***R v MDB* [2018] QCA 283 (19 October 2018) – Queensland Court of Appeal**

'Aggravating feature' – 'Appeal against sentence' – 'Breach protection order' – 'Domestic violence offences' – 'Strangulation'

Charges: 1x common assault, 1x threatening violence, 1x assault occasioning bodily harm, 1x choking in a domestic setting, and 1x wilful damage.

Appeal type: application for leave to appeal against sentence.

Facts: The applicant was in a relationship with the complainant from August 2016. On 22 December 2016, a protection order requiring that the applicant be of good behaviour and not commit acts of domestic violence against the complainant was issued pursuant to the *Domestic and Family Protection Act* 2012 (Qld) (DFVPA). On 17 February 2017, the applicant attacked the complainant. Consequently, the applicant was charged with five offences (common assault, threatening violence, assault occasioning actual bodily harm, choking in a domestic setting, wilful damage) and three summary offences (deprivation of liberty, breach protection order, unlawful possession of a weapon). On 15 February 2018, the applicant was convicted and sentenced on the five indicted offences and convicted of the three summary offences without any further punishment.

Issues: there were four grounds of the applicant's appeal:

- Four-year sentence imposed for the offence of choking was manifestly excessive
- The sentencing judge erred by relying upon the protection order as evidence that the offending was not isolated.
- The sentencing judge erred by finding that the applicant had made a threat to kill.
- The sentencing judge erred by finding that the applicant was generally not credible because he told police it wasn't 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.

Decision and reasoning: application for leave to appeal against the sentence refused.

Whether the sentence was manifestly excessive was determined by Gotterson JA through a consideration of relevant authority, the nature and purpose of the offence of choking, and the circumstances of the case at hand. Both *R v MCW* [2018] QCA 241 and *Bennet* were referred to by his Honour to illustrate the seriousness of the offence and the factors relevant to sentencing offenders under the offence (see [44]-[50]). His Honour then noted there were five material facts that warranted the severity of the punishment; these factors included, among others, the disturbing circumstances of the offending, the physical, emotional and financial impact it had on the complainant, and the applicant's concerning criminal history (see [52]).

As to the second ground of appeal, his Honour initially notes that the order was part of the agreed facts which formed the basis of the sentence proceedings. Gotterson JA then refers to s 9(3)(g) and s 9(10A) of the *Penalties and Sentences Act* 1992 in asserting that the existence and contravention of an order is a key consideration for the sentencing judge and forms an aggravating feature respectively. In doing so, his Honour dismisses the foundation of this contention that the order cannot be referred to as evidence. In addressing the applicant's specific contention, his Honour observes that orders are only made on the basis of evidence of previous difficulties in a relationship and that accordingly, the sentencing judge's inference that the order was a result of previous relationship difficulties was a reasonable one. Taking this into account, his Honour then affirms that it was correct for the sentencing judge to state that the offences committed on 17 February 2017 were not "an isolated and exceptional incident" (see [26]).

Gotterson JA rejected the third ground of appeal on the basis that the applicant's contention mis-interpreted the sentencing judge's remarks in coming to the finding that the applicant threatened to kill her (see [27]). Having regard to the seriousness and criminality of the applicant's conduct, his Honour perceives the sentencing judge's finding as reflecting no error at all (see [28]).

Similarly, his Honour also rejected the fourth ground of appeal on the basis that it was a misconstruction of the sentencing judge's comments. Gotterson JA was of the view the judge made no error in his assessment of the reliability of the matters at hand on the basis of the applicant's instructions (see [33]).