DISTRICT COURT OF NEW SOUTH WALES 2015 ANNUAL CONFERENCE

Court of Criminal Appeal Review

The Honourable Justice R A Hulme

7 April 2015

CONTENTS

SCOPE OF PAPER

The purpose of this paper is to provide brief notes concerning the range of issues that have been considered in appellate criminal cases in the past 12 months.

Where reference is made to the author of a judgment in the Court of Criminal Appeal it should be taken that the other members of the Court agreed unless otherwise indicated.

I am most grateful for the assistance in the compilation of this paper provided by Mr Nicholas Mabbitt BA (Hons) JD and Ms Roisin McCarthy BA LLB.

APPEAL

Admissibility on appeal of post-conviction admissions

In an appeal to the District Court against a conviction entered in the Local Court the prosecution sought leave to adduce evidence of an admission made by the appellant during the course of a intensive correction order assessment. He had contested the prosecution case on the basis that he was not involved in an assault but then admitted to a community corrections officer that he was. The judge granted leave for the evidence to be given but also agreed to state a case to the Court of Criminal Appeal. It was held in ***Landsman v R*** **[2014] NSWCCA 328** that leave to adduce the evidence should not have been granted because it was not in the interests of justice for such fresh evidence to given (that being the precondition for fresh evidence in s 18 of the *Crimes (Appeal and Review) Act* 2001). Beazley P held that the admission was obtained during a court-ordered process of obtaining an ICO assessment and that, "In a real and practical sense, the [appellant] was denied his common law right of silence."

BAIL

Onus of proof in consideration of a bail release application

Mr Lago applied for bail in the Supreme Court under the *Bail Act 2013*. He contended that, in the event that an unacceptable risk was found, the onus of proof was on the prosecution to show that the risk could not be sufficiently mitigated by the imposition of conditions. Hamill J in ***R v Lago*** **[2014] NSWSC 660** found that the Act does not cast an onus either way in relation to the question of unacceptable risk, but that the prosecution carries the onus of proof in establishing that the risk, if found, cannot be mitigated by the imposition of conditions. This conclusion was derived from s 20 of the Act which "provides that bail can only be refused where the Court is satisfied that any unacceptable risk 'cannot be sufficiently mitigated by the imposition of bail conditions'": [7].

Note: This is an awkward reading of the legislation, given that there is a choice between two outcomes – whether or not there is an unacceptable risk, and then whether or not, if found, it can be sufficiently mitigated. Furthermore, it is hard to imagine an onus of proof having a bearing on a bail determination in a police station. Obviously the decision related to the Act in its original form; the amended form having commenced on 28 January 2015.

Nevertheless, it may be of some relevance to decisions required to be made by a bail authority (aside from the "show cause" issue).

Further release applications under the Bail Act 2013 and the need for special or exceptional circumstances where bail is sought pending appeal

Mr Potier was refused bail in 2010 under the *Bail Act 1978*. He sought bail from the Court of Criminal Appeal under the (unamended) *Bail Act 2013*. In ***Potier v R* [2014] NSWCCA 177** the Court considered whether there were grounds for a further release application: s 74. They found that there were, and then had to apply s 22 of the new Act. That section provides that bail is not to be granted unless special or exceptional circumstances exist. The Court applied the decision of *Petroulias v R* [2010] NSWCCA 95 in which Barr AJ said that if the grounds of appeal are put forward as the only or principal factor to demonstrate special or exceptional circumstances, much more must be shown than that the grounds seem arguable.

Note: s 22 in the amended Act maintains the "special or exceptional circumstances" requirement when an appeal is pending in the CCA. By s 22(2), this requirement prevails over any "show cause" requirement.

EVIDENCE

Tendency evidence wrongly admitted

Mr Sokolowskyj was found guilty by jury of indecent assault upon a person under the age of 10. He and his girlfriend took an 8 year old girl, who was the daughter of a friend of the girlfriend, to a local shopping mall. When the girlfriend went to the ladies bathroom it was alleged he took the girl into the parents room and locked the door, and then removed her lower clothing and touched her vagina. He threatened her and told her not to tell anyone. Tendency evidence was allowed at trial, comprising three separate events that occurred 5-8 years before the alleged conduct. Previously he had: exposed himself to a 15 year old female who was walking her dog along a street; exposed himself masturbating within view of a number of people at a gym; masturbated in a parked car within sight on an adult female pedestrian. The Crown alleged that this demonstrated that "the accused had a tendency at the relevant time to have sexual urges and to act on them in public in circumstances where there was a reasonable likelihood of detection". Hoeben CJ at CL in ***Sokolowskyj v R* [2014] NSWCCA 55** quashed the conviction and ordered a new trial. The evidence did not have significant probative value due to its generality and also its dissimilarity to the alleged conduct. It focused on generalised sexual activity, involving neither an assault nor a child. Furthermore, the probative value did not substantially outweigh the danger of unfair prejudice. There were various impermissible ways the jury could have used the evidence, for example, to show that the appellant was a sexual deviant. The trial judge did give a direction relating to unfair prejudice but did so without actually assessing the danger himself.

Temporal nature of tendency evidence

RH pleaded guilty to five counts of aggravated indecent assault involving his foster daughter, L, committed between December 2005 and November 2006, when she was 11 years' old. This was led as tendency evidence in relation to offences committed against two other foster daughters, J and K, alleged to have occurred in 1989-93 and 2003 respectively. The appellant argued that since the acts in question did not occur within a confined time period and were subsequent to those that had been charged, the probative value was significantly reduced and the evidence should not have been admitted. There may have been an explanation for the later acts that did not apply to the earlier ones, such as RH's depression that developed in 2002-3. The principle argument was that the jury was invited to find a tendency at an earlier time based on the same facts that the tendency was led to prove. Ward JA in ***RH v R*** **[2014] NSWCCA 71** held that the evidence was admissible as tendency evidence. If the jury was satisfied beyond reasonable doubt of the appellant's tendency in 2005-6, there was nothing wrong with the conclusion that he had the same tendency 2 or 3 years earlier. In relation to K, the jury was also entitled to take into account the conduct against J, provided they were satisfied of it beyond reasonable doubt. The same applied to the conduct alleged against K in respect of J.

Significant probative value of tendency and coincidence evidence

Saoud v R **[2014] NSWCCA 136** provided something of an opportunity for the New South Wales Court of Criminal Appeal to respond to the decision of the Victorian Court of Appeal in *Velkoski v The Queen* [2014] VSCA 121. In that case it was asserted that there had been a divergence between the two States as to what is required to establish "significant probative value" for the purposes of tendency and coincidence evidence under ss 97 and 98 of Uniform Evidence Law. The Victorian approach was characterised as requiring "some degree of similarity in the acts or surrounding circumstances", whereas the Court of Appeal asserted that the NSW approach has "emphasised that tendency reasoning is not based on similarities and evidence of such a character need not be present". The NSW approach was regarded as having lowered the threshold to admissibility. (*Velkoski* at [163]-[164]).

Basten JA observed that the Courts in each State had cited judgments of the other over a number of years without major points of departure being noted. Without considering whether the opinions expressed in *Velkoski* were correct, his Honour noted a number of basic propositions "which are not in doubt". Although the common law language of "striking similarities" has been universally rejected, there was no necessary harm in using the common law concepts of "unusual features", "underlying unity", "system", or "pattern". (*Velkoski* holds (at [171] that "it remains apposite and desirable" to assess whether the evidence demonstrates such features.) But "reliance upon such language may distract (by creating a mindset derived from common law experience) and may provide little guidance in applying the current statutory test".

> "[42] … [A]ttention to the language of s 97 (and s 98) has the practical advantage of focusing attention on the precise logical connection between the evidence proffered and the elements of the offence charged. Thus, rather than asking whether there is 'underlying unity' or 'a modus operandi' or a 'pattern of conduct' the judge can focus on the particular connection between the evidence and one or more elements of the offence charged."

Determination of admissibility of coincidence evidence and tendency evidence does not require assessment of credibility of evidence

JG was charged with sexually assaulting a number of young boys. Tendency and coincidence evidence based on evidence of two complainants was ruled admissible. A trial was held and the jury was unable to agree on a verdict. Upon being re-tried, JG argued that, in determining whether to admit the evidence, the judge should make an assessment of its credibility. It was argued that since the complainants had given evidence in the first trial and had been cross-examined, the new judge was in a better position to assess their credibility. Moreover, because the appellant also gave evidence, it was now possible to discern "an alternative explanation" for conduct of the appellant of which the two complainants gave evidence. The judge declined and Simpson J dismissed an appeal against the decision in ***JG v R* [2014] NSWCCA 138**. In determining the admissibility of evidence under s 97 or s 98 the judge must first determine whether it would have "significant probative value". This assessment is not informed by an assessment of credibility. That is within the province of the jury: *R v Fletcher* [2005] NSWCCA 338.

Assessing competence of a child witness to give unsworn evidence

In ***MK v R* [2014] NSWCCA 274** there was an issue about a trial judge's approach to determining whether child witnesses were competent to give sworn evidence. It appeared to be accepted that the children (they were 6 years old) were not competent to give sworn evidence so the judge was then required to determine whether unsworn evidence could be given. The *Evidence Act* 1995 in s 13(5) authorises the giving of such evidence provided the court has told the person that (a) it is important to tell the truth; (b) if the person does not know the answer to a question or cannot remember they should say so; and (c) that if things are suggested to the person they should feel free to indicate that they agree with things they believe to be true but should feel no pressure to agree with things they believe are untrue. The trial judge in this case had omitted to tell the children that they should agree with statements put to them which they believed were true. Convictions were quashed and the matter was remitted for retrial.

Evidence given by a cognitively impaired person

A cognitively impaired person may give evidence by way of pre-recorded police interview and from a remote room via CCTV in the same way a child may give evidence: Ch 6 Pt 6 of the *Criminal Procedure Act* 1986. In ***Panchal v R; R v Panchal* [2014] NSWCCA 275** it was contended that in a judge-alone trial there was error in the judge not having expressed satisfaction of the requirement in s 306P(2) that the provisions apply "only if the court is satisfied that the facts of the case may be better ascertained if the person's evidence is given in" the manner provided for in Ch 6 Pt 6. Although there was no dispute about it, on appeal it was asserted to have been a "fundamental defect" requiring the verdict to be quashed. It was held by the Court (Leeming JA, Fullerton and Bellew JJ) that there was no requirement for the judge to have expressly recorded satisfaction of this matter. But the appeal was dismissed on the basis of another section within Ch 6 Pt 6, namely s 306ZJ, which provides that "the failure of a vulnerable person to give evidence in accordance with this Part does not affect the validity of any proceeding or any decision made in connection with that proceeding". (Query whether a "failure of a vulnerable person to give evidence

in accordance with this Part" encompasses a vulnerable person giving evidence in accordance with the Part as the complainant did in this case.)

OFFENCES

An unassembled crossbow is not a prohibited weapon

Mr Jacobs was found guilty of selling a prohibited weapon, a crossbow, on numerous occasions. What he actually sold were unassembled crossbows, packaged in boxes that contained all the parts required for construction. He appealed his conviction on the basis that the definition of "crossbow" in the *Weapons Prohibition Act 1998* did not encompass unassembled crossbows. Ward JA and RS Hulme AJ (Johnson J contra) in ***Jacobs v R*** **[2014] NSWCCA 65** allowed the appeal and quashed the conviction. The definition of crossbow in the Act is: "A crossbow (or any similar device) consisting of a bow fitted transversely on a stock that has a groove or barrel design to direct an arrow or bolt". The language focuses on whether there is actually a bow fitted (transversely) on a stock, not that there is a bow capable of being fitted transversely on a stock.

Reckless damage or destruction of property

The applicant CB, who was 14 at the time of the offence, was found guilty by a magistrate of recklessly destroying or damaging property belonging to another under s 195(1)(b) of the *Crimes Act*. He broke into an unoccupied house with a companion and whilst inside played with a lighter in an attempt to singe the edge of a couch. The couch caught alight and the house ended up burning down. CB contended that to prove recklessness, the prosecution had to establish that he foresaw the possibility of the house being destroyed. This was rejected by the magistrate at first instance, Adamson J in the Supreme Court and finally by Barrett JA in ***CB v Director of Public Prosecutions (NSW)*** **[2014] NSWCA 134**. Recklessness is established by proof that the accused realised that the particular type of harm constituting the offence may possibly be inflicted, yet went ahead and acted. In this case the harm is either destruction or damage. Recklessness to either will mean the offence is made out. It does not matter what the extent of the damage is, so long as damage is done. Furthermore, foresight of destruction or damage to specified property is not necessary. Rather, it is in relation to property more generally.

Defence of honest and reasonable but mistaken belief - accused must discharge evidentiary onus

The appellant in ***Ibrahim v R*** **[2014] NSWCCA 160** argued that the trial judge had incorrectly directed the jury as to the elements of honest and reasonable but mistaken belief. The belief related to the age of the complainant in a kidnapping. Simpson J held that the Crown concession at trial that such a belief was actually held was misplaced. The evidence merely disclosed that the appellant thought the complainant looked "like 17, 18" and that he did not really give any thought to the complainant's age.

The meaning of the element "corruptly" for an offence against s 249B of the Crimes Act 1900

Mr Mehajer was accused of various financial crimes, including an offence contrary to s 249B(2)(a)(i), corruptly giving an agent of a bank a benefit as an inducement to grant a loan. It emerged on the hearing of an appeal that the trial judge erroneously directed the jury as to the elements of the wrong offence, being s 249B(2)(b). The Court in ***Mehajer v R* [2014] NSWCCA 167** had to consider the meaning of the word "corruptly". Bathurst CJ held that the term is to be considered according to normally received standards of conduct. This means that the requisite mental element for the offence is that the corrupt benefit is received (s 249B(1)(a)) or given (s 249B(2)(a)) as an inducement or reward on account of one of the purposes set out in that section.

Riot – the meaning of the element "present together"

A question arose in ***Parhizkar v R* [2014] NSWCCA 240** as to meaning of "present together", one of the elements of the offence of riot that requires proof that there were 12 or more persons present together using or threatening unlawful violence for a common purpose. The case concerned a disturbance at the Villawood Immigration Detention Centre. A number of detainees, including Mr Parhizkar, were on a roof of a building, some of whom were using or threatening violence (he was involved in vigorously throwing roof tiles). Many other detainees were on the ground of the compound using or threatening violence. For Mr Parhizkar to be one of "12 or more persons" it had to be proved that he was present together with those on the ground as there were insufficient detainees on the roof. Price J (McCallum J agreeing; Basten JA dissenting) held that the phrase "present together should be given its ordinary meaning. There was no requirement for persons to be within a certain distance of each other. The concept was directed to people being in the same place as each other.

The elements of the offence of supplying a prohibited drug are not wholly contained in the offence of attempt to possess the same drug

Mr Yousef Jidah was convicted of an offence of possession of a precursor and an offence of supplying a prohibited drug under ss 24A and 25(2) *Drugs Misuse and Trafficking Act 1985*, respectively. In circumstances where the precursor and the prohibited drug were the same drug, in this case pseudoephedrine, a question arose on appeal as to whether the prosecution of both offences occasioned a miscarriage of justice by reason of the elements of one offence being contained in the other: ***Yousef Jidah v R* [2014] NSWCCA 270**. In dismissing the appeal, the Court identified the critical differences in the offences: first, proof that the drug was of a commercial quantity was only required for the supply offence, and secondly, it is possible, although unlikely, that a person charged with possession of a precursor may be unaware that the substance was a prohibited drug, knowing only that the substance was a precursor. It was also noted by the Crown that there may be a defence available to the s 25(2) offence that is not available to s 24A. Accordingly, it was unanimously held that while there were similarities in the elements of each offence, the whole criminality of the supply offence was not entirely captured in the possession offence.

"Import" – meaning of in s 300.2 of the Criminal Code (Cth)

A new meaning for the concept of "import" was introduced into the *Criminal Code* after the decision of the Court of Criminal Appeal in *R v Campbell* [2008] NSWCCA 214. That case held that the importation ceased when the consignment cleared customs and was delivered to the consignee's warehouse. The new definition provides that "import" means import the substance into Australia and includes (a) bring the substance into Australia and (b) deal with the substance in connection with its importation.

In ***El-Haddad v R*** **[2015] NSWCCA 10** the trial judge adopted too broad an approach by regarding "any dealing in a substance once it has reached this country" including re-exporting it or distributing it. Leeming JA held that paragraph (b) of the definition could include physical processes and legal processes such as a sale by payment and physical delivery or a merely sale by deed. In this case, involvement of the appellant in the freight forwarder being directed to hold the goods for another entity was sufficient in that it caused there to be a change in the character of the actual possession such that a different entity had the right to delivery of the goods. An inquiry about what was required to release a package from a bond warehouse was not sufficient.

PRACTICE AND PROCEDURE

Entitlement of an accused to attend a view

The appellant in ***Tongahai v R*** **[2014] NSWCCA 81** was on trial for a murder allegedly committed at a bar in Kingsford. There was a view of the crime scene and on appeal Mr Tongahai alleged that a remark made by the trial judge led him to believe that he was not entitled to attend. Basten JA found that, even if he did form the view that he was not entitled to attend, which was unlikely, no miscarriage of justice was occasioned. Since there is room for mistakes and misunderstandings if the accused is not present, an accused's right to be present during a view "should be accepted as a fundamental element of procedural fairness in a criminal trial" (at [24]). It is not an obligation, however, since an accused may be prejudiced by, for example, being present in shackles.
(N.B. – In *Jamal v R* [2012] NSWCCA 198, Hidden J held that s 53(2)(a) meant that an accused had a right to be present at a view).

"Practical unfairness" not determinative where evidence before Crime Commission made available to prosecution

Jason Lee and Seong Won Lee were summoned to give evidence before the Crime Commission. At the time of Jason Lee's examination, the Commission gave a direction, in accordance with s 13(9) of the *New South Wales Crime Commission Act*, that the evidence was not to be published except as directed by the Commission. The same direction failed to be given at Seong Lee's examination but it was accepted that it should have been. Notwithstanding this, the evidence was made available to the DPP after the appellants had been charged, prior to their trial. The Court of Criminal Appeal found that no miscarriage of justice was occasioned because there had been no practical unfairness to the accused. A five-member bench of the High Court ***Lee & Lee v The Queen*** **[2014] HCA 20** overturned this decision. The companion rule to the principle that it is for the Crown to prove the guilt

of an accused person is that an accused cannot be required to testify. The question of whether practical unfairness has occurred is not determinative given that the case concerns "the very nature of a criminal trial and its requirements in our system of criminal justice" (at [43]).

Eligibility for certificate under Costs in Criminal Cases Act after DPP terminates proceedings

JC and others were charged with a number of sexual offences. They were committed for trial and upon arraignment entered pleas of not guilty. However, the matter never came on for trial as the charges were no-billed. Certificates under the *Costs in Criminal Cases Act 1967* were sought but a District Court judge held that the court did not have jurisdiction to grant them. In ***JC v Director of Public Prosecutions (NSW)*** **[2014] NSWCA 228** Basten JA set aside the District Court judgment. A certificate may only be granted "after the commencement of a trial in the proceedings" (s 2 *Costs in Criminal Cases Act*). His Honour concluded that by virtue of s 130 of the *Criminal Procedure Act 1986* (NSW), taking a plea and fixing a date for trial are encapsulated by the term "proceedings", and so the District Court judge was wrong to conclude that there was no jurisdiction to make the order.

Principles relating to judge alone trials and special hearings

In ***W v R*** **[2014] NSWCCA 110**, Bathurst CJ provided a comprehensive statement of the principles relating to judge alone trials and special hearings. His Honour referred to the High Court decision in *Fleming v The Queen* [1998] HCA 68; 197 CLR 250 where it was emphasised that a Judge sitting alone must not only state the principles of law applied and the findings of facts made, but demonstrate the reasoning process involved in linking these matters. This may be done impliedly and extends to judicial warnings.

Apprehended bias where judge expresses personal opinion

B was found guilty of an offence of having sexual intercourse with a person whilst knowing that he suffered from a sexually transmissible medical condition and failing to inform the other person of the risk of contracting the condition. His appeal to the District Court was dismissed. One of the things said by the judge was that "no normal woman in her right mind would have unprotected sexual intercourse with a man she knew to be HIV positive". Beazley P, Tobias AJA agreeing, Barrett JA contra, remitted the matter to the District Court for redetermination: ***B v Director of Public Prosecutions*** **[2014] NSWCA 232**. A fair minded lay observer might reasonably apprehend that the judge's remark revealed a preconception as to how a reasonable woman would act. It was not premised upon the evidence in the case and was an integral part of his Honour's decision. Barrett JA held that in context, the words indicated no more than a permissible testing, against common experience, of a conclusion independently reached. Barrett JA provided numerous examples whereby common experience was taken into account by courts in considering human behaviour. It was only at the conclusion of his Honour's reasoning that the opinion was expressed.

Allowing video recording of interview between police and vulnerable witness to be given to jury during their deliberations

Mr Jarret was convicted of multiple sex offences against the 12 year old friend of his daughter. The complainant's evidence in chief was an interview between herself and a police officer. Mr Jarret appealed his conviction on the basis that the trial judge should have given the jury a warning pursuant to s 306X of the *Criminal Procedure Act* when the video of the interview was provided to the jury. It was also submitted that providing the jury with the video was inconsistent with *R v NZ* [2005] NSWCCA 278 but this ground was withdrawn at the hearing. In ***Jarrett v R*** **[2014] NSWCCA 140** Basten JA, with whom R A Hulme J agreed, Campbell J contra on this point, dismissed the appeal , holding that there is no rule of practice or procedure to be followed in every case where the evidence in chief of a witness is provided by video (*NZ* at [210]). Campbell J held that the High Court's approach in *Gately v The Queen* [2007] HCA 55 was more prescriptive than this, given that Hayne J held that it would seldom, if ever, "be appropriate to allow the jury unsupervised access to" recorded evidence. In relation to the s 306X warning, Basten JA held that since a warning was given earlier in the trial, there was no realistic likelihood that the jury would draw an inference "adverse to the accused" because of the way the evidence was given.

Date of expiry of non-parole period should not be specified

In ***R v BA*** **[2014] NSWCCA 148** McCallum J held that in making parole orders pursuant to s 50 of the *Crimes (Sentencing Procedure) Act* the Court should simply direct that the "offender be released on parole at the end of the non-parole period", instead of specifying a date. Although it is not impermissible to direct that an offender be released on the last day of the non-parole period, many frustrated associates find that upon entering such orders into JusticeLink, it appears that the offender is not eligible to be released until the day after the last day of the non-parole period. (Confusion also arises when BOSCAR audits sentencing outcomes by comparing the terms of the order made against the court's computer record.) This can be avoided by not specifying a date.

Note: It is s 50 that requires a court to make a parole order where a sentence is for 3 years or less. It does not require anything more than "an order directing the release of the offender on parole at the end of the non-parole period". Section 48 requires a court to specify certain information concerning a release date. This has commonly been complied with by nominating an actual date. But the stated purpose (in s 48(2)) of this is to provide information about the likely effect of a sentence. Arguably, being clear about when a non-parole period commences, together with its duration and/or its terminal date, is more than adequate to achieve this purpose.

Court of Criminal Appeal grants a permanent stay of proceedings

TS was to undergo a special hearing under the *Mental Health (Forensic Provisions) Act 1990* in respect of offences alleged committed in 1973. The complainant did not come forward to police until 2010, after having received therapy. TS claimed to have no memory of the complainant and suffered from a range of medical conditions. He sought a permanent stay but this was refused at first instance. Bellew J in ***TS v R*** **[2014] NSWCCA 174** found that the trial judge made a number of errors in approaching the matter. Based on evidence before the trial judge as well as further evidence placed before the court,

Bellew J held that it was appropriate that the "extreme remedy" of a permanent stay was granted. Matters that led to that conclusion included that the judge had misconstrued evidence that suggested that certain documents had become unavailable; further evidence that undermined the Crown case; the applicant's physical and mental health issues; and the lack of corroborating evidence.

Change in law during period alleged in indictment

On 16 September 2010 the provisions in the *Crimes Act 1900* dealing with "child pornography" were recast so as to use the term "child abuse material". The former was defined more narrowly than the latter. The indictment in ***NW v R*** **[2014] NSWCCA 217** alleged offences under the new provisions but in periods that extended either side of the amendment date. The problem was only identified during sentence proceedings. Bail was granting pending an appeal against conviction. The Court (Garling J, with the other members of the court agreeing, although McCallum J with different reasoning) held that there had been a miscarriage of justice. The offences did not exist for the entire period charged. Although there were analogous offences, there were significant differences in the definitions and in the elements of the offences.

Construction of s 29 Children and Young Persons (Care and Protection) Act 1998

In ***Re Application of the Attorney General for New South Wales Dated 4 April 2014*** **[2014] NSWCCA 251** the Court held that s 29 *Children and Young Persons (Care and Protection) Act 1998* should not be construed so as to interfere with an accused's right to a fair trial. Pursuant to section 29(e) a person cannot be compelled to produce a report made to the Director-General which concerns a child or young person. In this case, the trial judge ordered the Department of Family and Community Services to produce various reports following the issue of subpoenas to the Department on behalf of an accused on trial for murder. The Attorney-General submitted for determination three questions of law to the Court of Criminal Appeal (at [3]). Each question was answered in the negative (at [33]). Macfarlan JA acknowledged that the purpose of s 29 is to provide protections to persons who make reports under s 29. However, his Honour found that s 29 is not intended to preclude a person, in particular an accused on trial for murder, from ever accessing relevant reports made to the Director-General. It was held that as a matter of construction, the principle of legality operates to protect an accused person's right to a fair trial. This right includes the right to require third parties to produce relevant documents on subpoena.

Permanent stay of proceedings not warranted notwithstanding an illegal compulsory examination of an accused by a Crime Commission after having been charged

The accused person known as "X7" will finally have to undergo trial after lengthy pre-trial litigation. The High Court held that his compulsory examination by the Australian Crime Commission after he was charged with a number of drug offences was illegal. He then sought a permanent stay of proceedings in the District Court but failed. He returned to the Court of Criminal Appeal but again failed. In a 5-judge bench decision in ***X7 v R*** **[2014] NSWCCA 273** it was held by Bathurst CJ (the others agreeing but Beazley P with additional comments) that no actual unfairness had been demonstrated in that the actual content of the ACC examination of X7 was unknown. Continuing the criminal proceedings would not

bring the administration of justice into disrepute and a stay was not required to protect the court process from abuse.

Preferable that advising a witness about privilege against self-incrimination be done in the absence of the jury

In ***KH v R* [2014] NSWCCA 294** a trial judge granted leave to the prosecutor to cross-examine a witness. In the presence of the jury the witness was informed that he could object to answering questions if he believed his answer might render him liable to prosecution. Included in what the judge said was that if the witness did make an objection "there are some things that I can say and do which might protect you to enable the truth to be properly told by you". (His Honour was obviously alluding to s 128 and was complying with s 132 of the *Evidence Act* 1995). As it turned out, the witness nothing to incriminate himself but on appeal it was contended that there was a miscarriage of justice because the advice to the witness was given in the presence of the jury. It was argued that if the witness did not take any objection, the jury might infer that the truth could not "be properly told". It was held, per Leeming JA, that there was no error in the judge's approach (and it had not been the subject of objection at trial), although it would usually be preferable for such things to happen in the absence of the jury.

SENTENCING – GENERAL ISSUES

Denial of procedural fairness does not arise where parties have opportunity to address sentencing judge on all matters

Mr Dang was sentenced for two offences involving the supply of a prohibited drug. He received a non-parole period of three years and five months, backdated for the eight months he had already spent in custody. Prior to this the sentencing judge had indicated that counsel would not need to be present when sentence was passed and that "another couple of years on the bottom is something that he can expect". On appeal Mr Dang argued that he had been denied natural justice because the actual sentence imposed was substantially longer than the sentence earlier foreshadowed. Adamson J in ***Dang v R* [2014] NSWCCA 47** dismissed the appeal. "The real question is whether there has been actual unfairness, not whether there has been a disappointment because an expectation engendered by the decision-maker has not been fulfilled: *Re Minister for Immigration & Multicultural and Indigenous Affairs; ex parte Lam* [2003] HCA 6; 214 CLR 1 at [34]". Unfairness will commonly arise where parties have not had a chance to make submissions or have not made submissions based on an assertion that turns out to be false, for example, that a custodial sentence will not be imposed. In the present case, both parties were given the opportunity to address the sentencing judge on all matters and had availed themselves of that opportunity.

Mental condition should be considered in sentencing notwithstanding mental illness defence eschewed

Mr Elturk pleaded guilty to stealing a knife and wounding with intent to cause grievous bodily harm. The Crown applied to have his pleas set aside on the basis that a special verdict of not guilty by reason of mental illness would be more appropriate. That

application was rejected. At sentence the sentencing judge did not take into account the appellant's mental condition when assessing the objective seriousness of the offence, because the appellant had not availed himself of the defence of mental illness. Beazley P in ***Elturk v R*** **[2014] NSWCCA 61** held that this was an erroneous determination. Beazley P quoted from the decision in *McLaren v R* [2012] NSWCCA 284 where McCallum J held that "the decision in *Muldrock* does not … derogate from the requirement on a sentencing judge to form an assessment as to the moral culpability of the offending in question … I do not understand the High Court to have suggested in *Muldrock* that a sentence judge cannot have regard to an offender's mental state when undertaking that task" (at [29]). Accordingly the sentencing judge erred in determining that the applicant had waived his right to have his mental illness considered as a causal factor in the commission of the crime: [35].

Whether providing a witness statement in relation to an unrelated matter amounts to assistance to authorities

On 20 November 2013 Mr Peiris was found guilty by a jury of two counts of indecent assault upon a child. On 10 April 2012 he made a witness statement to the effect that the victim's older brother had been sexually assaulted by the father of one of the victim's friends. The trial judge altered the ratio of parole to non-parole to 50% in recognition of the statement and the appellant's preparedness to give evidence in those proceedings. His Honour did not award a discount in sentence, however, and the appellant appealed this decision. In ***Peiris v R*** **[2014] NSWCCA 58** Leeming JA held that there was no error disclosed in the approach adopted by the sentencing judge. It is doubtful that s 23(1) *Crimes (Sentencing Procedure) Act* should be read literally, as this could lead to a scenario whereby, for example, a discount is awarded to a victim of a home burglary for reporting the crime to police years before offending him or herself (see *RJT v R* [2012] NSWCCA 280). There was no evidence as to the value of the statement, as this largely depended upon the testimonial and forensic evidence otherwise available to the Crown.

Relevance of bail conditions to sentence ultimately imposed

Mr Bland was on bail pending sentence, one of the conditions of which was that he not leave home unless in the company of one of several nominated family members. He argued on appeal that this condition should have resulted in a lower sentence, given that it was a form of custody. Johnson J in ***Bland v R*** **[2014] NSWCCA 82** dismissed the appeal. There was no curfew condition, nor was he required to reside in a treatment facility. The sentencing judge was not required to take the condition into account in his favour on sentence.

Double jeopardy in sentencing under Road Transport legislation

A truck was loaded in breach of the Road Transport regulations and was involved in an accident whereby its load fell into the path of oncoming traffic, resulting in the death of a driver, damage to six vehicles and damage to the road surface. KGB Protective Coating Pty Ltd pleaded guilty to two offences under the *Road Transport (General) Act 2005* (now *Road Transport Act 2013)*, one in its capacity as the loader of goods onto the truck and one as the consignor of goods. The operative facts of the offences were, in substance, the same. That is, as both loader and consignor of the goods, KGB breached a load restraint

requirement. Section 77 of the *Road Transport (General) Act* (now s 181) provides that person may be punished only once in relation to the same failure to comply with the particular provision of the Road Transport legislation, even if the person is liable in more than one capacity. Garling J held in **Kemp v KGB Protective Coating Pty Ltd [2014] NSWSC 586** that the double jeopardy provision applied.

Denial of procedural fairness at a sentence hearing

Mr Tran was sentenced for, among other offences, supplying a commercial quantity of methylamphetamine. The sentencing judge held that the objective seriousness of this offence was "well above the middle of the range of seriousness for such offences". However, in the course of the sentencing hearing, the judge indicated that the offence was in the middle range of objective seriousness. Hall J in ***Tran v R*** **[2014] NSWCCA 85** held that Mr Tran had been denied procedural fairness. Senior Counsel for the applicant should have been given the opportunity to make submissions against the finding of above mid-range objective seriousness.

Denial of procedural fairness not established where judge says "gun crimes are on the rise"

Mr Wootton was sentenced in the District Court for an offence of specially aggravated breaking and entering a dwelling and committing a serious indictable offence. In her remarks on sentence the judge said, among other things, that "gun crimes are on the increase". On appeal Mr Wootton argued there was no evidence for this and that he was denied procedural fairness. Campbell J in ***Wootton v R*** **[2014] NSWCCA 86** dismissed the appeal. The judge referred to the increase in gun crimes in the context of general deterrence and was not singling it out as a determinative factor in fixing the sentence. However, it was wrong to refer to "police expectations". Just as prosecutorial opinions are irrelevant as to the available range of sentences, so to are those of the police.

Jurisdiction of District Court to deal with breach of bond imposed in Local Court

The applicant Mr Yates sought a writ of habeas corpus in the Supreme Court. He had been convicted of an offence in the Local Court and sentenced to a three year good behaviour bond under s 9 Crimes (Sentencing Procedure) Act. The bond was "confirmed" on appeal to the District Court. Community Corrections later alleged that Mr Yates breached the bond and the matter came before the District Court on a number of occasions. On the last of those, the judge stood the matter over and remanded Mr Yates in custody. Rothman J in ***Yates v The Commissioner of Corrective Services NSW*** **[2014] NSWSC 653** granted the application of habeas corpus. The bond continued to have been imposed by the Local Court, and s 98 of the Crimes (Appeal and Review) Act required that the Local Court, not the District Court, deal with an alleged breach of that bond.

General deterrence must be reflected in non-parole period as well as head sentence

Mr Wasson was found guilty by a jury of armed robbery. The sentencing judge found that special circumstances applied and that "the need for general deterrence in respect of the matter … will be dealt with in the head sentence". The Crown appealed on the basis that general deterrence should have been reflected in the non-parole period as well as the head sentence. R A Hulme J in ***R v Wasson*** **[2014] NSWCCA 95** allowed the appeal. The

decision was contrary to *R v Simpson* [2001] NSWCCA 534 where Spigelman CJ said that the non-parole period must reflect all of the circumstances of the offence and the offender, including the need for general deterrence.

Offender turning himself in to police is "assistance to authorities"

Mr Mencarious was found guilty by a jury of murdering his wife. They had been estranged and upon meeting at a hotel one night an argument occurred and he killed her. He left the hotel without being detected and after a delay of some hours he drove himself to a police station where he told an officer that he thought he had "done something horrible to my wife". The Court in ***Mencarious v R*** **[2014] NSWCCA 104** heard an appeal brought by way of referral under s 78 *Crimes (Appeal and Review) Act 2001*. The Crown conceded *Muldrock* error. One issue was whether a lesser sentence was warranted because of the appellant's attendance at the police station. Adams J held that it was capable of being regarded as "assistance to authorities" within the meaning of s 23 of the *Crimes (Sentencing Procedure) Act 1999*. However, in this case the appellant attended the station because he believed his identification was inevitable. Accordingly, no allowance was made on sentence. [Regarding an offender turning himself in to police as being within s 23 is novel.]

Relevance of offender's brain injury on sentence

In ***Aslan v R*** **[2014] NSWCCA 114**, the offender pleaded guilty to three counts of sexual intercourse without consent and one of assault occasioning actual bodily harm. He sexually assaulted the victim after approaching her on the street and taking her to the front of a church in the early hours of the morning. He struck her when she attempted to escape. The offender suffered from a degree of brain damage as the result of two motor traffic accidents he had been involved in some years earlier. Because of this the sentencing judge found that the effects of imprisonment would be more onerous and that general deterrence should be given marginally less weight. It was also found that he had less capacity to exercise care and judgment as to the use of drugs and alcohol, but it was not accepted that there was a direct link between injury and offending. On appeal Mr Aslan argued that the sentencing judge erred in the way he treated the injury. Simpson J disagreed. The principle issue was whether the injury had a causative role to play in the commission of the offences. Where this is the case, McClellan CJ at CL in *Director of Public Prosecutions (Cth) v De La Rosa* [2010] NSWCCA 194 emphasised that an offender's moral culpability and the need for general and specific deterrence *may* be reduced; that a custodial sentence *may* be more onerous; and an offender *may* pose more danger to the community. Simpson J noted that a comparison between the offender's pre- and post-injury record suggested that there was not a causal connection between the injury and the offences, and concluded that the sentencing judge had not erred.

Effect of incarceration on elderly frail family member not exceptional

The applicants, Mr and Mrs Sakovits, were found guilty by a jury of offences relating to the evasion of company and personal income tax amounting to $1,177,893. Evidence was given at trial regarding the health of Mrs Sakovits's mother, Mrs Potts. She was described as severely frail and was living in hospital at the time. She passed away after the applicants were sentenced. The applicants argued on appeal that the sentencing judge erred in

failing to find that exceptional circumstances warranted family consequences being taken into account on sentence. The Court in ***Sakovits v R*** **[2014] NSWCCA 109** disagreed. On the evidence before the trial judge it was clear that Mrs Potts would no longer be able to live independently after being released from hospital, and so the applicants were not required to care for her. Furthermore, even if she did return home, the applicants' daughter in law would have been able to provide sufficient care. The Court also found as a general proposition "the fact that the parents of members of the prison population may be ill or disabled is not uncommon" (at [26]).

Aggregate sentence not properly imposed

Mr Khawaja pleaded guilty to two offences of armed robbery committed nine days apart. The sentencing judge imposed an aggregate sentence. On appeal in ***Khawaja v R*** **[2014] NSWCCA 80** R S Hulme AJ held that there was error in the way in which the sentence was imposed. Instead of indicating what each sentence would have been with a plea discount, the judge arrived at a "hypothetical aggregate" and then applied the discount. Notwithstanding this, sentence was not invalidated.

Importance of assessment of objective seriousness on sentence

The offender in ***R v Campbell*** **[2014] NSWCCA 102** pleaded guilty to one offence of break and entering a dwelling house and committing a serious indictable offence in circumstances of special aggravation, and an offence of assault occasion actual bodily harm. Wholly concurrent sentences were imposed, with an effective sentence of 3 years and 11 months with a non-parole period of 1 year and 10 months. The Crown appealed. One of the issues was the importance of the assessment of the objective seriousness in formulating an appropriate sentence. Harrison J reached a different conclusion to Simpson J, with whom Hall J agreed. Harrison J wrote that he doubted the utility, for appellate purposes, of dissecting the extent to which a sentencing judge has referred to objective seriousness in passing sentence. "The nature of judicial discretion means that there is both a wide range of circumstances capable of supporting the same conclusion, and a narrow range of circumstances capable of supporting different conclusions" (at [86]). Therefore, statements regarding objective seriousness must be approached with circumspection. Simpson J emphasised that the assessment of objective seriousness is a critical component of the sentencing process. Nothing in *Muldrock* derogates from that principle. The sentencing judge did no more state that offences under s 112(3) are serious and then enumerate the features of aggravation in this case. An assessment of the objective seriousness of this particular offence was called for. Had that been done, it would have been clear that a harsher sentence was warranted.

Seriousness of offences committed by a Customs Officer

Lamella was a Customs Officer and pleaded guilty to offences of corruption and conspiracy to import a controlled precursor substance, namely cold and flu tablets. He was sentenced to a total term of 8 years with a non-parole period of 4 years. In ***R v Lamella*** **[2014] NSWCCA 122** Price J found that the non-parole period was inadequate but dismissed the appeal in the exercise of the residual discretion. The non-parole period failed to appropriately reflect the criminality involved and the need for general deterrence. General

deterrence was a matter of fundamental importance in this case. "These offences undermine the very core of our Nation's border protection and other Customs officers must be deterred from engaging in similar conduct" (at [57]).

Credit for time served in custody on unrelated matter

Whilst Mr Hampton was being sentenced for offences of robbery in company and stealing from the person, it became apparent that there was a period of 3 months which he had spent in custody for being bail refused on a charge for which he was eventually found not guilty. On appeal it was argued that the sentencing judge should have taken this into account, and that the line of authority based on *R v Niass* (NSWCCA, 16/11/88, unrep) was wrong. Johnson and Bellew JJ in ***Hampton v R*** **[2014] NSWCCA 131** held that the judge did not err and that the line of authority should not be overturned. A period of custody for an unrelated matter leading to acquittal or discharge is not, in and of itself, relevant to sentencing. It is, however, possible to take into account subjective matters related to the period, such as marital breakdown or loss of employment.

Judge makes error regarding what normal street purity of a prohibited drug is

Mr Farkas pleaded guilty to supply prohibited drugs on an ongoing basis. The sentencing judge found that the drug involved was higher than "normal street purity", but did not base this finding on any evidence before him. Basten JA, R A Hulme J agreeing, Campbell J contra on this point, allowed the appeal: ***Farkas v R*** **[2014] NSWCCA 141**. The judge impermissibly based his finding on two previous decisions of the Court. Facts found in previous cases are relevant to precedent value, such as legal principle or a range of sentences, but facts found in later cases "must generally be based on the evidence before the later court". Nor was the judge entitled to treat the finding as "common knowledge" (s 144 *Evidence Act*).

Fine may be imposed despite paucity of material regarding offender's financial circumstances

Mr Jahandideh pleaded guilty to an offence of importing a marketable quantity of opium. A component of his sentence was a fine of $100,000. Brief submissions were made on sentence but no evidence was adduced relating to the offender's financial circumstances. On appeal it was argued that the judge was in error by imposing the fine without first establishing that the offender had the means to pay the fine. Rothman J in ***Mahdi Jahandideh*** **[2014] NSWCCA 178** refused leave to appeal on the basis that a fine may still be imposed where financial circumstances cannot be ascertained. Financial circumstances are mandatory to consider but not determinative. A sentencing court is not in a position to investigate financial circumstances or to call evidence, and no evidence was provided by trial counsel to that end. In the absence of complaint about procedural fairness, lack of reasons or prejudice, Rothman J held that it was inappropriate for the Court to intervene.

Violence towards the elderly will not be tolerated

In ***R v Wood*** **[2014] NSWCCA 184** the Court allowed a Crown appeal against the inadequacy of the sentence imposed for the manslaughter of a 71 year old woman. Mr Wood pleaded guilty to the offence, which involved him pushing the deceased to the

ground after riding past her on his bicycle. She struck her head on the ground and died shortly after. In re-sentencing, the Court emphasised the need for general deterrence in these types of offences, particularly given the increase in the number of aged and vulnerable persons in the community, and also the need for the specific deterrence of Mr Wood, given his poor subjective case.

Erroneous regard to a "comparable case" in determining sentence

RCW pleaded guilty to drug offences. The prosecutor provided 3 comparable cases at the sentencing proceedings and the judge engaged in a discussion with the prosecutor about the similarity of one in particular where there had been a starting point of 12 years. The judge thought the criminality in the case at hand was more serious so that meant it warranted 13 years. He then "knocked off" 2 years for RCW having come forward to the police, thereby arriving at a starting point of 11 years which was then reduced for the plea and assistance. R A Hulme J held that the judge placed too much emphasis on the so-called comparable case: ***RCW v R (No 2)*** **[2014] NSWCCA 190**. It was wrong to compare the objective criminality of the offences to the comparable case, and then indicate what the starting point would be and apply the discount. Instead, the judge was required to instinctively synthesise all the relevant material and then treat the outcomes of the other cases as a check or yardstick.

Relevance of victim impact statements in establishing substantial emotional harm in child sex offences

MJB was convicted of various child sex offences and the Crown appealed the sentence on the basis that there was inadequate accumulation. Victim impact statements were provided but the sentencing judge rejected the Crown's contention that substantial emotional harm had been established, referring to *R v Slack* [2004] NSWCCA 128. Adamson J allowed the appeal in ***R v MJB*** **[2014] NSWCCA 195** and remarked that it was "difficult to understand why her Honour was not prepared to infer, on the basis of the statements, that the victims suffered substantial emotional harm as a result of the offending conduct". Although there are limits to which victim impact statements can be put, it is important to have regards to the content and purpose of the relevant statutory provisions e.g. s 21A(2)(g) *Crimes (Sentencing Procedure) Act 1999*.
(NOTE: *R v Slack* was disapproved of in *R v Aguirre* [2010] NSWCCA 115.)

Motive does not bear on moral culpability or objective seriousness in offence of make explosive device with intent to injure

Mr Carr constructed a parcel bomb and caused it to be delivered to his victim, who opened it and received minor injuries. The trial judge held that the objective seriousness of the offence would be "significantly elevated" if he accepted that Mr Carr was motivated to send the bomb to punish the victim for what he perceived were inappropriate advances on his daughter. In ***Carr v R*** **[2014] NSWCCA 202** Fullerton J dismissed the appeal but held that Mr Carr's motives did not elevate his moral culpability nor increase the objective seriousness of the offence. Objective seriousness is arrived at through an assessment of the nature of the offending and its consequences as well as the offender's appreciation of those consequences. An assessment of moral culpability is relevant but care must be taken that this does not overwhelm considerations of the offending conduct itself.

Sentencing judge not bound by findings made by another judge in different sentencing proceedings

Mr Baquiran was part of a drug supply syndicate and was sentenced by Knox DCJ. Jeffreys DCJ sentenced one of the other offenders and Knox DCJ was provided with material regarding that sentence, which he took as binding. Macfarlan JA in ***Baquiran v R*** **[2012] NSWCCA 221** held that Knox DCJ erred and that the role of Mr Baquiran had to be determined by reference to the facts found based on the evidence in the case at hand. Jeffreys DCJ found that the offender he sentenced acted on behalf of Baquiran and at his instruction and direction. The sentencing remarks were part of the factual matrix that Knox DC had to take into account, but Baquiran's role had to be determined by the facts in evidence before his Honour.

Parity - no justifiable sense of grievance where different approach taken by prosecution regarding offender and co-offender

Mr Gaggioli pleaded guilty to three counts of aggravated robbery. After he was sentenced, a co-offender pleaded guilty to offences with a lower maximum penalty, because the classification of the weapon was less serious. Fullerton J dismissed the appeal in ***Gaggioli v R*** **[2014] NSWCCA 246** that was brought based on parity. Prosecutorial discretion is unreviewable and furthermore, the decision to accept pleas to less serious charges could not be criticised in this case.

Judge manipulates legislation to achieve a desired result

In ***R v West*** **[2014] NSWCCA 250** a judge wanted to impose an intensive corrections order but to do so needed to impose a sentence of imprisonment of 2 years or less. To achieve this he unilaterally remanded the offender, who had been on bail, in custody for 3 months. He did so on the basis that on the resumed hearing date he would assess a sentence of 3 years, reduce it by 25 per cent because of the early plea of guilty, then take of 3 months for presentence custody, thereby being within the jurisdictional ceiling for the imposition of his desired sentencing option. Such an approach was censured. Hoeben CJ at CL said "there is no place in the sentencing process for idiosyncratic manipulation" of legislation and sentencing principles. Adamson J described the approach as subverting the need to comply with the legislation.

Lawyer's delay in entering guilty plea relevant where applicant believed plea was entered early

A man was charged with a range of firearm offences. He instructed his legal representative to enter guilty pleas. The pleas were not entered until arraignment in the District Court and he received a reduced discount, less than 25%. There had been the distraction of another more serious charge in respect of which he was ultimately acquitted. In ***Atkinson v R*** **[2014] NSWCCA 262**, Simpson, Adams and McCallum JJ (in separate judgments) were each of the view that the reason for the late pleas was, in the circumstances, relevant in determining the sentence discount to be allowed. It was accepted that the delay was not the fault of Mr Atkinson who believed that his plea had

been entered earlier than it was in fact done. Their Honours agreed that the utilitarian value of the pleas was not undermined by the delay.

Aggregate sentencing

The Court was prompted to review the correct approach to aggregate sentencing because of some unnecessary steps taken by the sentencing judge in ***JM v R*** **[2014] NSWCCA 297**. In the judgment of R A Hulme J at [34]-[40] there is an exhaustive review of the legislation and the case law to date. Some of the points made included the following.

It remains necessary to comply with the requirements of *Pearce v The Queen* [1998] HCA 57; 194 CLR 610.

The criminality of each offence needs to be assessed individually. And each indicative sentence must be assessed by taking into account such matters in Part 3 or elsewhere in the *Crimes (Sentencing Procedure) Act* as are relevant: s 53A(2)(b). Commonly encountered ones in Part 3 include aggravating, mitigating and other factors (s 21A); reductions for guilty pleas, facilitation of the administration of justice and assistance to law enforcement authorities (ss 22, 22A and 23); and offences on a Form1 taken into account (Pt 3 Div 3). Commonly encountered matters elsewhere in the Act are the purposes of sentencing in s 3A, and the requirements of s 5 as to not imposing a sentence of imprisonment unless a court is satisfied that there is no alternative and giving a further explanation for the imposition of any sentence of 6 months or less.

Non-parole periods need not be specified in relation to indicative sentences except if they relate to an offence for which a standard non-parole period is prescribed: ss 44(2C) and s 54B(4).

Specification of commencement dates for indicative sentences is unnecessary and is contrary to the benefits conferred by the aggregate sentencing provisions.

If a non-custodial sentence is appropriate for an offence that is the subject of the multiple offence sentencing task, it should be separately imposed.

Being "in company" does not aggravate an aid and abet offence

The sentencing judge in ***Kukovec v R*** **[2014] NSWCCA 308** was found to have erred by taking into account that an offence was committed in company when the offence was one of aiding and abetting an aggravated (corporal violence) robbery. It was an element of the offence when the offender was a principal in the second degree that it was committed "in company".

Re-opening sentence proceedings to correct error is not an opportunity to present fresh evidence

A judge imposed aggregate sentences upon two offenders but it was later realised when an appeal in the Court of Criminal Appeal was pending that there was no power to do so. The Crown went back to the District Court with an applicant pursuant to s 43 of the *Crimes (Sentencing Procedure) Act* 1999 to re-open the proceedings and impose sentences

according to law. The offenders sought to present additional material relevant to sentence but the judge rejected it. The appeal was continued with an additional complaint about the judge's refusal. It was held in ***Bungie, Scott v R; Bungie, Robert v R*** **[2015] NSWCCA 9** that s 43 does not afford an opportunity to re-litigate what has already been litigated, or to seek a different outcome on different evidence. Section 43 was held by the High Court in *Achurch v The Queen* [2014] HCA 10; 306 ALR 566 to have very narrow scope.

Aggregate sentencing – no power to suspend and no power to impose a single bond for multiple offences

RM v R **[2015] NSWCCA 4** was a Crown appeal against sentence in respect of various child sexual assault offences. It was common ground that the sentencing judge had erred in two respects. For the more serious offences the judge had imposed an aggregate sentence but then suspended it pursuant to s 12 of the *Crimes (Sentencing Procedure) Act* 1999. There is no power to do this as the imposition of an aggregate sentence is enabled by s 53A which is with Pt 4 of the Act which by virtue of s 12(3) does not apply when a sentence is suspended. The judge also erred in imposing a single s 9 good behaviour bond for five less serious offences

Sentencing following revocation of a s 12 bond

The applicant in ***Lambert v R*** **[2015] NSWCCA 22** was sentenced to a 2 year suspended sentence for a drug supply offence. She breached the good behaviour bond, was called up, and the suspension was revoked. Section 99(2) enables a court in such circumstances to impose an intensive correction order or home detention instead of full-time imprisonment but the judge gave no apparent consideration to those options. It was held that the sentence proceedings miscarried. Despite nothing being placed before the judge concerning the making of an intensive correction order, it was a realistic potential sentencing outcome in the circumstances. Insufficient material was before the Court to consider resentencing for itself so the matter was remitted to the District Court for reconsideration.

SENTENCING - SPECIFIC OFFENCES

Commonwealth money laundering offences – assessment of seriousness

The respondent Ms Ly was found guilty by a jury of dealing with the proceeds of crime, believing it to be the proceeds of crime and exceeding a value of $100,000. The respondent committed a series of frauds on the Australian Taxation Office, accruing $357,568. She was sentenced to 3 years 6 months with a non-parole period of 2 years 4 months. The maximum penalty is 20 years imprisonment and/or 1200 penalty units. The Crown appealed the sentence. The Court in ***R v Ly*** **[2014] NSWCCA 78** allowed the appeal and increased the sentence to 8 years. A number of matters relevant to the assessment of money laundering offences were provided. The seriousness of the offences set out in the statutory scheme depends on the value of the proceeds and the state of mind of the offender. The number of transactions and the period over which they occur is also significant. For instance, a number of transactions of small amount will generally be more

serious than a single transaction of a large amount. The use to which the money is put is also relevant, as well as knowledge of illegality of conduct.

Manslaughter - seriousness of alcohol-fuelled, one-punch manslaughter offences and the utility of previous sentencing decisions

Kieran Loveridge pleaded guilty to offences of manslaughter, assault occasioning actual bodily harm and three offences of assault. The well-known facts are that he went to Kings Cross one evening after consuming a significant amount of alcohol and randomly assaulted passers-by. One of the victims hit his head on the ground after being punched and later died. Loveridge was sentenced to 7 years and 2 months with a non-parole period of 5 years and 2 months. It was held in ***R v Loveridge*** **[2014] NSWCCA 120** that the sentencing judge made a number of errors and that the sentences were manifestly inadequate. In referring to previous United Kingdom and Australian cases, the Court held that "it is not meaningful to speak of one-punch manslaughter cases as constituting a single class of offences" (at [215]). In addition, offences of this sort are of great concern to the community and "call for an emphatic sentencing response to give particular effect to the need for denunciation, punishment and general deterrence" (at [216]). The sentencing decisions provided to the sentencing judge "represented nothing more than sentencing decisions in cases depending upon their particular facts and the circumstances of the offender in question" (at [222]). They did not establish a range. "There is, in truth, no range of sentences for offences of manslaughter which may be said to have a single common component relating to the mechanism of death (such as the victim's head striking the ground after a blow to the head) (at [226]). Loveridge was re-sentenced to 13 years and 8 months with a non-parole period of 10 years and 2 months.

Dangerous driving occasioning death - calculation of length of journey

Mr Aitken was sentenced for an offence of driving under the influence of intoxicating liquor occasioning death. He was the driver of a car with 2 passengers. Their trip began in Wellington and was broken by a three-hour stop in Gulgong, during which the offender refuelled. The final destination was Mudgee. In ***Aitken v R*** **[2014] NSWCCA 201** R A Hulme J held that it was not wrong to regard the two legs of the trip as part of the one journey. Mudgee was always the intended destination and the stop at Gulgong was only initiated by a need to re-fuel. They continued drinking throughout the entire period and the offender's risk to others increased accordingly.

Break enter and commit serious indictable offence may be aggravated if offence occurs in home of victim

Mr Bennett was charged with an offence under s 112(2) *Crimes Act*, break enter and commit serious indictable offence in circumstances of aggravation. The circumstance of aggravation was that he knew there were persons in the house. An aggravating factor on sentence under s 21A *Crimes (Sentencing Procedure) Act 1999* is that the offence was committed in the home of the victim. The trial judge found that this did not apply because it was an element of the offence. Simpson J, with whom Harrison J agreed, Hall disagreeing on this point, held in ***R v Bennett*** **[2014] NSWCCA 197** that this was incorrect. That the building the subject of the break and enter was the home of the victim is not an element of the offence.

De Simoni error in relation to money laundering offences under the Commonwealth Criminal Code

The Commonwealth Criminal Code provides for various money laundering offences on a scale of seriousness in terms of maximum penalty. The offences in s 400.3 to s 400.8 are differentiated by an offender's mental state ranging from actual belief, reckless or negligence as to whether the money or property is the proceeds of crime. Then there is the offence in s 400.9 in which the only requirement is that it may be reasonable to suspect that the money or property is the proceeds of crime, something to which absolute liability applies. In ***Shi v R*** **[2014] NSWCCA 276** a judge was found to have committed a *De Simoni* error in taking into account in sentencing for a s 400.9 offence that the offender had known that the money was the proceeds of crime.

SUMMING UP

Error in judge unilaterally posing a question in the nature of "why would the complainant lie"

Mr Miles was found guilty by a jury of two counts of sexual intercourse without consent. The complainant alleged that he had assaulted her on two separate occasions but she did not complain on the first occasion. The defence case was that the appellant and the complainant had been in a consensual and romantic relationship. The judge gave a direction concerning the absence of complaint for the first incident and then, in relation to the defence case about the relationship, posed the question: "why did she go to complain on this occasion if it was just another act of consensual sexual intercourse". The appellant argued that this was analogous to the judge asking, "why would the complainant lie" (*Palmer v The Queen* [1998] HCA 2). Simpson J (Harrison J agreeing, Button J dissenting on this point) in ***Miles v R*** **[2014] NSWCCA 72** refused an extension of time in which to appeal. The question was closely allied with but did not contravene the principle in *Palmer* because it did not require that the applicant provide a motive for the fabrication of complainant's allegations. Button J found that it did contravene *Palmer* since it had the potential to reverse the onus of proof, but was also of the view that there was no substantial miscarriage of justice.