**Prosecutions for “Non-fatal strangulation and non-fatal suffocation” – A positive step?**

Too often in our courts, we prosecute and defend matters of domestic violence, committed by one partner against their significant other. When sentencing these Offences against the Person, such as s.47 or Assault by beating, Judges or benches of Magistrates’ will often take into account in their decisions the domestic violence guidelines and specific aggravating features, such as strangulation, suffocation, and asphyxiation. However, as of 7th June 2022, two specific offences of “non-fatal strangulation” and “non-fatal suffocation” have been implemented into our justice system, as part of the government’s introduction of the Domestic Abuse Act.

What does it say?

Section 70 of the Domestic Abuse Act 2021, which came into force on 7th June 2022, substituted s.75A into the Serious Crime Act 2015 - two separate offences of non-fatal strangulation or non-fatal suffocation. This legislation provides for someone (named person “A” for the purposes of the Act) to be charged with an offence if they:

1. Intentionally strangle another person (“B”); or
2. Does any other act to B that –
   1. Affects B’s ability to breathe, and
   2. Constitutes battery of B.

Therefore, s.75A(1)(a) constitutes an offence of “Non-fatal strangulation”, and s.75A(1)(b) constitutes an offence of “Non-fatal suffocation”. However, for the purposes of this article, the two have been grouped together.

As established under s.75A(2) and (3), it is a defence for the individual charged to show that B consented to the strangulation or the other act; to take into consideration situations where couples are consenting to acts of strangulation/suffocation either for sexual gratification purposes or otherwise. They must do so by providing sufficient evidence of the fact, and the contrary is not proved beyond reasonable doubt. This defence does not apply if B suffers serious harm as a result of the strangulation or the other act, and the individual charged either intended to cause B serious harm or was reckless as to whether B would suffer serious harm. This defence of consent does not extend to s.47, s.20, or s.18.

The offence is one to be tried either way. On summary conviction, the maximum sentence is one of 12 months (or 6 months if the offence was committed before 2nd May 2022, prior to the increase in the magistrates’ court sentencing powers) and/or a fine. On indictment, the maximum sentence is a term of 5 years and/or a fine.

Is this a positive move?

At first glance, the enactment of these offences seems positive. In practice, prosecuting offences where strangulation and suffocation are alleged but cause no visible injury can be a difficult task. Especially in the domestic violence context, when complainants may withdraw their support of the prosecution either out of fear or a wish to continue with the relationship.

Campaigners for domestic violence reform urged the government to better protect victims of domestic violence, and the introduction of s.70 Domestic Abuse Act 2021 clearly intended to tackle the low rate of successful prosecutions for non-fatal strangulation in our country. Studies such as Glass et al’s *“Non-fatal strangulation is an important risk factor for homicide of women”* confirm that if victims of domestic abuse were subject to non-fatal strangulation beforehand, then they are seven times more likely to be murdered by their romantic partner.The enactment of these offences, along with the Act in general, is therefore a positive shift to recognise the difficulties and complexities victims of domestic violence face on a daily basis.

However, to a legal mind, there are clearly flaws within s.70/s.75A. We are used to the legal definition of ‘serious harm’ including GBH and offences under s.20 and s.18 Offences against the Person Act 1861. We are also instilled to recognise the definition of actual bodily harm as being “any hurt calculated to interfere with the health or comfort of the victim, which need not be pertinent but must be more than transient and trifling” (*R v Donovan* [1934] 2 KB 498). Nevertheless, s.75A(6) defines “serious harm” as:

1. Grievous bodily harm, within the meaning of s.18,
2. Wounding, within the meaning of s.18, or
3. Actual bodily harm, within the meaning of s.47.

There appears to be a disconnect between the definition of s.47 as we know it and s.47 within the terms of s.75A(6). For ‘serious harm’, there is now a need to prove an intention or recklessness under s.75A to disprove the defence, instead of proving an application of unlawful force in s.47 cases. Additionally, the mens rea requirement for proving a defence under s.75A appears to make these two offences more difficult to prosecute than a s.47 offence – where the maximum sentence is also one of 5 years.

We have discussed the resemblance of s.75A to other Offences against the Person, but they share an even more striking resemblance to the offence of s.39 Assault by Beating – an offence triable only summarily with a maximum sentence of 6 months. However, under s.75A, if the defendant elects a Crown Court trial or the magistrates’ do not believe they have sufficient sentencing powers to deal with the case, the maximum sentence is one of 5 years. Although it is important to recognise the difference between the strangulation of a stranger or a friend in the street and the strangulation of an intimate partner as a mechanism to gain control, it is unclear why there is such a disparity between the maximum sentences. Judges and benches across the country have for some time applied the domestic violence guidelines and the aggravating feature of strangulation when sentencing these offences, to take into account these differences. However, applying these aggravating features to the new offence of Strangulation or Suffocation could be classified as ‘double counting’.

There are currently no Sentencing Council Guidelines in place for non-fatal strangulation or suffocation, and prosecutions for these offences are only just starting to trickle through the lower courts. Without seeing the updating Sentencing Guidelines for these two offences, it is unclear how they will be sentenced in practice moving forward. However, what is clear is that in some way, with the introduction of the Domestic Violence Act 2021 and the improved Victim’s Code, victims of domestic violence will be one step closer to getting the justice and closure which they are searching for.

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