 to 7 that there was a course of deteriorating health over 10 days until finally, in paragraph 8, the male accused called the ambulance. The basis of responsibility is outlined in paragraph 12.

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HIS HONOUR: Just bear with a moment, please. Yes?

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MR CAMPBELL: Essentially, they were sentenced on the basis that they intended no harm, and in a deluded way, but genuinely believed her difficulties were caused by a spiritual struggle and that she would come to no harm. The male offender was sentenced on appeal to four years with a parole recommendation after 18 months.

Your Honour will note in paragraph 24 that the major factor in sentencing these types of matters is the departure from the reasonable community standards, and in my submission in this case-----

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HIS HONOUR: Sorry, what was the paragraph?

MR CAMPBELL: Paragraph 24. Your Honour, the Peznaks believed, based on their deluded religious beliefs, that she would not come to harm. As a result - and I should say that that deceased voluntarily commenced the program - this accused acted in a gross breach of his duty to ensure the safety, a duty he had undertaken appreciating the risks, and that there were concerns about her diving at this site, and that's particularly by reference to the emails and the recommendation that she undertake the orientation dive, and that when he left her he appreciated the risk to her life. It's, therefore, my submission that the accused behaviour must be characterised as significantly worse.

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Your Honour, finally, if I can refer to a recent single Judge decision. That is a decision of her Honour Justice White, and it's the matter of Cramp. The citation is in my outline. It involved a case of failing to provide the necessities of life, and she was sentenced to five years imprisonment with a recommendation of parole after 18 months. That accused, who had very recently taken in the care of her four daughters - she was also a recovering heroin addict.

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The youngest of the daughters, a three year old, fell in the shower causing an injury that over some hours led to her death. The accused sought advice from neighbours and kept careful watch on her daughter but didn't call the ambulance, it seems for fear of alerting authorities and therefore losing the care of her children again. If she had called the ambulance, the daughter may have survived. As I've indicated, her Honour Justice White sentenced that offender to five years with a recommendation for parole after 18 months.

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Your Honour, taking into account all of those matters, as I've indicated none of which are precisely on all fours with this situation, it is my submission that to reflect the serious nature of the accused breach and the other aggravating breaches, that a head sentence, before consideration of mitigating factors, of six years imprisonment would be appropriate.

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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. 1

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. 10

In those circumstances, it is my submission, your Honour, that an appropriate way to structure the sentence is to impose that sentence of five years suspended after 18 months and certainly no less. Unless I can be of further assistance, they are my submissions.

HIS HONOUR: No, thank you for your assistance, Mr Campbell. 20

MR CAMPBELL: Your Honour, I apologise, I have failed to tender the pre-sentence custody certificate-----

HIS HONOUR: Thank you for-----

MR CAMPBELL: -----which indicates there is a period of 23 days which should be ordered to be considered time served.

HIS HONOUR: Subject of a declaration, yes. I'll receive the pre-sentence custody certificate as Exhibit 9. 30

ADMITTED AND MARKED "EXHIBIT 9"

HIS HONOUR: And those are your submissions? 40

MR CAMPBELL: Thank you, your Honour.

HIS HONOUR: I suspect it's desirable that I read the Victim Impact Statements before I hear from you, Mr Zillman.

MR ZILLMAN: Yes.

HIS HONOUR: And I therefore propose to adjourn until 10 past 12.00 to read those statements, and I'll also make arrangements about the matter that was listed for not before 12.00 in that period. Adjourn till 10 past 12.00 please. 50

THE COURT ADJOURNED AT 11.51 A.M. TILL 12.10 P.M.

THE COURT RESUMED AT 12.20 P.M.

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HIS HONOUR: Yes, Mr Zillman?

MR ZILLMAN: Your Honour, my ultimate submission is that, by an analysis of the facts and circumstances in this case, and paying due regard to the various authorities, that the Court would impose a sentence of the order of four years imprisonment and would appropriately suspend that sentence after my client has served a period of approximately 12 months. Your Honour, it is traditionally the case that, where a prisoner enters a timely plea of guilty, the Court will recognise that by ordering the person to serve of the order of a third of the head sentence. Now, in the event that the Court saw the appropriate head sentence of four years, a third of that period would be some 16 months, but there are particular circumstances in this case that I point to that would, in the end, cause your Honour to order a lesser period of custody to be actually served that a period of 16 months, and I'll address those now.

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The first matter upon which I would rely is simply this. My client made admissions to the investigating police officers which ultimately was the foundation of the Crown case. The second issue is that there then were known to the investigating officers all necessary detail that might have caused his arrest. That is, for the offence for which he has pleaded guilty this morning.

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The second issue is that there then were known to the investigating officers all necessary detail that might have caused his arrest, that is, for the offence for which he has pleaded guilty this morning.

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HIS HONOUR: By then I take it you mean in October 2003?

MR ZILLMAN: Or thereabouts. I don't necessarily say it was on the very day but certainly within a short period following. Notwithstanding that there has therefore been a substantial delay for which he bears no responsibility and I will address that in some more detail shortly.

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The next matter that I specifically identify in these submissions is that although he was not charged until such time as the Coroner charged him with the offence of murder his case has attracted intense publicity, particularly in the media and elsewhere. Thousands upon thousands of words have been written concerning this matter, at least on the internet. He has been for a long period of time publicly accused of a crime or crimes for which he is not guilty. He has had to endure that situation for a period of up to six years.

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The next matter that I particularly raise: beyond his admissions is his subsequent cooperation with the criminal system of justice. He chose not to contest any extradition proceedings, which obviously were contemplated but which had not commenced. And he voluntarily returned to this country to face a charge of murder. It was not until such time after his return that the DPP indicated that they would accept a plea of manslaughter in discharge of the indictment.

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And the last matter-----

HIS HONOUR: Sorry, I just want to get that clear. So the first knowledge that your client had of the acceptance of a plea of manslaughter was quite recent?

MR ZILLMAN: Yes.

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HIS HONOUR: Thank you.

MR ZILLMAN: That is to say after his return.

HIS HONOUR: Yes.

MR ZILLMAN: And the last matter is that of course he is not a citizen of this country and all of his family and friends reside in the US and so any time in prison that he is required to serve will be harder for him than it would be for an Australian citizen.

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So can I return to those matters and address you upon them, as well as other matters which are certainly relevant? Your Honour, he was interviewed by police following the return of the Spoiled Sport to Townsville. He provided a statement and thereafter was reinterviewed on a number of occasions and as I indicated to you earlier the admissions that he made were

sufficient foundation for the charge as it has been accepted
this morning. 1

Now, thereafter there was an extensive investigation where the
police set about the gathering of evidence and materials which
may have supported a charge of murder. As I indicated to you
earlier there was much debate and much speculation well prior
to the time that the Coroner determined it was a prima facie
case with respect to that charge. He was the subject of such
adverse publicity that it simply is not overstating it to
describe it as a vilification of his otherwise good character. 10

You would, consistent with the Penalties and Sentences Act, of
course give him due allowance for his good character. As you
heard he has no previous convictions. He does have persons
willing to speak on his behalf and I have a number of
references which I will now tender in that respect. I don't
know if your Honour wishes me to identify them but there's a
bundle. I can simply hand them to you and ask you to admit
them as a bundle. 20

HIS HONOUR: We receive the references as to Mr Watson's
character as Exhibit 10.

ADMITTED AND MARKED "EXHIBIT 10"

HIS HONOUR: Shall I read these now? 30

MR ZILLMAN: Yes, please, your Honour.

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HIS HONOUR: Yes.

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MR ZILLMAN: Your Honour, has seen some reference in those references to his current position but for the purpose of the record I can indicate that he did remarry. That is in August of last year. His wife is present in Court today and supports him.

Your Honour, he works in a family business in a packaging materials business in the United States and it his wish, of course, on his release to return to the United States and to resume that employment which his business, I don't think I indicated, is currently conducted by his father.

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Your Honour, with respect to the issue of delay which I have touched upon, I refer your Honour to the judgment of the Victorian Court of Appeal in the matter of The Queen and Tivurcy, numbers 355, 56 and 57 of 2005. Judgment delivered the 12th of August 2006. Can I hand a copy of that to your Honour.

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HIS HONOUR: Thank you.

MR ZILLMAN: And I would ask you particularly to note the Court's approval of statements made in the cases of Cockerill and Blanco which both appear on the first page.

HIS HONOUR: Just a moment please.

MR ZILLMAN: Could I simply invite your Honour to read that passage commencing at paragraph 3 through to the conclusion of the page.

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HIS HONOUR: Yes.

MR ZILLMAN: Your Honour, this is a case of course of a kind at least based in the concepts of criminal negligence and for that reason the references to rehabilitation which appear in those passages are not so much relevant. But it is the second of the principles upon which I particularly rely, namely that where a matter has been hanging over the head of a person, thereby keeping that person in a state of suspense, then that is a matter properly to be taken into account. And there is also in the judgment of Blanco an endorsement of the desirability for prosecuting authorities to act promptly.

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I want to now go to the facts as they have been alleged. Considerable weight, your Honour, has been placed on the fact that my client held a rescue diver's qualification. I wish to address you about that. The qualification was obtained in mid-1999, about four and a half years prior to this particular occasion. The course was a two day course which in large part focused on the theory rather than the practicalities of rescue and of the course evidence was before the Coroner that about 20 per cent only of that course was devoted to rescue as against related features such as search.

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Now, the evidence also of Mr Crocombe, which was before the Coroner, provides an important qualification to how such a certificate might be regarded. Mr Crocombe was a commercial diver. He was in fact working on the Yongala site on the day of this tragedy.

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He gave evidence before the Coroner as to the worth of the certificate as follows and I will read it to you. It is contained at page 647 to 648 of that record. He said this much:

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"Whether or not somebody who has got a piece of paper says they are a rescue diver who is competent to be able to control a situation when they have got a panicking diver under water or not is another thing. A rescue diver who has been through the requirements of the course, and you can get two people go through the same course and at the end of that course - one can be - they can meet all the skill requirements, they can meet all the academic requirements of the course, and get the piece of paper that says they are a rescue diver, and you can have a very different level of competence at the end of that. And as an example we have a person who said - working for us years ago who had lots of qualifications as far as first aid and things like that go. There was a person who had a heart attack and she panicked and came - came running to me to get me to go out and provide first aid for this person and at the time my level of certification was way below her. She had the piece of paper. She should have been able to handle the situation a lot better but she panicked. And with rescue divers I feel exactly the same way. You can have two people do the same course and at the end of that course even though they have done the same theory and same practical skills you can get a big difference in who is going to be the better person to be able to perform a rescue or handle the situation under water."

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Now, the fact is my client's qualifications were obtained four and a half years prior to this day. There was no refresher course or updating at all of those qualifications. As I said to you earlier, the course was one of two days' duration with about a fifth of that devoted to the actual rescue. He was in a position not much better than that of a novice in terms of rescue on that day.

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Your Honour, the facts are very clear. He panicked. He ought, in accordance with the duty imposed upon him, to remain, but he did not. He panicked. Now, that was a decision nonetheless made in the circumstances which were then happening. His wife was in difficulty, she was panicking, and he then panicked. It is not a case where the conduct occupied any substantial period of time. My learned friend says "he didn't reconsider and go back". Well, true, he didn't. But the timeframe in which things were happening was very short. In fact, on the evidence, it might have been that, from the time that he made the decision to go to the surface and when he surfaced, it was a little over a minute.

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Now, that must be contrasted, with respect, to various of the cases which you have been referred to and, in particular, the cases of Pesnak-----

HIS HONOUR: Yes.

MR ZILLMAN: -----and the other case of Kramp, which I will come to very shortly. But here what I am endeavouring to stress is that his decision was one born out of panic and, whilst the consequences of course were drastic, the time occupied was very, very brief. There is no question that he was distraught on his return to the surface and thereafter.

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I indicated to your Honour that, insofar as his rescue qualifications, he was in little better position than that of a novice. Insofar as his experience generally as a diver, again he was not someone who might be considered to be particularly experienced. Fifty-five dives is the number of dives that he had said to have undertaken over a period of at least five to six years prior. The fact is that most of those dives had been done not in saltwater, but in fresh. That is, a disused quarry in Alabama, which was used for the purposes of diving and dive training. The record reveals that he had not done any saltwater dive between July 2001 and the fatal dive in October 2003. The dives that he had participated in, in saltwater - that is to say current, in the present - had been in Mexico some four years prior to the fatal dive.

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I said I would go to the cases and I'll do so now, and I particularly want to address you on the basis of both Pesnak and Kramp. Your Honour will see, if you go to firstly Pesnak, that the program had commenced on Saturday the 13th of June 1998 - on the 21st line in paragraph four.

HIS HONOUR: Yes.

MR ZILLMAN: There is a description of the deterioration in the condition of the deceased in the paragraphs which follow, to the point in paragraph six where, on the morning of Wednesday the 24th of June, she was seen to be in such an enfeebled state that finally medical attention was called. Now, she ultimately died, as you will see at the bottom of paragraph eight, on the 1st of July.

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HIS HONOUR: Yes.

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MR ZILLMAN: It was implicit of course in the conviction that, had the medical attention been sought at an earlier time, death would not have ensued.

HIS HONOUR: Yes.

MR ZILLMAN: Now, that was a course of conduct commencing on the 13th of June, going through at least until the 24th of June. That is to say, over a period of some 11 days where she was steadily deteriorating.

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HIS HONOUR: Perhaps one should note the history from the 19th of June, though, in paragraph four.

MR ZILLMAN: That's true - that's true, so I accept that. We'll reduce that to five days at least where something ought to have been done because she was obviously in a desperate position thereafter. Now, this was described by the Court in paragraph 24 as involving "an extremely grave departure from reasonable community standards". Now, if one is accepting of that description in the instant case, it is difficult to understand how Pesnak might be said to be a less serious instance of this crime than the instant case. It's to be remembered that the male offender was sentenced to four years imprisonment with a suspension after 18 months, and his wife's sentence was significantly less, given her lesser role.

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Now, of significance, of course, is that there was a trial. Now, it was endeavoured to be argued on their behalf that, since it was an issue of community standards, the absence of the plea of guilty did not indicate an absence of remorse, and the Court regarded that submission as having some merit. But, nonetheless, recognised that there may have been no discounting of the sentence by reason of a plea of guilty, because there was no plea of guilty if there was a trial.

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HIS HONOUR: Where is that with-----

MR ZILLMAN: I'll take you to that. That follows reference to Streathfield at paragraph 23, where I ask your Honour to note the judgment of Justice Thomas, as he then was, where he said the absence of intention to harm must be a very significant factor. That's referred to in Streathfield at the bottom of page six. Thereafter, there's some further remarks - the matter where the breach was described in the terms that I've just used, but the particular reference that your Honour asked me about I thought was at that point, but I've since noted that is at paragraph 14.

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HIS HONOUR: There's also one in paragraph 26 in the second-last sentence.

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MR ZILLMAN: That's so, yes.

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HIS HONOUR: And the last sentence in paragraph 14 in particular supports your submission.

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MR ZILLMAN: Now, I might add that the Peznac - at least we're not in a situation where there has been a delay of time here. They certainly were not opine with some level of confidence, the subject of speculation to the extent that my client has been, naturally, they do not have - or did not have available the mitigating circumstances of a cooperation with the system of justice, not only by client's plea of guilty, but also by his voluntary return, and of course, they apparently were citizens of this country.

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I've already drawn your attention to that feature, so far as my client is concerned. Now, similarly so, in a Cramp's case, there was a substantial time alleged where Cramp was said to be in breach of her duty to provide all the necessaries of life.

You'll see on page 3 that, on the evening of the 17th of September, that the deceased had apparently fallen in the shower and suffered what turned to be a fatal injury. It wasn't until about 4 o'clock the next morning, that is, on the 18th, that she passed away when the prisoner having earlier fallen asleep, had woken to find her daughter to have died. The prisoner, as appears in the record, had numerous-----

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HIS HONOUR: Just a moment, if you would.

MR ZILLMAN: Beg your pardon?

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HIS HONOUR: Just bear with me a moment, if you would.

MR ZILLMAN: Yes.

HIS HONOUR: Yes, thank you.

MR ZILLMAN: She had numerous convictions, you'll see, in the middle of page 7, and there's reference to those. In fact, it would appear that she was, at the time of sentence, the subject of a suspended sentence which was then activated.

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Now, lastly, she apparently had resisted, of her own inclination perhaps, and advices for others to call for medical treatment, simply for selfish reasons.

HIS HONOUR: I'm not sure I'd class them as selfish, but nevertheless, they don't reflect the seriousness of the situation she faced.

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MR ZILLMAN: Yes. Your Honour, with respect to the issue of suspension, the Crown - and it's to be noted, of course, do not urge upon you to recognise the matters in mitigation of my client by way of any parole orders or recommendations and I join with the Crown in that submission.

If it were otherwise, of course, it'd be subject to those conditions and would not be free to leave the country. It is

of importance to him, of course, that once his sentence is served, that he do return to the United States. So, I do ask your Honour to proceed by way of partial suspension of the sentence. I just want to consult with my instructing solicitors for a moment.

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HIS HONOUR: Well, I don't propose to deliver a sentence before the date. Would you prefer to adjourn now or would you like to take a moment and continue?

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MR ZILLMAN: I will take a moment, if I might, but - in fact, remind myself of one matter that I intended to mention and that is, I made some submissions to you earlier that for a person to be sentenced to imprisonment, where that person is from overseas, is something that might ordinarily have been considered to be more onerous and might properly be taken into account.

I rely, in that regard, on that of Queen v Giri and Karki, a judgment of Justice Studdert of the Supreme Court of New South Wales. The reference is volume 109, Australian Criminal Reports, 499 and the passage particularly appears on page 505, paragraph 38 in these terms, "I am satisfied that in the case of each prisoner, incarceration is going to be more difficult for him away from his native land. This I will take into account."

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So, it's a short statement to that point. Can I perhaps hand that to your Honour.

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HIS HONOUR: Thank you.

MR ZILLMAN: Those are my submissions, your Honour.

HIS HONOUR: Do you wish to say anything further?

MR CAMPBELL: Your Honour, there are a couple of matters I need to apply to. Firstly, my learned friend made submissions about the accused's admissions. In essence, what the accused told police and others which is at the core of the basis of the plea of guilty, is that he ascended while she descended, but he attempted to give an exculpatory explanation for that.

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Those statements included what subsequent investigations proved to be significant falsehoods and attempt to shift blaming. The necessity to investigate therefore was important and difficult because many of the witnesses were from the four corners of the earth and it was a lengthy process.

It therefore cannot be said that the delay is not a fault of the accused because part of that process was because of his falsehoods and his attempts to shift blame.

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That also factors into his subsequent cooperation that he didn't contest extradition and voluntarily returned but your Honour can take, as a factor against that, that his initial responses were to tell falsehoods and to try and shift blame.

My learned friend also made some reference to the level of competency of the rescue certificate. The presence of the - the obtaining of the certificate indicates that he reached a minimum level of competence at the very least.

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What my learned friend didn't refer to was that he had, in fact, been involved in the rescue of one of his friends prior to this incident, where he competently assisted someone who was in difficulty.

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What the breach in this case is that he didn't try in relation to his own wife and that is the difference that I draw between the matters of Peznac and Cran is that the breach was so gross, so fundamentally failing the duties of a buddy and as husband and buddy, it is almost inexplicable that he would make the decision to leave her.

The breach of duty in those circumstances can only be viewed as extremely serious. Thank you, your Honour.

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MR ZILLMAN: Well, your Honour, I know I'm not permitted to-----

HIS HONOUR: I'd rather hear from you if you wish to say more, thank you, Mr Zillman.

MR ZILLMAN: I do. Can I simply raise these matters? Whether he told falsehoods or not, at some particular time, does not bear on his culpability with respect to this particular offence as it's particularised, in that respect.

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That was the point of my submission, that he made statements acknowledging that he did not remain with his wife and returned to the surface, and that is the basis of the Crown case. 1

HIS HONOUR: Can they be demonstrated by reference to the statement of the 22nd of October?

MR ZILLMAN: : I don't have it with me at the moment but they certainly - I expect they will be. 10

HIS HONOUR: I'll look at it then.

MR ZILLMAN: Because he said she was in trouble, she sank and he went to the surface.

The second issue is the other matter referred to by my learned friend, the other rescue. That was a case when simply, as I recall it, he prevented a fellow from ascending too quickly when that person was in some level of difficulty. But it was not a case of any comparability to that here, and obviously it was at a time, whenever it was, closer to his obtaining the qualifications. So those are the only matters I wish to respond to. 20

MR CAMPBELL: Your Honour, perhaps before my learned friend finishes, there was one other matter I needed to also mention very briefly. That was my learned friend's comment that his ascent time may have been as short as one minute. If I can refer your Honour to paragraph 29 - sorry. 30

MR ZILLMAN: Well, with respect, I didn't say minute, I said a little over a minute.

HIS HONOUR: Yes, I understood that.

MR CAMPBELL: If I can - it's on page 11, your Honour, in paragraph 30, which indicates-----

HIS HONOUR: Sorry, just let me catch up with you. Page 11, was it? 40

MR CAMPBELL: Page 11, paragraph 30.

HIS HONOUR: Yes.

MR CAMPBELL: Where the ascent time as recorded by his computer is indicated. So there is-----

HIS HONOUR: "During the sixth minute of the dive the deceased descended towards the sea bed and the prisoner ascended towards the surface." Is that what you're referring to? 50

MR CAMPBELL: Yes. And then, so during that sixth minute, so five minute and some seconds, he has gone down to 54 feet and then up through 41 feet, then in the next minute he's gone through 31 feet and 19 feet, and then in the next minute he's gone through the 10 foot and the 3 foot marks. So whilst it

can't be accurately calculated down to the moment it's - well, those things speak for themselves. 1

HIS HONOUR: It sounds a little to me, if I have the arithmetic correct, it was more than a minute but less than there.

MR CAMPBELL: Yes.

MR ZILLMAN: And might I just add to that, hopefully that is not in any way inconsistent with my submission. 10

HIS HONOUR: No. If neither of you wishes to make any further submission I propose to adjourn until 2.15.

THE COURT ADJOURNED AT 1.09 P.M. TILL 2.15 P.M.

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HIS HONOUR: Stand up, please, Mr Watson. You stand convicted on your plea of guilty of the offence of manslaughter causing the death of your wife. The offence occurred when you had both been diving in the vicinity of the historical shipwreck Yongala some 48 nautical miles east of Townsville.

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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".

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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.

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There are circumstances beyond those I have just described which are relevant to determining your sentence. You were clearly a far more experienced diver than the deceased was. The deceased had what is called an open-water certification, which I understand to be a basic diving qualification and which she had attained some months previously. The dive at the Yongala was a significant challenge for a diver of the level of experience and competence of the deceased.

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On the other hand, you were a diver with substantial experience, although it is pointed out that much of your experience was not in open waters where significant currents

could be encountered. You had a number of qualifications, including a rescue diver certificate which you had obtained some four and a half years before these events.

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The dive was carried out using the buddy system. As your wife's buddy for the dive, you took responsibility for providing her with assistance if she encountered difficulty. 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.

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It follows from these matters, that you failed to make any reasonable attempt to take the deceased to the surface. I therefore accept that you are guilty of a very serious departure from the standard of care which was incumbent upon you with the result that your conduct is deserving of criminal punishment.

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An offence such as manslaughter which involves the loss of a human life is obviously a very serious matter. The deceased

was 26 years old. You were recently married. She had every reason to look forward to a long and happy life. 1

Her death is also a great tragedy for her family. I have read the victim impact statements. They demonstrate that she and her family were very close and that she was very close to her friend. They demonstrate how deeply her loss is felt by all of them. Her family, obviously and naturally, take a very serious view of your conduct and that, not surprisingly, appears in their statements. However, there is much in those statements from which I do not gain assistance in determining your sentence. 10 20

I propose to say something about the course of proceedings which have led to today's hearing. The events which led to the charge against you occurred in October 2003. You were interviewed by the police on that day and on some occasions subsequently. 30

A coronial inquest was conducted in late 2007 and in 2008 resulting in your being committed in June 2008 and a warrant then issuing for your arrest. 40

An indictment charging you with murder was presented on the 28th of November 2008. 50

You have voluntarily returned from the United States and have surrendered yourself into custody in Australia. In my view, it is quite significant that at the time of your return you

against you. It is plainly considerable delay. When there is
delay in the prosecution of a criminal charge, a major
consideration which often works in reduction of the sentence
is the fact that rehabilitation may have occurred in the
period since the offence. That is not a relevant
consideration in this case. However, you have carried the
burden of these events for a substantial period. That is a
matter to which I am prepared to give weight.

I consider that that burden has been increased by the very
extensive publicity which these events have occasioned. That
is demonstrated, to some extent, by the obvious presence of a
significant number of representatives of the media in the
court today. I also accept that in that period you have been
subject to accusations of matters of which you are not guilty.

In addition to the admission constituted by your plea, I
accept that you cooperated with the police at an early stage
and that, generally, the essential matters relied on now for
acceptance of a plea of manslaughter were communicated by you
to the police in about October of 2003. In fact, a
significant number of them appear in the statement you gave to
the police on that day, including your certification as a
rescue diver, the fact that you and the deceased were on this
dive diving as dive buddies, and the circumstances in which
you left the deceased.

There have been, in some of your statements, some
inconsistencies and some attempts to put blame on other

people. There does not seem to be any persistence in your attempt to put blame on anyone else and I accept that the responsibility for this loss is yours alone. The inconsistencies and those attempts, to me, while they do not speak particularly well of you, should be looked at in the circumstances in which they occurred. That is, they occurred shortly after the dive and at a time when you, no doubt, were deeply upset by the events which have occurred.

I have been referred to a number of authorities. I do not propose to refer to all of them. There is always a difficulty in finding authorities which are strongly analogous to the circumstances of a particular case in which a sentence is to be given. I do, however, note the submissions made by your Counsel in relation to the case of Pesnak [2000] QCA 245. That was a case where the accused had a significant period of time, a matter of days, in which to identify the worsening condition of the person who ultimately died.

Your case is quite different. The precise time is unclear, but it can only have been of the order of two minutes from the time that the deceased first started to encounter difficulties until you surfaced, and the time within which you made your initial decision to leave her was obviously significantly less. 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.

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The seriousness of the matter, notwithstanding the factors
which I take into account in mitigation, means that it is
necessary to impose a penalty which provides for a substantial
period of imprisonment. I therefore propose to impose a head
sentence of four and a half years.

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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.

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Accordingly, I order that you be imprisoned for a period of
four and a half years. I declare that the period of 23 days
from the 13th of May 2009 until the 5th of June 2009 be deemed
time already served under the sentence.

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I order that the term of imprisonment be suspended after a
period of 12 months' imprisonment which will take into account
that 23 day period.

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I am required to inform you that you must not commit another
offence punishable by imprisonment within a period of four and
a half years to avoid being dealt with for the suspended term

of imprisonment.

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For the avoidance of any doubt, I order that a conviction be recorded.

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SENTENCE

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