SUPREME COURT OF QUEENSLAND

CITATION:	*R v MDB* [2018] QCA 283
PARTIES:	**R** **v** **MDB** (applicant)
FILE NO/S:	CA No 35 of 2018 DC No 265 of 2018 DC No 254 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 15 February 2018 (McGill SC DCJ)
DELIVERED ON:	19 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	10 October 2018
JUDGES:	Gotterson and McMurdo JJA and Bowskill J
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – GENERALLY – where the applicant pleaded guilty to domestic violence offences against his partner including common assault, threatening violence, assault occasioning bodily harm, choking in a domestic setting and wilful damage – where the applicant contends the sentencing judge erred by relying upon the existence of an earlier domestic violence order as evidence that the offending was not isolated and exceptional – whether the existence and contravention of a previous domestic violence order is a relevant and aggravating feature – where the applicant contends the sentencing judge's finding that the applicant had, by his actions, threatened to kill the complainant represents an erroneous interpretation and impression of the agreed facts – where the applicant contends the judge erred by questioning the applicant's credibility and reliability, as a result of him telling police he did not believe it was illegal to possess a flick knife in a private place, when he had previously been convicted of possessing a knife in a public place – where the sentencing judge questioned the applicant's reliability, in the context of submissions made about the effects of medication combined with alcohol as causes of his offending, in the absence of supporting evidence – whether the sentencing

judge erred in any of these respects

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced to four years imprisonment for choking in a domestic setting under s 315A of the *Criminal Code* – where the applicant is a mature man, with a serious and relevant criminal history, including for offences of violence – where the offending was protracted and violent, including a threat with a flick knife, threatening to bite the complainant's face off, and attempting to bite her face and cheeks, squeezing the complainant's throat, twice, to the point she could not breathe, and wilful damage of substantial value – where general deterrence, personal deterrence and denunciation, as well as community protection, are important factors in sentencing an offender under s 315A – whether the sentence imposed by the sentencing judge was manifestly excessive

Corrective Services Act 2006 (Qld), s 180, s 184
Criminal Code (Qld), s 315A
Evidence Act 1977 (Qld), s 132C
Penalties and Sentences Act 1992 (Qld), s 4, s 9, s 13, s 159A

Griffiths v The Queen (1989) 167 CLR 372; [1989] HCA 39, cited
Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, cited
R v Fares [2012] QCA 13, cited
R v Field [2017] QCA 188, cited
R v King [2006] QCA 466, cited
R v Major; Ex parte Attorney-General (Qld) [2012] 1 Qd R 465; [2011] QCA 210, cited
R v MCW [2018] QCA 241, considered
R v Nagy [2004] 1 Qd R 63; [2003] QCA 175, cited
R v Omar [2012] QCA 23, cited
R v Pham (2015) 256 CLR 550; [2015] HCA 39, cited
R v RAP (2014) 244 A Crim R 477; [2014] QCA 228, cited
R v Tout [2012] QCA 296, cited
R v Tran; Ex parte Attorney-General (Qld) [2018] QCA 22, cited
R v Wells [2018] QCA 236, cited
R v West [2006] QCA 252, cited

COUNSEL: The applicant appeared on his own behalf
D C Boyle for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** I agree with the order proposed by Bowskill J and with the reasons given by her Honour.

[2] **McMURDO JA:** I agree with Bowskill J.

[3] **BOWSKILL J:** The applicant commenced a relationship with the complainant in August 2016. They were living together at a house in Durack from which the complainant also operated a beauty business. Another couple also rented a room in this house. Not very long after the relationship commenced, on 22 December 2016, a domestic violence protection order was made, requiring that the applicant be of good behaviour and not commit acts of domestic violence against the complainant. Two months later, on 17 February 2017, the applicant attacked the complainant at their home, resulting in charges of assault, threatening violence, assault occasioning bodily harm, choking in a domestic setting and wilful damage (on indictment) as well as deprivation of liberty, contravention of a domestic violence order and unlawful possession of a weapon (summarily).

[4] The applicant pleaded guilty to those offences, and was convicted and sentenced on 15 February 2018 to the following concurrent terms of imprisonment on the indicted offences:

1. common assault – 6 months imprisonment;
2. threatening violence – 2 years imprisonment;
3. assault occasioning bodily harm – 2 years imprisonment;
4. choking in a domestic setting – 4 years imprisonment; and
5. wilful damage – 12 months imprisonment.

[5] On the remaining, summary charges he was convicted, but not further punished.

[6] The almost 12 months the applicant had already served in pre-sentence custody, from 17 February 2017 to the date of sentence, was declared as time served under s 159A of the *Penalties and Sentences Act* 1992. Taking that into account, the date for his eligibility for parole was fixed at 16 February 2018, being a period of 12 months (slightly less than the usual one-third) taking into account his plea of guilty, some cooperation with the police and an expression of hope by the learned sentencing judge that "you are not beyond prospects of rehabilitation completely".

[7] The applicant appeals the sentence on the ground that it is manifestly excessive. Whilst not clear from the notice of appeal, it is clear from the applicant's outline of argument that the complaint is about the sentence of four years in relation to the choking offence. The applicant also contends that the learned sentencing judge erred by:

1. relying upon the existence of a domestic violence order as evidence that the offending was not isolated and exceptional;
2. finding that the applicant had made a threat to kill; and
3. finding that the applicant was not generally credible because he told police that he did not believe it was illegal to possess a "flick knife" in a private place in circumstances where he was previously convicted of possessing a knife in a public place.

[8] The sentence proceeded upon the basis of an agreed statement of facts, which described the circumstances of the offending as follows:

"On 17 February 2017 the complainant and defendant arrived home from shopping at around 12 pm. The defendant immediately commenced drinking, and was still drinking when the complainant awoke from her nap at around 2 pm. The complainant confronted the defendant about marks and bruises on his shoulders which she perceived to be drug injection marks. A brief argument ensued, culminating in the complainant requesting the defendant to pack his belongings and move.

The complainant went upstairs to her 'beauty room' to clean and prepare for a client appointment that afternoon. The defendant followed her upstairs, and entered his bedroom to pack. The complainant stood at the door and said, 'make sure you pack everything because I don't want you to come back'. The defendant continued to pack, and the complainant returned to her cleaning her work room. The complainant was cleaning the massage table when the defendant suddenly pushed her from behind, grabbing her shoulders and swinging her around. He pushed her in the chest so that she fell backwards onto the massage bed (***Summary charge – Deprivation of liberty***). The defendant said "I'm going to bite your face off", and attempted to bite the complainant's face and cheeks. The defendant placed his hands on top of the complainant's shoulders and near her neck (**Count 1** [common assault]). The complainant attempted to push and scratch the defendant with her hands. The defendant retrieved a black, flick action knife from inside his pants and used his left hand to deploy the button and flick it open. The defendant held the knife against the complainant's throat and said 'what are you going to do' (**Count 2** [threatening violence]). [One of the housemates] ran into the room and tried to pull the defendant away. The defendant put the knife away and threw the complainant to the floor, where she landed with her upper back smashing and breaking a plastic box on the floor (**Count 3** [assault occasioning bodily harm]).

The defendant swung a punch at [the housemate], which missed. The complainant grabbed his leg to prevent him attacking [the housemate], and he turned back and grabbed her with both hands around her ribs. The defendant picked the complainant up in that manner and again slammed her, on her back, onto the massage table. He moved his hands to her throat and began squeezing, causing the complainant to be unable to breathe or speak. The defendant threw the complainant onto the wooden floor and knelt over her and pinned her arms down with his knees. He again used his left hand to squeeze her throat such that she was unable to breathe or swallow (**Count 4** [choking in a domestic setting]). As he was doing this, he punched the floor next to the complainant's head with his right hand, repeating this action 3 or 4 times with significant force. [The other housemate] ran into the room carrying a baseball bat and tried to push the defendant away. The defendant let go and chased [that housemate], attempting to punch him. The complainant grabbed her ceramic diffuser and smashed it over the back of the defendant's head, causing a laceration. The defendant fell backwards and the complainant [and the two housemates] forced him down the stairs. He

> began attempting to climb the stairs again, so the complainant threw a chair down at him to prevent his ascent. The defendant has again pulled his knife out and held it in his hand. The complainant continued to throw items and furniture down the stairs to deter the defendant, including the frame of a small side table, and a glass plate which smashed when it hit the wall.
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> As this was happening, the complainant telephoned 000 and requested police attend. The defendant disappeared outside, picked up a chair and used it to smash the windscreen and rear window of the complainant's car. He returned inside and pulled the television off its stand, causing it to smash (**Count 5** [wilful damage]). The defendant exited the house and walked away down the street carrying a bag."

[9] The applicant was found by police in the backyard of a nearby house. He had a black spring assisted "tactical survival" knife in his bag, which is the subject of the summary charge of possessing a weapon. He was also charged with breaching the domestic violence order put in place in December 2016.

[10] The applicant participated in an interview with police the following day. According to the agreed schedule of facts tendered on the sentence, he said he had been drinking a couple of beers on the afternoon of 17 February. He told police the complainant had accused him of injecting drugs, which he denied, but said they began arguing loudly about this, with the complainant hitting him on the back of his head. The argument continued upstairs. He told police the complainant tripped over a box as she was chasing the defendant. He said she fell down, and he helped her up, and that was the only time he touched her. He made admissions about smashing the windscreen of the car and pulling the television down, saying that he did this because he was angry about being accused of things he had not done. He confirmed to police that he owns a number of knives and told police he was unaware that flick knives are illegal. He denied choking, assaulting or threatening the complainant with a knife, and said the complainant was inventing this story and may just want people to feel sorry for her, and that the housemates were lying to support her as they wanted him out of the house.

[11] The complainant suffered pain in her throat, head, neck, right shoulder and lower abdomen. She sustained a superficial graze to her left forearm, painful posterior right ribs, and limited c-spine movement due to pain. Bruising to her knees, arms, ankles, shoulders and ribs later became apparent. She suffered no fractures. She was taken to hospital on the day of the attack, and spent the night there.

[12] There were two letters from the complainant tendered at the sentencing hearing, which are substantially inconsistent. The first, apparently dated 12 February 2018, was tendered by the prosecution. In this letter, the complainant describes ongoing physical pain in her neck and back, as well as depression and financial hardship as a result of what she refers to as the "accident", but is clearly the assault upon her by the applicant. She lists the expenses incurred, as a consequence of the items damaged, as amounting to approximately $5,400, as well as other expenses incurred by her. The second document, tendered on behalf of the applicant, apparently dated 20 January 2018, has the complainant describing the applicant as "a very polite and very helpful person", states that he has sincerely apologised for his actions, that she

believes he was out of control on his medication and alcohol on the day, and that she forgives him and is willing to help him in the future.

[13] In an attempt to reconcile these two documents, in submissions on the sentence counsel for the applicant suggested the letter tendered by the prosecution seemed primarily geared towards compensation, whereas the letter he had tendered demonstrated, consistently with his instructions, that the applicant and complainant were in an ongoing relationship; a matter which the learned sentencing judge described as "frankly, frightening".

[14] The applicant is a mature man, who was aged 38 at the time of the offences, and 39 at the time of sentence.

[15] The applicant has a serious and concerning criminal history, including as a juvenile offender. At the sentencing hearing the prosecutor summarised the history by saying it showed the applicant had appeared before the courts 31 times before that day, and had been sentenced to imprisonment as an adult on nine prior occasions. Since 1996, when he was 18, he has acquired multiple convictions for property, dishonesty and motor vehicle offences, some drug offences, as well as breaches of various orders (including bail and breach of suspended sentences). He also has multiple convictions for offences involving violence, including stealing with actual violence (in 1997), common assault (in 1999), robbery with actual violence, whilst armed and in company (2001), further convictions for robbery with actual violence whilst armed, in company, causing wounding, as well as deprivation of liberty (in 2009), assaults occasioning bodily harm (also 2009), assaulting or obstructing a police officer (2011), and another assault occasioning bodily harm (2011). He has also twice been convicted of possessing a knife in a public place (in 2011 and 2016).

[16] The offence of assault occasioning bodily harm, of which the applicant was convicted in 2011, arose in circumstances where the applicant had gone to the home of his sister and brother-in-law, and seriously assaulted his brother-in-law in anger, attempting to strangle him on a number of occasions, only releasing his grip as a result of intervention by his sister. A domestic violence order was put in place as a result of that offending.

[17] It was submitted before the learned sentencing judge that the applicant's earlier offending was in large part driven by an addiction to heroin which he developed from the age of 15, following a traumatic childhood and adolescence involving sexual abuse. The learned sentencing judge was informed the applicant had been on the methadone program since 2009, which it was submitted resulted in a "marked change in him".

[18] There was tendered at the sentencing hearing a handwritten letter from a psychologist, Mr Melville, who said he had engaged with the applicant from October 2010 to July 2014 "for treatment of anxiety and depression, with symptoms of post-traumatic stress (consistent with individuals who have spent long periods of time in incarceration), set against a background of impending court matters (a charge of assault occasioning bodily harm) and previous heroin use".

[19] At the sentencing hearing counsel for the applicant conveyed his instructions that around the time of the offending the applicant "had a change in his medication and a combination of alcohol which caused him to commit offences in this way". There

was no medical or other evidence tendered in relation to any current treatment of the applicant, or medication in that regard. His counsel fairly acknowledged this, saying, after conveying the instructions just referred to, "[h]ow much of that is reliable is impossible to tell, but that's his explanation for the offending".

[20] It is convenient to deal first with the particular errors contended by the applicant on this appeal, before dealing with the overall complaint of manifest excess.

Existence of a domestic violence order at the time of the offending

[21] The applicant contends the learned sentencing judge erred by relying upon the existence of a domestic violence order as evidence that the offending was not isolated and exceptional. It was part of the agreed facts that a domestic violence protection order had been made on 22 December 2016, naming the applicant as the respondent and requiring that he be of good behaviour and not commit acts of domestic violence against the complainant.

[22] In his sentencing remarks the learned sentencing judge said, after referring to the relationship between the complainant and the applicant having broken down on 17 February 2017, when she had asked him to pack his bags and leave:

> "There had been, or there must have been, some previous difficulties with the relationship, because, on the 22nd of December, a protection order was taken out by the complainant against you, requiring you to be of good behaviour and not committing acts of domestic violence. The order was in force at the time of this offending."

[23] None of that was controversial. The applicant pleaded guilty to the summary charge of contravening that domestic violence order, by his offending on 17 February 2017.

[24] Later in the sentencing remarks, in the context of addressing the inconsistent letters from the complainant, after referring to the January 2018 letter in which the complainant spoke well of the applicant and of her forgiveness of him, his Honour said:

> "… you are obviously not living up to the description that she gives of you in that letter in the conduct which led to the protection order being made in December 2016, so that this was not an isolated and exceptional incident, and the fact that it – these offences were committed in breach of the protection order is an aggravating feature, as is the fact that it involved domestic – they were domestic violence offences."

[25] The existence, and indeed contravention, of a domestic violence order which was in force at the time, was plainly a relevant consideration for the learned sentencing judge to take into account, and an aggravating feature. It is relevant as part of the past record of the offender, under s 9(3)(g) of the *Penalties and Sentences Act* 1992. In addition, s 9(10A) of the Act requires a sentencing court to treat the fact that the conviction is of a "domestic violence offence"[1] as an aggravating feature.[2]

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1 See s 4 of the *Penalties and Sentences Act* 1992 and s 1 of the *Criminal Code*.

2 As Mullins J notes in *R v MCW* [2018] QCA 241 at [35], s 9(10A) does not operate in relation to sentencing for an offence against s 315A of the *Criminal Code*, because all sentences under that section will be in respect of domestic violence offences. Section 9(10A) would operate, however, in relation to the other offences of which the applicant was convicted on 15 February 2018.

[26] It was reasonable to infer that the December 2016 domestic violence order was made as a result of "previous difficulties with the relationship" – such orders are not made otherwise. There do not appear to have been any details given to the learned sentencing judge of precisely what those difficulties were; but his Honour did not impermissibly speculate about that. In that context, it was correct to say the offences committed on 17 February 2017 were not "an isolated and exceptional incident". Something had happened previously, in the context of this domestic relationship, to result in the making of a protection order in December 2016. That protection order was breached by the offending on 17 February 2017. There is no error in the learned sentencing judge's approach in this regard.

Threat to kill

[27] The applicant next contends the learned sentencing judge erred in finding that the applicant had made a threat to kill. This ground misconstrues what the learned judge said in the course of his sentencing remarks. What the learned sentencing judge said was this:

> "You then threatened to bite her face off and began to bite at her neck and cheeks and placed your hands on top of her shoulders, near her neck, which is the count of common assault. She resisted, and you produced a flick-knife and opened the knife and held it against her throat, in what I regard as a menacing fashion, particularly – charge of threatening violence for that, particularly bad example of threatening – that offence of threatening violence.
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> … there were two other people in the house, and they were attempting to protect the complainant. You put the knife away when one of them came into the room, and you threw the complainant onto the floor, so that she landed in a painful way, causing bruising to her, and that is the offence of assault occasioning bodily harm.
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> There was then some further melee involving the housemates and the complainant. At one point, you threw the complainant onto the floor, knelt over her, pinned down her arms with your knees and used your left hand to squeeze her throat, so that she was unable to breathe or swallow, and that was the offence of choking in a domestic setting.
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> While you were doing that, you were punching the – you punched the floor next to the complainant's head with your right hand a number of times. The whole experience would have been quite terrifying for the complainant. <u>You were obviously, by your actions, threatening to kill her</u>."[3]

[28] The applicant submits this represented an erroneous interpretation and impression of the agreed facts, which resulted in a "negative weight towards the level of criminality and seriousness perceived by the court". In my view, the learned sentencing judge's comment, that the applicant was, by his actions, threatening to kill the complainant, reflects no error at all. In the course of what plainly must have been a terrifying incident for the complainant, the applicant has grabbed her and pushed her, causing her to fall; threatens to bite her face off, and then proceeds to try to bite her face and cheeks; pulls out a flick knife and holds it against her throat; throws her to the floor when someone intervenes, then picks her up with both his

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[3] Emphasis added.

hands around her ribs and slams her, on her back, on a massage table; puts his hands around her throat and squeezes, causing her to be unable to breathe or speak; throws her onto the floor and then, on the floor, pins her arms down with his knees, and again squeezes her throat such that she is unable to breathe or swallow; and punches the floor next to her head three or four times with significant force. The level of criminality and seriousness of this conduct, perceived by the court as reflected in the sentencing remarks, was entirely appropriate.

Applicant's lack of credibility

[29] The third error contended by the applicant is the finding by the learned sentencing judge that the applicant was not generally credible because he told police that he did not believe it was illegal to possess a "flick knife" in a private place in circumstances where he was previously convicted of possessing a knife in a public place. Again, in my view, this involves a misconstruction of what the learned sentencing judge said.

[30] The agreed facts included reference to the applicant, in his interview with police, telling police that he was unaware flick knives are illegal. There is no mention of private or public place. But in any event, what the learned sentencing judge said, in this regard, was:

> "When spoken to by investigating police, you agreed to be interviewed, and you made some admissions, but you minimised your conduct, and you were not frank. You claimed to the police that you did not – aware that flick-knives were – were illegal – [in] circumstances where you have a previous conviction for carrying a – being in possession of a knife in a public place. So you were certainly not frank with the police, and you denied choking the complainant or threatening her with the knife. So it was not a case where there was – you are entitled to the consideration of … having made a true confession to investigating police."

[31] Later in the sentencing remarks, his Honour said this:

> "I was also told that there had been a change in your medication at about this time and that that in combination with alcohol led to this condition. There is no medical evidence to support that. In view of some of the things you said to the police, I am very sceptical about placing any great reliance on things you have claimed yourself. I am not particularly persuaded that there was some particular consequences of medication operating at the time which led to abnormal behaviour."

[32] His Honour did, nevertheless, give the applicant the benefit of "such cooperation as there was with the police", in fixing the parole eligibility date at less than one-third of the four year sentence.

[33] The learned sentencing judge's remarks about being sceptical about placing reliance on things the applicant had said – relevantly, about the role of medication in combination with alcohol in causing his offending on 17 February 2017 – were not merely on the basis of the view his Honour formed about the applicant's comment about flick knives; but more generally on the basis that, having regard to the agreed statement of facts, the applicant was not frank or candid with police when he was interviewed the day after the offending. He denied the offending, and suggested the

complainant had been injured when she tripped on something and fell over, and that the only time he touched her was when he went to help her up.

[34] A sentencing judge is not obliged to act on the basis of an allegation of fact conveyed in submissions, without any evidence in support.[4] The only evidence of a medical kind tendered on behalf of the applicant was the letter from the psychologist, in relation to treatment which had ended in July 2014, some two and a half years prior to the offending in February 2017. The applicant's counsel conveyed his instructions regarding a change in medication at the time of the offending, and the combination of that with alcohol causing him to commit the offences – but immediately said "how much of that is reliable is impossible to tell, but that's his explanation for the offending". It was also acknowledged that the applicant "might not be the best historian… given his background".

[35] In my view, the learned primary judge made no error in his assessment of the reliability of matters put to him, on the basis of the applicant's instructions. The caution adopted by his Honour was appropriate, on the basis of the agreed facts, and in the absence of any evidence to support the submission in relation to medication.

Was the sentence manifestly excessive?

[36] Finally, I turn to the applicant's argument that the sentence of four years imposed on the choking in a domestic setting offence was manifestly excessive.

[37] Where it is contended a sentence is manifestly excessive, the test is whether, having regard to all the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle.[5] A sentence is not established to be manifestly excessive merely if the sentence is markedly different from other sentences in other cases. It is necessary to demonstrate that the difference is such that there must have been a misapplication of principle or that the sentence is "unreasonable or plainly unjust".[6]

[38] This Court has recently considered, for the first time, an appeal against a sentence imposed for the offence of choking or strangulation in a domestic setting, in *R v MCW* [2018] QCA 241. The offender in that case was 45 years old at the time of the offence. He had a lengthy criminal history that included street offences, minor drug offending, dishonesty offences, unlawful use of motor vehicles, breach of bail and probation orders as well as contraventions of domestic violence orders in April 2009 (involving a different complainant), March, June and November 2015 and also June 2016. The offending the subject of the sentence on the appeal was committed in January 2017. The offender had been in a relationship with the complainant since the beginning of 2015. A protection order had been made in August 2015, and then later varied in August 2016, and was in force at the time of the offences in January 2017. All of the offending in 2015, 2016 and 2017 concerned the same complainant.

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4 See s 132C(2) of the *Evidence Act* 1977; *R v Field* [2017] QCA 188 at [35]-[48].

5 *R v Pham* (2015) 256 CLR 550 at [28]; *Hili v The Queen* (2010) 242 CLR 520 at [58]-[60].

6 *Hili v The Queen* at [58] and [59]; *R v Tout* [2012] QCA 296 at [8].

[39] The circumstances of the offences are described in the reasons of Mullins J at [14]-[16]. The complainant had come home at about 7.30 am. She was confronted by the offender who was agitated and angry, who said to her "… you black piece of shit, why didn't you come home?". After the complainant responded with an explanation, the offender approached her and punched her with his right hand repeatedly. She fell to the floor and felt blood running down her face and out of her ear. That resulted in a charge of assault occasioning bodily harm. The offender then walked behind the complainant, placed her in a choke hold with his right arm, and squeezed hard enough that she could not breathe, causing the complainant to lose consciousness. He was charged with choking, suffocation or strangulation in a domestic setting. When she regained consciousness a short time later, the offender was stomping on her head with his left foot, and then started punching her in the face again, giving rise to a second assault occasioning bodily harm charge. The complainant suffered black eyes and a burst blood vessel in her eye.

[40] The offender in that case pleaded guilty, but in light of letters he had subsequently written to the complainant from custody, it was found his plea in no way reflected any remorse on his part. At first instance, the learned sentencing judge indicated that, but for the plea of guilty, the level of offending in that case warranted a head sentence in the order of four years. The guilty plea was taken into account by reducing that to a sentence of three years and six months. Given the absence of any remorse, and the offender's history of domestic violence offences and failure to take steps to address his issues in that regard, the sentencing judge did not set any parole eligibility date. Consequently, he would not be eligible to apply for parole until he had served half of his sentence.[7]

[41] The application for leave to appeal against the sentence was refused.

[42] The offence of choking, suffocation or strangulation in a domestic setting, under s 315A of the *Criminal Code*, was introduced as a new offence in 2016. The maximum penalty is seven years' imprisonment. As Mullins J (with whom the other members of the Court agreed) observed in *R v MCW* at [35]:

> "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 [Penalties and Sentences] 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."

[43] After referring to three authorities dealing with sentences for assault occasioning bodily harm, prior to the introduction of s 315A,[8] Mullins J continued, at [39] and [40]:

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7 Section 184(2) of the *Corrective Services Act* 2006 (Qld).

8 *R v West* [2006] QCA 252; *R v King* [2006] QCA 466 and *R v RAP* (2014) 244 A Crim R 477; [2014] QCA 228.

> "[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:
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> > '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.'
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> [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."

[44] Deterrence, both personal and general, as well as community protection and denunciation, were emphasised as important factors in sentencing offenders under s 315A.[9] This reflects earlier statements, for example in *R v Major; Ex parte Attorney-General (Qld)* [2011] QCA 210; [2012] 1 Qd R 465 at [53], per McMurdo P, about the importance of these factors in sentencing for domestic violence offences generally:

> "Deterrence, both personal and general, is an important factor in sentencing in domestic violence cases. So too is denunciation. The community through the courts seeks sentences which show the public disapprobation of such conduct. The effects of domestic violence go beyond the trauma suffered by victims, survivors and their children to their extended families, and friends. Domestic violence also detrimentally affects the wider community, causing lost economic productivity and added financial strain to community funded social security and health systems."

[45] In the context of this particular type of domestic violence offending, choking or strangling, the serious and dangerous nature of such an act, the fact that it has been shown to be a predictive indicator of escalation in domestic violence offences, and

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9 *R v MCW* at [3] per Philippides JA, at [21], [41] and [44] per Mullins J and at [47] per Boddice J.

the concerning prevalence of this act in domestic violence offending all support the need for stern punishment in cases of this kind.

[46] In this case, as at first instance in *R v MCW*, the learned sentencing judge imposed a sentence for the choking offence which was higher than that submitted by the prosecutor who submitted, by reference to two earlier decisions of single judges of the District Court, that a sentence of not less than two and a half years would be appropriate. As Mullins J said, at [43] of *R v MCW*, 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 as to the appropriate sentence. Such a submission is merely a statement of opinion. It is a matter for the sentencing judge, in the exercise of their discretion, to impose what they regard as the appropriate sentence, taking into account and balancing all the relevant factors that bear upon the sentence.

[47] One of the decisions referred to by the prosecutor was a matter of *Rose*, a sentencing decision of her Honour Judge Clare SC made on 19 September 2017, in which a sentence of three years imprisonment was imposed for a choking offence arising in the context of what was described as a vicious and protracted attack by a young man on an even younger woman, his ex-partner, who had come to his house to collect her things. In the course of the attack he told her he would rather kill her than let her leave him. The learned sentencing judge in this case made it clear, in the course of submissions by both the prosecutor and the applicant's counsel, that he regarded the applicant's offending as more serious than *Rose*, who was only 24 years old, had no relevant criminal history, used no weapon, and there was no earlier domestic violence order in place.

[48] The respondent, on this application, has referred the court to a sentencing decision of Applegarth J given on 10 November 2017 in a matter of *Bennett*. In that case, the offender was being sentenced for commercial possession of methylamphetamine and cannabis, as well as for offences of violence perpetrated against his domestic partner, including choking. The violence inflicted in that case was serious and protracted, extending from one evening over to the next day. On the evening, the offender and the victim argued, after the victim accused the offender of being a junkie when seeing him with a cut down needle. She was 10 weeks pregnant at the time. He pushed her to the ground, and then applied pressure with both hands to her neck so that she could not breathe, her vision was blurred and she saw white dots in her eyes. Her four year old daughter was present, screaming. After recovering, the victim packed her belongings and the offender and the victim stayed in separate rooms. The argument continued. The offender told the victim during that night that he could have happily stabbed her. The following morning he again came towards her and held her by the throat against the back of the lounge with both hands. She was able to get away, but he then tackled her to the ground. The argument continued after the victim left in her car later that morning, with the offender.

[49] The offender in *Bennett* was 35 years old at the time, and had a relevant criminal history, including a conviction of unlawfully doing grievous bodily harm with intent about four years earlier. He was in fact on parole for that offence at the time of the domestic violence offences. He had belatedly shown remorse. Applegarth J said he considered a sentence of three and a half years would have been appropriate for the choking offence; that was effectively ameliorated down to three years, because it was to be served cumulatively on a sentence of two years for the drug offending.

[50] In the course of the sentencing remarks, and reflective of the observations made in *R v MCW*, Applegarth J said this:

> "… One reason why acts of strangulation are treated so seriously is that someone in your victim's position could have been dead within seconds. Any act of strangulation is inherently dangerous, and your act of strangulation was not momentary. Your victim saw white dots in her eyes and persistence in this abuse of power over an effectively defenceless woman, could easily have caused permanent serious injury or death.
>
> Any strangulation is serious. Strangulation perpetrated in a domestic setting is even more serious. Given the epidemic of domestic violence in our community and the number of fatalities caused to victims of domestic violence every year, you deserve to be severely punished for the act of strangulation which you committed…"

[51] On this application, the applicant relies upon *Rose,* and also the decision of this court in *R v RAP* [2014] QCA 228, involving a sentence for assault occasioning bodily harm, prior to the introduction of s 315A, which was one of the cases referred to by Mullins J in *R v MCW* at [38]. For the reasons articulated by Mullins J at [39], set out above, *R v RAP* does not support a conclusion that the sentence imposed in this case, of four years imprisonment, was manifestly excessive.

[52] On the contrary, having regard to:

1. the factual circumstances of the offending by the applicant, which included a disturbing assault of the complainant, threatening to "bite your face off" and then attempting to bite her face and cheeks; a serious example of threatening violence, by holding a flick knife to the complainant's throat; throwing her to the floor; grabbing her and slamming her onto a table; choking her, by squeezing her throat in such a way that she could not breathe, not once but twice; on the second occasion, choking her whilst she was pinned to the ground, with his knees on her arms; followed by the violent behaviour involved in again pulling out his knife, and smashing the windscreen of the car and the television, causing substantial and expensive damage;

2. the protracted nature of the incident and that the applicant was only deterred and ultimately desisted as a result of intervention by others who were present;

3. the impact, physical, emotional and financial, on the complainant;

4. the applicant's mature age and serious and concerning criminal history of violence, not the worst of which, but relevantly including, in 2011, a conviction of assault occasioning bodily harm involving attempts to strangle his brother-in law; and

5. the fact that the offending was committed in breach of a domestic violence order,

a stern and severe punishment was justified. Taking into account the maximum penalty of seven years imprisonment, the imposition of four years imprisonment for this offending, by this applicant, cannot be said to be unjust or unreasonable.

[53] The learned sentencing judge adopted an accepted approach, when sentencing an offender for multiple offences, of sentencing the applicant, on the most serious offence,

choking in a domestic setting, to a head sentence taking into account the overall criminality of the applicant's offending; rather than imposing cumulative penalties for some of the offences.[10]

[54] The penalty of four years imprisonment imposed on the applicant in this case is consistent with the starting point identified by the sentencing judge in *R v MCW*. The applicant and the offender in *R v MCW* were of a similar age. Whereas the offender in *R v MCW* had a worse history of domestic violence offending, against the same complainant; the applicant in this case has a far more serious criminal history, more generally, involving offences of violence. The particular circumstances of the offending in each case may be said to be broadly comparable in terms of seriousness – although it is not said the complainant in this case lost consciousness, it is said she was unable to breathe, speak or swallow whilst being choked; and, concerningly, in this case, there was also the use of a flick knife. In the present case, in addition to the threat with a knife, assaults and chokings, there was also wilful damage of property of considerable value.

[55] The offender in *R v MCW* was given the benefit of his guilty plea by a reduction of six months in the head sentence, to three years and six months, with no other reduction in the penalty, given his lack of remorse and concerns regarding rehabilitation. In this case the applicant's guilty plea, some cooperation with police and prospects of rehabilitation were taken into account by reducing the time to be served, before becoming eligible for parole, to 12 months. Section 13(1) of the *Penalties and Sentences Act* 1992 requires a sentencing court to take an offender's guilty plea into account, and confers a discretion on the court to reduce the sentence that it would otherwise have imposed. How that discretion is exercised will depend upon the particular circumstances of the case.[11] The manner in which it was exercised in this case was principled and appropriate.

[56] Lastly, notwithstanding that he became eligible for parole in February 2018, the applicant remains in custody. This is the consequence of s 180(2)(b) of the *Corrective Services Act* 2006, which prevents a prisoner from applying for parole until an appeal against the sentence to which their imprisonment relates has been decided. The operation of that provision is not capable of being treated as a factor rendering a sentence manifestly excessive.[12] It is a factor which warrants a prompt decision in the appeal.

[57] The applicant has not shown that the sentence imposed on him was manifestly excessive. I would order that the application for leave to appeal against the sentence be refused.

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10 *R v Nagy* [2004] 1 Qd R 63 at [39]; *Griffiths v The Queen* (1989) 167 CLR 372 at 377 per Brennan and Dawson JJ and at 393 per Gaudron and McHugh JJ.

11 See, for example, *R v Tran; Ex parte Attorney-General (Qld)* [2018] QCA 22.

12 *R v Wells* [2018] QCA 236, referring to *R v Fares* [2012] QCA 13 at [54]; *R v Omar* [2012] QCA 23 at [38].