LOCAL COURT OF NEW SOUTH WALES 2016 ANNUAL CONFERENCE

Criminal Law Update

The Honourable Justice R A Hulme

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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 decisions 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 Ms Roisin McCarthy BA LLB and Mr Ryan Schmidt BCCJ LLB (Hons).

BAIL

Relevance of "police views" to determination of bail applications

Director of Public Prosecutions (NSW) v Tony Mawad **[2015] NSWCCA 227** concerned a bail detention application. An objection was made to the prosecutor's tender of a letter under the hand of a police officer setting out certain information about the respondent and also the officer's views as to the outcome of the application. Hamill J in the Supreme Court had disregarded the latter on the basis that it was irrelevant. Beech-Jones J, with the concurrence of the other members of the Court, agreed that it was a matter that could not be considered. As to other information provided by the officer, for example that the respondent had contacts with known criminals who had access to firearms, Beech-Jones J noted that the rules of evidence did not apply and that the court could take into account any information it considered credible or trustworthy (s 31 of the *Bail Act*), but concluded that it must be put aside as the officer had not provided any basis for the assertions.

EVIDENCE

Voice identification evidence - admissibility

Part of the prosecution case against Mr Damon Miller in respect of fraud-related offences was based upon voice identification evidence. A recording of him speaking in a prior court case was played to witnesses who had spoken with the perpetrator of the fraud. They also listened to 7 other voices reading a transcript of what he had said in court. 7 out of 10 witnesses selected his voice. It was contended on appeal that the voice identification was inadmissible either on the basis that it was not relevant or that it should have been excluded pursuant to s 137 of the *Evidence Act 1995*. It was held in ***Miller v R*** **[2015] NSWCCA 206** that since the *Evidence Act* came into force the only precondition to the admissibility of voice identification evidence was the requirement in s 55(1) that it be relevant. Here it was clearly relevant as it went to the assessment of the probability that Mr Miller was the offender. After a detailed review of the evidence, the Court concluded that no unfair prejudice warranting exclusion of the evidence had been established. A general discussion about admissibility of such evidence may be found at [44]-[60].

Expert evidence - admissibility of evidence by detective concerning use of code words in illicit drug trade

It was the Crown case that a man participated in a criminal group which sold substantial quantities of heroin and cocaine. The Crown called a Detective Hamilton to give evidence regarding the use of slang, veiled speech and codes by those involved in the illicit drug trade. The admissibility of this evidence was challenged on appeal: ***Czako v R* [2015] NSWCCA 202**. It was held that the evidence was admissible because, rather than being evidence of an 'ad hoc expert' based on expertise acquired for the purpose of the particular proceedings (the admission of which requires great caution), Detective Hamilton gave evidence of veiled or coded speech generally. This evidence was based on his experience and observations as an undercover police officer in illicit drug deals.

Doli incapax

***RP v R* [2015] NSWCCA 215** concerned sexual assault offences alleged to have been committed by a person when aged between 11 years 6 months and 12 years 3 months against his much younger half-brother. The case is notable for the survey of the law relating to *doli incapax* (incapable of crime) in the judgments of Davies J (at [34]-[38]) and Hamill J at (at [123]-[137]). This was the only issue in the judge-alone trial. It was conceded on the appellant's behalf at the trial that if the judge was satisfied that the prosecution had rebutted the presumption beyond reasonable doubt in respect of the earliest offence, he would make the same finding in relation to the two later offences. This concession was held to be erroneous and the judge should not have acted upon it (as he did). The analysis of Davies J led him to conclude that the presumption was not rebutted in respect of the third offence. Johnson J agreed. Hamill J concluded that it was not rebutted in respect of the second and third offences.

Tendency evidence - where joint concoction alleged

Mr Jones was charged with ten counts of aggravated sexual assault committed against three brothers. The trial judge ruled that evidence of each complainant could be used as tendency evidence in the cases involving the other complainants (and determined that all counts be heard together). Proceedings were brought under s 5F *Criminal Appeal Act*: ***Jones v R* [2014] NSWCCA 280**. The issues were whether the judge erred in concluding that there was no evidence of concoction or contamination; whether his Honour erred in applying *Hoch v The Queen* [1988] HCA 57; 165 CLR 292 and subsequent decisions; and whether his Honour erred by concluding that the effect of *R v Shamouil* [2006] NSWCCA 112; 66 NSWLR 228 is to prohibit consideration of the possibility of concoction in determining probative value.

The Court was satisfied that the judge did not err in finding that there was no evidence of concoction, but went on to consider the other two issues. It was observed that the principle in *Hoch* - that similar fact evidence is inadmissible if there is a possibility of concoction - does not apply to the test for admissibility of tendency evidence under the *Evidence Act.* In light of the decisions in *R v Ellis* [2003] NSWCCA 319; 58 NSWLR 700 and *Saoud v R* [2014] NSWCCA 136, the applicant's reliance on *Hoch* was described as "problematic". Finally, the Court found that the judge's conclusion that questions of concoction can never be relevant to the determination of probative value overstated the

effect of *Shamouil.* The authorities support a restrictive approach to this question. Depending upon the evidence, it may be that an assessment of probative value will involve a consideration of questions of concoction or contamination in the context of competing inferences that might arise from the evidence.

The judgment in this case must now be read in the light of ***Imm v The Queen*** **[2016] HCA 14** where the plurality judgment briefly dealt with a contention concerning the possibility of concoction as follows:

> [59] Before turning to the application of ss 97(1) and 137 to the facts in this case, there should be reference to the appellant's submission concerning the risk of joint concoction to the determination of admissibility of coincidence evidence. The premise for the appellant's submission – that it is "well-established" that under the identical test in s 98(1)(b) the possibility of joint concoction may deprive evidence of probative value consistently with the approach to similar fact evidence stated in *Hoch v The Queen* – should not be accepted [*McIntosh v The Queen* [2015] NSWCCA 184 at [42]-[48] per Basten JA was cited in a footnote] . Section 101(2) places a further restriction on the admission of tendency and coincidence evidence. That restriction does not import the "rational view ... inconsistent with the guilt of the accused" test found in *Hoch v The Queen*. The significance of the risk of joint concoction to the application of the s 101(2) test should be left to an occasion when it is raised in a concrete factual setting.

The reference to the judgment of Basten JA in ***McIntosh v R*** **[2015] NSWCCA 184** included (at [47]) his Honour's statement: "[T]he suggestion that the possibility of concoction is a factor which must be taken into account in determining whether particular evidence has significant probative value should not be accepted".

Tendency evidence - single event occurring years prior can be admitted

In ***Aravena v R*** **[2015] NSWCCA 288** the trial judge admitted evidence establishing a tendency of the appellant to *inter alia* indecently assault young women in certain circumstances. The evidence concerned a single event (for which he was convicted) arising seven years prior to the present incident. In the current proceedings, the appellant pleaded not guilty to a charge of recklessly inflicting actual bodily harm with intent to have sexual intercourse. On appeal the Court (Beazley P, Hall and Wilson JJ) held that there was no error in admitting the evidence. With respect to s 97 of the *Evidence Act 1995* (NSW), the fact that a single event was relied upon and that there was a lapse in time between that event and the current incident were relevant but not determinative to considerations of admissibility. The judge also applied s 101 in a principled way. In a trial where the appellant admitted the assault but denied that it was of a sexual nature, making the critical issues for determination the nature of the assault and the question of the appellant's intention at the time, the probative value of the tendency evidence was very high. This probative value substantially outweighed the clear prejudicial effect of the evidence.

Expert evidence - admissibility of evidence from fingerprint expert where reasons for opinion not explained

JP was convicted in the Children's Court of aggravated breaking and entering with intent to commit a serious indictable offence. The conviction was entirely dependent upon evidence given by an expert witness that a fingerprint at the crime scene identified JP. He appealed

to the Supreme Court against his conviction on a number of grounds concerning that evidence. In ***JP v DPP (NSW)*** **[2015] NSWSC 1669**, Beech-Jones J found that the expert's certificate did not provide any reasoning sufficient to support the admissibility of his opinion. It set out the methodology that was applied but did not state what the examination actually revealed; there was simply a statement of the ultimate opinion formed. A bare assertion that two fingerprints are identical does not satisfy the second condition of admissibility in s 79 of the *Evidence Act 1995* (NSW), namely that the relevant opinion must be "wholly or substantially based on that [specialised] knowledge." Some explanation of what an examination revealed at a level of detail below a conclusion that the fingerprints are identical must be provided for the evidence to be admissible. Despite the erroneous admission of the certificate, the subsequent oral evidence given by the expert rectified its deficiencies and the challenge to admissibility on appeal therefore failed.

Unsworn evidence

The Queen v GW **[2016] HCA 6** raised for consideration two aspects concerning a child giving unsworn evidence pursuant to s 13 of the *Evidence Act 2011* (ACT) which is in identical terms to s 13 of the *Evidence Act 1995* (NSW). A judge presiding when the 6 year-old complainant gave pre-trial evidence made an assessment that she was not competent to give sworn evidence (s 13(3) but competent to give unsworn evidence (s 13(4)-(5)). The (different) judge who presided at the trial refused to exclude the child's unsworn evidence and refused to warn the jury about the fact that it was unsworn.

The child conveyed to the first judge that she understood the difference between the truth and a lie. The High Court held that this did not necessarily mean that she had the capacity to understand that she would be "under an obligation to give truthful evidence" (s 13(3)). "Obligation" is to be understood as being morally or legally bound to give truthful evidence. In the circumstances of this case it was open to the pre-trial judge to be satisfied that the child was not competent to give sworn evidence.

There was no requirement at common law or under s 165 (if a request had been made) to warn the jury about the fact that the child's evidence may be unreliable because it was unsworn. (The Court put to one side the possibility that a warning may be required in the case of a witness other than a young child who does not have the capacity to under the obligation to give truthful evidence and who gives unsworn evidence.)

Tendency evidence – general principles reviewed

The Court (Beazley P, Schmidt and Button JJ) provided a summary of the case law and principles applying to the admissibility of tendency evidence under s 97 of the *Evidence Act 1995* in ***Hughes v R*** **[2015] NSWCCA 330** at [158]-[193]. It is too lengthy to summarise here but is commended for its usefulness.

Tests of credibility and reliability not to be applied in determining probative value of evidence

The appellant in ***IMM v The Queen*** **[2016] HCA 14** was convicted of two counts alleging sexual misconduct against his step-granddaughter. During the trial the judge admitted

tendency evidence from the complainant and complaint evidence from her friend pursuant to ss 97 and 137 respectively of the *Evidence (National Uniform Legislation) Act* (NT) (those provisions are in identical terms to the NSW Act). In ruling the evidence admissible, the judge assessed its probative value on the assumption that the jury would accept it and in so doing, did not have regard to factors such as the credibility of the witness or the reliability of the evidence. The appellant unsuccessfully appealed against that approach in the NTCCA and then appealed to the High Court.

The Court (French CJ, Kiefel, Bell and Keane JJ in a joint judgment, Nettle and Gordon JJ agreeing in the result but for different reasons) allowed the appeal. The plurality held that the judge correctly approached the assessment of probative value of the evidence but ultimately reached the wrong decision with respect to the tendency evidence. The words "if it were accepted" in s 55 make it clear that the relevance of evidence is to be determined on the assumption that the jury will accept it; there is therefore no allowance for a judge to consider its credibility or reliability. Similarly, the *Evidence Act* contains no warrant for the application of tests of reliability or credibility in connection with ss 97(1)(b) and 137. It is the evident policy of the Act that, generally speaking, questions as to the reliability or otherwise of evidence are matters for a jury. The trial judge therefore took the correct approach.

However, the tendency evidence was wrongly admitted because it did not have significant probative value. Unsupported evidence from a complainant adduced to show an accused's sexual interest in him/her can generally have limited, if any, capacity to rationally affect the probability that the complainant's account of the charged offences is true (see [60]-[64]). The complaint evidence – which was tendered for the purpose of proving the acts charged – on the other hand was admissible. In the circumstances, it could not be said that its probative value was low.

OFFENCES

PCA - deeming provision not available to defendant

In a roadside breath test at about 9.00am Mr Bignill returned a reading of 0.063. About half an hour later a breath analysis reading was 0.054. He agreed to go the hospital to undertake a blood test which returned a reading of 0.049 at 10.35am. At the hearing of a charge of low-range PCA a magistrate accepted Mr Bignill's argument that, pursuant to Sch 3 cl 31 of the *Road Transport Act 2013,* his blood alcohol concentration at the time of driving should be deemed to be 0.049. In ***DPP v Bignill*** **[2015] NSWSC 668** Adamson J allowed a prosecution appeal finding that the deeming provision in the *Road Transport Act* did not entitle Mr Bignill to have his blood alcohol concentration revealed by the blood test at the hospital, deemed to be his blood alcohol level at the time he was driving. It was a matter for a defendant to rebut the deemed reading by showing that his blood alcohol concentration was within the legal limit at the time of driving. In ***Bignill v DPP*** **[2016] NSWCA 13**, it was confirmed that the presumption that a test result establishes the blood alcohol level at the time of driving is available only to the prosecution. It is a matter for the defendant to rebut it. A second test result would be admissible for that purpose but it would only establish the blood alcohol level at the time of that test.

Money laundering – s 400.9 Criminal Code (Cth)

Mr Lin was charged with 5 offences of dealing with money which, it was reasonable to suspect, was the proceeds of crime and was of a value of $100,000 or more, contrary to s 400.9 of the *Criminal Code (Cth)*. Mr Lin sought a stay or quashing of the indictment in the District Court, arguing that the prosecution had failed to particularise the indictable offence(s) from which the proceeds were derived. The District Court refused the application. Mr Lin appealed pursuant to s 5F(3) *Criminal Appeal Act*. In ***Lin v R*** **[2015] NSWCCA 204** the appeal was dismissed, the Court finding that proof of a s 400.9 offence does not require the prosecution to provide particulars of a class of indictable offence(s) from which the money or property is said to have been derived. An offence against s 400.9 can be distinguished from offences against ss 400.3 – 400.8. Pursuant to s 400.9(2) the Director may establish that it is reasonable to suspect that the money or property is proceeds of crime based on proof of various kinds of conduct, not limited to proof of an indictable offence. Thus, s 400.9(2) proves an alternative route to proof of the 'reasonable to suspect' element of the offence.

Meaning of "anything" in s 135.1(3) Criminal Code (Cth)

It is an offence under s 135.1(3) to do "anything with the intention of dishonestly causing a loss to" a Commonwealth entity. Mr Masri was charged with an offence under that section on the basis that he was party to a joint criminal enterprise to import cigarettes into Australia in containers by falsely representing their contents. The Crown relied upon a variety of acts by Mr Masri to sustain the charge including facilitating and dealing with the paperwork, providing funds and arranging the release of the container. In ***Masri v R*** **[2015] NSWCCA 243**, it was contended the Crown could not rely upon a course of conduct to sustain the charge. The Court held that the concept of "anything" in s 135.1(3) could encompass a variety of acts or a course of conduct. The decision in *Giam v R* [1999] NSWCCA 53; 104 A Crim R 416, a case which concerned the meaning of "any statement", was distinguished on the basis that the two concepts are materially different. The effect of the appellant's proposition was that a person could be charged with a separate offence for individual telephone calls, every dealing with documentation and every communication with a Customs agent. It was found that this was not the intended construction of the legislation.

Use of offensive instrument to prevent or hinder lawful apprehension

In ***Harkins v*** **R [2015] NSWCCA** 263 the appellant had been convicted of an offence under s 33B(1)(a) *Crimes Act* on the basis that he used an offensive instrument, a motor vehicle, with intent to prevent the lawful apprehension of himself. He had been identified to police as a possible suspect for an attempted break and enter. The police approached vehicle he was in as he was moving into the front seat and starting the engine. One officer grabbed the arm of Mr Harkins and attempted to turn off the engine. Mr Harkins revved the engine in an attempt to escape and the car bunny hopped about 10 metres with the police officer being dragged alongside the vehicle. As he had not actually driven the vehicle toward the officer with the intention of causing him harm, it was argued on appeal that it could not be established that the car had been used as an offensive instrument. The Court construed s 33B broadly, finding that it includes the use of an instrument with the intention of preventing or hindering lawful apprehension. The Court found that it was not

necessary that there be a positive intent to injure or threaten someone to sustain a charge under s 33B.

Perverting the course of justice - commencement of the "course of justice"

The issue in ***The Queen v Beckett*** **[2015] HCA 38; 325 ALR 385** was whether an act done before the commencement of judicial proceedings could constitute an offence contrary to s 319. Ms Beckett was charged with an offence of doing an act with the intention of perverting the course of justice under s 319 *Crimes Act*. In the District Court, she sought a permanent stay on the basis that there were no existing proceedings on foot and thus no course of justice to pervert. The stay was refused in the District Court but granted by the Court of Criminal Appeal which held that liability for an offence against s 319 is confined to acts or omissions carried out with the intention of perverting an existing course of justice: *Beckett v The Queen* [2014] CCA 305; 315 ALR 295. The High Court held that the Court of Criminal Appeal erred in reasoning based on *R v Rogerson* (1992) 174 CLR 268 which concerned the common law offence of conspiring to pervert the course of justice. The High Court emphasised that the meaning of "perverting the course of justice" in s 319 includes "preventing … the course of justice" which, the High Court said was "eloquent of a legislative intention that liability extend to acts done with the proscribed intention in relation to contemplated proceedings" (at [35]).

Break enter and commit serious indictable offence - indictable offence committed outside dwelling-house does not qualify

The applicant in ***Nassr v R*** **[2015] NSWCCA 284** pleaded guilty to an offence of break, enter and commit serious indictable offence contrary to s 112(2) of the *Crimes Act 1900* (NSW). The agreed facts established that he entered the victim's home but was then interrupted, leading to a confrontation outside in which Mr Nassr assaulted the victim. He sought leave to appeal out of time against his conviction on the ground that he could not in law have been convicted of the offence on the admitted facts. The Court allowed the appeal and quashed the conviction because an essential element of the offence – that the applicant assaulted the victim inside the dwelling-house – was not established; "dwelling-house" as defined in s 4 does not include an adjoining yard.

Statutory interpretation of "drug analogue" in the Criminal Code (Cth)

The respondents in ***R v Peart; R v Sorokin*** **[2015] NSWCCA 321** were charged with jointly importing a drug analogue (MDMC) of a border controlled drug (Methcathinone) contrary to s 307.3(1) of the *Criminal Code* (Cth). Section 301.9(2) provides that "…a drug analogue does not include a substance that is itself a listed controlled drug or a listed border controlled drug." MDMC is a listed controlled drug but not a listed border controlled drug. After a pre-trial hearing, the judge relied on s 301.9(2) to quash the charges ruling that MDMC was not, as a listed controlled drug, capable of being a drug analogue of Methcathinone. The Crown appealed against that construction. Ward JA allowed the appeal holding that while there is no doubt that the judge's construction is correct if s 301.9(2) is read in isolation, when read in context with s 301.9(1) it is to be construed such that a drug analogue of a listed controlled drug does not include a substance that is itself a listed controlled drug and a drug analogue of a listed border controlled drug does not include a substance that is itself a listed border controlled drug. That is to say that the

presence of a substance on one list has no bearing on its status as a drug analogue of a substance appearing on the other list. There are two textual reasons for this. First, the words "drug analogue" in s 301.9(2) import the meaning given to them in s 301.9(1), in which a clear distinction is drawn between a drug analogue of a listed controlled drug and that of a listed border controlled drug. Second, the repetition of the word "listed" in s 301.9(2) makes clear that the focus is on two separate lists of drugs. This construction is also supported contextually. Even if the trial judge's construction was textually correct, it would have produced a manifestly absurd result which would have been resolved by construing the subsection in this way.

Manslaughter by criminal negligence – establishing a duty of care in an employment context

The respondent was an experienced bricklayer and sole director of a company that hired the deceased. During the course of that employment the deceased constructed a freestanding brick wall that was not in any way braced, attached or supported. Four days later the wall collapsed on the deceased causing his death. The respondent was charged with manslaughter by criminal negligence. During the Crown opening address, the trial judge ruled that there was no duty owed by the respondent to the deceased that could form the basis of the charge and granted a permanent stay of proceedings. On appeal in ***R v Moore*** **[2015] NSWCCA 316**, the Crown proposed three alternative bases upon which the respondent could be held to have been under a duty of care to the deceased: (1) a statutory duty imposed by s 20 of the *Occupational Health and Safety Act 2000* (NSW); (2) a common law duty by reason of his direct involvement in the construction of the wall; (3) a "novel duty of care". The Court (Bathurst CJ, Simpson JA and Bellew J) held that the trial judge's ruling was erroneous; Bathurst CJ and Bellew J (Simpson JA dissenting) allowed the appeal and quashed the order granting the stay. With respect to the first basis, Bathurst CJ and Bellew J (Simpson JA dissenting) held that the legislature did not intend for contraventions of s 20 to give rise to criminal liability for manslaughter. Secondly, all judges agreed that it would be open to conclude that a common law duty existed provided certain facts were established by the prosecution. Finally, Simpson JA and Bellew J rejected the novel duty of care basis.

Recklessness – foresight of possibility as opposed to probability

Mr Aubrey was convicted of maliciously inflicting grievous bodily harm contrary to s 35(1)(b) of the Crimes Act 1900 in circumstances where he infected a homosexual partner with HIV. The offence was charged in the form that applied in 2004. Liability was established on the basis of recklessness by virtue of s 5 as it then stood. With respect to recklessness, the trial judge directed the jury in terms of the foresight of possibility of harm. While this was conceded to be the correct approach at trial, on appeal in ***Aubrey v R*** **[2015] NSWCCA 323** it was contended that this was erroneous and the correct approach was to direct in terms of foresight of probability. Supporting this ground was a challenge to the decision in *R v Coleman* (1990) 19 NSWLR 467 and the authority flowing from it as wrongly decided. Fagan J rejected this argument, holding that there is no reason to doubt the correctness of established authority. The Court has already considered and determined not to follow Victorian authority requiring foresight of probability. Further, there is no need for a direction requiring the jury to distinguish between a merely

theoretical possibility on the one hand and a possibility as a matter of reality on the other; "possibility" is an ordinary English word of perfectly clear meaning.

Misconduct in public office - elements of the offence are as formulated by the Victorian Court of Appeal

The appellant in ***Obeid v R*** **[2015] NSWCCA 309** was charged with wilfully misconducting himself in a public office. The trial judge refused an application to have the indictment set aside, stayed or quashed on a number of grounds. The appellant appealed against that refusal including on the ground that the judge took an erroneous approach to the elements of the offence. The Court (Bathurst CJ, Beazley P and Leeming JA) dismissed the appeal approving the five elements of the offence formulated by the Victorian Court of Appeal in *R v Quach* [2010] VSCA 106. The primary judge applied that decision as one of an intermediate court of appeal on a question of common law. The Court held this was the appropriate course of action and the Victorian decision was of sound precedential value. The Court rejected a submission the decision was internally inconsistent, noting that the Victorian Court's conclusions could not have been clearer. The Court also rejected a submission that the decision was plainly wrong in light of different overseas appellate decisions. Finally, the Court rejected a submission that the *R v Quach* formulation rendered the elements of the offence uncertain.

Constructive murder and manslaughter where clandestine drug lab explodes: misapplication of principles of joint criminal enterprise

The Crown alleged that the respondent in ***R v IL*** **[2016] NSWCCA 51** was party to a joint criminal enterprise to the manufacture a large commercial quantity of methylamphetamine. As part of that enterprise, either the respondent or the deceased (her co-offender) ignited a ring burner, causing a fire that killed the deceased. The judge directed the jury to return verdicts of not guilty to murder and manslaughter. The Crown appealed against the acquittals submitting that the judge erred by not applying the correct test when determining there was no prima facie case of constructive murder or of involuntary manslaughter by unlawful and dangerous act. Simpson JA allowed the appeal, quashed the acquittals and ordered a retrial. The judge misapplied the principles of joint criminal enterprise. Those principles were applicable to the *foundational* crime for constructive murder (drug manufacture) as opposed to the offence of murder itself. Accordingly, the judge erred by holding that it was the injury or death of the deceased, rather than the ignition of the burner, that had to be within the scope of the criminal enterprise. Plainly, the lighting of the burner was an act within the scope of the joint criminal enterprise of drug manufacture, making whichever of the respondent and the deceased did it equally as liable as the other. If that is proven, the act causing death was done either in an attempt to commit, or during the commission, by the respondent or her accomplice, of a crime punishable by imprisonment for life. The judge similarly erroneously misapplied the principles of joint criminal enterprise with respect to manslaughter; liability for that offence was not derivative but co-extensive with that of the deceased.

Meaning of "malicious" in s 18(2)(a) of the Crimes Act 1900

In ***R v IL*** **[2016] NSWCCA 51** the Crown appealed against directed verdicts of acquittal for murder and manslaughter. The respondent argued that, if the Crown were to succeed, the Court should not order a retrial as the acquittals were otherwise correct because the acts alleged to constitute the homicide were not "malicious". This argument turned on a submission that the word "malicious" in s 18 of the *Crimes Act 1900* ("the Act") has a different meaning now to what it did prior to 2008 when s 5 (containing a definition of "malice") was repealed and the concept of malice removed from most of the Act. Simpson JA rejected this proposition, holding that the effect of Sch 11 cl 65 – a savings or transitional provision – is that s 18(2)(a) is to be read and interpreted as though s 5 had not been repealed. The operation of s 5 in relation to murder is confined to constructive murder, as the remaining categories are provable by evidence of the relevant state of mind, leaving no room for the concept of malice. Her Honour then considered the actual meaning of s 5, noting that it included an element of recklessness. In the present case, it was open on the evidence for the jury to conclude that the act alleged to constitute the offence of murder was done recklessly and it was therefore necessary to order a retrial. At [98]ff, Simpson JA considered the meaning of s 5 in the event that she was wrong in her conclusion regarding the effect of cl 65. However, R A Hulme and Bellew JJ expressed that there was no doubt in her Honour's primary view.

Intimidation – (s 60 Crimes Act) *– intimidatory conduct need not be in the presence of the police officer*

The defendant in ***DPP (NSW) v Best*** **[2016] NSWSC 261** was charged with intimidating a police officer in the execution of his duty contrary to s 60(1) of the *Crimes Act* in circumstances where he walked into a police station and said to a sergeant "Just tell [a named Detective] that if he doesn't back off I'm going to go and get a gun and kill him." The Magistrate dismissed the charge holding there was no case to answer as there was no evidence of "direct action" because the intimidatory conduct was communicated through a third party. R A Hulme J allowed the appeal and remitted the matter, holding that the magistrate erred in "reading down" s 60(1) to require the prosecution to establish that the conduct was carried out in the presence of the relevant police officer. The meaning of "intimidates" in s 60(1) is as explained in the clear authority of *Meller v Low* [2000] NSWSC 75. The commission of the offence of intimidating a police officer requires proof that a person deliberately engaged in conduct (be it by words, deeds or both) intending or designed to intimidate a police officer in execution of the officer's duty and that such conduct in fact had that effect. Whether that is done in the presence of the officer or communicated to the officer by some other means is a question of fact and not determinative in itself.

PRACTICE AND PROCEDURE

"Prasad direction" in a summary trial

Mr Mikhael pleaded not guilty to two offences of intentionally causing fire and being reckless as to its spread (s 203E(1) of the *Crimes Act*). The matter was heard before a

magistrate in the Local Court where the police brief was tendered and submissions were made in respect of "prima facie case". The magistrate ruled that there was a prima facie case but immediately directed herself in accordance with *R v Prasad* (1979) 23 SAR 16; 2 A Crim R 45 and dismissed the charges. The Director of Public Prosecutions took over the proceedings and appealed to the Supreme Court on the basis that the prosecutor was denied procedural fairness. In ***Director of Public Prosecutions (NSW) v Mikhael & Ors*** **[2015] NSWSC 819**, Rothman J found that the failure of the magistrate to invite the prosecutor to make submissions opposing a *Prasad* direction amounted to a denial of procedural fairness. His Honour described the opportunity of the Crown to be heard before a *Prasad* direction is given as "axiomatic" (at [21]) and "fundamental to the precepts of procedural fairness" (at [23]). In ruling successively on the prima facie case issue and on whether to give a Prasad direction, it was held that the magistrate conflated the two concepts.

Compulsory examination material may be made available to prosecutors in ASIC Act prosecution

In ***Regina v OC*** **[2015] NSWCCA 212** the Court was called upon to decide whether material derived from a compulsory examination carried out pursuant to s 19 of the *Australian Securities and Investment Commission Act* 2001 (Cth) could be made available to prosecutors: cf *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Lee v R* [2014] HCA 20; 308 ALR 252. After a detailed examination of the provisions of the ASIC Act, Bathurst CJ held that the ASIC Act disclosed, by necessary intendment, that prosecutors may be given access to the transcript of compulsory s 19 examinations, not only to formulate charges but to prosecute them.

Evidence can be given in confidence to assist judge in cases where the sexual assault communications privilege applies

Mr Khan pleaded not guilty to a number of sexual offences and issued subpoenas to the Commissioner of Police and the Department of Family and Community Services. The Commissioner and FACS applied to have the subpoenas set aside and sought an order preventing access on the basis that the subpoenaed documents were privileged. The judge refused to set aside the subpoenas and made rulings as to which documents were protected confidences and subject to the sexual assault communications privilege. In ***ER v Khan*** **[2015] NSWCCA 230** this ruling was appealed pursuant to s 5F *Criminal Appeal Act*. In dismissing the appeal, Hall J commented on the power of the court to make orders to facilitate the court's task of determining questions of sexual assault communications privilege. Section 299B(4) expressly provides that a court may make "any orders it thinks fit to facilitate its consideration of a document or evidence under this section". This would permit the making of an order allowing the evidence to be given in confidence. (This is an approach which has been taken in relation to client legal privilege.)

Failure to follow the procedure for hearing and determining a summary offence in the Local Court

After the defendant in ***DPP v Ridley*** **[2015] NSWSC 1478** returned a positive roadside blood alcohol reading, police observed him to be intoxicated. At the police station, he failed to provide a breath or blood sample. During those events, he revealed to police that

he suffered from Asperger's. He was ultimately charged with driving a vehicle under the influence of alcohol. In the Local Court, the defence raised a number of objections to evidence in the police brief on the basis that it did not comply with the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) or the *Road Transport Act 2013*, under which the defendant was charged. The Magistrate conducted a *voir dire* to determine its admissibility. Following the decision to exclude *all* evidence, his Honour finalised the matter by dismissing the charge. The manner in which each of those decisions was reached was the subject of a number of grounds of appeal by the DPP. It was common ground that the appeal ought be allowed and the matter remitted to be dealt with according to law. Adamson J observed that in conducting the *voir dire* and in hearing and determining the matter, the Magistrate was required to undertake a number of steps in each regard (see [41] and [59] respectively). In both instances, his Honour failed to undertake any of the steps – including hearing submissions from the parties – prior to reaching a decision. The two processes were erroneously rolled up and dealt with as one. His Honour's reasons in relation to both rulings were insufficient and incomprehensible.

Section 32 of the Mental Health (Forensic Provisions) Act - relevance of the operation and effect of the order and the need for general deterrence

Mr Quinn was fined and placed on a good behaviour bond following his plea of guilty to an offence of dishonestly obtaining a financial advantage by deception. He appealed to the District Court, seeking an order that he be discharged under s 32 of the *Mental Health Forensic Provisions Act 1990*. In declining to make the order, the judge referred to the fact that the order would only have six months to work and also referred to the need to balance the public interest in having Mr Quinn's mental health dealt with against the public interest in general and specific deterrence. Mr Quinn sought judicial review of the District Court decision in the Court of Appeal: ***Quinn v Director of Public Prosecutions* [2015] NSWCA 331**. The Court found no error, much less jurisdictional error, in the judge's approach. Adamson J held that in determining whether to make a s 32 order the judge was entitled to consider what would be achieved and what the operation and effect of such an order would be. Her Honour also found that general deterrence was a relevant consideration in the circumstances. She observed that the weight to be given to general deterrence is a matter for the primary decision-maker and not a matter generally giving rise to an error of law.

No error in refusing to permanently stay proceedings despite prejudicial pre-trial publicity

The applicant in ***Hughes v R* [2015] NSWCCA 330**, the star of the 1980s and 1990s Hey Dad! television program, was convicted of a number of child sex offences. He appealed against those convictions on the ground that the judge erred by refusing to permanently stay the proceedings in light of prejudicial pre-trial publicity said to undermine his right to a fair trial. Beazley P, Schmidt and Button JJ dismissed the appeal, holding that the complaints advanced on appeal cannot be approached purely prospectively; they must be resolved with the assistance of what actually transpired at the trial. The judge in fact took a number of steps to ensure a fair trial. This included the provision of a detailed explanation to potential jurors of the role of a jury, the importance of the qualities they must bring to their task, and the importance of disregarding media reports. Once empaneled, the jury were appropriately addressed with respect to issues such as the onus of proof; the presumption of innocence; impartiality; their role as judges of the facts based

on the evidence; and applying the law as directed by his Honour. The jury were given written directions concerning the exclusion of publicity from their minds. These issues were revisited during the trial, in the applicant's submissions and in his Honour's summing up. There continues an expectation that despite technological developments and the increased accessibility of media material, juries will approach their task correctly as directed. The jury in this case undoubtedly did so as evidenced by their notes and deliberation process. All evidence establishes that the applicant in fact received a fair trial.

Erroneous exclusion of evidence complying with the Criminal Procedure Act 1986 but not with court directions

A complete police brief was not served within the timeframe prescribed by a Magistrate's directions. As a result, her Honour considered herself bound by certain provisions of the *Criminal Procedure Act 1986* ("the Act") to exclude crucial parts of the brief and ultimately dismiss the charges. In ***DPP v Lazzam*** **[2016] NSWSC 145** Adamson J allowed an appeal against those rulings and orders. While service of the police brief did not comply with the Magistrate's directions, it did meet the requirements of s 183 of the Act. The prosecutor did not fail to comply with any other provision of Div 2 of Pt 4 of Ch 4 of the Act or any rules made under that Division, meaning that s 188 of the Act – which provides for the mandatory or discretionary exclusion of evidence in such circumstances – was not enlivened. In considering herself bound by s 188 to reject evidence when that provision did not in fact apply, the Magistrate erred. The error was caused by her Honour elevating her direction into a statutory requirement. In resolving the appeal, Adamson J offered a helpful outline of the proper operation of s 188 at [29]-[38].

SENTENCING – GENERAL ISSUES

Rejection of psychological opinion that goes beyond expertise

Mr Lam was sentenced for an offence of importing a commercial quantity of heroin. It was agreed that three consignments of heroin were imported from Hong Kong into Australia, but there was an issue as to Mr Lam's involvement. The offences were committed after he travelled to Australia from Hong Kong and he claimed that he decided to come to Australia after breaking up with his girlfriend, because he wanted a holiday and to visit an old school friend. This account was rejected by the sentencing judge. A psychological report, finding that Mr Lam suffered from a major depressive disorder, causally related to his offending, was also rejected. In ***Lam v R*** **[2015] NSWCCA 143** the Court dismissed Mr Lam's appeal against sentence finding that the psychological opinion was based on an account which the sentencing judge had rejected. This is a legitimate basis for a court to reject the conclusions in an expert report. Hoeben CJ at CL took the opportunity to make some remarks about psychological opinions in sentence proceedings and the approach to be taken to opinions that go beyond the parameters of the author's expertise (at [74]-[77]). In this case, it was appropriate for the sentencing judge to reject the opinion that Mr Lam's impairment resulted from the breakdown of his relationship with his girlfriend. This was an opinion which was not based on the psychologist's specialised opinion.

No error in judge indicating possible sentence and inviting submissions on that sentence

Mr Browning pleaded guilty to an offence of throwing petrol, an explosive substance, on his estranged wife with intent to burn her. During the sentence hearing, the judge indicated a possible sentence and invited submissions from counsel. The Crown submitted that it would be an appealable error for the postulated sentence to be imposed. Further submissions were sought from Mr Browning's counsel before the judge imposed a sentence that was longer than the indicated sentence. Mr Browning appealed his sentence arguing that the judge erred in inviting the Crown to comment on the appropriateness of the indicated sentence. In ***Browning v R* [2015] NSWCCA 147,** the Court held that there was no error in this approach. The Court reviewed recent pronouncements of the High Court concerning this issue. In *Barbaro v The Queen; Zirilli v The Queen* [2014] HCA 2; 253 CLR 58 it was held that the practice in Victoria of prosecution counsel specifying an appropriate range for a head sentence in numerical terms impermissibly blurred the distinction between the role of the judge and the role of the prosecution. In *CMB v Attorney General for New South Wales* [2015] HCA 9; 89 ALJR 407 the Court acknowledged, however, that the prosecutor has a duty to assist the sentencing judge to avoid appealable error. This was not a case where the prosecutor had suggested in a numerical sense, or at all, an appropriate range of sentences. The prosecutor directed the Court to the facts and the relevant aggravating circumstances. So long as the offender's lawyer is given an opportunity to be heard, Garling J concluded that there is no error in a sentencing judge inviting submissions on a proposed sentence and then reconsidering what the sentence should be.

Failure to allow Ellis discount to an offender who voluntarily disclosed guilt

Mr Herbert was sentenced for three offences of aggravated sexual assault committed against a 55 year old woman. Two days after the offence he voluntarily attended a police station, having become aware of the assault through media reports. While he could not remember committing the offences (he had consumed alcohol, codeine and ice on the day of the offences) he told police that he thought he had done it. The sentencing judge refused to allow an "Ellis discount" finding that Mr Herbert would have been detected by police anyway. Mr Herbert contended on appeal that he should have been awarded a discount for assistance to authorities: ***Herbert v R* [2015] NSWCCA 172**. The ground was upheld, it being found that the denial of an Ellis discount in these circumstances was "contrary to the public interest of encouraging offenders to come forward" (at [46] per R A Hulme J). While Mr Herbert received a discount for his guilty plea, further leniency was required to recognise his voluntary disclosure of guilt. Mr Herbert had gone to the police station before he was considered to be a suspect and it was not clear on the evidence how long a police investigation would have taken to identify Mr Herbert as the perpetrator.

Failure to allow an Ellis discount

The applicant was sentenced for 11 child sexual assault offences committed over a decade against two stepchildren and his biological daughter. The overall sentence imposed was 20 years with a non-parole period of 12 years, there being partial accumulation of the sentences by a year or two. The applicant appealed against the severity of his sentence arguing that, inter alia, there was a failure to allow him an Ellis discount for two of the counts and that the individual and overall sentences were manifestly excessive. It was

held in ***MRM v R*** **[2015] NSWCCA 195** that there was a failure to allow a discount for the applicant's voluntary disclosure of guilt in respect of two of the counts and that the degree of partial accumulation was too great resulting in an overall sentence that was manifestly excessive. In relation to the Ellis discount issue, Simpson JA found that the sentences imposed for the two counts in relation to which the applicant voluntarily disclosed his guilt was the same as the sentence imposed for two identical offences. In addition, the remarks on sentence contained no reference to the Ellis principles or to the fact that the applicant himself provided the only information about the offences. Accordingly, Simpson JA was satisfied that there was a failure to allow an Ellis discount. Schmidt J dissented, finding that the applicant received a substantial benefit in having the sentences imposed for the two counts in question wholly subsumed within the sentences imposed for other offences.

Appropriateness of imposing an intensive correction order

In re-sentencing for child pornography offences in ***R v Porte*** **[2015] NSWCCA 174** (see below) the Court held that it was inappropriate in the circumstances of this case to impose an intensive correction order ("ICO") having regard to the need for general deterrence and denunciation. Johnson J said that for cases of serious child pornography offences, an appropriate level of punishment will generally take the form of immediate incarceration.

Findings of guilt in Children's Court inadmissible in subsequent sentencing proceedings

The applicant in ***Siddiqi v Regina (Commonwealth)*** **[2015] NSWCCA 169** was sentenced for an offence of importing a marketable quantity of cocaine. The sentencing judge took into account findings of guilt in the Children's Court for offences of armed robbery and entering enclosed lands, observing that "his record does not permit much leniency". On appeal the Court found that the sentencing judge erred in having regard to those matters on the basis that s 15(1) *Children (Criminal Proceedings) Act 1987* renders guilt for a matter determined in the Children's Court inadmissible in subsequent criminal proceedings in circumstances where, inter alia, a conviction is not recorded. The Court was satisfied that the applicant was denied the leniency which might be afforded to an offender with no relevant criminal history.

Aggregate sentencing - specifying fixed terms for indicative sentences

An aggregate sentence was imposed on Mr McIntosh for 42 historical child sexual assault offences concerning 4 victims. He argued on appeal that the sentencing process was infected with a variety of errors and the overall sentence was manifestly excessive. In ***McIntosh v R*** **[2015] NSWCCA 184** the Court allowed the appeal. In the judgment of Basten JA (see [135]-[142] and [165]-[169]) it was suggested that when imposing an aggregate sentence it may be appropriate for the court to specify a fixed term for each individual indicative sentence. The fixed term could represent what would otherwise be the non-parole period or the minimum period of mandatory custody.

Comment: This approach has not been suggested before. There are issues about its utility and whether it is consistent with the rationale of aggregate sentencing to simplify the sentencing task for multiple offences.

Aggregate sentencing - error in applying discount for guilty plea to the aggregate

In imposing an aggregate sentence on Mr Sparkes for offences of aggravated break and enter and commit serious indictable offence and take and drive conveyance, the sentencing judge applied a 25 per cent discount for a guilty plea to the aggregate sentence. In ***Sparkes v R*** **[2015] NSWCCA 203** the Court dismissed the appeal, not being satisfied the sentence was manifestly excessive. However, the Court emphasised that the sentencing judge should have applied the discount to the indicative sentences, not to the aggregate sentence: s 53A(2)(b) *Crimes (Sentencing Procedure) Act 1999; JM v R* [2014] NSWCCA 297 at [39](3).

Aggregate sentencing - consideration of indicative sentences helps identify causes of manifestly inadequate aggregate

The respondent in ***R v Crowe*** **[2016] NSWCCA 39** pleaded guilty to offences committed against five young victims between 1989 and 1991. In relation to each victim there was a kidnapping offence and at least one sex offence. Further offences were taken into account on four Form 1 documents. He was sentenced to imprisonment for 12 years (7 years 6 months NPP). Hoeben CJ at CL allowed a Crown appeal finding the aggregate sentence to be manifestly inadequate. The respondent was resentenced to 15 years (10 years NPP). A consideration of the indicative sentences reveals the trial judge's reasoning to an extent. His Honour failed to give adequate weight to Form 1 documents and to have regard to the aggravating feature of the respondent being on bail at the time of some of the offences. His Honour focused on the offending in a general way, failing to fully appreciate the individual aspects of the offending against each victim. The aggregate sentence failed to reflect the objective criminality of the offences and the proper application of the totality principle. It was necessary for the notional level of accumulation to give proper regard to the fact that there were five young victims. There was also a requirement for some accumulation between the kidnapping counts and the sexual assault counts in relation to each victim as the criminality of one offence was not wholly subsumed by the other.

Discount for guilty plea - error in awarding greater discount to co-offender

In this case, the applicant received an aggregate sentence for three drug supply offences following her pleas of guilty. The sentencing judge awarded a 12.5% discount for the guilty pleas. A co-offender, Tran, had been earlier sentenced for essentially the same offences plus two prohibited weapons offences. Tran received a 17.5% discount in recognition of his guilty pleas. In ***Nguyen, Kathy v R*** **[2015] NSWCCA 209** the applicant argued that she had a justifiable sense of grievance because of a marked disparity between her sentence and the sentence imposed on Tran. In allowing the appeal, the Court found that the sentencing judge erred in allowing a lesser discount for the pleas of in the applicant's case. Hall J examined the procedural history of the matters and concluded that there was no justifiable basis for the applicant receiving a lesser discount. No explanation or justification was given for the difference. In those circumstances, the principle of parity could be applied. Accordingly, the applicant was re-sentenced with the court applying a discount of 17.5%.

Discount for guilty plea - early plea to historical offences to attract full benefit of utilitarian value

The applicant in ***Henderson v R*** **[2016] NSWCCA 8** pleaded guilty to nine counts of indecent assault committed against four complainants between 1961 and 1979. The judge accepted that sentencing was to be in accordance with sentencing practices extant at the time of the offences. Her Honour noted that applying a discount of 25% was not the usual practice for an early plea at the relevant time. The applicant appealed against the judge's dealing with the plea, submitting that he was entitled to the benefit of a full discount. Hoeben CJ at CL (Bathurst CJ agreeing, RS Hulme AJ agreeing but dissenting as to re-sentence) upheld the ground, finding that there is a strong inference the judge erroneously failed to apply the discount. If a 25% discount was applied to the indicative sentences in this case, it is readily apparent that for some offences the starting point for the head sentence exceeded the maximum penalty or was otherwise very close to it.

Discount for guilty plea - to be applied to specific sentences and not to be averaged or combined

The applicant in ***Bao v R*** **[2016] NSWCCA 16** pleaded guilty to two sets of drug offences occurring 12 months apart. The plea to one set of offences was made in the Local Court while the plea for the other set was made just before trial. The sentencing judge acknowledged this before applying "a combined discount of 17.5%." The applicant appealed against that approach and the Crown conceded error. Hoeben CJ at CL held that the correct procedure was for the judge to independently apply the appropriate discount to each of the indicative sentences. In this case the error was of significance and likely affected the aggregate sentence to the detriment of the applicant making it necessary for the Court to exercise the sentencing discretion afresh.

Guilty plea - relevance in sentencing for Commonwealth offences

Director of Public Prosecutions (Cth) v Gow **[2015] NSWCCA 208** was a Crown appeal against the asserted inadequacy of a sentence imposed for a commercial drug importation offence. The parties relied upon so-called comparable cases to support their respective arguments. Basten JA engaged in a detailed consideration of the manner in which a plea of guilty is taken into account in sentencing for Commonwealth offences, leading him to conclude (at [35]) that where sentences in the other cases had been the subject of a quantified discount because of a plea of guilty, the comparative exercise is of limited value. (Why this is so when the starting point is readily identifiable is not clear.) In the course of this, his Honour examined in detail what was said in *Cameron v The Queen* (2002) 209 CLR 339. It was said in *Lee v R* [2012] NSWCCA 123 at [58] that in accordance with the principles stated in *Cameron* "the plea of guilty is taken into account as recognition of an offender's willingness to facilitate the course of justice but not on the basis that the plea has saved the community the expense of a contested hearing". Basten JA (Hamill J agreeing; Garling J not engaging with the issue) said (at [27]) that "*Cameron* is not authority for that principle". A detailed analysis of *Cameron* led his Honour to conclude that it stood for the proposition that a plea of guilty may operate in mitigation as evidence of remorse; sparing the community the expense of a contested trial; acceptance of responsibility; and a willingness to facilitate the course of justice" (see [28] and [35]).

In **R v Saleh [2015] NSWCCA 299**, Beech-Jones J raised a question about the correctness of this decision, observing that the Court did not appear to have been taken to *Tyler v R* [2007] NSWCCA 247 (which he said "represents the applicable law in this Court") and the other cases that followed it, including *C v R* [2013] NSWCCA 81; 229 A Crim R 233 at [33] and *Isaac v R* [2012] NSWCCA 195 at [24] to [27].

In ***R v Harrington*** **[2016] ACTCA 10** the ACT Court of Appeal (Refshauge ACJ and Gilmour J; Murrell CJ dissenting) held that the conclusion reached in *DPP (Cth) v Gow* to the effect that *Cameron v The Queen* had nothing to say about the operation of Commonwealth law with respect to sentencing, was plainly wrong. The principle in *Cameron v The Queen* that a court should not allow a discount for the utilitarian value of a guilty plea when sentencing for a Commonwealth matter continues to apply. The value of a guilty plea is not limited to where there is a "willingness to facilitate the course of justice" and can be relevant to other subjective considerations such as remorse.

Mere breach of trust does not increase objective seriousness of sexual offence

In ***Cowling v R*** **[2015] NSWCCA 213** the Court allowed the appeal on the basis that the seriousness of Mr Cowling's conduct was not increased because he and the complaint were friends and trusted each other. The matter involved two sexual offences committed against the girlfriend of the offender's best friend.

Onus of proof – fact finding adverse to the offender

In ***Filippou v The Queen*** **[2015] HCA 29**, special leave to appeal to the High Court was allowed in respect of a sentence imposed for two counts of murder. It was argued that because the Crown had not proved beyond reasonable doubt that the appellant had brought the gun to the scene of the murders, he should have been sentenced on the basis that the gun was brought by one or other of the two deceased. It was held in that where an offender asserts a fact favourable to him/her which is contested, or not accepted by the Court, the onus is on the offender to establish the fact on the balance of probabilities. In this case, the fact that the trial judge was not satisfied beyond reasonable doubt that Mr Filippou had brought the gun to the scene does not obviate the need for him to prove, on the balance of probabilities that he did not. If this onus is not discharged, it is open to the court to sentence the offender on the basis that neither of the competing possibilities is known.

Statistics - need to be properly understood if they are to be relied upon

In ***Knight v R*** **[2015] NSWCCA 222**, it was contended that an aggregate sentence comprising a non-parole period of one year and nine months with a balance of one year and seven months imposed for four offences of drug supply and a related offence of allowing premises to be used as a drug premises, was manifestly excessive. To support the assertion of manifest excess, reference was made to sentencing statistics from the Judicial Commission of NSW. In dismissing the appeal, the Court made some observations about the use of statistics in severity appeals. R A Hulme J referred to the repeated comments that have been made regarding the limited use of sentencing statistics before going on to emphasise that, "if they are to be relied upon, it is necessary that counsel ensure that the

limits of their utility are properly understood" (at [13]). This was echoed by Garling J who observed that the problem here was that "like is not being compared with like" (at [89]).

Statistics – use of in Commonwealth cases

In re-sentencing Pham for the offence of importing a marketable quantity of heroin, Maxwell P in the Victorian Court of Appeal relied upon a table containing 32 sentencing decisions of Australian intermediate appellate courts for offences involving a marketable quantity of a border controlled drug where the accused was a "courier", had pleaded guilty and had no relevant prior convictions (see *Pham v The Queen* [2014] VSCA 204). In ***The Queen v Pham*** **[2015] HCA 39** the High Court was critical of this approach. As explained by French CJ, Keane and Nettle JJ this table of comparable cases gave uniform significance to Mr Pham's courier status and treated the weight of the drug as the only variable affecting the seriousness of the offence (at [37]). In doing so, the High Court found that the Court of Appeal adopted an impermissible statistical analysis of comparable cases to determine the objective seriousness for the subject offence.

Need for sentencing judge to assess seriousness of criminal conduct and offender's culpability

Gal v R **[2015] NSWCCA 242** involved sentencing for two offences of breaking entering and stealing (one committed in circumstances of aggravation). The sentencing judge, in ex tempore reasons, gave no description of the facts of the offences. Mr Gal appealed against the severity of his sentence arguing that the sentencing judge erred in failing to assess the objective seriousness of the offending conduct or by failing to give reasons stating what that assessment was. The Court held that a sentencing judge is obliged to refer to the essential facts upon which an offender is sentenced and to provide some assessment, or reflection upon, the objective seriousness of the offending. While the Court acknowledged that some latitude is to be afforded when scrutinising ex tempore sentencing judgments given immediately after the conclusion of submissions, this factor does not obviate the fundamental need for a judge to assess the objective seriousness of the offence.

Essentially the same problem arose in ***R v Van Ryn*** **[2016] NSWCCA 1** where, although the sentencing judge recited the facts of the offences in detail, no indication was given as to there having been any assessment of their seriousness.

Assistance to authorities discount not mandatory

In ***Williamson v R*** **[2015] NSWCCA 250** the applicant pleaded guilty to a variety of fraud offences committed when he was General Secretary of the NSW Health Services Union. The judge allowed the maximum discount for the utilitarian value of his pleas of guilty but did not quantify a discount for assistance to authorities (s 23 *Crimes (Sentencing Procedure) Act*). On appeal against the severity of sentence it was contended that even though the judge found that the assistance was of "very limited significance" his Honour was required to quantify a discount. It was submitted that s 23(4) operated in mandatory terms. The Court held that there was no merit in this. Section 23 is not framed in mandatory terms. It provides that "… a court *may* impose a lesser penalty …". It was open to the sentencing judge to conclude that Mr Williamson's assistance did not warrant the

imposition of a lesser penalty. R A Hulme J also noted that it was indicative of a lack of merit that this ground raised a matter which had not been raised in the District Court where Mr Williamson had been represented by very experienced senior counsel.

Judicial officer's intervention in sentence proceedings may deprive person of the opportunity to present their case

In ***Ellis v R*** **[2015] NSWCCA 262** the Court concluded that a judge's intervention in sentencing proceedings was unwarranted and deprived the offender of the opportunity properly to present his case. Mr Ellis pleaded guilty to manufacturing a large commercial quantity of a drug and agreed to give evidence at his sentence proceedings. Shortly after he commenced giving evidence the sentencing judge asked him to identify a person in a photograph tendered by the Crown. He told the judge that he did not wish to do so because he was concerned for the safety of himself and his family. The judge told him that he could be in contempt of court for refusing to give evidence. The following day Mr Ellis was granted leave to withdraw his evidence. The judgment of Garling J at [67] – [72] sets out the reasons which led the Court to this conclusion. The court placed significant emphasis on the nature and timing of the questions asked (they were of doubtful relevance and were asked early on in examination in chief); the reaction of the sentencing judge after Mr Ellis declined to identify the person in the photograph; inadequate consideration of the reasons given for refusing to answer; and the threat of sanctions if the questions weren't answered. The matter was remitted to the District Court for re-sentencing.

Sentencing for Commonwealth offenders to be consistent with current sentencing practices across Australia

Mr Pham was sentenced in the County Court of Victoria for an offence of importing a marketable quantity of heroin. His appeal to the Court of Appeal was upheld with the Court finding that he was entitled to be sentenced in accordance with current sentencing practices in Victoria, rather than those across Australia. This resulted in his sentence being reduced: *Pham v The Queen* [2014] VSCA 204. The High Court granted the prosecution special leave to appeal and held in ***The Queen v Pham*** **[2015] HCA 39; 325 ALR 400; 90 ALJR 13; 244 A Crim R 280** that it was an error for the Victorian Court of Appeal to disregard sentencing practices throughout Australia. In order to achieve sentencing consistency for federal offences, a court must ensure that regard is had to sentencing practices Australia-wide. To do otherwise is to "exacerbate inconsistency" and is ultimately unfair (at [27]). The High Court also clarified that in order to "follow" sentencing decisions of intermediate appellate courts, regard must be had to comparable cases as "yardsticks" which illustrate the possible range of sentences available. A compelling reason is required to not approach decisions of other intermediate appellate courts in this way.

Relevance and weight to be given to mental illness

Marrow v R **[2015] NSWCCA 282** involved an offender sentenced for an offence of armed robbery. A psychiatric report, tendered on his behalf at sentence, included a diagnosis of schizophrenia, substance use disorder and pathological gambling. It was submitted that his mental illness made him an inappropriate vehicle for general deterrence. It was argued

on appeal that the judge erred in failing to consider the offender's mental illness and the psychiatrist's opinion. It was held that the relevance of, and weight to be given to, a person's mental illness are matters of discretionary judgment having regard to the circumstances of the case and the purposes of sentencing in s 3A *Crimes (Sentencing Procedure) Act 1999*. The Court concluded that the sentencing judge had adequate regard to the psychiatrist's diagnoses, in particular the evidence of the psychiatrist that Mr Marrow had some capacity to control himself and was aware that his actions were illegal, despite his psychotic condition.

Approach to uncharged criminal conduct did not breach De Simoni principle

Mr Lago was convicted by a jury of supplying methylamphetamine. Evidence of a similar prior transaction not the subject of any charge was led at trial as tendency evidence. Mr Lago did not give evidence at trial or during the proceedings on sentence. In the latter, the judge was satisfied beyond reasonable doubt of his involvement in the prior transaction. In ***Lago v R* [2015] NSWCCA 296**, Gleeson JA held that the sentencing judge's careful approach to the uncharged conduct did not violate the principle established in *The Queen v De Simoni* (1981) 147 CLR 383. The judge expressly acknowledged the limited use of the uncharged conduct. Rather than support a finding that it constituted a circumstance of aggravation of the charged offence, the uncharged conduct was permissibly used: to establish that the charged offence was not an isolated one; in her Honour's assessment of the applicant's reliability by supporting the rejection of his claim to a psychiatrist that his involvement in this offence was the first of its kind; and to assess the objective seriousness of the charged offence.

State sentencing legislation erroneously applied to Commonwealth offence

The applicant in ***Elshani v R* [2015] NSWCCA 254** was convicted of trafficking a marketable quantity of heroin contrary to s 302.3 of the *Criminal Code* (Cth). His appeal against sentence was on the ground that the judge erroneously applied State sentencing laws and principles to a Commonwealth offence. Allowing the appeal, Adams J held that the judge's finding of "special circumstances" and failure to explain the sentence in accordance with s 16F(1) of the *Crimes Act 1914* (Cth) were indicative of an erroneous approach. Her Honour's consistent working through the State statutory regime demonstrated error beyond a mere slip of language, which was of significance because of differences between the two regimes in the discretion concerning setting non-parole periods.

Being on parole does not aggravate the objective seriousness of an offence

It was held in ***Boney v R* [2015] NSWCCA 291** that a judge erred by saying that "the offence is aggravated by the fact that at the time it was committed the offender was on parole". This was said to be erroneous on the basis that in *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120 at [27] that objective seriousness is to be assessed wholly by reference to the nature of the offending. (It may be noted that the judge did not specifically say that it was the "objective seriousness" of the offence that was aggravated; merely that "the offence" was.)

Criminal history erroneously considered in the assessment of objective seriousness

The applicant in ***McCabe v R*** **[2106] NSWCCA 7** pleaded guilty to an offence of break, enter and steal contrary to s 112(1)(a) of the *Crimes Act 1900*. He was sentenced to 4 years 6 months (2 years 6 months NPP). He appealed against that sentence on the basis that the judge erred in assessing the objective seriousness. Bellew J held that on a fair reading of the revised sentencing remarks, giving effect to the plain language used, his Honour clearly assessed the objective seriousness by taking into account the applicant's past criminal history and thereby fell into error. That conclusion is fortified by the unremarkable circumstances of the offending, which did not support the finding that the offence fell only "slightly" below the mid-range. Further support is found in the manner in which the case was conducted by the parties, both of whom submitted the offending was below the mid-range.

Procedurally unfair for sentencing judge to reject unchallenged evidence where that course is not indicated to the witness

The applicant in ***Heath v R*** **[2016] NSWCCA 24** pleaded guilty to two market misconduct offences, namely market manipulation and a matched trade offence contrary to ss 1041A(c) and 1041B(1)(b) respectively of the *Corporations Act 2001* (Cth). The fault element in each offence is recklessness. An affidavit sworn by the applicant to the effect that he was unaware that his conduct was criminal stood as unchallenged evidence before the sentencing judge, who ultimately rejected it. The applicant appealed against that decision, submitting that he was denied procedural fairness by not being afforded the opportunity to address the proposed rejection. McCallum J held that while a sentencing court is not obliged to accept unchallenged evidence, in the circumstances of this case it was not open to the judge to reject the evidence without first raising the matter. The finding informed, and was informed by, his Honour's assessment of the objective seriousness; the rejection was informed by a misapprehension of the true nature of the offending.

No De Simoni error in setting out surrounding circumstances of sexual assault offence

The applicant in ***Wakeling v R*** **[2016] NSWCCA 33** was convicted of having sexual intercourse with a person above the age of 14 years and under the age of 16 in circumstances of aggravation, namely in company, contrary to s 66C(4) of the *Crimes Act 1900*. On appeal he alleged that the judge erred in his assessment of the objective seriousness of the offence. Supporting this challenge were submissions that the judge effectively sentenced him for the more serious offence against s 61J by taking into account a lack of consent (not an element of the s 66C offence) and for uncharged offences against s 61M. Davies J dismissed the appeal finding there was no violation of the principle in *The Queen v De Simoni* (1981) 147 CLR 383. His Honour was entitled and required to have regard to the details surrounding the offending, including the uncharged assaults, so that a proper assessment of the objective seriousness could be made. Whether the complainant was a willing participant, notwithstanding her age, was relevant. A fair reading of the sentencing remarks as a whole leaves no doubt the judge was aware the offence for which the applicant was to be sentenced was one against s 66C.

Whether delay in prosecution serves to mitigate sentence depends on the particular circumstances of the case

The applicant in ***Coles v R*** **[2016] NSWCCA 32** pleaded guilty to 15 counts laid variously under ss 117, 125, 178A and 178B of the *Crimes Act 1900* and a further 18 offences on two Forms 1 for his fraudulent dealings with artworks valuing millions of dollars. The sole ground of appeal alleged that the sentencing judge erred by failing to take into account by way of mitigation a three year delay between the execution of search warrants at his home and business and the laying of charges. Fullerton J dismissed the appeal. Her Honour noted that inordinate and unexpected delay in police investigations against an offender may result in mitigation of sentence and that each case depends upon its own particular circumstances. A preliminary question is whether the passage of time was a delay of the kind which might attract the considerations of fairness referred to in *Todd v R* [1982] 2 NSWLR 517. There was nothing in the evidence in this case to suggest that the delay was of that order. No evidence was called from the applicant or led on his behalf to the effect that he suffered any detriment. Further, the cause of the delay in this case was the complexity of the investigation, including the sheer number of paintings seized and the need to have them authenticated and have their ownership traced. Finally, it is noteworthy that the applicant's legal representative at sentence conceded that delay was not in issue.

Failure to take into account circumstances of social deprivation in upbringing

The applicant in ***Ingrey v R*** **[2016] NSWCCA 31** was convicted after trial of attempted armed robbery. He was sentenced to 10 years imprisonment (6 years NPP). He appealed against that sentence on the ground that the judge erred by not taking into account the social disadvantage he experienced in his home community of La Perouse. Hoeben CJ at CL allowed the appeal and re-sentenced the applicant to a term of imprisonment of 9 years (5 years NPP). The particular circumstances of disadvantage experienced by the applicant did not arise from within his family home but through his association with peers and extended family engaged in criminal activities. It is clear from his Honour's remarks that the sentencing judge fully reviewed the applicant's subjective case but nonetheless disregarded the social disadvantage aspect when exercising the sentencing discretion. The judge made no reference to the cases of *Bugmy v The Queen* (2013) 249 CLR 571 and *R v Fernando* (1992) 76 A Crim R 58 despite repeated reference to them in submissions by defence counsel. In so doing, the judge fell into error of the kind identified in *House v The King* (1936) 55 CLR 499.

Alcohol use from an early age does not provide a principled basis for leniency absent circumstances of deprivation

The applicant in ***Daniels v R*** **[2016] NSWCCA 35** pleaded guilty to recklessly causing grievous bodily harm contrary to s 35(2) of the *Crimes Act 1900*. He had been drinking at a hotel for some hours before being ejected. While leaving, in an unplanned and unprovoked attack, he delivered a single punch to a stranger that broke his jaw. The applicant appealed against his sentence alleging that the judge failed to have regard to his background including his exposure to alcohol from an early age. He submitted that his commencement of drinking at age 14 in his uncle's company adversely impacted him in his formative years, attracting application of the principles in *Bugmy v R* (2013) 249 CLR 571.

Fullerton J rejected the ground of appeal. Apart from his unchecked abuse of alcohol through his adolescence and beyond, there was no evidence of any deprivation in his home or social circumstances serving to reduce moral culpability. In fact, his family life was stable and supportive. The applicant's teenage drinking was not exceptional in duration or degree and there is no principled basis upon which he could seek leniency because of it. The sentencing judge's appropriate consideration of the applicant's subjective case as a whole is evident from his Honour's reasons.

Interests of justice required sentence to be backdated because of presentence custody

The applicant in ***Hamilton v R*** **[2016] NSWCCA 59** was convicted of aggravated break, enter and commit serious indictable offence contrary to s 112(2) of the *Crimes Act 1900*. He was granted bail following his arrest for that offence. On 29 September 2014, he was arrested and bail refused on an unrelated robbery offence. On 21 October he pleaded guilty to the s 112 offence; he was committed for sentence and bail was refused for that offence. The sentencing judge ordered the sentence to commence from the date it was imposed in February 2015 in accordance with the parties' agreement. On appeal, the applicant submitted that was erroneous and that the sentence ought to have commenced on 21 October 2014. It was observed that the robbery offence was no billed in August 2015. The Crown conceded that the applicant ought to be resentenced and Schmidt J allowed the appeal. The usual and preferable course is that presentence custody is taken into account in a sentencing exercise such as this. However, there is no mandatory requirement that sentences be backdated in every case where presentence custody is served, although reasons for not doing so should be clearly stated. The reasons in this case (the parties' agreement) were so stated. While parties are ordinarily bound by the way the case is presented at first instance, the rule is not absolute. Here, in the interests of justice, in circumstances where it could not be foreseen that the robbery offence would later be no billed, the applicant ought to be resentenced so that the sentence commences from 21 October.

Erroneous to compare an offence with a different one carrying a higher penalty in assessing objective seriousness

The appellant in ***Nguyen v The Queen*** **[2016] HCA 17** was convicted of wounding with intent to cause grievous bodily harm and manslaughter. He provoked a gun fight with police officers he believed to be "fake police" intending to rob him. An officer fatally shot another while shooting at the appellant. The appellant's liability for manslaughter was on the basis of excessive self-defence, where his firing of the pistol caused the death of the deceased because it substantially contributed to the exchange in which the fatal shot was fired and that consequence was reasonably foreseeable. The CCA allowed a Crown appeal on the ground that the judge erred by taking into account in the appellant's favour in the assessment of objective seriousness that he did not know the deceased was a police officer. Had that fact not been established, there would have been no basis for the appellant's invocation of the partial defence of excessive self-defence and he would have been guilty of murder. The CCA referred to the principle in *De Simoni* in reaching that conclusion. With special leave, the appellant appealed to the High Court against that decision. The Court (Bell and Keane JJ, Gageler, Nettle and Gordon JJ) dismissed the appeal. Gageler, Nettle and Gordon JJ held that it is irrelevant in assessing the objective gravity of an offence of manslaughter to contrast it with what would be an offence of

murder because it is likely to result in an assessment which ill-accords with its gravity relative to other instances of offences of that kind. The CCA was not correct, however, in characterising that error as one in contravention of the *De Simoni* principle. That principle has nothing to say about the impropriety of a judge taking into account the absence of a circumstance which, if present, would render the subject offence a different one. That approach is erroneous simply because it is irrelevant to, and likely to distort, the assessment of objective gravity.

SENTENCING - SPECIFIC OFFENCES

De Simoni error in sentencing for arson

The appellants in ***Ruge and Cormack v R*** **[2015] NSWCCA 153** were sentenced for arson offences. The case concerned the setting fire to a house that R was renting and her car that was on the property. She arranged for this to be done by another man, Mr Buckman, and Mr Cormack was present and a participant in a joint criminal enterprise when it occurred. It was included in a statement of agreed facts that Cormack was aware that Ruge was motivated to commit "an insurance job". The sentencing judge took this into account when sentencing Cormack, inferring that he must have appreciated that Ruge would gain substantially. However, although Ruge was sentenced for an offence against s 197(1)(b) (dishonestly, with a view to making a gain, damaging or destroying property by means of fire) which carries a maximum penalty of 14 years, Cormack was only charged with an offence against s 195(1A)(b) (damaging or destroying property by means of fire in company) which carries a maximum penalty of 11 years. It was held by Hamill J that there was an infringement of the principles in *R v De Simoni* (1981) 147 CLR 383 in that the judge took into account a circumstance of aggravation with which Cormack was not charged but would have rendered him liable to a more severe penalty.

Child pornography offences – sentencing principles

Mr Porte pleaded guilty for offences of using a carriage service to access child pornography material (s 474.19(1)(a)(i) of the *Criminal Code* (Cth)); possessing child abuse material (s 91H(2) of the *Crimes Act 1900* (NSW)); and possession of a prohibited weapon (s 7(1) of the *Weapons Prohibition Act 1988* (NSW)). He was sentenced to concurrent sentences of 18 months imprisonment to be served by way of an intensive correction order. In ***R v Porte*** **[2015] NSWCCA 174,** the Court allowed a Crown appeal and Mr Porte was re-sentenced to a period of full time custody. The Court found a range of patent errors in the sentencing process and concluded that the ultimate sentence for the first two offences was manifestly inadequate. A number of principles regarding the approach to sentencing for child pornography offences under NSW and Commonwealth law can be found in the detailed judgment of Johnson J at [51] – [81].

Further canvassing of the principles of sentencing for this type of offence can be found in Johnson J's judgment in ***R v De Leeuw*** **[2015] NSWCCA 183** at [70] – [72]**.**

Child pornography offences - assessment of objective seriousness does not require judge to view all material where it has been classified

The applicant in ***Fitzgerald v R*** **[2015] NSWCCA 266** was convicted of a number of offences relating to his possession of child abuse material (1,145 images including 390 videos) and access to child pornography (96 videos). The judge viewed a representative sample of the material only. On appeal it was asserted the judge erred in his assessment of the objective seriousness of the offending. In dismissing the appeal, Hoeben CJ at CL held that it was not necessary for the judge to view all or even most of the material subject of the offending as the nature and extent of the harm caused is readily discernible from the Child Exploitation Tracking System (CETS) classification. This is in contrast to the encouragement in other cases of sentencing judges viewing the material rather than placing too heavy an emphasis on classification systems in isolation: e.g. *R v Porte* [2015] NSWCCA 174 at [73] ff.

Drug supply - no breach of De Simoni to have regard to frequency of individual sales where charge based on multiple acts of supply

In ***Jardon v R*** **[2015] NSWCCA** 217 the applicant had been sentenced for a number of offences including supply methylamphetamine, contrary to s 25(1) of the *Drug Misuse and Trafficking Act*. The quantity, 157.9 grams, was calculated on the basis of individual sales over the six month period covered by the charge. It was contended that in sentencing him on the basis of multiple individual sales to make up the total supply, the judge breached the principle in *De Simoni* because that feature of the offence (that it involved multiple sales) could have sustained a charge for the more serious offence of ongoing supply under s 25A(1). The Court dismissed the appeal, finding that the frequency of the sales constituting the supply and the fact that they were for reward were merely particulars of the physical elements of the offence. These were not additional matters of aggravation and accordingly, there was no breach of the principle in *De Simoni*.

Revenue fraud offences – importance of general deterrence

A 20 month suspended sentence was imposed on the applicant in ***R v Saleh*** **[2015] NSWCCA 299** for aiding and abetting the importation of tobacco products with the intention of defrauding the revenue contrary to s 233BABAD of the *Customs Act 1901* (Cth). On appeal R S Hulme AJ held that the sentence was manifestly inadequate not only because of an erroneous assessment of objective seriousness but also because of a failure to consider general deterrence in the sentencing exercise. An actual custodial sentence as opposed to a suspended sentence is required for the purposes of general deterrence. The judge made no reference to the sentencing principle, a failure suffered in most decisions in this area. The introduction of s 233BABAD (which effectively increased the penalty fivefold) and the rationale advanced by the Attorney General strengthen the need for general deterrence in these matters.

Section 112 Crimes Act offences - difficulty in assessing where in the range of objective seriousness offences fall

The respondent in ***R v Meatuai*** **[2016] NSWCCA 42** pleaded guilty to two counts of aggravated break, enter and commit serious indictable offence (assault occasioning actual bodily harm) contrary to s 112(2) of the *Crimes Act 1900* in circumstances where he entered a home and attacked the two occupants. The sentencing judge assessed the offences as "well above the mid-range for offences of this kind." He was sentenced to a total term of imprisonment of 5 years with a non-parole period of 3 years 6 months. The

Crown appealed against the sentences on the ground of manifest inadequacy, submitting they failed to reflect the assessment made of the objective gravity. The Court allowed the appeal (RS Hulme AJ, Fullerton J expressing different reasons and restructure of sentence, Hoeben CJ at CL agreeing with the orders proposed by Fullerton J). RS Hulme AJ considered s 112. That section makes it an offence to break, enter and commit *any* serious indictable offence. Despite being required to do so by legislation, it is practically impossible to make a sensible judgment as to where the middle range of seriousness falls for an offence contrary to s 112 because of the breadth of the serious offences that can constitute the offence. There are many and much more serious indictable offences than assault occasioning actual bodily harm. Nonetheless, in this case the assaults fell at or very close to the top of the range of offences of assaults occasioning actual bodily harm. The severity of those assaults combined with the fact that the property was the victims' home and that the offences were committed in company makes it impossible to regard the offences as anywhere near the bottom of the scale of offences under s 112(2). However, the respondent is not to be double punished for the one incident of breaking and entering being a feature of two offences.