SUPREME COURT OF QUEENSLAND

CITATION:	*R v HBZ* [2020] QCA 73
PARTIES:	**R** **v** **HBZ** (appellant/applicant)
FILE NO:	CA No 176 of 2019 DC No 21 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Townsville – Date of Conviction: 6 June 2019; Date of Sentence: 10 June 2019 (Lynham DCJ)
DELIVERED ON:	17 April 2020
DELIVERED AT:	Brisbane
HEARING DATE:	13 February 2020
JUDGES:	McMurdo and Mullins JJA and Boddice J
ORDERS:	**1. Appeal against conviction dismissed.** **2. Application for leave to appeal against sentence granted.** **3. Appeal against sentence allowed.** **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.**
CATCHWORDS:	APPEAL AND NEW TRIAL – NEW TRIAL – IN GENERAL AND PARTICULAR GROUNDS – MISDIRECTION OR NON-DIRECTION – DIRECTIONS AS TO PARTICULAR MATTERS – OTHER MATTERS – where the appellant was convicted of choking in a domestic setting – where word "choked" is undefined in the *Criminal Code* (Qld) – where the jury was directed that "choked" meant "to stop or hinder the breathing of a person" from the act of choking – where the appellant submits that a penal provision should be interpreted narrowly – where the history of the offence supports a purposive interpretation – whether the offence was not proved unless the act of choking caused the complete stoppage of breath

CRIMINAL LAW – SENTENCE – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR ADEQUATE – where the offender was sentenced to imprisonment for two years and six months to be suspended after 15 months for an operational period of three years for choking in a domestic setting – where the offender had a good work history and no prior criminal history – where the offender's conduct was less serious than offending in the comparable authorities relied on by the prosecution before the sentencing judge – where the offence was created to eliminate the conduct of choking due to the risk of serious consequences from an escalation of that type of conduct – where need for general deterrence – whether sentence was manifestly excessive

Acts Interpretation Act 1954 (Qld), s 14A, s 14B
Criminal Code (Qld), s 315, s 315A
Criminal Law (Domestic Violence) Amendment Act 2016 (Qld), s 3
Fire Services Legislation Amendment Act 1994 (Qld), s 14

Burch v South Australia (1998) 71 SASR 12; [1998] SASC 7055, cited
R v A2 (2019) 93 ALJR 1106; [2019] HCA 35, followed
R v Green (No 3) [2019] ACTSC 96, distinguished
R v Lansbury [1988] 2 Qd R 180, considered
R v MCW [2019] 2 Qd R 344; [2018] QCA 241, considered
R v MDB [2018] QCA 283, considered
R v Osborne [1987] 1 Qd R 96, considered

COUNSEL: A W Collins for the appellant/applicant
D Balic for the respondent

SOLICITORS: Resolute Legal for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO JA:** I agree with Mullins JA.

[2] **MULLINS JA:** The appellant was convicted of choking 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 a period of 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. He appeals his convictions and applies for leave to appeal against the sentences on the ground they were manifestly excessive.

Conviction grounds of appeal

[3] The grounds of appeal are:

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

The evidence

[4] The complainant's evidence-in-chief was as follows. The appellant was her partner on and off over four years commencing on December 2014. She had five children and the appellant was the father of the youngest child. She resided with her children at an address where the appellant would often stay. That happened on 8 July 2018. At the same time the complainant also had other family visiting her. The complainant spent the day cleaning and looking after the children and organising things, when she noticed that the appellant's dog had urinated inside the house. She had already cleaned it up a couple of times and she told her son to inform the appellant. The appellant had been sleeping and got upset about being woken up. He went and grabbed the dog, picked him up, was hitting him into the ground and rubbing his face into the urine and said to the complainant words to the effect "You know, you did this. This is your fault. Is this better? Is this the way you want it to happen?". The complainant then asked the appellant to leave. The complainant let the dog out and the appellant followed. The complainant then locked the door, told him to leave, and then went to retrieve his keys, wallet and phone from the bedroom, so he could go somewhere else.

[5] While the complainant was in the bedroom, she heard the door unlock, because the appellant had used the spare hidden key to get in. There were camp beds in the bedroom that the complainant had been setting up for her son's friends who were having a sleepover, and she put the camp beds between herself and the appellant. She told the appellant that he could take his stuff and go. He became more aggressive and the complainant told him that he had to stop or she was going to call the police. When the appellant started picking up the camp beds, shoving them out of the way to get to the complainant, she called triple zero on her mobile phone. She started speaking 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 then wrestled the phone from the complainant's hand, hung up and smashed it on the ground beside the bed. The appellant used his right hand, so that it 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". The complainant was unable to speak, felt pains in her chest and had black spots in her vision. She asked the appellant three or four times to stop, before she ran out of breath. It was probably for 70 seconds for which she could not breathe. After the

incident stopped, the complainant asked the appellant to call an ambulance, because she could not breathe.

[6] The complainant described the other physical contact she had with the appellant in the bedroom:

> "He grabbed my shoulders. When I was having difficulty breathing before he left, he grabbed my shoulders and shaked me and said, 'You're okay. You're okay.' And he was – when he – I think he just – 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, and I was worried about my back at that point because I'd had back surgery."

After the appellant had grabbed the complainant's shoulders and flicked her back and forth, he put his arms around her and gave her "a really, really tight hug". When the appellant grabbed her by the shoulders, she told him not to touch her. The appellant grabbed his work shirt, his keys and wallet and left the complainant's home. The incident in the bedroom lasted for about 20 minutes. The complainant went to her ensuite and made a video diary about the incident. The police arrived and the complainant then went to the hospital. Photographs taken from the complainant's video diary were tendered. They showed the marks that were on the right side of the complainant's neck.

[7] The complainant's evidence during cross-examination included the following. Although the complainant said in her police statement given on 9 July 2018 that she asked her son to tell the appellant about his dog urinating in the house, she approached the appellant about it and told him to be more assertive in toileting the dog. She probably overlooked telling the police that she spoke to the appellant about this due to trauma and trouble breathing that day. She conceded that it was incorrect when she alleged in her police statement that the appellant attacked the dog in front of her children, as it was only her elder son who was present. She conceded that she did not mention in her police statement about the appellant getting upset, becoming aggressive and banging and throwing things around. She said she would have been overwhelmed, when she gave the statement and there may have been some things she accidentally overlooked. The complainant also conceded that the appellant was the one who said he was going to leave to go to his other residence. The camp beds were on the bed, as she was putting them together for her son and his friends. She pulled them off the bed and put them in front of her to protect herself. When the appellant came into the room he pushed them up onto the bed and ploughed through them to get to the complainant. The complainant conceded that she had omitted from her police statement the detail about the camp beds as a barrier. The complainant told the appellant to get his uniform and leave and that she would pack up the rest of his belongings. She told him that if he did not walk outside with his uniform, she would call the police. It was when she called 000 and asked for the police that he crossed the barrier.

[8] The complainant clarified that the appellant did not apply the choking pressure until she was on the bed. The appellant pushed her onto the bed and put his hand on her throat, whilst trying to grab her phone. After he got the phone, he hung up, threw it and still had his hand on her throat. (A joint admission was made that the triple 000 call lasted 31 seconds.)

[9] The complainant denied that she had previously told people that the appellant punched her during the incident. She specifically denied telling the nurse in the Emergency Department that the appellant punched her multiple times to the shoulder and the head. The complainant also recalled for the first time during cross-examination that she had locked the bedroom door and that the appellant knew how to unlock it by using a stick in the keyhole. The lock broke on this occasion.

[10] 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" during the incident, she disagreed and responded "He pushed the air out of me and I thought I was going to die." The complainant then conceded that she had recorded in her video diary after the incident:

> "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] The complainant did not call the ambulance immediately after this incident, explaining:

> "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."

[12] The complainant denied the suggestion that she moved the camp beds into the bedroom after the appellant had left and before the police arrived.

[13] The complainant's 13 year old son was interviewed by the police on 12 July 2018. The transcript of his s 93A interview and his pre-recorded cross-examination was played for the jury. He was playing video games in the lounge room with two school friends on the evening of the incident, when he left the lounge room to use the toilet. Whilst in the toilet, he heard "smacking, like smashing", "banging", and "muffled yelling". After he left the toilet, he saw his mother was crying in the lounge room and five minutes later the police officers were at the house. He saw red marks or something around his mother's neck.

[14] There was an admission made by both parties that the medical records relating to the complainant's admission to the hospital on 8 July 2018 contained an entry made by the nurse at 11.44 pm:

> "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."

[15] The complainant was seen at the hospital by Dr Bonner at 12.44 am on 9 July 2018. Dr Bonner found that the complainant had no head injuries, but some soft tissue swelling and redness to her neck at the front, and some tenderness to her cervical spine at the back of her neck. The redness and the soft tissue injury were consistent with a blunt trauma to her neck.

[16] Dr Home, a clinical forensic medical officer employed by Queensland Health, reviewed photographs of the complainant that were taken on 8 July 2018 and gave evidence as follows in respect of those photographs. When a person is choked, one does not always see identifiable marks or injuries to the person. The degree of force, where the pressure is applied, how long it is applied for and factors relevant to the individual (such as the person's likelihood of bruising with simple trauma) contribute to whether there may be visible injuries or marks in the neck area. One explanation for the marks in the photographs and the symptoms complained of by the complainant of loss of breath, black spots to her vision and pain to her neck, was the application of compressive force around the neck. The redness meant there was blunt force applied to the neck, but what the source of that force was cannot be determined from a photograph alone, but a hand was one possible explanation, but it was not the only one.

[17] In cross-examination, Dr Home explained that "people interpret the difference between choking and strangulation differently", but he put it simply as "choking is obstruction of the airway" and agreed that strangulation suggests external constriction of the neck that may impede breathing or blood supply to the neck.

[18] Constable Hodder was one of the police officers who attended at the complainant's home on the evening of 8 July 2018. The complainant came to the front door and was very upset. She was crying, when she spoke it was "very soft" and she was shaking when speaking with the police.

[19] The complainant's niece and her niece's boyfriend were staying at the complainant's house at the time of the incident. The boyfriend gave evidence they were staying in the garage which was off the house and he did not overhear an argument or incident between the complainant and the appellant.

[20] The appellant did not give or call evidence, but his record of interview with the police on 9 July 2018 was played to the jury as part of the prosecution case. His evidence in that interview was as follows. He was very sick that day. The complainant was picking at him while he was in bed sick. He gave the dog "a good smack" and carried him outside. He went to get his clothes and was in the bedroom when the complainant called the police. He wanted to get the phone off her. There was a struggle for the phone, when the complainant was sitting on the bed. 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.

The direction

[21] In the summing up, the trial judge described count 1 as alleged by the prosecution to be constituted by conduct that the appellant "stopped or hindered the complainant's breathing". The trial judge provided the jury with a handout that set out the elements of the offences and was specified as being an aid to the oral directions. Element (1) of count 1 was to the effect that the prosecution had to prove beyond reasonable doubt that the appellant choked the complainant. The explanation for "choked" on the handout was as follows:

> "'Choked' is an English word that bears its ordinary, everyday meaning – that is – 'to hinder or stop the breathing of a person'."

[22] That explanation was repeated in the oral directions:

> "Now you'll see as I've set out there, members of the jury, that choking is an English word that bears its ordinary everyday meaning, that is, in the context here it means to hinder or stop the breathing of a person."

[23] This direction and the explanation in the handout were given over the objection of counsel who appeared for the appellant at the trial who had submitted that there was one definition of "choked" on the handout, but there were multiple definitions in various dictionaries.

[24] There are two aspects of the direction which are challenged on appeal. The first is the correctness of the direction. The second is that the direction was given as if the meaning of "choked" was a direction on the law, when it was a matter for the jury to apply the ordinary meaning of the word.

Construction of "chokes" in s 315A

[25] Count 1 is an offence provided for in s 315A of the *Criminal Code* (Qld):

> "(1) A person commits a crime if—
>
> (a) the person unlawfully chokes, suffocates or strangles another person, without the other person's consent; and
>
> (b) either—
>
> (i) the person is in a domestic relationship with the other person; or
>
> (ii) the choking, suffocation or strangulation is associated domestic violence under the *Domestic and Family Violence Protection Act 2012*.
>
> Maximum penalty—7 years imprisonment.
>
> (2) An assault is not an element of an offence against subsection (1)."

[26] There is no definition of "chokes" for the purpose of the offence. The issue therefore is how the word "chokes" should be construed in s 315A of the *Code*. The appellant contends that "choking" means stopping the breath by internal pressure and that it must have a different meaning to the other words "suffocates" or "strangles" used in s 315A(1)(a). Mr Collins of counsel for the appellant relies on Dr Home's evidence for defining "choking" as use of internal pressure to cause obstruction of the airway and for submitting that strangulation should be construed as external pressure to the neck which blocks the trachea and stops breathing. Mr Collins submits that suffocation should be construed as a blockage of the nostril or mouth to prevent breathing. Ms Balic of counsel for the respondent argues that, in theory, it was the act of choking that had to be proved for the purpose of s 315A and that it was not essential to prove, as an element of the offence, the subjective effect of the act of choking on the victim. In view of the direction that was given by the primary judge to the jury, it was sufficient for the respondent to rely on the alternative contention that the word "chokes" is used to describe the act committed by one person against another and, in context, means the act of the first person that

has hindered or impeded the breathing of the other person. The respondent submits that the words "chokes" and "strangles" may be used interchangeably.

[27] Section 315A was inserted by s 3 of the *Criminal Law (Domestic Violence) Amendment Act* 2016 (Qld) (the 2016 Act) to follow after s 315 of the *Code* which provides for the offence of disabling in order to commit an indictable offence:

> "Any person who, by any means calculated to choke, suffocate, or strangle, and with intent to commit or to facilitate the commission of an indictable offence, or to facilitate the flight of an offender after the commission or attempted commission of an indictable offence, renders or attempts to render any person incapable of resistance, is guilty of a crime, and is liable to imprisonment for life."

[28] The application of s 315 was considered in *R v Osborne* [1987] 1 Qd R 96. Mr Osborne had been charged that, by means calculated to choke, namely by a manual squeezing of the neck of the named complainant, and with intent to commit an indictable offence, namely unlawful and indecent assault, he attempted to render the said complainant incapable of resistance. The trial judge had directed the jury that the third element of the offence was that the choking, the squeezing of the throat to stop the breathing, was done in an attempt to render the complainant incapable of resisting an indecent assault. The trial judge had given examples of resisting by physical means such as struggling, pushing and kicking, but also by stopping the breath of another person by choking with a view to making it impossible for the person being choked to call out for assistance. It was argued on appeal that the word "resistance" used in s 315 would not cover calling out for help and, as the complainant was able to struggle, s 315 was not satisfied.

[29] Mr Osborne was unsuccessful on appeal. It was held that the summoning of help by calling may amount to a form of resistance. Connolly J observed at 98:

> "To apply manual pressure to the neck is calculated to choke and to prevent calling for assistance and is therefore calculated to render the victim incapable of this type of resistance."

[30] McPherson J dealt with the argument on behalf of the appellant that was based on the use in s 315 of the word "incapable" without the addition of any qualifying adjective such as "partly" in these terms at 100:

> "It is equally true that the section does not say 'wholly incapable of resistance'. The only way in which a person could by choking be rendered wholly incapable of resistance is by causing her death. Plainly that is not required by the section. Causing her to become unconscious would not make her wholly incapable of resistance because, unless she died, she would be capable of renewing her resistance when she regained consciousness. Section 315 is derived from s 18 of *The Offences against the Person Act of* 1865, which is the Queensland statute 29 Vic. No. 11, and ultimately from s. 21 of The Offences against the Person Act 1861 (England). As a matter of passing interest, one of the two forms of the offence created by those provisions required that the victim be rendered 'insensible unconscious or incapable of resistance'. That suggests that

> 'incapable of resistance' was conceived of as something falling short of complete immobility such as results from unconsciousness."

[31] *Osborne* was followed in *R v Lansbury* [1988] 2 Qd R 180 where Mr Lansbury had been found guilty of the charge that he had "by means calculated to choke namely by pulling tight a tie around the throat and with intent to facilitate the commission of an indictable offence attempted to render (the named complainant) incapable of resistance". It was held that the relevant resistance could be constituted by a calling out for help, even if the act of choking did not affect the capacity of the victim to continue to resist in other ways. Another issue in *Lansbury* was the meaning of the word "calculated". The majority comprising Macrossan and McPherson JJ held that "calculated" means "likely", as the question of intent was dealt elsewhere in relation to the offence.

[32] The same three actions of choking, suffocating and strangling are the subject of both s 315 and s 315A of the *Code*, but the interpretation of "choke, suffocate, or strangle" s 315 is affected by the context that the consequence of the choking, suffocating or strangling is also specified as an element of the offence in s 315 that the action of the offender either renders the victim incapable of resistance or attempts to render the victim incapable of resistance. It was therefore not necessary in either *Osborne* or *Lansbury* for the court to dwell on the extent of the restriction on the breathing of the victim who was subjected to an act likely to choke, provided that the act was committed with the requisite intent, as the offence focused on the consequence of the choking action for the victim in resisting the offender. That also follows from the fact that in each case the offending act did not need actually to choke the victim, but had to be proved to be likely to choke the victim.

[33] Section 14A of the *Acts Interpretation Act* 1954 (Qld) (AIA) applies to the construction of the word "chokes" in s 315A. Section 14A relevantly provides:

> "(1) In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.
>
> (2) Subsection (1) does not create or extend criminal liability, but applies whether or not the Act's purpose is expressly stated in the Act."

[34] In order to ascertain the purpose of s 315A and to resolve the dispute over the construction of the word "chokes", it is permissible to have regard to the relevant extrinsic material, as defined by s 14B of the AIA. The Explanatory Notes for the Bill that became the 2016 Act reveal at p 1 that s 315A was enacted to implement 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*. Recommendation 120 was that the Queensland Government consider the creation of a specific offence of strangulation. The Report at p 113 referred to evidence that identified strangulation of a partner as a factor that may increase the risk of death to that partner in a domestic relationship.

[35] The Taskforce's rationale for the recommendation of a specific offence of non-fatal strangulation was explained at p 302 of the Report:

> "The Taskforce also heard repeated submissions in support of the introduction of a criminal offence which specifically encompasses the act of non-fatal strangulation. Strangulation was also mentioned in many of the personal stories told to the Taskforce, often using language such as 'choking' or 'grabbing the throat'. Using terms such as these instead of 'strangulation' downplays the seriousness of the behaviour. This in turn can affect the response of health professionals, the police and the justice system to the act of domestic and family violence.
>
> Under the Criminal Code, it is currently an offence to 'choke, suffocate, or strangle, and with intent to commit or to facilitate the commission of an indictable offence, or to facilitate the flight of an offender after the commission or attempted commission of an indictable offence, renders or attempts to render any person incapable of resistance.' This section is therefore limited to acts of strangulation and choking committed in association with an indictable crime.
>
> Strangulation is a very common feature of domestic and family violence and is also seen as a predictive risk factor for future more severe domestic and family violence and for homicide. The introduction of a separate offence for strangulation, which is not limited by association with a further crime, would allow for better recording of domestic and family violence incidents leading to better risk assessment and increased protection of victims."

[36] The following explanation is set out at p 2 of the Explanatory Notes relating to the 2016 Act:

> "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."

[37] It is acknowledged in the Explanatory Notes at p 3 that the enactment of the new offence "constitutes a potential infringement of the fundamental legislative principle that legislation has sufficient regard to the rights and liberties of individuals", but the justification is also explained at p 3:

> "The introduction of the new offence is justified to protect vulnerable members of our community, identify this predictive violent domestic conduct, denounce this type of offending and provide adequate deterrence to perpetrators of this type of offending."

[38] Despite the express intention of the Legislature in enacting s 315A to address the problem of conduct committed within a domestic relationship of choking or strangulation that was accepted in the Report as a predictive indicator of escalation in domestic violence offending, including homicide, the appellant submitted that as s 315A of the *Code* was a penal provision, it should be construed narrowly. That submission overlooks the express terms of s 14A. The purposive approach to

interpretation is applicable to a penal provision, subject to the express qualification in s 14A(2) of the AIA that s 14A(1) does not create or extend criminal liability.

[39] The respondent relies on the approach to statutory interpretation of an offence provision of the majority in *R v A2* (2019) 93 ALJR 1106. Section 45(1) of the *Crimes Act* 1900 (NSW) (the NSW Act) provided:

> "A person who:
>
> (a) excises, infibulates or otherwise mutilates the whole or any part of the labia majora or labia minora or clitoris of another person, or
>
> (b) aids, abets, counsels or procures a person to perform any of those acts on another person,
>
> is liable to imprisonment for 7 years."

[40] Two of the respondents had been charged with having mutilated the clitoris of two children and the third respondent was charged as an accessory to these offences. They were convicted at trial, but successfully appealed to the New South Wales Court of Criminal Appeal on the basis the trial judge had misdirected the jury on the meaning of "otherwise mutilates" in s 45(1) of the NSW Act. The jury had been directed that the word "mutilate" in the context of female genital mutilation means to injure to any extent and that it was not necessary for the Crown to establish that serious injury resulted. The jury were directed that, in the context of that trial, a nick or cut was capable of constituting mutilation for the purpose of the alleged offence.

[41] The issue in the High Court was therefore meaning of "otherwise mutilates". The history of the enactment of the provision is set out at [21]-[30] in the judgment of Kiefel CJ and Keane J. The provision was enacted as a result of a report published by the Family Law Council with respect to the practice of female genital mutilation in Australia. The FLC Report referred to four forms of female genital mutilation ranging from the least severe form of ritualised circumcision to the most severe form of infibulation. The FLC Report used the term female genital mutilation to include all four types of the practice. The Minister giving the second reading speech described female genital mutilation (or FGM) as "the term used to describe a number of practices involving the mutilation of female genitals for traditional or ritual reasons" and made specific reference to the FLC Report that recommended the introduction of legislation to make clear that FGM constitutes a criminal act and a form of child abuse. When the Minister said that it would be an offence for anyone to perform FGM in New South Wales, he went on to describe the three forms of FGM in order of severity and therefore did not refer to ritualised circumcision, but did say that the Bill sought to prohibit "all of these various methods of FGM".

[42] Kiefel CJ and Keane J noted at [32] that "consideration of the context for the provision may point to factors that tend against the ordinary usage of the words of the provision" and further at [33] that context "includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole" and "extends to the mischief which it may be seen that the statute is intended to remedy". At [36], Kiefel CJ and Keane J confirmed that the text should

be read in context and by reference to the mischief to which the provision is directed, referring to s 33 of the *Interpretation Act* 1987 (NSW) which is in similar terms to s 14A(1) of the AIA.

[43] Kiefel CJ and Keane J at [43] concluded that the second reading speech "as a whole conveys acceptance of the FLC Report and an intention to implement it" and then stated at [44]:

> "So understood, the mischief to which s 45 is directed is a gap in the law concerning the practice of female genital mutilation in all its forms which are productive of injury. Its immediate purpose is to criminalise the carrying out of that practice on female children. Its wider purpose may be taken to be its cessation."

[44] On the issue of construing a penal provision, Kiefel CJ and Keane J stated at [52]:

> "A statutory offence provision is to be construed by reference to the ordinary rules of construction. The old rule, that statutes creating offences should be strictly construed, has lost much of its importance. It is nevertheless accepted that offence provisions may have serious consequences. This suggests the need for caution in accepting any 'loose' construction of an offence provision. The language of a penal provision should not be unduly stretched or extended. Any real ambiguity as to meaning is to be resolved in favour of an accused. An ambiguity which calls for such resolution is, however, one which persists after the application of the ordinary rules of construction." (*footnotes omitted*)

[45] The construction given by Kiefel CJ and Keane J to "otherwise mutilates" at [53] was that it refers "to female genital mutilation in all its injurious forms", explaining:

> "The meaning to be given to 'otherwise mutilates', as referable to practices falling within the umbrella term 'female genital mutilation', does not involve any artificial or unexplained extension. There is no ambiguity as to its meaning after it is considered in its context and by reference to the mischief to which it is directed and its purposes. The word 'mutilates' in its ordinary usage is simply displaced in order to give effect to the purpose of s 45, to prohibit the practice of female genital mutilation on female children in order to achieve its cessation."

[46] Nettle and Gordon JJ at [148] of *A2* agreed generally with the reasons of Kiefel CJ and Keane J, but added some comments about the construction s 45(1) of the NSW Act. They noted at [151] that:

> "As these reasons will demonstrate, the phrase 'otherwise mutilates' in s 45(1)(a) means any physical injury to the whole or any part of the labia majora, labia minora or clitoris, which is done for non-medical reasons. It is not necessary to demonstrate that the physical injury lasted beyond the time it took for that immediate injury to heal or that there was any permanent disfigurement, alteration or loss of function, of the whole or any part of the labia majora, labia minora or clitoris."

[47] There is a similar offence to s 315A of the *Code* under s 28(2)(a) of the *Crimes Act* 1900 (ACT) that provides that "A person who intentionally and unlawfully chokes, suffocates, or strangles another person ... is guilty of an offence". In giving reasons for upholding a no case submission, Loukas-Karlsson J ruled on the meaning of "choke" for the purpose of this offence in *R v Green (No 3)* [2019] ACTSC 96, holding at [46] that the relevant element of "choke" is constituted by "the stopping of the breath". The appellant submits that the approach to the construction of, and the meaning given to, "choke" in *Green* should be followed on this appeal.

[48] When s 28(2)(a) was introduced into the existing provision that dealt with acts endangering health, s 27 of the ACT Act already dealt with acts endangering life that made it an offence for a person to intentionally and unlawfully choke, suffocate or strangle another person, so as to render that person insensible or unconscious or, by any other means, render another person insensible or unconscious. The Explanatory Statement for the Act that introduced s 28(2)(a) explained the purpose of the new provision:

> "Currently the only offence in ACT Legislation directly aimed at strangulation is contained in section 27 of the *Crimes Act 1900* as an 'act endangering life'. The penalty for an offence under this section is imprisonment for up to 10 years.
>
> In order to prove an offence under section 27 of the Crimes Act, the prosecution must prove beyond reasonable doubt that the strangulation was so severe that the victim lost consciousness or was rendered insensible. If an accused merely applied pressure to a victim's throat to such an extent that they lost the ability to breathe but stayed conscious and in possession of all their faculties, the charge would fail.
>
> …
>
> The amendment seeks to recognise the seriousness of strangulation in an offence with a lower threshold than "endangering life.""

[49] The reasons for concluding that "choke" means "stopping the breath" are set out at [47] and include reliance on the Explanatory Statement, the common aspect of the definition for "choke", "suffocate" and "strangle" in the Macquarie dictionary involving a stopping of the breath and not merely the impeding or restricting of the breath, and stopping the breath is consistent with the nature of the other offences encapsulated in s 28(2) of the ACT Act.

[50] At paragraph (g) in [47] of *Green*, reference was made to the nature of the provision being penal and the following observation was made in that context:

> "The alternative construction of impeding or restricting the breath is an ambiguous construction in the context of construing a penal statute. It would be difficult to administer an offence which is based on restricting the breath, as opposed to stopping the breath. Therefore, stopping the breath, an inability to breathe, is in my view the correct construction. The alternative construction invites the question of the requisite extent of restriction necessary to constitute the offence."

[51] The decision in *Green* was given before the High Court decision in *A2*. The approach of the judges in the majority in *A2* to the construction of an offence provision enacted to address particular conduct is instructive. The context of the introduction of s 28(2)(a) into the ACT Act to provide for a specific offence that did not require the extreme outcome of unconsciousness from the choking also differed from the purpose of the enactment of s 315A to deter conduct committed within the domestic setting that "is a predicted indicator of escalation in domestic violence offending, including homicide".

[52] One difference between s 33 of the *Interpretation Act* 1987 (NSW) that was applied in *A2* and s 14A of the AIA is that s 14A(1) which similarly promotes the interpretation best achieving an Act's purpose is qualified by s 14A(2) that expressly provides that subsection (1) does not create or extend criminal liability. Section 14A(2) was inserted in its current form in 1994 by s 14 of the *Fire Service Legislation Amendment Act* 1994 (Qld). The Explanatory Note in respect of s 14A(2) that was repeated in the second reading speech stated:

> "Proposed section 14A(2) ensures that purposive interpretation is enhanced without creating or extending criminal liability. South Australia has an equivalent safeguard in its purposive interpretation provision – *Acts Interpretation Act 1915* (SA), section 22. The proposed subsection also remakes existing section 14A(2)."

[53] There is little assistance found in the South Australia authorities where s 22 of the South Australian Act is considered. Section 22(1) provides for the purposive interpretation, but is subject to subsection (2) which provides that "This section does not operate to create or extend any criminal liability.". Some of the history of s 22 of the South Australian Act is referred to by Cox J in *Burch v South Australia* (1998) 71 SASR 12, 18, but there is no discussion on subsection (2).

[54] Even though s 14A(2) is intended to be a safeguard, when the purposive interpretation is used, so as not to create or extend criminal liability, it does not expressly or impliedly preclude the purposive interpretation of an offence provision. That is consistent with s 14B which assists in discerning the purpose of an enactment for the purpose of s 14A and which applies to the interpretation of an offence provision. Even where there is recourse to extrinsic material, the interpretation of an offence provision in context and having regard to the purpose of the provision, may result in an ambiguity as to its application. That gives scope for the operation of s 14A(2) to resolve the ambiguity against creating or extending criminal liability under the provision. Even without an equivalent provision to s 14A(2) in New South Wales, Kiefel CJ and Keane J recognised in *A2* at [52] that the purposive interpretation of a penal provision may result in ambiguity after the application of the ordinary rules of construction which must then be resolved in favour of an accused person.

[55] The Taskforce's Report shows that the new offence was to address non-fatal strangulation which was also referred to in the Report as choking. The words are used interchangeably in the Report and not in a technical sense that may be familiar to medically qualified persons such as Dr Home. The dictionary definitions show that words "choke", "strangle" and "suffocate" can be used interchangeably, although there is a slight difference in emphasis of meaning for each of the words. For example, the first meaning of "choke" in the Macquarie Dictionary is "to stop

the breath of, by squeezing or obstructing the windpipe; strangle; stifle; suffocate". The first meaning of "strangle" in the same dictionary is "to kill by compression of the windpipe; as by a cord around the neck" and the second meaning is "to kill by stopping the breath in any manner; choke; stifle; suffocate". The first meaning of "suffocate" in the Macquarie Dictionary is "to kill by preventing the access of air to the blood through the lungs … " and the second meaning is "to impede the respiration of".

[56] The gravamen of the offending conduct which the offence seeks to deter is the action of one domestic partner towards the other that is described as either choking, strangling or suffocating the victim and not the consequence of the act. The rationale for the offence is that even though one incident in the domestic context of choking, strangling or suffocating may not result in any serious injury, the conduct must be deterred, because it is inherently dangerous and experience shows that if it is repeated, death or serious injury may eventually result.

[57] With the benefit of the approach of the majority judges in *A2*, the interpretation of "chokes" in s 315A in context and in light of the extrinsic material does not result in any ambiguity. In order to achieve the purpose of the introduction of this offence, "chokes" must be construed as the act of the perpetrator that hinders or restricts the breathing of the victim and does not require proof that breathing was completely stopped, although the hindering or restriction of the breathing would encompass the stopping of the breathing. The act of choking will not be proved, unless there is some detrimental effect on the breathing of the victim, because otherwise it would not constitute the act of choking. Even if the restriction of the breathing, as a result of the action of choking the victim, is of short duration, without any lasting injury and does not result in a complete stoppage of the breath of the victim, that will be sufficient, as the offence is directed at deterring that type of conduct from occurring at all.

[58] To the extent that the reasoning in *Green* justified the construction that choking means stopping the breath, because of the difficulty of administering an offence which is based on restricting the breath, that concern can be addressed in respect of s 315A by focusing on the act that amounts to the choking, strangling or suffocating of the victim. There is no choking, if the perpetrator merely puts his or her hands to the neck of the victim. 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.

[59] 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".

The particularisation of counts 1 and 2

[60] The prosecutor had identified in opening to the jury that the case against the appellant on count 1 was that the appellant "stopped and/or hindered [the complainant's] breathing and, in doing so, choked her". The particulars identified for count 2 in the opening were the appellant "shook and/or applied force to [the complainant's] shoulders and, in doing so, he unlawfully assaulted her".

[61] In relation to each account, the appellant now argues that as the particulars were opened with alternative conduct for each count, they failed to inform the appellant sufficiently of the prosecution case against him.

[62] The complaint about the particulars in relation to count 1 is resolved by the conclusion reached above on the meaning of "choked" for the purpose of the charge. It was sufficient for the jury to be satisfied beyond reasonable doubt that the appellant's act in putting his hand around the complainant's neck and applying pressure hindered her breathing. If some members of the jury were satisfied that the conduct resulted in stopping the complainant's breathing that would also amount to hindering the complainant's breathing.

[63] In relation to count 2, although the conduct that was said to be the assault was described in terms of either the shaking of her shoulders or the application of force to her shoulders, it was apparent from the manner in which the prosecution case was conducted, as to the timing of that particular incident between the appellant and the complainant which took place after the act that was the subject of count 1. There is no substance in the appellant's complaint about uncertainty of the particulars in respect of count 2.

Unreasonable verdict

[64] To the extent that the appellant relies on the submissions made in relation to the direction given by the trial judge on the meaning of "choked" and the asserted defects in the particulars of each count to support the submission that the verdicts were unreasonable, those aspects of the matter have been addressed by the resolution of the grounds of appeal specifically relating to them.

[65] The appellant otherwise focuses on certain inconsistencies in the complainant's evidence. The focus of the trial, however, was on the complainant's evidence about what she said happened in the bedroom. The jury were given extensive and appropriate directions that they could not convict the appellant of count 1 unless they were satisfied beyond a reasonable doubt that the complainant was "a reliable and truthful witness in the account [she] was giving" … "that she was choked by the [appellant] by him placing his right hand around her throat and squeezed in the way that she described". The appellant's record of interview provided some support for the complainant's evidence as the appellant conceded there was a struggle between them over the phone and his thumb may have made contact with her during the struggle. There was also independent evidence of a red mark on the complainant's neck immediately after the incident. It was a matter for the jury to evaluate the discrepancies in the complainant's evidence. The trial judge gave a similar direction in relation to count 2, as had been given in respect of count 1, that the verdict on count 2 "depends on whether or not you are satisfied beyond reasonable doubt that what the complainant describes, so far as the conduct alleged in count 2 is concerned, that the complainant's evidence in respect of that was both truthful and reliable".

[66] It was a matter for the jury whether they accepted the complainant's evidence of the two incidents as truthful and reliable. An independent assessment of the evidence at trial does not suggest it was unreasonable for them to return verdicts of guilty. This ground of appeal cannot succeed.

Was the sentence manifestly excessive?

[67] The trial judge had been referred to *R v MCW* [2018] QCA 241 and *R v MDB* [2018] QCA 283.

[68] The 45 year old offender in *MCW* 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 a summary charge of contravention of domestic violence order (aggravated offence). He was unsuccessful in his application to appeal against his sentences, including imprisonment of three years and six months for the offence of choking, suffocation and strangulation in a domestic setting. Apart from the physical assault that resulted in the first assault occasioning bodily harm, the offender had placed the complainant in a choke hold using his right arm, and squeezed hard enough with his arm that she could not breathe or move and eventually lost consciousness. When she regained consciousness, the offender was stomping on her head with his left foot and started punching her in the face again which comprised the second assault. The offender had a lengthy criminal history including contraventions of domestic violence orders, lack of remorse and lack of insight into his conduct.

[69] The 38 year old offender in *MDB* pleaded guilty to common assault, threatening violence, assault occasioning bodily harm, choking in a domestic setting, wilful damage and associated summary charges. After committing the common assault on the complainant, holding a knife against the complainant's throat (that was the subject of the threatening violence offence) and throwing the complainant to the floor (which was the assault occasioning bodily harm), the offender threw the complainant onto the floor again, knelt over her, pinned her arms down with his knees and used his left hand to squeeze her throat such that she was unable to breathe or swallow (resulting in the offence of choking in a domestic setting). It was an aggravating feature of the offending that it was committed in contravention of a domestic violence order which resulted in one of the summary offences. The offender had a serious criminal history. He was sentenced to four years' imprisonment for the choking in a domestic setting and lesser concurrent sentences for the other offences and given a parole eligibility date after serving 12 months. The importance of deterrence as a principle of sentencing in respect of an offence under s 315A of the *Code* was emphasised in *MDB* at [44]-[45] by Bowskill J (with whom Gotterson and McMurdo JJA agreed).

[70] Even on the basis of these authorities, it is submitted the sentence was manifestly excessive. The appellant was 34 years old at the time of offending, had no prior criminal history and had a good work history. The trial judge was informed that, subsequent to the offending, the appellant gained a substantial windfall that put him in the position of being able to say he was going to have "absolutely nothing" to do with the complainant on his release from prison. The trial judge found that the appellant's offending might be characterised as "an overreaction" and it was for a short duration. In imposing the sentence of imprisonment of two years and six months, the trial judge elected to suspend the sentence at the half way point,

because the trial judge considered there was nothing in the appellant's background or antecedents which warranted his being placed on parole and was not persuaded the appellant required supervision upon his release.

[71] 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.

[72] As emphasised in both *MCW* and *MDB*, s 315A of the *Code* was enacted to deter a type of offending that was viewed as a precursor to offending with much greater consequences for the victims, including death. That the offending may be committed over a very short period of time will frequently be a characteristic of this offence. The deterrent aspect of sentencing for this offence is not just directed at the offender being sentenced, but more generally, in an attempt to eliminate the dangerous conduct of one domestic partner choking, suffocating, or strangling the other that can easily result in fatal or lasting consequences.

[73] Even allowing for the importance of general deterrence and that the appellant was being sentenced after trial, the imposition of a sentence of two years and six months on the appellant does not sufficiently recognise the difference between his offending and that in *MCW* and *MDB* and is manifestly excessive in the circumstances. I consider the appropriate sentence to be two years' imprisonment. The question arises whether the sentence should be suspended or a parole release date fixed. Because of the nature of the offending, the fact that the appellant had a previous good record was not necessarily determinative of whether supervision upon release was required. I would therefore fix a parole release date at the half way point of the sentence at 5 June 2020.

Orders

[74] The orders which should be made are:

1. Appeal against conviction dismissed.
2. Application for leave to appeal against sentence granted.
3. Appeal against sentence allowed.
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.

[75] **BODDICE J:** I agree with Mullins JA.