

***Hutcheon v West* [2015] ACTSC 55 (13 March 2015) – Australian Capital Territory Supreme Court**

‘Assault occasioning actual bodily harm’ – ‘Choking’ – ‘Common assault’ – ‘Denunciation’ – ‘Deterrence’ – ‘Exposing children’ – ‘Manifestly inadequate’ – ‘Non-parole period’ – ‘Physical violence and harm’ – ‘Risk factor-strangulation’ – ‘Sentencing’

Charges: Choking a person so as to render them unconscious, assault occasioning actual bodily harm, common assault

Appeal type: Crown appeal against sentence

Facts: The respondent and victim were in a domestic relationship for three and a half years and lived together with the complaint’s son. One afternoon the respondent and victim got into a fight that resulted in the respondent striking the victim across her face and placing her in a chokehold. The respondent then placed his knee on the victim’s shoulder. After the victim asked him to stop, he asked ‘You want to die?’. The respondent then placed his hand around the victim’s throat and started squeezing before placing his other hand over her mouth and nose. As a result the victim briefly lost consciousness. Later the same day the respondent grabbed the victim by her hair and began shaking her. Attempting to free herself from the respondent’s grip, she ended up on the ground when the respondent kicked her face, and jumped and stomped on her arm and head. When the respondent realised the victim’s son witnessed the attack he told him ‘I didn’t do anything wrong. Mum’s flipping out’.

In relation to this conduct the respondent was charged and made late guilty pleas to choking a person so as to render that person unconscious, for which he was sentenced to 15 months’ imprisonment; assault occasioning actual bodily harm, for which he was sentenced to 10 months’ imprisonment, with three months to be served cumulatively on the sentence imposed for the offence of choking; and common assault, for which he was sentenced to five months’ imprisonment concurrent with the sentence imposed on the charge of choking. A non-parole period of 12 months was ordered. While the offending occurred, the respondent was on parole for burglary, theft and unauthorised possession of a firearm. The respondent’s parole was subsequently revoked and he was liable to serve the remainder of his sentence. The sentence imposed for the offence of choking was ordered to commence at the expiration of the sentence the respondent was serving as a result of the cancellation of the parole order.

The respondent had an extensive criminal history, having been convicted for approximately 80 criminal offences in the past 20 years. He also had a long history of substance abuse and mental health issues including being previously diagnosed with antisocial and paranoid personality traits. A pre-sentence report noted that the respondent made derogatory comments about the victim and demonstrated minimal victim empathy. The report also considered the respondent was at high risk of reoffending.

Issue: Whether the sentence was manifestly inadequate.

Decision and reasoning: The appeal was allowed on the sentences imposed for the offences of choking and assault occasioning bodily harm. These sentences were set aside and the respondent was resentenced to a term of three years and one month's imprisonment for the offence of choking and 20 months' imprisonment for the offence of assault occasioning actual bodily harm.

The starting point of 18 months' imprisonment adopted by the magistrate before a reduction for the guilty pleas was manifestly inadequate in relation to the choking offence when considering the maximum penalty of 10 years' imprisonment, the objective circumstances of the offence and the subjective circumstances of the offender. Burns J held that an appropriate starting point was three years and nine months' imprisonment with a reduction of eight months for the plea of guilty. Likewise, the starting point of 14 months' imprisonment for the offence of assault occasioning actual bodily harm was also manifestly inadequate. An appropriate starting point when considering the seriousness of the offending was two years' imprisonment, reduced to 20 months' imprisonment to reflect the plea of guilty.

In coming to this conclusion, Burns J considered that the seriousness of offences of violence within intimate relationships requires sentences that strongly denounce and deter such offending. Citing Wood CJ in *R v Edigarov* [2001] NSWCCA 436, 'such conduct is brutal, cowardly and inexcusable, and the Courts have a duty to ensure that it is adequately punished, and that sentences are handed out which have a strong element of personal and general deterrence'.