

## **Choking, suffocation or strangulation in a domestic setting s 315A**

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The prosecution must prove that:

**1. The defendant unlawfully choked/ suffocated/ strangled the complainant.**

The act of choking requires that the defendant hinders or restricts the breathing of the complainant.

The act of choking does not require proof that breathing was completely stopped. The act of choking requires some detrimental effect on the breathing of the complainant.<sup>1</sup>

**2. The choking/ suffocation/ strangulation was unlawful.**

Unlawful means not justified authorised or excused by law.<sup>2</sup>

**3. The complainant did not consent.**

**4. The defendant and the complainant were in a domestic relationship<sup>3</sup> with each other.**

Section 1 of the *Criminal Code* 1899 provides that “domestic relationship” means a relevant relationship under section 13 of the *Domestic and Family Violence Protection Act* 2012.

Section 13 of the *Domestic and Family Violence Protection Act* 2012 provides

*“A relevant relationship is-*

*(a) an intimate personal relationship; or*

*(b) a family relationship; or*

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<sup>1</sup> In *R v HBZ* [2020] OCA 73 the Court of Appeal said:

[57] ... 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. ...

[58] ... 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. ...”

The High Court refused special leave to appeal on 11 November 2020: *HBZ v The Queen* [2020] HCA Trans 187.

<sup>2</sup> Refer to any relevant issue raised on the evidence.

<sup>3</sup> It will be necessary to point out the basis for the allegation of being in “a domestic relationship” or the allegation that the act is “associated domestic violence” within the meaning of the *Domestic and Family Violence Protection Act* 2012. See also the *Domestic and Family Violence Protection Act* 2012 Benchbook.

(c) *an informal care relationship.*”

Section 14 and 15 of the *Domestic and Family Violence Protection Act 2012* define “an intimate personal relationship”.

**OR**

**5. The choking/ suffocation/ strangulation is “associated domestic violence” under the *Domestic and Family Violence Protection Act 2012*<sup>4</sup>**

Section 9 of the *Domestic and Family Violence Protection Act 2012* provides that “associated domestic violence means behaviour mentioned in section 8(1) by a respondent towards-

- (a) *a child of an aggrieved; or*
- (b) *a child who usually lives with an aggrieved; or*
- (c) *a relative of an aggrieved; or*
- (d) *an associate of an aggrieved.”*

**Assault is not an element of the offence.<sup>5</sup>**

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<sup>5</sup> Provocation is only available in relation to “an offence of which assault is an element”, see section 268(1) of the *Criminal Code 1899*.