Lewis v Storey **[2019] ACTSC 74 (22 March 2019) – Australian Capital Territory Supreme Court**

'Physical violence and harm' – 'Sentencing' – 'Strangulation'

Charges: Five offences including two counts of common assault, one count of assault occasioning actual bodily harm, one count of choking to render insensible, and one count of possession of an offensive weapon with intent.

Case type: Appeal of sentence.

Facts: The victim and the appellant had been in a relationship for approximately two months. The two counts of common assault were constituted by the appellant putting his hands around the victim's neck and pushing her into a wall, as well as saying intimidating and threatening words. The appellant also armed himself with two knives (count of possession of an offensive weapon with intent), and had wrapped his arm around the victim's neck cutting off her circulation and causing her to lose consciousness (count of choking to render insensible). The count of assault occasioning bodily harm was established by the appellant kicking the victim numerous times, grabbing her hair and repeatedly hitting her head on the ground, and slapping the victim's face. The victim suffered significant injuries ([18]). Notably, a total head sentence of three years and six months imprisonment was imposed, with a non-parole period of 18 months.

Issues: The appellant sought leave to appeal on the grounds that that the sentence with the respect to the charge of choke render insensible and the non-parole period were manifestly excessive. He sought leave to add two grounds of appeal: 1) that the Magistrate offended the *R v De Simoni* principle by punishing him for attempted murder; and 2) that the Magistrate erred by not applying the full discount of 20% to the sentence imposed for the offence to choke to render insensible. He sought orders setting aside the Magistrate's order, and that he be re-sentenced in respect of that charge.

Decision and reasoning: The Court allowed the appeal and re-sentenced the appellant, in relation to the offence of choking to render insensible, to three years' imprisonment, with a non-parole period of 17 months. At [43], the Court held that a head sentence of three years and two months was not manifestly excessive. With respect to the non-parole period of 18 months, the Court found that 'as expressed as a percentage of a head sentence of 3 years and 2 months of imprisonment, the relevant percentage is approximately 47%'. This is outside the usual range of non-parole periods in the ACT. The proper approach to fixing a non-parole period is to have regard to all the sentencing purposes, the objective seriousness of the offence, and the appellant's subjective circumstances and prospects of rehabilitation. The proportion of the sentence served by way of non-parole period is a matter of judicial discretion, and ordinarily, the non-parole period is a significant part of the total sentence ([52]). The appellant's youth was important to his prospect of rehabilitation. It was necessary to fix a non-parole period that is relatively low, but also reflected the total sentence and was consistent with sentencing purposes ([53]).