***DPP v Johnson* [2011] VSCA 288 (23 September 2011) – Victorian Court of Appeal**

'Aggravated burglary' – 'Assault' – 'Breach involving a child' – 'Contravening/breaching a family intervention order' – 'Exposing children' – 'Following, harassing, monitoring' – 'Physical violence and harm' – 'Protection order' – 'Sentencing'

Charge/s: Aggravated burglary, assault, contravening a family intervention order.

Appeal Type: Crown appeal against sentence.

Facts: The male respondent entered the house of his former female partner, the complainant, with two knives and with the intention of killing himself in front of her. The complainant awoke and started screaming. This woke their daughter and the respondent left the premises (aggravated burglary and assault). The applicant was also charged with breach of a family violence intervention order which included conduct of a home invasion four days prior to the aggravated burglary, telephoning the complainant and threatening her and her family, and by coming within 200 metres of the complainant's house on the night of the offence.

He was sentenced to 15 months imprisonment for aggravated burglary, six months imprisonment for assault, and six months imprisonment for contravening a family intervention order. The sentencing judge took the view that the circumstances surrounding the burglary and assault were 'almost identical' to those surrounding the breach and ordered the sentence for breach to be made wholly concurrent with these sentences. After cumulation, a head sentence of one year and nine months imprisonment was imposed, with a non-parole period of ten months.

Issue/s: One of the grounds of appeal was that the sentence was manifestly inadequate.

Decision and Reasoning: The appeal was allowed, with Redlich, Neave and Bongiorno JA providing separate reasoning. The judges gave detailed consideration to matters relevant to sentencing for breach of an intervention order.

Neave JA (Bongiorno JA agreeing) agreed with Redlich JA in part but held that the sentence imposed for the breach of the intervention order was manifestly inadequate. Her Honour stated that the frequency with which intervention orders are breached – and the potentially tragic consequences of this – warrants strong judicial condemnation of the contravention of such offences. As per Her Honour at [4]-[5]:

'All Australian states have enacted legislation which is intended to protect potential victims of family violence from physical injury and from being placed in fear by harassment or threats. Family violence is a serious problem in Australia. In 2004, it was reported that family violence is 'the leading contributor of death, disability and illness in women in Victoria aged 15 to 44 years'. Breach of intervention orders is relatively common. In its Report on Breaching Intervention Orders, the Sentencing Advisory Council said that, between July 2004 and June 2007, the Magistrates' Court of Victoria and the County Court of Victoria imposed on average approximately 14,000 intervention orders per year. Over a quarter of all intervention orders imposed were breached.

Further, offenders who breach orders and continue to threaten and assault their partners may go on to seriously injure or even kill them. As was recognised during parliamentary debates on the Family Violence Protection Bill 2008, intervention orders can only protect victims of threatened violence if they are effectively enforced and if breach of an order attracts an appropriate sentence. The Victorian Law Reform Commission, in its report which 'underpin[ned]' many of the changes in the Bill, observed:

The response to a breach of an intervention order is crucial to ensuring the intervention order system is effective in protecting family violence victims. If police or the courts do not respond adequately to breaches of intervention orders, they will be perceived as ineffectual – 'not worth the paper they are written on' – by victims and perpetrators alike'.

Here, the respondent's conduct that formed the basis of the breach was conceptually distinguishable from the other offences, including the aggravated burglary. The respondent also had a significant history of breaching these orders and displayed contempt for such orders. Accordingly, the sentence imposed for breach an intervention order was manifestly inadequate.

Redlich JA (with whom Neave JA and Bongiorno JA agreed in part) held that the sentence imposed for the aggravated burglary was manifestly inadequate. In dissent, His Honour held that the sentence for the breach of the intervention was not manifestly inadequate. However, upon re-sentencing the respondent, the sentence imposed for breach of an intervention order was lenient and thus a substantially higher sentence was warranted in the circumstances.

Redlich JA concluded that the sentencing judge erred by having regard to the respondent's claims that his previous breaches were 'innocuous or insignificant' (at [49]). In reaching this conclusion, His Honour noted that it was an aggravating feature of the offending that the respondent had repeatedly contravened intervention orders. Accordingly, the principles of general and specific deterrence had to assume particular importance here (See [42]-[43]). As per the Court in *R v Cotham* at [14]:

'Intervention orders must be strictly adhered to, and it is very much in the interests of the community that those against whom such orders are made be under no misapprehension that the courts will punish severely those who breach such orders. The applicant's actions suggest that he believed he could breach the intervention order with impunity. Only by appropriately severe penalties can the courts make clear to the applicant and the broader community that such conduct will not be tolerated'.

It was also an aggravating feature that the breach involved a child who was protected by the order because such orders are granted pursuant to a legislative regime that places *'particular emphasis on the protection of children from family violence'* (See [45]).

Redlich JA also concluded that the sentencing judge erred in ordering the sentence for the breach to be wholly concurrent. The offence of breach was not part of a single episode of offending (See [52]-[53]). As per the comments in *R v Maher* at [16] relating to cumulation and concurrency:

'I turn to the relationship between, on the one hand, the stalking counts and the burglary and aggravated burglary, and, on the other hand, the breaches of the intervention order. It appears to me that the distinct criminality of the offending means that there should be some cumulation between the sentences imposed. Breaches of the intervention order, were in terms, disobedience of a court order. It would be inappropriate if that was not reflected in the breaches having real impact upon sentence. But, to meet the totality point, some amelioration of the individual sentences for the breaches and on the other counts is, in my view, required'.