***Craill v Police* [2016] SASC 168 (4 November 2016) – South Australia Supreme Court**

*Note this case was decided under now superseded legislation however the case contains relevant statements of principle.

'Aggravated assault' – 'Breaching bail' – 'Contravention of an intervention order' – 'Exposing children' – 'Listening to Victims' – 'Physical violence and harm' – 'Protection orders' – 'Repeated contraventions of protection order' – 'Sentencing' – 'Suspended sentence'

Charge/s: Aggravated assault x 1; contravention of an intervention order x 9, breaching bail x 5.

Appeal Type: Appeal against sentence.

Facts: The appellant attended the home of the female victim (his former partner). An argument ensued. While holding their eight-week-old child, the appellant pushed the victim against the bedroom door by holding her throat (aggravated assault). The appellant was also charged with nine counts of failing to comply with a term of an intervention order and the five counts of breaching bail. The applicant was sentenced to five months and two weeks imprisonment. This also involved revoking a suspended sentence imposed for an offence of driving while disqualified. The breaching offences were five of the counts of contravening an intervention order and one of the counts of breaching bail.

Issue/s: Some of the grounds of appeal included –

1. The magistrate erred in the application of s 18A of the *Criminal Law (Sentencing) Act 1988* (SA);
2. The magistrate erred in failing to find that there were no proper grounds to refrain from revoking a suspended sentence.
3. The magistrate erred in failing to have regard or sufficient regard to the complainant's attitude toward penalty;
4. The sentence was manifestly excessive.

Decision and Reasoning: The appeal was dismissed.

First, the magistrate did not err in the application of s 18A. It was appropriate and convenient to go directly to the single sentence imposed for the course of conduct constituting the breach and contravention charges. The magistrate treated this offending separately from the offending on the charge of aggravated assault. Any descent into further detail would have created unnecessary elaboration – *R v Major* applied: see [18].

Second, there was no error in the approach of the magistrate. One of the key submissions rejected by Stanley J was that proper grounds existed to refrain from revoking a suspended sentence because there was a marked disproportion between the seriousness of the offence constituting the breach and the sentence of imprisonment that would be activated. In rejecting this, Stanley J held that the breaching offences shared the same characteristic as the earlier offending; they involved the appellant failing to comply with a term or condition imposed on him. However, more importantly, there was not a marked disproportion between the seriousness of the breaching offences and the sentence of imprisonment activated. The contraventions of an intervention order were 'serious offending'. As per Stanley J at [28]:

'In R v McMutrie this Court said that a breach of a restraining order is a matter of particular gravity. The object of the Intervention Orders (Prevention of Abuse) Act 2009 (SA) is the prevention of domestic and non-domestic abuse, and the exposure of children to the effects of such abuse. The principal instrument for achieving this objective is the making of intervention orders. The protective objects of the Act can only be achieved if courts are scrupulous in doing what they can to ensure that persons who are subject to such orders comply with them. The repeated breaches of those orders by the appellant demonstrate a persistent, blatant and contumelious disregard for the orders and the authorities that impose them. Crimes of domestic violence are often occasions for the exercise, or attempted exercise, of power over the victim by the offender. Breaches of intervention orders can be occasions for the offender to intimidate the victim with an implied threat that such orders will not protect them. The courts must act to contradict this impression'.

Third, there was no error in the approach taken by the magistrate to the victim's attitude towards penalty. Stanley J noted that '[w]hile the attitude of the victim to an offence is not an irrelevant factor in sentencing, that attitude cannot be determinative of what constitutes an appropriate sentence. Moreover, this principle must be applied with considerable caution in cases of domestic violence' ([33]). His Honour continued at [36]:

'The reason for such caution is obvious. In situations of domestic violence a victim's motivation for advocating a particular penalty is often influenced by their ongoing relationship with the defendant and an unhealthy relationship of dependency between them. Their attitude is often influenced by apprehension about the consequences for them in the future given a continuing relationship with the defendant. This attitude frequently fails to reflect what is in their best interests and what the court might consider appropriate in all the circumstances. It would be contrary to sound sentencing practice to place victims of domestic violence in the position where they hold, or appear to hold, the keys to the offender's release. To place victims in that position is to impose on them a burden they ought not be required to bear'.

Finally, the sentence was not manifestly excessive. This was in circumstances where the aggravated offence was towards the lower end of the scale for that offence but it was still a serious offence, exacerbated by the presence of a small child; the aggravated assault was not mitigated by the expressed attitude of the victim; the repeated breaches of the intervention order constituted serious offending; the

appellant did not have a favourable criminal history; and considerations of general and specific deterrence were particularly important here: see [52]-[53].