

S v Barnes [2020] WASC 327 (11 September 2020) – Western Australia Supreme Court

‘Application for leave to appeal against conviction’ – ‘Defence of provocation’ – ‘Domestic violence’ – ‘Social media confession’ – ‘Strangulation’ – ‘Victim as (alleged) perpetrator’

Charges: Aggravated common assault x 1.

Proceedings: Application for leave to appeal against conviction.

Facts: The male appellant admitted to assaulting his female partner; the sole issue at trial was whether the assault was unlawful. The complainant and appellant had a ‘prolonged and heated argument’ regarding the complainant buying plants and because the appellant refused to leave the TV room so that the children could watch TV. The context proceeding the assault included: the complainant slapping the appellant and trying to pull him off the couch where he was sitting; the complainant threatening to smash a hard disk drive unless the appellant left the TV room and when he did not leave throwing the hard disk drive against the wall; the complainant threatening to smash a PlayStation device and, when the appellant refused to leave the room, smashing it on the floor; the complainant kicking the appellant to try and force the appellant off the couch and allegedly saying ‘If you don’t do as I say, you’ll never see your son again’.

The appellant then grabbed the complainant around the neck with his right hand and squeezed her throat. The complainant collapsed and lost consciousness. The appellant’s evidence was that after she regained consciousness, she immediately started hitting him again. The complainant’s evidence was that she left the room but returned some minutes later and punched the appellant in the face. The appellant recounted these events two months after the incident in an extended Facebook post.

Grounds: (1) In making an assessment of the severity of the provocation, the magistrate failed to assess the totality of the complainant’s conduct.

Decision and reasoning: *Leave to appeal refused.*

It is clear from the magistrate’s reasons as a whole, and particularly the following passages, that the magistrate considered the totality of the complainant’s conduct:

[60] “To say to a person in the course of an argument, ‘You will never see your child again’ if it was said, and I’m assuming that it was, is an unpleasant thing to say, and I would expect that it would have an effect on any father. It would make anybody angry, in my view, or perhaps more angry than they already were. But applying what was said in paragraph 35 of the *Hart* case which is been brought to my attention, I do not accept that saying that would be sufficient to cause a reasonable person to lose control to such an extent as to choke the person who said it into unconsciousness.

Many things get said in the course of heated domestic arguments; I don’t consider that it can be said to justify such an extreme response. Although there is no medical evidence on the subject, I am sure that to choke a person into unconsciousness requires a considerable force and sustained over a period of time. It’s a requirement of provocation defences the force used must not be disproportionate to the provocation which is offered, and my view, this force which I have been talking about clearly is disproportionate.

[61] ... So at the end of the day, I am satisfied that the conduct of the complainant may well have provoked the accused to some extent, that it may well have provoked him to lose control and act on the sudden. But I do not consider that her conduct was sufficiently provocative in all of the circumstances to justify an assault of this magnitude and of this seriousness. And I am of the view that choking her into unconsciousness was clearly disproportionate *to any provocation that she may have offered*.

Had I concluded that the magistrate had erred in any of the respects alleged by ground 1, I would have granted leave to appeal but dismissed the appeal on the basis that there had no substantial miscarriage of justice. In my judgment looking at the totality of the evidence and, for the purpose of the objective element of the defence of provocation, attributing to the ordinary reasonable person each of the characteristics identified by the appellant in ground 1, the prosecution discharged the burden on it to negative the defence of provocation. Faced with the provocation offered by the complainant as described by the appellant in the Facebook post, an ordinary reasonable person would not have ‘choked out’ the complainant.”