

***R v HBZ* [2020] QCA 73(17 April 2020) – Queensland Court of Appeal**

‘Animal abuse’ – ‘Appeal against conviction’ – ‘Application for leave to appeal against sentence’ – ‘Choking’ – ‘Non-fatal strangulation’ – ‘Step-children’

Facts: The appellant man was convicted of choking the female complainant in a domestic setting (domestic violence offence) (count 1) and common assault (domestic violence offence) (count 2) after trial before a jury in the District Court. He was sentenced to imprisonment for two years and six months on count 1 to be suspended after serving 15 months’ imprisonment for an operational period of three years. He was sentenced to three months’ imprisonment for count 2.

The appellant often stayed at the complainant’s home where she lived with her five children; the appellant was the father of the youngest child. The appellant and his dog were staying at the complainant’s home when the appellant’s dog urinated on the floor and the complainant asked her son to tell the appellant.

The complainant’s evidence in chief was that:

- The appellant hit the dog on the floor, rubbed it’s face in the urine and told the complainant his abuse of the dog was her fault. She asked him to leave, locked him out and went into a bedroom. He let himself back in with a spare key.

Re Count 1:

- She dialled 000 and then: "[The appellant] moved the camp beds and he grabbed me, and he grabbed the phone, and then he put his hands around my neck – his right hand, and then he pushed on my shoulder at the same time to knock me onto the bed, and then he pinned me to the bed with his hand to stop me from speaking. So when I first started speaking, I could ask for help, but then the words wouldn’t come out, and I struggled to breathe."
- The appellant grabbed the phone and smashed it. The appellant’s right hand was almost in a "V" around her throat and "instead of squeezing, he just was on top of me and used his body weight as the force to stop me from speaking". She couldn’t speak, felt pains in her chest and had black spots in her vision. She asked him to stop 3 or 4 times before she ran out of breath. She could not breathe for probably 70 seconds. She asked him to call an ambulance because she couldn’t breathe. [5]

Re Count 2:

- "He grabbed my shoulders. When I was having difficulty breathing before he left, he grabbed my shoulders and shook me and.... he shook me so hard that I was just flicking back and forth, and I could feel my neck – like, the back of my head hitting the back of my shoulders...."

- > He gave her "a really, really tight hug" and grabbed her by the shoulders. She told him to leave and he left.
- > She made a video diary of the incident and her injuries.

In cross-examination:

- > "The complainant denied, when it was put to her, that after the incident she was having trouble breathing due to a panic attack."
- > When it was put to the complainant that the appellant did not have his hand on her neck or throat "that much" she disagreed; "He pushed the air out of me and I thought I was going to die." [10]
- > She recorded in her video diary: "I'm finding it hard to breathe. I think it's just a panic attack. Because he didn't have his hand around my neck and throat that much." [11]
- > She did not call the ambulance immediately: "I was still having trouble breathing, which is why, on the video, I said I felt like I was having a panic attack during the video. Because I couldn't understand, after his hand had been removed, why I was still having difficulty breathing.""[11]
- > She denied moving the camp beds into the bedroom after he left. [12]

Medical records included a note: "the patient states her partner pushed her onto the bed and strangled her with both hand pushing downwards then made multiple blows with fists to the shoulder and head. Patient unsure if knocked out."

In the complainant's video record of interview he said there was a struggle for the phone. "He then sat down, gave her a big hug and got her to calm down. He denied choking her or trying to do that. He thought his thumb may have made contact with her during the struggle for the phone." [20]

Against the objection of defence counsel [21] the jury were given both a handout and direction in the terms: "'Choked' is an English word that bears its ordinary, everyday meaning – that is – 'to hinder or stop the breathing of a person'." [20] Defence counsel argued there was only one definition given to the jury whereas dictionaries gave various definitions. [23]

Grounds: The grounds of appeal against conviction were:

1. the learned trial judge erred in the direction given to the jury on the definition of choking;
2. the appellant was deprived of a fair trial, because of the manner in which the allegations of fact in count 1 were particularised;
3. the verdicts on counts 1 and 2 were unreasonable and cannot be supported, having regarded to the evidence.

The sole ground of the application for leave to appeal against sentence was that the sentences were manifestly excessive.

Held:

1. Appeal against conviction dismissed.

Ground 1: Mullins JA considered the construction of s 315A *Criminal Code* (Qld) in light of s14A Acts Interpretation Act 1954 (Qld) and the purpose given for the introduction of the offence in the relevant Bill Explanatory Notes referring to recommendation 120 of the Special Taskforce on Domestic and Family Violence (Queensland) in its Report *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland*.

"In order to amount to choking, there must be some pressure that results at least in the restriction of the victim's breathing. As the evidence in this trial illustrated, there were overt signs in the consequences the complainant described of her struggle to breathe, her inability to speak, the black dots in her vision, the pain in her chest, and her feeling disoriented from which it could be inferred there was some restriction of her breathing, as a result of the appellant's hand around her neck. The consequence of the restriction of the complainant's breathing was not a separate element of the offence, but the evidence required to prove the act of choking."

The direction given by the trial judge on the meaning of "choked" was correct. It was a direction on the law. The meaning of the word "choked" for the purpose of count 1 was a matter of legal interpretation and it was appropriate that the judge directed the jury to apply the meaning "to hinder or stop the breathing of a person". [58]-[59]

Ground 2: The appellant's argument was that as the particulars specified alternative conduct for each count they failed to sufficiently inform him of the case against him (Count 1: "stopped and/or hindered [the complainant's] breathing and, in doing so, choked her"; Count 2: "shook and/or applied force to [the complainant's] shoulders and, in doing so, he unlawfully assaulted her" [60]). The complaint re Count 1 was resolved by the conclusion as to meaning of "choke" re ground 1; it was sufficient that the jury be satisfied the complainant putting his hand around her neck hindered her breathing [62]. There was no substance to the complaint re Count 2 [63].

Ground 3: The jury were given extensive and appropriate directions that they could not convict unless satisfied beyond reasonable doubt that the complainant was "a reliable and truthful witness"... "that she was choked by the [appellant] by him placing his right hand around her throat and squeezed in the way that she described" and similar directions were given re Count 2 [65]. The jury's verdicts were not unreasonable [66].

2. Application for leave to appeal against sentence granted.

3. Appeal against sentence allowed.

The trial judge considered the sentencing decisions in R v MCW [2018] QCA 241 and R v MDB [2018] QCA 283. Mullins JA said: "Objectively, the appellant's offending was less serious than the offending in MCW and MDB. The appellant also was younger than those offenders and without the relevant prior criminal history. It was therefore surprising that the prosecutor at the trial submitted to the trial judge that a sentence in the order of three years and six months or four years' imprisonment was appropriate. It does not assist a sentencing judge, when the prosecutor's submissions propose a sentence that is outside the proper exercise of the sentencing discretion for the offending committed by the particular offender." [71]

4. Set aside the sentence imposed at first instance for count 1 and, in lieu, the appellant is sentenced to imprisonment for a period of two years with the parole release date fixed at 5 June 2020.

5. The declaration as to pre-sentence custody and other orders made at first instance are confirmed.