***R v Nedza* [2013] SASCFC 142 (18 December 2013) – South Australia Supreme Court (Full Court)**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Aggravating factor' – 'Attempting to dissuade a witness' – 'Breach of bail' – 'Breach of restraining order' – 'Concurrency' – 'Creating risk of harm' – 'Deterrence' – 'Double punishment' – 'Exposing a child' – 'Physical violence and harm' – 'Rape' – 'Sentencing' – 'Sexual and reproductive abuse' – 'Totality'

Charge/s: Rape (two counts), creating a risk of harm, attempting to dissuade a witness, breach of bail, breach of restraining order.

Appeal Type: Application for permission to appeal against sentence.

Facts: The respondent attended the home of his former partner and then proceeded to threaten her with a knife, assault her multiple times, commit two acts of anal rape, threaten her daughter and parents and caused her to swallow petrol. He had possession of a cigarette lighter and threatened to set her alight. He also pressed the knife against their sleeping baby's cheek. The respondent then, through his sister offered to pay the complainant money if she dropped the charges. All of the conduct was in breach of bail and a domestic violence restraining order. The respondent's criminal history included multiple instances of prior violent offences committed against the complainant and her mother which demonstrate a pattern of domestic violence. The respondent pleaded guilty to all charges and was sentenced to a total term of imprisonment of 10 years with a non-parole period of 5 years and six months, imposed concurrently with a sentence of 6 months' imprisonment for different offences.

Issue/s: Whether the sentence was manifestly inadequate.

Decision and Reasoning: Permission to appeal was granted and the respondent was re-sentenced to 15 years' imprisonment with a non-parole period of 10 years. The Crown submitted that the sentence failed to reflect the seriousness of the offending and the need for deterrence (personal and general). Gray J (with whom Stanley J agreed) agreed with this argument and noted the offending involved various aggravating factors including that it was committed in breach of bail and the restraining order, the presence of children, the use of a knife and the putting of a knife on the head of a sleeping baby. His Honour concluded that the sentencing judge did not give sufficient consideration to these mitigating factors.

See in particular at [46] – '*In seeking and obtaining a restraining order against the defendant, the complainant had sought the law's protection against violence inflicted by her former partner, the defendant. Despite this and in breach of that restraining order, the complainant was again the victim of violent offending of a most serious nature. The restraining order ought to have demonstrated to the defendant in the clearest terms the seriousness with which domestic violence is regarded both by the courts and by wider society. The fact that the offending occurred in breach of that order is a serious matter of aggravation and a significant factor in my conclusion that the sentence imposed by the Judge was manifestly inadequate.'*

Nicholson J also upheld the appeal and made the same orders but made some additional comments regarding concurrency and double punishment in sentencing. His Honour noted that it was appropriate to deal with the breaches of bail and restraining orders (both summary offences) together with the more serious offences. However, it was important to avoid any double punishment in doing so, especially when the more serious offences were 'aggravated by and assumed colour and context from' (see at [102]) the summary breach offences. The trial judge ordered separate sentences and made them partially or wholly concurrent. However, '*the success of this approach depends upon being able to notionally but accurately separate out that component of the sentence nominated for the two summary offences which represents the aggravating feature with respect to the principal offences. Only by being able to do this can a sentencing Judge accurately identify the extent to which, if at all, partial or full concurrency ought to be ordered. Adopting the approach of sentencing separately for the two summary offences where those offences also aggravated the principal offences enhances the risk of an overall under-punishment or over (double) punishment* (see at [103])' – (see further at [105]). His Honour concluded that in this case, the best approach was to impose a single sentence for all offences as opposed to ordering individual sentences with partial and whole concurrency periods. Concurrency and totality however still should not be overlooked when employing that approach.