***R v MCW* [2018] QCA 241 (28 September 2018) – Queensland Court of Appeal**

'Breach of protection orders' – 'Fair hearing and safety' – 'Physical violence and harm' – 'Protection order' – 'Sentencing' – 'Sentencing considerations' – 'Strangulation'

Charges: Assault occasioning bodily harm x 2; Choking, suffocation or strangulation in a domestic setting x 1; Contravention of domestic violence order x 1

Appeal type: Appeal against sentence

Facts: The applicant pleaded guilty to two counts of assault occasioning bodily harm, one count of choking, suffocation or strangulation in a domestic setting and one summary charge of contravention of domestic violence order ([4]). The prosecutor, relying on *R v West* [2006] QCA 252, *R v King* [2006] QCA 466 and *R v RAP* [2014] QCA 228, submitted to the sentencing judge that three years' imprisonment was appropriate. A variation of the protection order was also sought so as to extend its operation and add a further 'no contact' condition.

The sentencing judge held that the offences were 'cowardly, prolonged and particularly violent' ([23]) and that the offender posed a genuine threat to the community and particularly, to the complainant ([25]). In respect of each of the assault occasioning bodily harm counts, the applicant was sentenced to imprisonment for two years and six months. Sentences of imprisonment for three years and six months was imposed for the offence of choking, suffocation or strangulation in a domestic setting, and three months for the summary charge. All sentences were concurrent. No date for eligibility for parole was specified. The applicant was therefore ineligible to apply for parole prior to having served half of the effective sentence of imprisonment of three and a half years ([4]).

The applicant appealed on the basis that the sentencing judge had denied him procedural fairness by failing to forewarn the parties of his intention to reduce the head sentence slightly to reflect the guilty plea, and to provide him with an opportunity for a parole at earlier than half the sentence. He also appealed on the basis that the sentence was manifestly excessive.

Issues: Whether the sentence was manifestly excessive; Whether there was a denial of procedural fairness.

Decision and reasoning: Application was refused on the basis that no procedural unfairness arose on the facts and the sentence was not manifestly excessive.

- Manifestly excessive sentence

The applicant submitted that the sentence imposed was manifestly excessive and that the notional starting point of four years' imprisonment for the offence against s 315A of the *Criminal Code 1899* (Qld) (the 'Code') was too high ([33]). Conversely, the respondent contended that consideration must not only be given to the particular circumstances of the applicant's case, but also to the legislative intention for enacting s 315A to provide for specific liability, and a potentially increased maximum penalty, for offences involving choking (and similar conduct) committed in a domestic setting ([34]). Prior to the sentencing, the Code was amended to create a specific offence of strangulation in a domestic setting (see s 315A). That section prescribes a maximum penalty of seven years to deter the increasing frequency of such behaviour. The Court referred to the *Explanatory Notes for the Criminal Law (Domestic Violence) Amendment Bill (No 2)* 2015 at [39] –

> *'The new strangulation offence and the significant penalty attached, reflect that this behaviour is not only inherently dangerous, but is a predictive indicator of escalation in domestic violence offending, including homicide…'*

The Court was cautious to apply authorities for sentences for offences constituted by conduct comparable to choking, suffocation or strangulation in a domestic setting, prior to the enactment of s 315A. *R v West* [2006] QCA 252, *R v King* [2006] QCA 466 and *R v RAP* [2014] QCA 228 involved assaults occasioning bodily harm, the maximum penalty for which was seven years' imprisonment. The Court found that it was not useful to consider the sentences in those cases as comparable authorities for an offence of strangulation in a domestic setting, having regard to the legislature's intention for enacting s 315A and the seriousness of that offence.

The test of manifest excessiveness depends on whether the sentence is unreasonable or unjust, in light of all the factors relevant to the sentence (see *Hili v The Queen* [2010] HCA 45). The fact that the complainant lost consciousness, and that the offending occurred only 18 days after his release from custody for breach of a previous domestic violence order, increased the severity of the offence. The applicant's criminality was also increased by the fact that the choking incident was preceded, and then followed, by an assault occasioning bodily harm. Further, the applicant showed no remorse for the offending and refused to undergo counselling. Boddice J concluded that the circumstances indicated that the applicant's offending amounted to 'an episode of sustained violence undertaken by a recidivist who expressed no remorse' ([47]). Therefore, the Court found that the sentencing judge did not err in sentencing the offender to three years and six months without any further mitigation, and that the sentence was not manifestly excessive in the circumstances ([44]).