COURT: SUPREME COURT OF TASMANIA (COURT OF CRIMINAL APPEAL)

CITATION: *Director of Public Prosecutions v Whiteroad* [2025] TASCCA 3

PARTIES: DIRECTOR OF PUBLIC PROSECUTIONS
v
WHITEROAD, Braydon Leigh

FILE NO: CCA 2594/2024

DELIVERED ON: 4 June 2025

DELIVERED AT: Hobart

HEARING DATE: 11 April 2025

JUDGMENT OF: Estcourt J, Brett J, Cuthbertson J

CATCHWORDS:

Criminal Law – Appeal and new trial – Appeal against sentence – Grounds for interference – Crown appeal – Sentence manifestly excessive or inadequate – Inadequacy the sole ground of appeal – No specific error alleged – Sentence must be so manifestly wrong that it could only be the result of some undefinable error in the exercise of judicial discretion – Sentencing judge did not fail to give adequate weight to relevant sentencing factors – The sentence was within the very wide discretion available to the sentencing judge – Sentence imposed not unreasonable or plainly unjust – Appeal dismissed.

Aust Dig Criminal Law [3521]

Legislation:
Criminal Code Act 1924 (Tas)

Cases:
Bresnehan v The Queen [1992] TASSC 55
Dinsdale v The Queen [2000] HCA 54
Director of Public Prosecutions (Acting) v Pearce [2015] TASCCA 1, 28 Tas R 1
Director of Public Prosecutions v Foster [2019] TASCCA 15, 30 Tas R 217
Director of Public Prosecutions v Johnson [2020] TASCCA 4
Director of Public Prosecutions v Karklins [2018] TASCCA 6; 29 Tas R 373
Director of Public Prosecutions v King [2024] TASCCA 8
Gregson v Tasmania [2018] TASCCA 14
Hardwick v Tasmania [2020] TASCCA 2, 32 Tas R 62
House v The King (1936) 55 CLR 499
Palmer v State of Tasmania [2024] TASCCA 6
Price v Tasmania [2016] TASCCA 22; 31 Tas R 218
R v Ackland [2019] NZHA 312, referred to
The Queen v De Simoni (1981) 147 CLR 383

REPRESENTATION:

***Counsel*:**

Appellant:	L Ogden
Respondent:	F McCracken

Solicitors:

Appellant:	Director of Public Prosecutions
Respondent:	Fran McCracken

Judgment Number:	[2025] TASCCA 3
Number of paragraphs:	23

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DIRECTOR OF PUBLIC PROSECUTIONS v BRAYDON LEIGH WHITEROAD

REASONS FOR JUDGMENT

COURT OF CRIMINAL APPEAL
ESTCOURT J
BRETT J
CUTHBERTSON J
4 June 2025

Orders of the Court:

Appeal dismissed

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DIRECTOR OF PUBLIC PROSECUTIONS v BRAYDON LEIGH WHITEROAD

REASONS FOR JUDGMENT

COURT OF CRIMINAL APPEAL
ESTCOURT J
4 June 2025

The appeal

1 This is a Crown appeal against a sentence imposed by Jago J on 3 September 2024. The respondent pleaded guilty to two counts of assault on his female domestic partner. The respondent was convicted and sentenced to five months' imprisonment, the execution of which was suspended on condition that he commit no offence punishable by imprisonment for a period of two years.

2 The sole ground of appeal is that the sentence was manifestly inadequate.

3 The principles relevant to such an appeal were summarised by Pearce J in *Director of Public Prosecutions (Acting) v Pearce* [2015] TASCCA 1, at [8] 28 Tas R 1. An appellate court only sits to rectify a genuine error: *Dinsdale v The Queen* [2000] HCA 54. Where no specific error is alleged, the court must be persuaded that the sentence imposed is "unreasonable or plainly unjust": *House v The King* (1936) 55 CLR 499. This requires something beyond being too lenient or too harsh. It must be established that the sentencing order is so manifestly wrong that it could only be the result of some undefinable error in the exercise of judicial discretion: *Bresnehan v The Queen* [1992] TASSC 55.

4 As to Crown appeals, this Court said in *Director of Public Prosecutions v King* [2024] TASCCA 8 at [38]-[39]:

> "38 The primary purpose of Crown appeals against sentence is to lay down principles for the governance and guidance of courts having the duty of sentencing offenders. They also serve to maintain confidence in the administration of justice by an intervention of an appellate court in the case of a manifestly inadequate sentence: *Green v The Queen* [2011] HCA 49, 244 CLR 462 at [1]-[2]; *Everett v The Queen* (1994) 181 CLR 295 at 306; *Director of Public Prosecutions v Swan* (above) at [30].
>
> 39 The appellant needs both to persuade this Court of error in the exercise of the discretion, and to negate any reason the residual discretion of this Court not to interfere should be exercised: *CMB v The Attorney-General (NSW)* [2015] HCA 9, 256 CLR 346 at [66]."

5 The essence of the appeal is that the learned sentencing judge took "an unduly individualised approach" to sentencing the respondent and failed to give appropriate weight to denunciation, general deterrence and vindication.

Comments on passing sentence

6 In sentencing the respondent, the learned sentencing judge made the following comments:

> "Mr Whiteroad, you have pleaded guilty to two counts of assault contrary to s 184 of the Criminal Code. The victim of your crimes was your partner, whom I shall refer to as 'S'. You and S formed a relationship in May 2019. You lived together from 2021. In December 2021 you had a child together. Following the birth of that child S suffered with post-natal depression and some issues arose within the relationship. These issues were exacerbated by you and S finding yourselves without stable accommodation and with a newborn. It was a stressful time and from early 2022, the

relationship became quite volatile. Arguments became frequent and you began to display abusive behaviour towards S. The matters to which you have pleaded guilty are not isolated incidents.

On 1 May 2022, when you and S were living at a residence in Sisters Creek, S became upset and started talking about suicide. I infer, it was most likely a reflection of the difficulties she was experiencing with her post-natal depression. Rather than being supportive, your response was simply cruel and nasty. You said to her, "Here's a fucking rope, here you go" and you placed a dog lead around her neck. This constitutes the first count of assault.

On the evening of 30 May 202, you and the complainant argued. You began to pack your things intending to leave the residence. There was verbal abuse exchanged between the two of you. As you went to exit the home, S stood in front of the door. You grabbed her by the arms and shirt and grabbed her by the shoulder and pushed her around. You then grabbed her by the throat with both hands and squeezed. You squeezed her throat for up to ten seconds. She felt dizzy and light headed and was unable to breathe properly. She thought she was going to black out. You desisted, let her go and left the residence.

Afterwards, the complainant's neck started swelling. She went to her father's home. She was very distressed. He observed bruising and marks on her neck. Police and ambulance were called. Attending police also noted bruising to both sides of S's neck and when ambulance personnel arrived they noted that she appeared scared and also observed visible bruising, redness and swelling to her throat. She also had redness to her chest and bruising to her left, lower leg. She had a wheeze and a raspy voice.

S was taken to the hospital where the medical staff documented bruising on the left side of the neck, mild bruising on the right side of the neck, a red line around her neck consistent with a necklace being pulled, tenderness to the left forehead and bruising to both knees, her left calf and both thighs.

You were subsequently arrested. You were interviewed by police. In respect to the dog lead incident, you admitted that you had said words to the effect of "Here's a fucking rope, there you go". You agreed you threw the rope at her and "probably" put the lead over her neck but could not clearly recall.

In respect to the incident on 30 May, you agreed that there had been a significant argument and that you were trying to leave. You admitted grabbing S by the arms and shoulder and "throwing her around a bit". You admitted that you had placed your hands around her neck and held her by the throat for about five seconds. You denied, however, that you had used sufficient force to cause the injuries that S sustained. You now accept that you did, in fact, cause those injuries. I infer from the injuries caused that the pressure you applied to her neck was far from insubstantial.

After these incidents, you and S separated for a period. The relationship has since resumed. S has declined to provide a victim impact statement. That, of course, does not mean she was not badly impacted by your crimes. Whilst I accept the first incident resulted in no injury, it was, as I have commented, a nasty and cruel act and was particularly demeaning and unsupportive of her. The second act resulted in serious injury and her demeanour, as observed by others after the incident, clearly demonstrates that she was scared and upset by your behaviour.

You are 27 years of age. You have no prior convictions of relevance. The only matters recorded on your criminal history are some traffic infringement matters. You have a strong industrial record. You have worked as a chef and as a fly in/fly out contract worker. You are currently working as an arborist. You have worked your way up to a team leader position in that field and you are well regarded by your employer. I am told you have prospects of further advancement in that field of employment.

To your credit, you and S have worked hard on addressing issues within your relationship. After these incidents occurred, there was a Family Violence Order in

> place. You complied with the terms of that Family Violence Order. S, in fact, sought variations of that Family Violence Order during its currency to allow for there to be contact between you and her. Once the Order permitted it, the two of you resumed living together and I am told there have been no further difficulties within the relationship. The Family Violence Order expired in May 2023. Both you and S have worked hard to resolve the issues within your relationship. Each of you has undertaken counselling, and I am told the way you now communicate with each other over issues that may arise is much improved. The fact that there has been no further offending since May 2022, so a period of more than two years now, counts in your favour and is indicative, in my view, that these incidents were out of character and arose during a difficult period within the relationship. I am satisfied they are unlikely to be repeated and therefore specific deterrence does not attract significant weight in this sentencing exercise.
>
> I take into account your pleas of guilty. Whilst it could not be said that they were entered at an early stage, it is noteworthy that you were originally charged with additional offences. They have not been proceeded with and you have pleaded guilty to matters which are largely consistent with the admissions you made to police on interview. The pleas of guilty still retain mitigatory value because S has been spared the ordeal of giving evidence in circumstances where I suspect, for several reasons, it would have been difficult for her to do so.
>
> Family violence crimes are always serious. They inherently involve a breach of trust and are typically committed against vulnerable complainants. S was having significant difficulties at the time these crimes occurred. She deserved your support and assistance but instead, you reacted to her with violence. Courts have on many occasions emphasised the need to condemn family violence and in sentencing such matters, general deterrence, denunciation, punishment, and protection of victims are paramount sentencing considerations. That said, the Court must also recognise the individual circumstances of the criminal offending. As noted, I am satisfied that this was out of character for you, given your lack of prior convictions and the fact that there has been no further offending since May 2022. You have recognised your wrongdoing and you have worked hard to develop new skills and understanding to ensure that this sort of behaviour is not repeated. In all the circumstances, I am of the view that the seriousness of your behaviour warrants a period of imprisonment, but given the individual circumstances pertaining to you, and what I assess to be solid prospects of reform, it is appropriate that the period of imprisonment be wholly suspended. You need to very clearly understand however, Mr Whiteroad, that if you are foolish enough to breach the terms of the suspended sentence, a Court must activate it and require you to serve it unless it is unjust to do so."

The appellant's submissions

7 Counsel for the State, Mr Ogden, in the appellant's written submissions, submitted that recent decisions of this Court have clearly stated that family violence must be condemned and discouraged (see *Palmer v State of Tasmania* [2024] TASCCA 6; *Director of Public Prosecutions v Foster* [2019] TASCCA 15, 30 Tas R 217; *Director of Public Prosecutions v Karklins* [2018] TASCCA 6, 29 Tas R 373 and that family violence continues to be a matter of community concern (see *Gregson v Tasmania* [2018] TASCCA 14 at [37] per Martin AJ).

8 Counsel noted that in May 2022 Parliament enacted a standalone offence of strangulation, contrary to s 170B of the *Criminal Code* and that prior to that, acts involving choking, suffocating and strangling were charged as assaults (summary or indictable), crimes against s 170 of the Code, or attempting to commit murder, depending on the facts of the particular case. He noted that count 2 on the indictment on which the respondent was arraigned, occurred one week prior to the enactment of strangulation as a standalone offence and that as the crime of strangulation was not made retrospective by Parliament, the respondent could not be charged with strangulation and accordingly a charge of assault was pursued on indictment.

9 Counsel for the State submitted that as strangulation was not a crime at the relevant time, there could be no breach of the rule set out in *The Queen v De Simoni* (1981) 147 CLR 383 by sentencing the respondent on the basis that his conduct would now be charged as strangulation, that is, that he intended to choke, suffocate or strangle the complainant, and that he did in fact do so.

10 Counsel for the State submitted that prior to the crime of strangulation being enacted, clear statements were made by this Court in a number of cases to the effect that assaults involving acts of strangulation constitute extremely serious criminal conduct, particularly when they are committed in the context of family violence (see *Price v Tasmania* [2016] TASCCA 22, 31 Tas R 218 at [39] per Estcourt J; *DPP v Foster* (above) at [26]; *Hardwick v Tasmania* [2020] TASCCA 2, 32 Tas R 62; *Director of Public Prosecutions v Johnson* [2020] TASCCA 4 per Geason J at [33] with whom Wood J agreed).

11 Counsel for the State submitted that strangulation is no less insidious than assaults by punching and kicking. As was said in *DPP v Foster* (above) at [26] per Estcourt J:

> "Strangulation is a form of power and control that can have devastating psychological long-term effects on its victim, in addition to a potentially fatal outcome…Choking can cause loss of consciousness and can cause death quickly. It has been suggested that death can occur within seven to 14 seconds."

12 Counsel went on to submit that courts now have an increased understanding that choking of female victims by their male partners is a prevalent and dangerous feature of family violence (*Hardwick v Tasmania* (above) [49]-[53] per Martin AJ), and that it can be a form of coercion and control within domestic relationships (*DPP v Foster* (above) per Estcourt J at [26]-[27]; *DPP v Johnson* (above) at [33] per Geason J).

13 As to comparable sentences in other cases, counsel for the State said:

> "Whilst it is accepted there is often limited utility in appellate courts comparing sentences for other cases of the same crime or offence, a 2021 Sentencing Advisory Council Research Paper titled 'Sentencing for non-fatal strangulation' found that between 2010 and 32 October 2020, there were 74 cases heard by the Tasmanian Supreme Court that involved non-fatal strangulation as a basis or an aspect of the charge. Fifty-one of those cases were family violence related, the vast majority of which (40) were charged as assault contrary to s184 of the Criminal Code. The median sentence of imprisonment for assaults involving strangulation was 24 months (more than double the median for assault, which was 10 months). The shortest sentence for a case involving intimate partner violence was 8 months. It is submitted that in general terms, this trend has continued since 2020 with the majority of sentences for instances of assault involving strangulation or non-fatal strangulation contrary to s 170B of the Criminal Code being in the range of 9 - 14 months imprisonment, wholly suspended.
>
> The appellant submits the above analysis demonstrates that the sentence imposed upon the respondent sits at the far end of the range, and in the submission of the respondent, is so lenient as to be plainly wrong."

14 Counsel for the State relied upon a New Zealand decision of *R v Ackland* [2019] NZHA 312 in which Cooke J identified at [26] a number of well understood factors that are relevant in assessing the objective seriousness of assaults involving strangulation and said at [30]:

> "At the lower end would be offending involving strangulation as an intentional result of pressure being applied to the throat for a brief period, potentially without any of the above factors being present. Such offending might attract a starting point of six months to two years' imprisonment."

15 Counsel for the State submitted while some of the factors outlined in *Ackland* are not present in this case, many were present, along with other aggravating features including:

- The assaults were committed in a family violence context and were therefore a breach of trust.
- The second count of assault involved pressure being applied to the complainant's throat for up to ten seconds, to the point that she felt she was beginning to lose consciousness. The complainant was unable to breathe, became lightheaded and her arms and legs became tingly; she sustained actual injury in the form of bruising on both sides of the neck, swelling of the neck and redness to the neck that looked like a necklace being pulled.
- Count 2 on the indictment was not an isolated incident and was a continuation of degrading and abusive behaviour on the part of the respondent towards his partner.
- The conduct involved other violence (the respondent grabbing and pushing the complainant).
- The complainant was particularly vulnerable following the birth of a child and was experiencing post-natal depression.
- The offending occurred in the complainant's home where she was entitled to feel safe.

16 Finally, counsel for the State submitted that whilst the complainant was not a willing witness and continued the relationship with the respondent, that is not an unusual scenario in family violence matters and does not detract from the need to impose a sentence that gives sufficient effect to the principles of general deterrence, denunciation and vindication of the complainant (see *Karklins* (above) per Geason J at [73]-[79]).

Discussion and disposition

17 Whilst I accept each of the statements of legal principle advanced by counsel for the State, and whilst I detect no error in his adumbration of the aggravating features of the facts of this case, I cannot agree that the learned sentencing judge imposed a sentence that was manifestly inadequate. In my view, having regard to the reasons set out in her Honour's comments on passing sentence, she did not take "an unduly individualised approach" to sentencing the respondent and she did not fail to give appropriate weight to denunciation, general deterrence and vindication.

18 Her Honour recognised that family violence crimes are always serious, that they inherently involve a breach of trust and are typically committed against vulnerable complainants. Her Honour expressly acknowledged that courts have, on many occasions, emphasised the need to condemn family violence and in sentencing such matters, general deterrence, denunciation, punishment, and protection of victims are paramount sentencing considerations. However, her Honour was also aware that she was obliged to recognise the individual circumstances of the criminal offending. She noted that:

- The offences were out of character for the respondent, given his lack of prior convictions and the fact that there has been no further offending since May 2022;
- He had recognised his wrongdoing and had worked hard to develop new skills and understanding to ensure that this sort of behaviour was not repeated;
- The respondent had solid prospects of reform; and
- That such offending was not likely to occur again.

19 Her Honour had a difficult balancing exercise to undertake in sentencing the respondent in unusual circumstances. Her Honour had to take into account that both the respondent and his partner had worked hard on addressing issues within their relationship; that after the offences occurred there was a family violence order in place with which the respondent complied; that his partner sought variations of that family violence order during its currency to allow for there to be contact between her and the respondent and that once the order permitted it, the two of them resumed living together without further difficulties within the relationship. Her Honour also had to take into account that each of them had undertaken counselling and the way in which they communicated with each other over issues that might arise between them was much improved.

20 I am satisfied that while her Honour might easily have imposed a somewhat longer suspended sentence, the sentence she settled upon was within the very wide discretion she had to exercise. I am not satisfied that the sentence imposed is unreasonable or plainly unjust. Comparable sentencing data are instructive, but I do not find them to be determinative in this case given the uncommon concatenation of reassuring features about the respondent and his partner and their relationship.

21 I would dismiss the appeal.

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REASONS FOR JUDGMENT **COURT OF CRIMINAL APPEAL**
BRETT J
4 June 2025

22 I agree with the reasons stated by Estcourt J. For those reasons, I joined the order dismissing the appeal.

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REASONS FOR JUDGMENT **COURT OF CRIMINAL APPEAL**
CUTHBERTSON J
4 June 2025

23 I also agree with the reasons stated by Estcourt J. For those reasons, I joined the order dismissing the appeal.