SUPREME COURT OF QUEENSLAND

CITATION:	*R v MCW* [2018] QCA 241
PARTIES:	**R** **v** **MCW** (applicant)
FILE NO/S:	CA No 274 of 2017 DC No 2100 of 2017 DC No 2292 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 26 October 2017 (Jones DCJ)
DELIVERED ON:	28 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	3 April 2018
JUDGES:	Philippides JA and Mullins and Boddice JJ
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where 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 – where the applicant was sentenced to imprisonment of two years and six months in respect of each of the assault occasioning bodily harm counts, three years and six months for the choking, suffocation or strangulation in a domestic setting count and three months for the summary charge – where the sentencing judge did not forewarn the parties of his intention to reduce the head sentence slightly to reflect the guilty plea and not give the applicant an opportunity for a parole date at earlier than half the sentence – whether the applicant was afforded procedural fairness CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced to three years and six months for the choking, suffocation or strangulation in a domestic setting count – where the applicant persistently inflicted domestic violence

against the complainant – where the applicant contends that the sentence imposed was manifestly excessive – whether the sentence imposed by the sentencing judge was manifestly excessive

Corrective Services Act 2006 (Qld), s 184
Criminal Code (Qld), s 315A
Penalties and Sentences Act 1992 (Qld), s 9, s 15

Barbaro v The Queen (2014) 253 CLR 58; [2014] HCA 2, followed
Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, cited
Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, considered
R v Goodwin; Ex parte Attorney-General (Qld) (2014) 247 A Crim R 582; [2014] QCA 345, cited
R v King [2006] QCA 466, considered
R v Kitson [2008] QCA 86, distinguished
R v RAP (2014) 244 A Crim R 477; [2014] QCA 228, considered
R v Robertson [2017] QCA 164, considered
R v West [2006] QCA 252, considered

COUNSEL: A Loode for the applicant
J A Wooldridge for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **PHILIPPIDES JA:** I agree that the application for leave to appeal against sentence should be refused for the reasons given by Mullins J whose judgment I have had the significant benefit of reading.

[2] I agree also with the additional remarks of Boddice J. While there was no procedural unfairness in the present case, given ventilation of factors pertinent to the exercise of the discretion not to set a parole eligibility date, a failure to foreshadow (and thereby afford a defendant an opportunity to make submissions) as to the setting of a parole eligibility date may have the consequence in a given case that procedural fairness has been denied.

[3] As Mullins J has stated in respect of the sentence imposed for the strangulation offence under s 315A, authorities concerning sentence imposed for the offence of assault occasioning bodily harm do not afford a useful yardstick. In introducing the Bill[1] to amend the *Criminal Code* to include a specific offence of strangulation in a domestic setting, the Attorney-General and Minister for Justice and Minister for Training and Skills, the Hon Yvette D'Ath, stated that the offence and significant penalty recognised the importance of deterring "the prevalence of strangling or chocking conduct in domestic violent offending".[2] The new offence of strangulation directly addresses a particular type of domestic violence, identified as

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1 *Criminal Law (Domestic Violence) Amendment Bill* 2015.
2 *Criminal Law (Domestic Violence) Amendment Bill (No 2)*, Introduction, 2 December 2015 at 3083.

of itself of such a serious and dangerous nature as to attract a maximum penalty of seven years. The offence attracts that maximum because, as stated in the Explanatory Notes,[3] it concerns behaviour that is both inherently dangerous (reflected in this case in the complainant being rendered unconscious) and a predictive indicator of escalation in domestic violence offending, including homicide.

[4] **MULLINS J:** On 26 October 2017 the applicant pleaded guilty to two counts of assault occasioning bodily harm (domestic violence offence), one count of choking, suffocation or strangulation in a domestic setting (domestic violence offence) and one summary charge of contravention of domestic violence order (aggravated offence). In respect of each of the assault occasioning bodily harm counts, the applicant was sentenced to imprisonment for two years and six months. He was sentenced to imprisonment of three years and six months for the offence of choking, suffocation or strangulation in a domestic setting and imprisonment of three months for the summary charge. All sentences were concurrent. The applicant had been in pre-sentence custody for 294 days between 5 January 2017 and 25 October 2017 and that was declared to be time already served under the sentence. The learned sentencing judge declined to fix a date on which the applicant would be eligible to apply for parole. That has the consequence that the applicant is not eligible to apply for parole until he has served half of the effective sentence of imprisonment of three years and six months: see s 184(2) of the *Corrective Services Act* 2006 (Qld).

[5] There are two grounds relied on to support the application for leave to appeal. The first is that the sentence is manifestly excessive. The second is the sentencing judge erred by failing to accord the applicant procedural fairness by not providing him an opportunity to be heard concerning not imposing a parole eligibility date.

The applicant's antecedents

[6] The applicant was 45 years old when he committed the offences on 2 January 2017. After completing grade 9 at school, the applicant commenced an apprenticeship as a boilermaker. He left that at the age of 18 years, when he joined the army. He remained in the army for about 10 to 12 years mainly as a machine gun operator, serving in East Timor in 1999 where he witnessed low level combat. He was described by his counsel on the sentence (who was not the same counsel who appeared in this Court) as "an appalling alcoholic" and counsel attributed that as the underlying cause of his offending.

[7] The applicant has a lengthy criminal history that includes street offences, minor drug offending, dishonesty offences, unlawful use of motor vehicles, breach of bail and probation orders, but relevantly contraventions of domestic violence orders committed in April 2009, March, June and November 2015 and June 2016.

[8] The contravention in March 2015 arose out of the applicant showing up at the complainant's caravan in an intoxicated manner, when he assaulted her by punching her and then put her in a chokehold until she became unconscious and also bit her hand twice. He was sentenced to three months' imprisonment with immediate release on parole.

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3 *Criminal Law (Domestic Violence) Amendment Bill (No 2)*, Introduction, 2 December 2015.

[9] Whilst still on parole, the applicant committed the offence in June 2015 which involved an assault and choking the complainant. The applicant was sentenced in August 2015 to six months' imprisonment suspended for an operational period of 15 months, after serving two months.

[10] The next contravention was committed during the operational period of the suspended sentence. That contravention involved assaulting the complainant by punching her in the eye, grabbing her around her neck in a sleeper hold, placing a hand over her mouth and punching her. This contravention was dealt with in the Magistrates Court on 4 December 2015, when the applicant was sentenced to nine months' imprisonment with a parole release date of 4 March 2016 (after serving three months in custody) and the balance of the suspended sentence was activated to be served concurrently. That parole was eventually cancelled on 22 August 2016.

[11] The applicant was sentenced in the Magistrates Court on 17 August 2016 to imprisonment of four months with a parole eligibility date of 3 September 2016 for a contravention of domestic violence order (aggravated offence) between 8 and 11 June 2016. The offence was committed during the period of the parole order imposed on 4 December 2015 and concerned the applicant smashing a plate against the complainant's back that resulted in lacerations. He did not obtain parole and served in full the four months' imprisonment. His fulltime discharge date was 16 December 2016.

[12] A probation and parole report was tendered in relation to the court ordered parole that commenced respectively on 23 April 2015 and 4 March 2016 and a probation order imposed on 13 March 2015 for unlawful use of motor vehicle. The report noted the applicant's unwillingness to address the identified domestic violence and mental health issues concerning him. He failed to attend as directed on a number of occasions to counselling for either domestic violence or post traumatic stress disorder.

Circumstances of the offending

[13] The complainant was the woman with whom the applicant was in a domestic relationship at the relevant time and had been since the beginning of 2015. A protection order was made in the Magistrates Court on 17 August 2016 naming the complainant as the aggrieved and the applicant as the respondent to the order. That order varied the protection order made earlier on 7 August 2015. The conditions of the order were that the applicant be of good behaviour towards the complainant and not commit domestic violence against her and that the applicant was prohibited from entering, attempting to enter or approaching to within 100 metres of where the complainant lived, worked or frequented, except as set out in writing, including text message by the complainant or in compliance with any order of a court. That order was in effect at the time the offences were committed.

[14] On 2 January 2017 at about 7.30 am, the complainant came home to her residence and walked into the main bedroom and was confronted by the applicant who was agitated and angry. The applicant stated: "…you black piece of shit, why didn't you come home?" After the complainant responded with an explanation, the applicant approached her and punched her with his right hand repeatedly. The complainant fell to the floor and felt blood running down her face and out of her ear. That comprised the facts of the first assault occasioning bodily harm.

[15] The applicant then walked behind the complainant and placed her in a choke hold, using his right arm. He squeezed hard enough with his arm that the complainant could not breathe or move. She was terrified and eventually lost consciousness. Those facts constituted the offence of choking, suffocation or strangulation in a domestic setting.

[16] When the complainant gained consciousness a short time later, the applicant was stomping on her head with his left foot. He then started punching the complainant in the face again. Those facts constituted the second assault occasioning bodily harm. The complainant pleaded for the applicant to stop and to let her go to the bathroom. The applicant did stop and the complainant went into the bathroom with the applicant following her. The complainant's housemate had heard the assault taking place and heard the applicant say, as he followed the complainant into the bathroom, "the hide of it to lay into me", but the complainant had not at any point attempted to hit the applicant back. The housemate called the police. The complainant sustained black eyes and a burst blood vessel in the eye which the doctor who treated her described as having caused "moderate pain and discomfort".

[17] These offences contravened the protection order and resulted in the summary charge.

[18] At the sentencing hearing, the prosecutor tendered eight letters the applicant wrote to the complainant from custody to show the applicant's lack of remorse and lack of insight into his conduct.

Submissions before the sentencing judge

[19] The prosecutor who appeared before the sentencing judge accepted that the applicant's pleas of guilty were early, but relied on s 9(10A) of the *Penalties and Sentences Act* 1992 (Qld) (the Act) which specifies the fact that it is a domestic violence offence must be treated as an aggravating factor in determining the appropriate sentence. The prosecutor submitted that three years' imprisonment was the appropriate sentence for the applicant on the basis of the authorities of *R v West* [2006] QCA 252, *R v King* [2006] QCA 466 and *R v RAP* [2014] QCA 228. The prosecutor also sought to vary the protection order by extending its operation and adding a further "no contact" condition.

[20] Counsel for the applicant expressly recorded that he made no submissions of remorse and that he did not point to anything that indicated remorse on the part of the applicant. He submitted the letters tendered by the prosecution were relevant only to the exercise of the discretion to extend the protection order, as they did not make the offending for which he was being sentenced objectively more serious. Because of the applicant's criminal history and persistent offending against the particular complainant, the applicant's counsel submitted that a sentence of two years' imprisonment was appropriate with a parole release date after the 294 days already served.

Sentencing remarks

[21] The sentencing judge noted that the applicant's plea of guilty was a factor to be taken into account, but that it in no way reflected any remorse on the part of the applicant. The plea had to be seen in the light of what was "an extremely strong case". The only relevant mitigating factors were the saving of the time and trouble

of a trial and saving the complainant from giving evidence at court in the applicant's presence. Deterrence was "a particularly significant factor", in terms of both deterring the applicant from further offending and sending an appropriate message to the community "to indicate that people who commit these offences will be dealt with in an appropriate and salutary way". In light of the applicant's history, there must be serious doubts about the ability to deter the applicant from committing offences such as those for which he is being sentenced. The sentence also had to take into account a need to protect the community and the particular complainant.

[22] The sentencing judge noted that the subject offending represented the fifth occasion that the applicant had been dealt with by the court for violence against women in a domestic situation. Four of the sets of offences, including the subject offending, involved the same complainant. (The entry in the criminal history of 2009 was in relation to a different complainant.) The offending occurred within a matter of weeks of completing the previous sentence. There was no remorse on the applicant's part about his offending.

[23] The sentencing judge stated:

> "In my view, both the Crown's and defence submissions reflect a too lenient a sentence. You are a committed offender. The offences are cowardly, prolonged and particularly violent. Total disregard for any court orders."

[24] The sentencing judge noted that he had been referred to *RAP* and *King*, but also had regard to *R v R* (unreported, District Court at Bundaberg, 19 September 2017) where her Honour Judge Clare had sentenced the offender for choking the victim until she blacked out, or was close to blacking out, to three years' imprisonment. The offender in *R* was 24 years old with no relevant criminal history. On the basis of the applicant's criminal history and the level of violence inflicted, the appropriate head sentence for the choking offence committed by the applicant was three years and six months. The sentencing judge expressly acknowledged that he was sentencing the applicant only for the offences that were the subject of the guilty pleas, but the eight letters were relevant in formulating the regime for the sentence. The sentencing judge quoted from some of the letters. The gist of the letters was that the applicant wanted the complainant to send him her telephone number, she was still his fiancée and he was keeping her, and he would return to her residence as soon as he was released from prison.

[25] The sentencing judge concluded:

> "In my view, you are a genuine threat to the community and in particular, to this complainant. The level of offending in my view, would, but for your plea, warrant a head sentence of in the order of four years, but I think as I have indicated, taking into account your plea of guilty was just to be seen in light of, in what my view is, an overwhelming case and no reflection of remorse. I reduce that to three and a-half years. As far as I am concerned though, I do not propose to set any parole eligibility date. These letters, your total failure to comply and address your issues as indicated in the court report, would indicate to me that it would be for those in authority to determine when it is appropriate for you to be released back into society."

Was there a denial of procedural fairness?

[26] Ms Loode of counsel on behalf of the applicant relies on the approach of the court in *R v Kitson* [2008] QCA 86 at [21]-[22] to submit that procedural fairness required the sentencing judge to forewarn the parties that he contemplated not mitigating the sentence to give the applicant the opportunity to obtain parole at earlier than half the period of imprisonment. It was common ground that the applicant's guilty pleas were early and that, without forewarning, the sentencing judge by not fixing a date for parole at less than halfway through the sentence deprived the applicant's counsel of the opportunity to attempt to dissuade the sentencing judge from that course.

[27] Ms Wooldridge of counsel on behalf of the respondent relies on s 13 of the Act which required the sentencing judge to take the applicant's plea of guilty into account, but the sentencing judge was not required to reduce the sentence as a result. The sentencing judge did, in fact, take the plea of guilty into account by reducing the head sentence by a period of six months. It was open to the sentencing judge to reflect the plea of guilty in that way. The sentencing judge was not bound to seek a submission on not imposing a date for eligibility for parole, as that aspect of the sentence could not be characterised as resulting in a sentence which was unusual or incorporating an additional penalty that was unusual: *R v Robertson* [2017] QCA 164 at [56]. The circumstances in *Kitson* that resulted in a successful appeal against a sentence of 12 months' imprisonment with a fixed parole release date after serving nine months' imprisonment (where the parole release date was beyond the midpoint of the sentence) were distinguishable.

[28] The starting point for considering the applicant's and respondent's submissions on this ground is the nature of the sentencing process as one of instinctive synthesis where the sentencing judge takes account of all the relevant factors to arrive at a single sentence: *Markarian v The Queen* (2005) 228 CLR 357 at [27] and [37]; *Barbaro v The Queen* (2014) 253 CLR 58 at [34]. The head sentence and the date which is fixed for court ordered parole or eligibility to apply for parole are elements that make up that single sentence.

[29] The observations by Atkinson J (which whom the other members of the court agreed) in *Robertson* at [55] are also relevant:

> "A sentencing judge is not obliged to set out each and every alternative available to that judge in sentencing a defendant who appears before the judge. Counsel who appear before judges on sentences are expected to know the provisions of Queensland's sentencing law and to make relevant submissions."

[30] In *Kitson*, Fraser JA (with whom the other members of the court agreed) accepted the contention that where the offender had a claim upon the discretion of the sentencing judge for an order that he be released after serving less than half the head sentence, in view of his plea of guilty and personal circumstances, a parole release date significantly beyond the midpoint of the head sentence is "very unusual". The appeal was allowed and a sentence of 15 months' imprisonment with a parole release date after six months was substituted. Fraser JA stated at [21]:

> "Because that aspect of the sentence was unusual and was not sought or contemplated in the submissions of either party, in my respectful

> opinion it should not have been imposed without the learned judge adverting to it and giving the parties an opportunity to be heard."

[31] It is not "unusual" in the sense that expression was used in *Kitson* for a head sentence to be imposed that was selected after allowing for the guilty plea, leaving the eligibility for parole date as determined by s 184(2) of the *Corrective Services Act* 2006 after 50 per cent of the sentence had been served in custody.

[32] It does not follow from the fact that the sentencing judge did not foreshadow to the prosecutor and counsel for the applicant on the sentence that he was considering reflecting the guilty plea in a reduction of the head sentence without any further mitigation that he failed to afford procedural fairness to the applicant. The structure of the sentence that the sentencing judge imposed was within the alternative sentences that may have applied in the circumstances and must be taken as being within the contemplation of the prosecutor and the applicant's counsel. The applicant cannot succeed on the ground for leave to appeal based on denial of procedural fairness.

Was the sentence manifestly excessive?

[33] The applicant relies on the sentence being outside the range indicated by the submissions of both the prosecutor and the applicant's counsel at the sentencing hearing. In addition, the authorities to which the sentencing judge was referred did not support a head sentence in the order of three years' imprisonment. The applicant submits the notional starting point of four years for the sentence for the choking in a domestic setting offence was too high, and reducing the notional head sentence by six months to reflect the plea of guilty did not give sufficient weight to the value of the early guilty plea.

[34] The respondent submits that in considering any of the decisions to which the sentencing judge was referred as a "yardstick" against which to compare the sentence imposed on the applicant, consideration must be given not only to the particular features of the applicant's case, but the intention of the Legislature in inserting s 315A into the *Criminal Code* (Qld) to provide for specific liability, and a potentially increased maximum penalty, for offences involving choking (and similar conduct) committed in a domestic setting.

[35] The submissions made by both the applicant and the respondent on this ground must be analysed in the context that the maximum penalty for the offence of choking, suffocating or strangulation in a domestic setting is seven years' imprisonment and any offence against s 315A of the *Code* will be a domestic violence offence. This is because it is an element of the offence that either the offender is in a domestic relationship with the victim or the choking, suffocating or strangulation is associated domestic violence under the *Domestic and Family Violence Protection Act* 2012 (Qld). Section 315A reflects the Legislature's intention of creating a separate offence for physical conduct of the nature caught within s 315A that is committed in a domestic setting, without regard to whether there were lasting or serious consequences of the conduct. Section 9(10A) of the Act does not operate in relation to sentencing for an offence against s 315A of the *Code*, as all sentences under s 315A will be in respect of domestic violence offences. Care must be taken in considering authorities for sentences for offences constituted by comparable

conduct to choking, suffocation or strangulation in a domestic setting, but before the enactment of s 315A.

[36] The offender in *West* was 39 years old when he committed an assault occasioning bodily harm against his de facto partner of three or four months' standing. He had been drinking alcohol. He grabbed the complainant's hair and pulled her, and then let go of her hair, walked in front of her and punched her in the left eye, causing her to step backwards. He punched her twice to the face, so that she fell over, landing on her elbows and knees. He kicked her twice to the face. When he tried to punch her again, he missed and overbalanced, and the complainant was able to get away. She suffered multiple lacerations and soft tissue bruising. Her face was swollen and she had a broken upper incisor tooth. The offender pleaded guilty to one count of assault occasioning bodily harm and one count of unlawful use of a motor vehicle. He was sentenced to four years' imprisonment for the assault occasioning bodily harm, but that was reduced on appeal to three years' imprisonment. The offender was on parole when he committed the offences. He had a lengthy criminal history including a conviction for grievous bodily harm for which he was sentenced to six and a half years' imprisonment. All his convictions for offences of violence in the three years prior to committing the subject assault occasioning bodily harm involved threats or attacks on his de facto partners. He was described by McMurdo P at [17] as "a recidivist offender who, when intoxicated, persists in serious attacks upon his female partners". The sentence for the subject assault occasioning bodily harm was cumulative on the sentence in respect of which his parole was cancelled, as a result of the commission of the subject assault occasioning bodily harm. The sentence was moderated to three years' imprisonment to reflect that it was cumulative and the offender's remorse and cooperation with the administration of justice.

[37] The offender in *King* was aged 25 years and 26 years respectively at the time he committed the two assaults occasioning bodily harm on his de facto partner that resulted in a sentence of two years' imprisonment suspended after nine months for an operational period of three years. He also pleaded guilty to one count of wilful damage and three counts of unlawful use of a motor vehicle for which lesser sentences were imposed. The complainant had taken out a domestic violence order against the offender following earlier violent conduct about a year prior to the first of the subject assaults. On the occasion of the first assault, the offender and the complainant were arguing, when he chased her out of her house, grabbed her by the hair or neck and threw her against a fence and she struck her head, suffering bruising and lacerations. Over two months later the complainant was walking down the stairs of a friend's house, when the offender grabbed her by the hair, dragged her across the street and threw her on the ground, where he punched her repeatedly in the face and on the back and head. The offender was dragged away from the complainant and screamed that he was going to kill her. The complainant was 10 weeks' pregnant at the time. The offender had a lengthy criminal history of mainly dishonesty offences but, in more recent years, of domestic violence involving assaults occasioning bodily harm and breach of domestic violence orders. His application for leave to appeal against the sentence was refused.

[38] *RAP* concerned a 48 year old offender who had no criminal history prior to assaulting his wife from whom he had separated some six months' previously after 22 years of marriage. He went to the former matrimonial home where his wife and their 16 year old son were present. He spoke to his wife and, without warning, hit

her from behind on both sides of her head. He then punched her a further four times, pulled her towards him by the hair and repeatedly hit her in the face and back. He then dragged her by the hair across gravel and timber surfaces, repeating "you're fucking dead". The son told his father to stop. The offender dropped his wife, but then kicked her in the head and punched her again. The son held the offender's arms long enough for his mother to run away. The offender chased her, and again punched her to the face from behind, causing her to fall to the ground. The son held the offender's arms again to allow his mother to run into the bedroom where she locked the door. The offender then came back and damaged the bedroom door, before leaving the premises. He also pleaded guilty to unlawful damage to property. The complainant suffered three facial fractures to the cheek, cheekbone and eye socket and thought that she was going to die during the initial assault. A psychiatric assessment tendered at the sentence suggested at the time of the assault the offender was most likely suffering from a major depressive episode and probably a form of alcohol dependence. He had voluntarily sought professional help before the offences and continued to undergo professional treatment afterwards. He pleaded guilty. He would lose his employment as a university research fellow as a result of the convictions and suffered a degree of public shaming over the incident. The sentencing judge expressed hesitation about whether the offender was genuinely remorseful. He was unsuccessful in applying for leave to appeal on the ground of manifest excessiveness against the sentence for the assault of two years' imprisonment, suspended after eight months with an operational period of two years and six months.

[39] In each of these three authorities relied on as comparable before the sentencing judge and on this application, the maximum penalty for the offence of assault occasioning bodily harm was seven years' imprisonment, but the elements of the offence of assault occasioning bodily harm can be contrasted with the offence against s 315A of the *Code*. The gravamen of this offence committed by the applicant was the choking of the complainant in the domestic setting. The offence under s 315A was introduced as a result of the Legislature accepting the recommendation made about the creation of a specific offence of strangulation in the report "Not Now, Not Ever: Putting an End to Domestic Violence in Queensland" by the Special Taskforce on Domestic and Family Violence in Queensland. This was explained in the Explanatory Notes for the *Criminal Law (Domestic Violence) Amendment Bill (No 2)* 2015 pursuant to which s 315A was enacted:

> "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 Taskforce noted the importance of identifying this conduct to assist in assessing risk to victims and increasing protections for them."

[40] It is therefore not useful to consider sentences for an assault occasioning bodily harm, even where the assault was committed in the domestic context, as comparable authorities for an offence committed against s 315A.

[41] A mark of the seriousness of the offence committed by the applicant was that the complainant lost consciousness. 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. The sentencing of the applicant was distinguished by his criminal history of contraventions of domestic violence orders against the same complainant on three prior occasions, two of which involved putting the complainant in a chokehold. He is a mature man who has refused to undergo counselling when under the supervision of the Probation and Parole Office for his domestic violence issues and has shown absolutely no remorse for the offending for which he was being sentenced. The subject offending was committed only 18 days after his release from custody after serving the sentence of four months' imprisonment for the contravention of the domestic violence order committed against the same complainant in June 2016. The emphasis by the sentencing judge on the purpose of sentencing the applicant to protect the community, but particularly the complainant, was appropriate in the circumstances.

[42] As Fraser JA observed in *R v Goodwin*; *Ex parte Attorney-General (Qld)* (2014) 247 A Crim R 582 at [5] which was a case where there was an absence of comparable sentencing decisions:

> "Whether or not a sentence is manifestly inadequate or manifestly excessive is not to be decided by reference to a predetermined range of available sentences but by reference to all of the factors relevant to sentence."

[43] The test of whether the sentence imposed on the applicant was manifestly excessive is not determined by comparing the sentence selected by the sentencing judge with the submissions made by the parties before the sentencing judge as to the appropriate sentence. Although s 15 of the Act was amended in 2016 to clarify that a sentencing submission made by a party to a judge who was sentencing an offender could include a submission stating the sentence or range of sentences the party considers appropriate for the court to impose, that sentencing submission remains a statement of opinion: *Barbaro* at [42]. The sentence imposed by the sentencing judge is determined by the balancing of the relevant factors that bear upon the sentence. The test of manifest excessiveness depends on whether the sentence is unreasonable or unjust, having regard to all the factors relevant to the sentence: *Hili v The Queen* (2010) 242 CLR 520 at [58].

[44] On the basis of the applicant's persistence in inflicting violence on the complainant, including of the nature that is specifically targeted by the offence against s 315A, it was not unreasonable for the sentencing judge to conclude that the appropriate sentence for the choking, suffocation or strangulation in a domestic setting (even after an early guilty plea) was imprisonment for three years and six months without any further mitigation. The authorities of *West*, *King* and *RAP* supported the sentence of imprisonment of two years and six months for each of the two assaults occasioning bodily harm. The most serious of the offences to which the applicant pleaded guilty was the offence against s 315A and the sentencing judge was justified in imposing the higher sentence of imprisonment of three years and six months. The applicant has not shown that the sentence was manifestly excessive in the circumstances.

Order

[45] As the applicant has not succeeded in establishing either ground, the application should be refused.

[46] **BODDICE J:** I have had the considerable advantage of reading the reasons of Mullins J.

[47] I agree, for the reasons given by Mullins J, that the sentence was not manifestly excessive. The applicant's offending involved an episode of sustained violence undertaken by a recidivist who expressed no remorse. Deterrence and protection of the community properly loomed large as the relevant predominant factors on sentence.

[48] As to the second ground, as Mullins J properly observes, an absence of procedural fairness does not follow from the mere fact that a sentencing judge did not foreshadow an intention to reflect the fact of the applicant's guilty plea in a reduction of the head sentence, without any further mitigation by way of the setting of an earlier parole eligibility date.

[49] A lack of procedural fairness may arise where a sentencing judge intends not to afford due weight to the offender's plea of guilty, by reason of factors not the subject of submission by the parties. In such a circumstance, an obligation arises upon the sentencing judge to advise the parties of that intention, so as to first afford them an opportunity to make submissions in relation to the appropriateness of reliance upon those matters.

[50] No procedural unfairness arose in the present case because the factors relied upon by the sentencing judge for not setting a parole eligibility date, namely, that the plea of guilty occurred in the context of an overwhelming case and was no reflection of remorse, as well as the letters and the total failure to comply and address issues set out in the court report, were each matters, the subject of submission at the sentence hearing. The weight to be afforded to those factors was ultimately a matter for the sentencing judge, in the exercise of the sentencing discretion.

[51] I agree with the order proposed by Mullins J.