***Ebsworth v R* [2020] NSWCCA 229 (11 September 2020) – New South Wales Court of Criminal Appeal**

'Aboriginal and Torres Strait Islander people' – 'Application for leave to appeal against sentence' – '*De Simoni* issue ' – 'Intent to kill' – 'Strangulation'

Charges: Breaking, entering and committing a serious indictable offence in circumstances of aggravation x 1; Using an offensive weapon with intent to assault x 2; Intimidation x 5; Recklessly damaging property x 1; Contravening a DFV protection order x 5.

Proceedings: Application for leave to appeal against sentence.

Facts: The applicant man and female victim were in a domestic relationship. After an argument, the applicant was told to leave the victim's premises and did so. Later, he returned when the victim was absent and cut up most of her clothes. As a consequence of that incident, an protection order was issued. Following this the applicant committed a number of offences including threatening to kill the victim, sending abusive and threatening messages, breaking into the victim's house and assaulting the victim, including strangling her and threatening to kill her while holding a knife. The victim was able to run from the house, but the applicant chased her with the knife, grabbed her hair and punched her repetitively in the face. In response to the victim's cousin intervening to protect the victim, the applicant threatened to stab both the victim and her cousin. Afterwards, the applicant continued to send abusive and threatening messages to the victim, including threatening to shoot her and her family. The applicant is of Aboriginal heritage.

Grounds: (2) Whether the sentencing judge erred by taking into consideration a more serious offence contrary to the principles in *De Simoni.*

Decision and reasoning: *Leave to appeal granted. Appeal dismissed.*

The applicant argued that the sentencing judge considered that the applicant had a state of mind to kill or inflict serious injury upon the victim at the time of committing charge 1. As such, the applicant submits that the sentencing judge was sentencing the applicant in relation to a more serious, uncharged offence (i.e., strangulation with intent of committing murder under s 29 of the *Crimes Act*). The difficulty with this submission is that the strangling of the victim would have to have been done *for the purpose of* killing the victim to fall under s 29 of the *Crimes Act*.

> [58] If a choking occurs, which choking does not kill the victim, the offender does not commit an offence under s 29, unless there was an intention to kill. The sentencing judge referred to threats to kill or inflict grievous bodily harm for which the choking was an act following through on those threats. But the sentencing judge did not conclude that the "following through" by choking was done with an intent to kill. It could have been done to inflict really serious injury. The requirement in s 29 of the Crimes Act to commit an act of strangling "with intent … to commit murder", requires the offender to have an intention to kill; not one that may be to inflict really serious injury. On the other hand, if a strangulation occurs which does, in fact, cause death, then an intention to cause really serious injury is sufficient to give rise to the crime of murder.
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> [63] The prohibition based upon the principles established by the High Court in *De Simoni* should not be overstated. The principles disentitle a sentencing court from inflicting punishment or aggravating an offence for which a sentence is to be imposed, because conduct has occurred which otherwise would be a more serious offence.

Nothing in the circumstances of this case give rise to the principles described in *De Simoni*.