

# CRIMINAL LAW REVIEW

A paper for the District Court of New South Wales Annual Conference  
18 April 2017

Justice Peter Johnson

- 1 This paper is intended to provide an overview of a number of recent decisions of the High Court of Australia, the Court of Criminal Appeal and the Supreme Court of New South Wales in the area of criminal law.

## Decisions of the High Court of Australia

### *Presumption of Doli Incapax*

- 2 Section 5 *Children (Criminal Proceedings) Act 1987* provides for an irrebuttable presumption that a child under the age of 10 years cannot be guilty of an offence. For children aged between 10 and 14 years, there is a rebuttable presumption that a child cannot possess the necessary knowledge to have mens rea (doli incapax). Although doli incapax has been the subject of a number of decisions of the Court of Criminal Appeal in recent times, it had not been the subject of any recent High Court decision until *RP v R* [2016] HCA 53; 91 ALJR 248. That case involved alleged offences by a child (aged between 11 and 12 years) against his younger brother (aged six to seven years) being two offences of having sexual intercourse with a child aged under 10 years contrary to s.66A(1) *Crimes Act 1900* and one offence of aggravated indecent assault under s.61M(2).
- 3 At a judge alone trial which was confined to the doli incapax issue, the trial judge found the appellant guilty of these three offences. On appeal to the Court of Criminal Appeal, the Court (by majority) quashed the conviction with respect to the s.61M(2) charge but dismissed the appeal against conviction on the s.66A(1) matters: *RP v R* [2015] NSWCCA 215; 90 NSWLR 234. The High Court allowed the appeal, quashed the convictions and entered verdicts

of acquittal on the s.66A(1) matters. The judgment of the plurality (Kiefel, Bell, Keane and Gordon JJ) included the following propositions:

- (a) The rationale for the presumption of *doli incapax* is the view that a child aged under 14 years is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong and thus lacks the capacity for *mens rea* (at 250 [8]).
- (b) Under s.5 *Children (Criminal Proceedings) Act 1987*, there is a conclusive presumption that no child under the age of 10 years can be guilty of an offence, but the Act does not otherwise affect the operation of the common law presumption of *doli incapax* (at 250-251 [9]).
- (c) From the age of 10 to 14 years, the presumption may be rebutted by evidence that the child knew that it was morally wrong to engage in the conduct that constitutes the physical element or elements of the offence – knowledge of the moral wrongfulness of an act or omission is to be distinguished from the child’s awareness that his or her conduct is merely naughty or mischievous – this distinction may be captured by stating the requirement in terms of proof that the child knew the conduct was “seriously wrong” or “gravely wrong”(at 250-251 [9]).
- (d) No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts – the prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child’s development is such that he or she knew that it was morally wrong to engage in the conduct – this directs attention to the child’s education and the environment in which the child was raised (at 250-251 [9]).
- (e) What suffices to rebut the presumption will vary according to the nature of the allegation and the child – a child will more readily understand the seriousness of an act if it concerns values of which he or she has direct

personal experience – answers given in the course of a police interview may serve to prove the child possessed the requisite knowledge – in other cases, evidence of the child’s progress at school and of the child’s home life will be required (at 252 [12]).

- (f) The closer the child defendant is to the age of 10 the stronger must be the evidence to rebut the presumption – conversely, the nearer the child is to the age of 14, the less strong need the evidence be to rebut the presumption – however, it is not to be taken that all children mature at a uniform rate (at 252 [12]).
- (g) Rebutting the presumption directs attention to the intellectual and moral development of the particular child – some 10 year olds will possess the capacity to understand the serious wrongness of their acts while other children aged very nearly 14 will not (at 252 [12]).
- (h) It is necessary to keep in mind that a child under 14 years is presumed in law to be incapable of bearing criminal responsibility for his or her acts and the onus lies upon the prosecution to adduce evidence to rebut that presumption to the criminal standard (at 255 [32]).

4 The Court of Criminal Appeal has recently considered *RP v The Queen* in the course of dismissing an appeal against conviction in *AL v R* [2017] NSWCCA 34 (see [31]-[33] below).

#### *Doctrine of Extended Joint Criminal Enterprise*

5 In *Miller v The Queen* [2016] HCA 30; 90 ALJR 918, the High Court confirmed that the doctrine of extended joint criminal enterprise, as stated in *McAuliffe v The Queen* [1995] HCA 37; 183 CLR 108, remained part of the common law of Australia. The High Court rejected a submission that the law should be restated in accordance with the decision of the United Kingdom Supreme Court in *R v Jogee* [2016] UKSC 8; [2016] 2 WLR 681. By reference to a secondary offender’s liability for murder, the plurality (French CJ, Kiefel, Bell,

Nettle and Gordon JJ) explained extended joint criminal liability in the following terms at 920 [1]:

*“... the doctrine holds that a person is guilty of murder where he or she is a party to an agreement to commit a crime and foresees that death or really serious bodily injury might be occasioned by a co-venturer acting with murderous intention and he or she, with that awareness, continues to participate in the agreed criminal enterprise”.*

- 6 A helpful analysis of the history, development and operation of the concept of extended joint criminal enterprise may be found in a paper of the Hon Justice MJ Beazley AO entitled *“Extended Joint Criminal Enterprise in the Wake of Jogee and Miller”* (7 March 2017, Supreme Court Website).

#### *Trial by Jury for Commonwealth Offences Prosecuted on Indictment*

- 7 In *Alqudsi v The Queen* [2016] HCA 24; 90 ALJR 711, the High Court (French CJ dissenting) confirmed that trial by jury was required for a trial on indictment of Commonwealth offences. The Court refused to overrule the decision in *Brown v The Queen* [1986] HCA 11; 160 CLR 171.
- 8 It remains the case that trial by judge alone under s.132 *Criminal Procedure Act 1986* is not available for trials on indictment of Commonwealth offences. The following observations of Kiefel, Bell and Keane JJ at 740-741 [119]-[120] are of particular interest (footnotes omitted):

*“[119] It is notable that the Director did not contend that trial by jury was ill-suited to long trials or to trials involving complex expert evidence. The Director pointed to the discipline that trial by jury imposes upon all the participants. If a case cannot be made comprehensible to a jury, the Director asked how it can be made comprehensible to the accused and to the public, who must ultimately support the criminal process.*

*[120] The trial judge has mechanisms available to him or her to deal with adverse pre-trial publicity. These include adjourning the proceedings for a period and giving appropriately tailored directions to the jury. The administration of criminal justice proceeds upon acceptance that a jury, acting in conformity with the instructions given by the trial judge, will render a true*

*verdict in accordance with the evidence. The applicant's and the interveners' assumption that the interest of justice will, on occasions, be advanced by the trial on indictment of an offence against Commonwealth law by a judge alone should not be accepted."*

9 Nettle and Gordon JJ said at 753 [194]-[195] (footnotes omitted):

*"[194] That 'criminal trials today typically last longer, are more expensive and involve more complex issues' may also be accepted. That the decision making function of juries may be at risk of being affected by adverse influences, including prejudice, may also be accepted. But ignoring the text and constitutional context of s 80 is not a solution. These issues can be, and have been addressed legislatively and through a variety of mechanisms designed to reinforce the institution of the jury trial. As seen earlier, the Commonwealth Parliament can designate which offences are to be by 'trial on indictment'. The Commonwealth Parliament can also determine that whether an offence is to be tried on indictment is contingent on the satisfaction of certain conditions. It is neither necessary nor appropriate to determine whether there are other mechanisms or alternatives within the power of the Commonwealth Parliament.*

*[195] The criminal justice system is not naïve. While the law assumes the efficacy of the jury trial, it does not assume that the decision making of jurors will be unaffected by matters of possible prejudice. What 'is vital to the criminal justice system is the capacity of jurors, when properly directed by trial judges, to decide cases in accordance with the law, that is, by reference only to admissible evidence led in court and relevant submissions, uninfluenced by extraneous considerations.' [Dupas v The Queen [2010] HCA 20; 241 CLR 237 at 248-249 [29]]. Legislative and procedural mechanisms have evolved to reinforce the fairness and integrity of a jury trial. That is unsurprising. But those mechanisms reinforce, not destroy or detract from, a trial by jury."*

#### *Annulment of Conviction or Sentence*

10 In *Re Culleton (No 2)* [2017] HCA 4; 91 ALJR 311, the High Court held that an order of annulment by the Local Court under ss. 9 and 10 *Crimes (Appeal and Review) Act 2001* operates prospectively only and not retrospectively. In the course of their judgment, the plurality (Kiefel, Bell, Gageler and Keane JJ) said:

- “(a) Section 9(3) requires the Local Court to proceed upon the fiction that a conviction has not been made because, in truth, the conviction was not a nullity from the beginning (at 317 [27]);
- (b) The effect of s.10(1) is that an annulment does not purport retrospectively to treat the conviction as if it never occurred - the conviction ceases to have effect following annulment but is not void *ab initio* (at 317-318 [28]-[29]);
- (c) Although an absent offender was not liable to be sentenced to imprisonment in their absence, once a s.25 arrest warrant issued, the process of the law pursuant to which the person might lawfully be sentenced to imprisonment had been set in train (at 318 [32]-[36]).”

### Reference on Sentence to the “Worst Category” of an Offence

- 11 In *The Queen v Kilic* [2016] HCA 48; 91 ALJR 131, the High Court expressed caution concerning the use of the term “*worst category*” (or “*worst case*”) in sentencing for a particular offence. It was observed (at 137 [18]) that an offence may fall within this category even if it was possible to imagine an even worse instance of the offence, referring to *Veen v The Queen (No. 2)* [1988] HCA 14; 164 CLR 465 at 478. The Court warned (at 137 [19]) that it may be potentially confusing, and likely to lead to error, to describe an offence which did not warrant the maximum penalty as being “*within the worst category*”.
- 12 The Court observed further (at 137 [20]) that the common practice of describing an offence as “*not within the worst category*” may be misleading to lay persons, and that the appropriate course is for sentencing judges to state in full whether the offence was or was not so grave as to warrant the maximum penalty.
- 13 Where the offence is not so grave as to warrant the maximum penalty, a sentencing Judge is bound to consider where the facts of the particular offence and offender lie on the spectrum that extends from the least serious instances of the offence to the worst category (at 137 [19]).

## Court of Criminal Appeal Decisions

### *Sentencing for rolled-up counts and relevance of gambling addiction*

- 14 In *Johnston v R* [2017] NSWCCA 53, the applicant pleaded guilty to a single count of obtaining a financial advantage by deception under s.192E(1)(b) *Crimes Act 1900*, an offence punishable by imprisonment for 10 years. This constituted a rolled-up count involving the preparation of 156 false invoices over a three-year period by which the applicant obtained \$1,257,847.25, all of which was dissipated in gambling. The applicant was employed by a mining company as a senior accountant. The sentencing judge imposed a sentence of six years six months imprisonment with a non-parole period of four years. An appeal against sentence was brought upon a number of grounds.
- 15 The Court (Bathurst CJ, Johnson and Fagan JJ agreeing) said, with respect to grounds challenging the sentencing judge's approach to the applicant's gambling addiction:
- (a) the fact that offences were committed to feed a gambling addiction will not generally be a mitigating factor at sentence, even where it is pathological - this is particularly so in cases where general deterrence is an important factor and the offences are planned and perpetrated over an extended period (at [36]-[38]);
  - (b) a gambling addiction will not generally reduce moral culpability where the offence is committed over an extended period as the offender has a degree of choice as to how to finance his or her addiction - the disorder will not often be connected to the crime but merely provide a motive or explanation for its commission, and is therefore only indirectly responsible for the offending conduct (at [38]);
  - (c) the sentencing judge did not postulate a hierarchy of addiction placing gambling below drugs, but was simply stating that unlike some cases of drug addiction, the applicant did not lack the capacity to exercise

judgment nor was the crime something other than a willed act - the fact that gambling addiction is listed in DSM-5 does not indicate to the contrary (at [42]-[45]).

- 16 In considering a ground of appeal asserting that the sentence was manifestly excessive, the Court said:
- (a) in considering the question of manifest excess, it is relevant that the plea was to a “rolled-up count” involving 156 fraudulent transactions, which meant the criminality involved was greater than a charge involving only one episode of criminal conduct (at [68]-[70]);
  - (b) the offence involved systematic defrauding in circumstances where the applicant was in a position of trust - general deterrence was of considerable importance and the offender’s prior good character was not a matter of great significance as generally only persons of good character are placed in a position of trust so as to enable the commission of these offences (at [70]-[74]).

*Whether refusal to direct a Basha enquiry amounts to an interlocutory judgment or order*

- 17 In *Nicholson v R* [2017] NSWCCA 38, the applicant was to stand trial for a number of sexual assault offences. Defence counsel sought the issue of a subpoena, and also a *Basha* inquiry, so that counsel could question the complainant as to the identity of her counsellor. The trial judge declined to direct a *Basha* inquiry and the applicant sought leave to appeal against that decision under s.5F(3) *Criminal Appeal Act 1912*.
- 18 The Court (Hoeben CJ at CL, Garling and Beech-Jones JJ) refused the application for leave to appeal. The Court held that the refusal to permit a *Basha* enquiry was not an “interlocutory judgment or order” within the meaning of s.5F(3) and was akin to a ruling on evidence (at [40], [45], [54]-[55]).



*Unedited transcript mistakenly provided to jury*

- 19 In *SB v R* [2017] NSWCCA 30, the applicant appealed against conviction for a number of sexual assault offences. A ground of appeal asserted that a miscarriage of justice had occurred as a result of an unedited version of a transcript of an interview between the complainant and police being provided to the jury, in circumstances where it had been agreed prior to the trial that only a redacted version of that document would be provided to the jury.
- 20 The Crown accepted that this had occurred at trial and that, as a result, a miscarriage of justice had resulted and that it was not appropriate to rely upon the proviso in s.6 *Criminal Appeal Act 1912*.
- 21 The appeal was allowed, the convictions were quashed and a new trial was ordered on all counts. In making these orders, the Court noted that the material provided incorrectly to the jury involved allegations of physical abuse and other sexual abuse which was not the subject of any charge, and that the material had been supplied by mistake (and without either party realising the mistake) so that no steps had been taken to reduce the potential prejudice to the applicant by way of directions or otherwise.

*Sentencing an Offender following conviction for a Commonwealth offence at a retrial*

- 22 In *Director of Public Prosecutions (Cth) v Pratten (No 2)* [2017] NSWCCA 42, the Court of Criminal Appeal allowed a Crown appeal against sentence. The respondent acted as an insurance broker through two companies. During the financial years between 2003 to 2009, he collected premiums in excess of \$19 million of which an amount in excess of \$4.5 million was paid to him but was not declared by him as taxable income in the relevant financial years. The respondent was convicted after trial for seven counts of obtaining a financial advantage by deception contrary to s.134.2(1) *Criminal Code (Cth)*. Following a successful appeal to the Court of Criminal Appeal, the respondent was tried again and again convicted of these offences.

- 23 In sentencing the respondent, the sentencing judge had regard to the effect of double jeopardy as the respondent was being sentenced again following the earlier successful appeal from the first trial. The Court of Criminal Appeal held that it was not open to the sentencing judge to treat double jeopardy as a relevant consideration, so as to reduce the sentence which would otherwise had been imposed, in re-sentencing for a federal offence (at [43]).
- 24 The Court found error as well in the sentencing judge's approach in taking into account, in the respondent's favour, unproved hardship to his family (at [63]). The respondent was re-sentenced by the Court of Criminal Appeal.

*Offences of specific intent for the purpose of intoxication*

- 25 In *McIlwraith v R* [2017] NSWCCA 13, an issue arose as to whether the offence of intimidation under s.13 *Crimes (Domestic and Personal Violence) Act 2007* was an offence of specific intent for the purpose of Part 11A of the *Crimes Act 1900*. Section 13 provides:

"13 *Stalking or intimidation with intent to cause fear of physical or mental harm*

- (1) *A person who stalks or intimidates another person with the intention of causing the other person to fear physical or mental harm is guilty of an offence.*

*Maximum penalty: Imprisonment for 5 years or 50 penalty units, or both.*

- (2) *For the purposes of this section, causing a person to fear physical or mental harm includes causing the person to fear physical or mental harm to another person with whom he or she has a domestic relationship.*

- (3) *For the purposes of this section, a person intends to cause fear of physical or mental harm if he or she knows that the conduct is likely to cause fear in the other person.*

- (4) *For the purposes of this section, the prosecution is not required to prove that the person alleged to have been stalked or intimidated actually feared physical or mental harm.*

(5) *A person who attempts to commit an offence against subsection (1) is guilty of an offence against that subsection and is punishable as if the offence attempted had been committed.”*

- 26 The applicant had been convicted of an offence under s.112(2) *Crimes Act 1900* of, whilst being armed with an offensive weapon, breaking and entering a dwelling house and committing a serious indictable offence therein, namely intimidating a person with the intention of causing him to fear physical harm (an offence under s.13 *Crimes (Domestic and Personal Violence) Act 2007*). The trial judge (at a judge alone trial) held that the offence was not one of specific intent under ss.428B and 428C *Crimes Act 1900* but, even if it was, that the necessary elements had been established in this case to warrant a finding of guilt.
- 27 On appeal, the Court (Basten JA, Johnson and Button JJ agreeing) held that an offence of intimidation under s.13 was one of specific intent having regard to the terms of s.13(1) and (3).
- 28 After referring to a number of decisions, including *R v Grant* [2002] NSWCCA 243; 55 NSWLR 80, Basten JA said at [39]-[41]:

*“[39] The provisions of Part 11A dealing with intoxication, understood in their conceptual context within the criminal law, are concerned with circumstances in which a particular state of mind is required and can be characterised as wrongful. A particular state of mind can involve a specific intent to achieve an identified consequence (as in s 13(1)) or, (as in s 13(3)), matters of which the accused is aware (knowledge) and consequences which he or she knows to be likely. It is therefore coherent to treat as an offence of specific intent, one which can be proved by knowledge of specific matters in the same way as one where the state of mind involves a specific intention, and thus subject to the provisions of Part 11A. The underlying distinction, which is preserved by this approach, is between refusing to allow intoxication to remove what is described as ‘general intent’, and allowing it to be taken into account in considering a specific intent. This is an application of the principles of interpretation identified at (i) and (ii) in [36] above.*

*[40] The practical considerations relied on in Grant also support this conclusion. Subject to one further issue, the*

*complexity of jury directions if a charge could be based on specific intention (regarding consideration of intoxication) and knowledge of likely consequences (not permitting such consideration) is a significant reason to doubt that the legislation was intended to be so understood. Although neither party referred to Grant, either before the trial judge or in this Court, that case supports the applicant's submissions as to error. If murder, which can be based on reckless indifference, is always to be treated as an offence of specific intent, the legislative scheme should be understood as including an offence under s 13, whether based on a specific intention or a form of reckless indifference. The statute (s 428B) could not properly be read as encompassing reckless indifference in relation to one offence of specific intent, but not another, absent a justification which does not appear in the present case.*

[41] *The further issue referred to in the preceding paragraph in relation to the potential complexity of jury directions is whether s 13(3) may be a sufficient, but not a necessary, basis for establishing intention under s 13(1). That should follow because subs (3) adopts the structure 'a person intends ... if he or she knows ...'. Had it been intended to provide an exclusive method of proof of intention, one would expect the drafter to have used the expression 'if and only if', rather than merely 'if'. On the other hand, in the previous subsection, subs (2), in providing an expansive reading of 'causing a person to fear physical or mental harm', the drafter used the term 'includes', making it clear that what followed was not an exhaustive provision, although that might, in any event, have been clear from the subject matter. Such language was eschewed in s 13(3). However, the better view is that subs (3) is expansive and not exhaustive: in other words, the offence can be established by proving an intention to cause a person to fear physical or mental harm, without reference to subs (3). This is in part because of the effect of reckless indifference in determining criminal responsibility (for example, it does not create a lesser form of murder) and the fact that s 13(3) uses the language of reckless indifference."*

29 Although finding that the primary judge had erred in not finding that a s.13(1) offence was one of specific intent, the Court held that the trial judge had been correct in the alternative finding of guilt based upon an assumption that it was an offence of specific intent. Accordingly, the appeal was dismissed.

*Consent of a child complainant not relevant on sentence for a child sexual assault offence*

30 On an appeal against sentence for child sex offences in *CT v R* [2016] NSWCCA 15, it was argued (amongst other things) that the sentencing judge had erred in failing to take into account that the complainant (aged between six and eight years) had on occasions initiated the sexual contact and had said that she enjoyed it. In the course of rejecting this submission (and dismissing the appeal), the Court (Hoeben CJ at CL, Johnson and Latham JJ agreeing) said at [71]-[74]:

[71] *This is a bold submission. There is no authority for it with good reason. It is quite inappropriate to equate a child's appreciation of a sexual experience with that of a mature adult. Moreover, it is obvious from the complainant's evidence that although she may have experienced some physical pleasure, she was also experiencing feelings of guilt and an increasing appreciation of the wrongness of what was happening. It is clear from the complainant's victim impact statement that the emotional and psychological scarring brought about by this offending has remained with her and will remain with her for the rest of her life.*

[72] *As Lee J said in R v Dent (Court of Criminal Appeal (NSW), 14 March 1991, unrep) at 5 (with the agreement of Gleeson CJ and Loveday J):*

*'When the male parent takes advantage of the helplessness of the child, he not only commits a breach of trust but it is a cowardly breach of trust. The protector of the child's body, the guide and mentor of the child, in those circumstances has abandoned his proper role in order to gratify his lust on the child.'*

[73] *This submission on behalf of the applicant is misconceived and should be firmly rejected. The notion of consent has no role to play in sentencing for serious sexual assaults on very young children. In that regard, the observation by McCallum J in R v BA (with whom Gleeson JA and Fullerton J agreed) before set out at ([25] hereof) is unarguably correct.*

[74] *In R v Nelson [2016] NSWCCA 130 Basten JA (with whom Rothman J agreed) said [at [23]]:*

*‘While acknowledging that lack of consent was not an element of the offences, the sentencing judge placed some weight on the fact that the activity as described by him ‘was consensual’. No doubt the use of threats or force in overcoming resistance would be an aggravating factor; however, mere lack of opposition is otherwise irrelevant. The activity was not adequately described as ‘consensual’; it might be better described as not being the subject of opposition. To treat that as a mitigating factor is to misunderstand the nature of the offence. Lack of consent is not an element of the offence because persons of young age are deemed unable to give informed consent to sexual intercourse, no doubt because they do not appreciate the nature and consequences of the activity. The courts should accept that even when the activity is not opposed by the victim, it will be damaging. Early sexual relationships with adults will often exploit and exacerbate a precarious sense of self-worth and self-respect in the victim, which may have lifelong consequences, including an inability to form stable partnerships in adulthood and possible self-destructive behaviour.’*

#### *Doli incapax after RP v The Queen*

31 In *AL v R* [2017] NSWCCA 34, the applicant challenged his conviction upon a number of grounds, including an alleged failure to adequately direct the jury on the issue of *doli incapax*, with reliance being placed upon the decision of the High Court of *RP v The Queen* (see [2]-[3] above). In rejecting this ground of appeal, the Court (Leeming JA, Schmidt and Wilson JJ) noted evidence of school reports with respect to the applicant who was aged between 12 years and about two months and 13 years and about seven months at the time of the alleged offences.

32 The Court observed that the evidence in that case was significantly different to that considered by the High Court in *RP v The Queen*. There was a substantial body of evidence, including school reports and assessments of the applicant, all of which was pertinent to the question whether the presumption of *doli incapax* had been rebutted. The Court observed that there was “*no prescribed formula for evidence sufficient to rebut the presumption*” and that

this “*will depend upon the circumstances of individual cases*” (at [149]). The Court said at [150]:

*“In the circumstances of this case, there was evidence to suggest that the applicant had a good home life: he lived with both his parents and siblings in an apparently affluent environment; he attended school regularly, and his parents secured additional tuition for him each Saturday. The evidence of his performance and conduct at school pointed to a mature, respectful, and intelligent youth. There was evidence that the applicant had taken steps to hide his conduct to the complainant. That evidence coupled with the applicant’s own concession in evidence of his level of understanding, was sufficient for the jury to be satisfied beyond reasonable doubt of this aspect of the matter.”*

- 33 A challenge was made as well to the adequacy of directions to the jury concerning *doli incapax*. Having considered the directions and arguments based upon the decision of the High Court in *RP v The Queen*, the Court held that there had been no error nor any fundamental departure from the requirements of law so that the ground was rejected (at [151]-[167]).

*Importance of compliance with Form 1 procedures and the correct approach on sentence where maximum penalty reduced after date of offences but subsequently increased by a lesser extent prior to sentence*

- 34 In *Woodward v R* [2017] NSWCCA 44, the applicant appealed against sentences imposed in 2014 for a number of child sexual assault offences committed in the early to mid-1970’s. The offences comprised five counts of rape under s.63 *Crimes Act 1900* and one count of buggery under s.79 of that Act. A number of offences were also taken into account on sentence on a Form 1.

- 35 In the course of determining the appeal, the Court (R A Hulme J, Beazley P and Bellew J agreeing) noted that the Form 1 document did not specify a particular offence in respect of which the further offences were to be taken into account. The Court observed at [24]-[26]:

*“[24] The submissions for both parties in the District Court did not deal with the issue and, apart from a general reference to how further offences are to be taken into account, neither did the sentencing judge. The indicative sentences*

*for each of the rape offences are identical so it appears that the judge may have taken the further offences into account in some global but otherwise unspecified way. Error in relating further offences sought to be taken into account to a specific offence for which an offender is to be sentenced is not without precedent: Doumit v R [2011] NSWCCA 134 at [13]-[17].*

[25] *Another aspect of this issue is that no attention was paid to the basic statutory requirements: for example, the requirement in s 33 of the Crimes (Sentencing Procedure) Act to inquire of the offender whether he or she admits guilt in respect of the further offence(s) and asks that it/they be taken into account. Such formalities are not empty gestures and it has been said that courts should be astute that they are complied with: R v Felton [2002] NSWCCA 443; 135 A Crim R 328 at [3]; R v Brandt [2004] NSWCCA 3; 42 MVR 262 at [8].*

[26] *However, just as in R v Felton and R v Brandt, the point was not taken in this case. While this Court understands the heavy workload facing the District Court, it is important to highlight the necessity for attention to mandatory statutory requirements.”*

36 The Court noted the legislative history and penalties attaching to conduct which, in the early 1970's, fell within the descriptions of rape and buggery. With respect to the first ground of appeal (that the sentencing judge had erred in having regard to a maximum penalty which has since been reduced), the Court said at [70]-[77]:

*“[70] In the cluttered history of continual amendment of legislation dealing with sexual assault offences since the abolition of rape in 1981 and buggery in 1984, only a small proportion of which I have mentioned, the picture emerges that the conduct constituting the applicant's offences has been the subject of varying maximum penalties*

*[71] The High Court of Australia said in Elias v The Queen [2013] HCA 31; 248 CLR 483 at [27] that the maximum penalty represents the legislature's assessment of the seriousness of the offence and for this reason provides a sentencing yardstick. In the 40-odd years since the applicant's offending the yardstick has varied quite significantly. Rape was an offence punishable by life but it was replaced by offences constituting potential component parts of it that, depending on the breadth of offending conduct involved, saw an offender exposed to a maximum of anything from 7 years to 30 years imprisonment. The constituent components in the applicant's offence of rape became an offence with a maximum of 10 years. In 1984,*



*the applicant's conduct constituting the buggery offence become something that would also bring liability for the same penalty.*

[72] *There were increases in penalties for conduct that contained attributes of a crime of rape in the course of the 1980's until the present time when what previously was rape can constitute an offence carrying a maximum penalty of 14 years (s 61I) up to life (s 61JA – aggravated sexual intercourse without consent in company).*

[73] *The second limb of the applicant's argument in respect of this ground is to the effect that he should have the benefit of being sentenced within the confines of a maximum penalty that applied to his offending conduct at its lowest point within this convoluted legislative history; a maximum penalty that reflected the legislature's assessment of the seriousness of an offence that prevailed for less than a quarter of the time that has passed since his offending. It was an assessment that was acknowledged by the legislature in 1989 to have been unrealistic and out of keeping with community expectations.*

[74] *There is no statutory provision that entitles the applicant to the result for which he contends. There is nothing in the general law that does either.*

[75] *I accept the submission by counsel for the Crown. The correct approach was to have regard to the maximum penalty at the time of the offence, any identifiable sentencing practices and patterns at that time, and the maximum penalty reflecting community attitudes prevalent at the time of sentencing. It would be entirely inappropriate to afford the applicant leniency by way of windfall by having regard to a lower maximum penalty that prevailed for a time before it was abandoned many years before he came to be sentenced.*

[76] *The maximum penalty of 10 years' imprisonment that prevailed in the 1980's was never something the applicant was potentially subject to. He is not disadvantaged by a sentencing court in the 21st century not having regard to it.*

[77] *Ground 1 should be rejected."*

### *Importance of complying with an undertaking to assist authorities*

37 The importance of a witness complying with an undertaking to assist authorities (where a discount on sentence has been allowed in this respect) was emphasised in two appeals arising from the same trial: *R v X* [2016]

NSWCCA 265 and *R v MG* [2016] NSWCCA 304. Each of these persons had been sentenced in the District Court in circumstances where each of them was to give evidence at a subsequent murder trial. Each witness gave evidence at the trial but did not give evidence in accordance with his undertaking. In each case, the Court of Criminal Appeal allowed the Crown appeal under s.5DA *Criminal Appeal Act 1912* and sentenced the respondent to imprisonment in a manner which deprived him of the discount allowed for future assistance.

38 In *R v MG*, an issue arose as to whether the sentencing remarks of the judge who had presided at the murder trial should be received by the Court at the hearing of the s.5DA appeal concerning the degree of the respondent's non-compliance with the undertaking. Although it was not necessary to resolve the question of the admissibility of the sentencing remarks for the purpose of determining the appeal, the three members of the Court expressed views on the issue. Meagher JA (at [20]-[23]) considered that the sentencing remarks were probably not admissible on appeal. Johnson J (at [53]-[63]) disagreed and explained why the remarks would be admissible. Rothman J (at [65]-[68]) expressed agreement with part of the reasoning of each of the other members of the Court. The issue remains for determination at a future s.5DA appeal.

39 Where a judge has sentenced a person who has given an undertaking to give evidence at a later trial, there is utility in the trial judge saying something in the sentencing remarks (if there is a conviction) concerning the extent to which the witness has or has not complied with his or her undertaking in relation to which a sentencing discount was given. These statements will be available to the Court of Criminal Appeal, in the event that a s.5DA appeal is brought, subject to any objection to the Court of Criminal Appeal having regard to this material.

*Suggested double counting of an aggravating factor and failure to quantify discounts for certain matters*

40 In *Chung v R* [2017] NSWCCA 48, the applicant appealed against sentence imposed for an offence of breaking and entering a dwelling house and

committing a serious indictable offence in circumstances of aggravation under s.112(2) *Crimes Act 1900*. The Court rejected a ground of appeal which asserted that the sentencing judge had erred in finding that the offending was aggravated by being committed in the home of the victim under s.21A(2)(eb) *Crimes (Sentencing Procedure) Act 1999*. The Court noted (at [47]-[48]) that it was not an element of a s.112(2) offence that the premises (which are the subject of offending) be those of the victim. It followed that there was no double counting in considering the fact that an offence under s.112(2) occurred in the premises of the victim as an aggravating factor.

- 41 A further ground complained that the sentencing judge had erred in not quantifying the discount given to the applicant in relation to delay in the proceedings and the applicant being on bail. The Court rejected that ground, citing *R v Weismantel* [2016] NSWCCA 204 and *Flaherty v R* [2016] NSWCCA 188; 92 NSWLR 290. The Court observed (at [63]-[65]) that, had the sentencing judge approached the matter in the way contended for by the applicant on appeal, it may well have led to error of the kind referred to in *Flaherty* and *Weismantel* in that a mathematical or two stage approach would be introduced.

*Whether Independent Commission Against Corruption Act 1988 Abrogates Accusatorial Principle*

- 42 Ian Macdonald and John Maitland were examined by the ICAC at an inquiry into the circumstances surrounding the grant of a mining exploration licence. Both were examined subject to objection under s.37(3) *ICAC Act*. The transcripts of their evidence was made available to certain persons involved in the decision to prosecute the men. The accused sought a temporary stay of proceedings upon the basis that certain lawyers were excluded from further involvement in the prosecution. The trial Judge (Adamson J) dismissed the application: *Macdonald v R; Maitland v R* [2016] NSWSC 865.
- 43 An appeal was brought from this decision. The Court of Criminal Appeal dismissed the appeal: *Macdonald v R; Maitland v R* [2016] NSWCCA 306.

44 Bathurst CJ (R A Hulme and Bellew JJ) said at [107]-[108]:

*“[107] In the result, the ICAC Act by necessary intendment abrogates the accusatorial principle, at least in the circumstance of public examinations occurring before the examinee is charged, and substitutes for it the statutory protections contained in s 18 and s 112 if a non-publication order is made. The fact that the protection in s 112 is based on the public interest demonstrates that the Commission, if asked to make an order under that section, would be required to balance the undoubted importance of the accusatorial principle with other factors, including the need to expose corruption. No order under s 112 was sought in the present case and it is not appropriate to speculate on the result if such an application had been made. However, in the absence of any such order, it is, in my opinion, open to the Commission to make the transcript of the public examination available to the DPP. The primary judge was correct in so holding.*

*[108] The result may seem harsh but, in my opinion, a contrary conclusion would frustrate the primary objective of the legislation, namely, to expose and combat corruption. Further, it must be remembered that under s 31(6) of the ICAC Act, the person required to attend a public inquiry is entitled to be informed of the general scope and purpose of the inquiry and the nature of the allegation or complaint being investigated. Such a person would then be entitled to make an application under s 31(9) that his or her evidence be taken in private, or an application under s 112, if he or she was of the view that the evidence would operate adversely to him or her in subsequent criminal proceedings.”*

#### *Take-down Orders and making a non-publication order in the case of back-to-back trials*

45 In circumstances where a number of persons were charged with several murders and other offences, the trial judge determined that a separate trial should be held with respect to a number of counts. It was proposed that the first trial would proceed before a jury to be followed by a second and separate trial.

46 In these circumstances, application was made for a non-publication order under the *Court Suppression and Non-Publication Orders Act 2010* with respect to the evidence at the first trial as it proceeded. Hamill J made a non-

publication order in these circumstances: *R v Qaumi and Others* (No. 15) [2016] NSWSC 318. On an appeal against this order by media interests, the Court of Criminal Appeal held that it was open to the trial judge to make such an order with the appeal against that order being dismissed: *Nationwide News Pty Ltd v Qaumi* [2016] NSWCCA 97. The Court (Bathurst CJ, Beazley P and Hoeben CJ at CL) said at [75]-[77]:

[75] *We consider, conformably with the view of the primary judge, that the fair trial of the respondents in the Antoun murder trial would be prejudiced in the absence of a non-publication order. We also agree with his Honour that there are no practical alternatives capable of ensuring that the Antoun murder trial will not be prejudiced by the media coverage of the Hamzy murder trial, and that the order for the prohibition on reporting made by his Honour is necessary to prevent prejudice to the proper administration of justice. We are also of the view that it is otherwise in the public interest for the order to be made and that that public interest significantly outweighs the public interest in open justice. In our opinion, this is an exceptional case in which it is necessary to make an order prohibiting publication in the terms made by his Honour.*

[76] *We also make the following additional comments. The appellants indicated that the direction that the two trials be conducted back-to-back was a matter of case management and referred to the comments of Spigelman CJ in *John Fairfax Publications v District Court of NSW* to which we have referred above at [36]. Although Spigelman CJ indicated that there may be good administrative reasons why trials should be held back-to-back, the position in the present case goes well beyond administrative arrangements of court listings. The matters articulated by the primary judge at [74]-[76], set out above at [44]-[47], are matters that are fundamental to the proper administration of justice.*

[77] *In particular, it is essential that persons charged with criminal offences have those charges determined as early as is possible in the criminal justice system. Further, such persons should not be denied their liberty for lengthy periods pending trial. It is likewise fundamental that witnesses give their evidence, not only untrammelled by threats should they do so, but as soon as possible so as to protect the integrity of the evidence, which may not only be infected by fear of personal danger, but by the normal human processes of fading memory.”*

47 The Court allowed the appeal against take down orders made by the trial judge, concluding at [89]-[91]:

*“[89] Notwithstanding the very careful considerations his Honour gave to the making of the orders, and the views expressed by experienced trial judges in Perish and Deb, we have come to the conclusion that the take down orders would not result in the articles being sufficiently removed from the internet for the orders to be effective. In other words, we consider that it would be futile to make the orders.*

*[90] We have reached this conclusion notwithstanding that there was evidence that the removal of one item had had some effect in reducing the information available to a searcher on the internet. We are reinforced in this conclusion by two factors. First, much of the material is old. Secondly, we consider that a trial judge will be able to give adequate directions to a jury that they must determine the matter on the evidence before the Court. In this regard, we give full effect to the received wisdom of the courts, having conducted jury trials over the years, that juries act responsibly and in accordance with their oath, including in complying with the directions of the trial judge.*

*[91] Accordingly, we would allow the appeal in relation to the take down orders.”*

48 Following the return of verdicts at the first trial, the accused at the second trial made application for trial by judge alone and an order to that effect was made. In these circumstances, Hamill J lifted the non-publication order which had applied to the first trial: *R v Qaumi and Others (No. 67)* [2016] NSWSC 1601.

## **Decisions of Supreme Court of New South Wales**

### *The offence of wilful misconduct in public office*

49 The prosecutions of Edward Obeid, Ian Macdonald and John Maitland have given rise to a series of judgments which shed light upon the common law offence of wilful misconduct in public office.

50 Mr Obeid raised a demurrer to the Indictment which was overruled by Beech-Jones J in *R v Obeid (No 2)* [2015] NSWSC 1380. His Honour commenced that judgment in the following way at [1]-[2]:

[1] *The Parliament of New South Wales has enacted detailed statutory regimes for the detection, investigation and prevention of corrupt conduct by public officials including the Independent Commission against Corruption Act 1988 and the Police Integrity Commission Act 1996. However, for reasons best known to itself, the Parliament has not enacted legislation specifying whether and, if so, what improper or corrupt conduct by its own members constitutes a crime. It has left that topic to the vagaries and uncertainties of the common law.*

[2] *Those vagaries and uncertainties are at the forefront of this application which raises a number of matters concerning whether or not a member of the New South Wales Legislative Council ('MLC') is amenable to a criminal charge in respect of an accusation that he interfered in the dealings between a government department and some commercial leaseholders for the purpose of advancing his undisclosed interests in one of the leases. For allegedly so acting, the accused, Edward Moses Obeid a former MLC, is to shortly face trial on one count of wilfully misconducting himself in a public office, that only being an offence at common law."*

51 Mr Obeid bought an unsuccessful appeal against this decision under s.5F(3)(a) *Criminal Appeal Act 1912*: *Obeid v R* [2015] NSWCCA 309; 91 NSWLR 226. In the course of the judgment, the Court of Criminal Appeal (Bathurst CJ, Beazley P and Leeming JA) referred to the elements of the offence of misconduct in public office at 252-253 [133]:

*"Misconduct in public office is a common law indictable misdemeanour with a long history predating the tort described or created by Holt CJ in Ashby v White (1703) 2 Ld Raym 938; 92 ER 126: see M Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35 Melbourne University Law Review 1 at 15; and C Nicholls QC et al, Corruption and Misuse of Public Office (2nd ed, 2011, Oxford University Press), ch 3. For present purposes, however, it suffices to proceed immediately to the conclusions reached by the Victorian Court of Appeal in R v Quach [2010] VSCA 106; 201 A Crim R 522 at [46], where the elements of the offence were formulated as follows:*

- (1) *a public official;*
- (2) *in the course of or connected to his public office;*
- (3) *wilfully misconduct himself; by act or omission, for example, by wilfully neglecting or failing to perform his duty;*

- (4) *without reasonable excuse or justification; and*
- (5) *where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects’.*

52 The Court held that a member of the Legislative Council is a public officer to whom the common law offence of wilful misconduct in public office extends (at 250-251 [121]-[126]).

53 The Court rejected a submissions by Mr Obeid that the decision in *R v Quach* [2010] VSCA 106; 201 A Crim R 522 was wrongly decided. In the course of reaching that conclusion, the Court said at 254 [141]:

*“Turning to Mr Obeid’s third submission, what delineates this offence is not the presence or absence of connection between the conduct and the office, but rather the qualitative assessment required by the fifth element, which reflects what has been said in R v Dytham [1979] 1 QB 722 at 727-728, Question of Law Reserved (No 2 of 1996) (1996) 67 SASR 63 at 78-79, by Mason NPJ in Shum Kwok Sher v HKSAR (2002) 5 HKCFAR 381 at 409-410 and by the Court of Appeal in Attorney General’s Reference (No 3 of 2003) at [56]. These authorities were considered in R v Quach at [42]-[45]. Far from leaving the boundaries of the offence ‘entirely at large’, it is a necessary condition that the misconduct have the requisite serious quality, meriting criminal punishment, in light of the nature and importance of the office and the public objects served. It is this requirement, ultimately, which confines the scope of the offence. In an appeal in which many points were taken, there was no objection taken to the fact that the qualitative assessment required by the fifth element rendered the offence uncertain.”*

54 An application for special leave to appeal to the High Court from this decision was refused: *Obeid v The Queen* [2016] HCASL 86.

55 During the course of the trial, Beech-Jones J ruled that the offence of wilful misconduct in public office is made out in circumstances where the accused is reckless as to whether their act or omission was in breach of the duties and obligations attaching to their office: *R v Obeid (No 11)* [2016] NSWSC 974.



56 In the course of his sentencing judgment (*R v Obeid (No. 12)* [2016] NSWSC 1815), Beech-Jones J referred to the nature of the common law offence and the approach to sentencing for such an offence. His Honour said at [60]-[63]:

[60] *In R v Obeid (No 2) [2015] NSWSC 1380 at [1] I observed that, even though the Parliament of New South Wales has enacted detailed statutory regimes for the detection, investigation and prevention of corrupt conduct by public officials, for reasons best known to itself, the Parliament has not enacted legislation specifying whether and, if so, what improper or corrupt conduct by its own members constitutes a crime. Instead, Parliament left that topic to the vagaries and uncertainties of the common law.*

[61] *Since that statement, some of the uncertainties surrounding the application of the common law offence of wilful misconduct in public office to a parliamentarian have been resolved by the Court of Criminal Appeal's judgment in Obeid v R [2015] NSWCCA 309. Further, in relation to sentencing, the provisions of the Crimes (Sentencing Procedure) Act 1999 (NSW) ('Sentencing Act') apply to common law offences as well as statutory offences. Five aspects of that legislation are of particular relevance to the sentencing of Mr Obeid, namely:*

- *the identification of the purposes of sentencing (s 3A);*
- *the prohibition on a Court sentencing an offender to imprisonment unless, having considered the alternatives, it is satisfied that no other form of punishment is appropriate (s 5(1));*
- *the power, in some circumstances, to impose home detention or an intensive correction order on a person sentenced to a term of imprisonment (ss 6 and 7);*
- *the specification of aggravating, mitigating and other factors in sentencing (s 21A); and*
- *the power of the Court to alter the minimum ratio between a non-parole period and the balance of a sentence if 'special circumstances' are found (s 44(2)).*

[62] *Nevertheless, the absence of a statutory regime governing the conduct of parliamentarians means that resort must be had, at least in part, to the common law to ascertain the relevant principles to be applied in sentencing a parliamentarian who has been convicted of wilful misconduct in public office. In particular, as wilful*

*misconduct in public office is a common law offence there is no specified maximum penalty. This is a significant omission because, in sentencing for offences created by statute, the maximum penalty is a crucial component of the sentencing process because '[t]he maximum penalty for a statutory offence serves as an indication of the relative seriousness of the offence' and '[a]n increase in the maximum penalty for an offence is an indication that sentences for that offence should be increased' (Muldrock v The Queen [2011] HCA 39; 244 CLR 120 at [31]).*

[63] *Instead, in sentencing for common law offences, the Courts adopt an analogous or corresponding statutory offence as a 'reference point' for the imposition of a penalty (R v Hokin, Burton and Peisely (1922) 22 SR (NSW) 280 at 291; Jaturawong v Regina [2011] NSWCCA 168; 'Jaturawong'; at [5]; Blackstock v Regina [2013] NSWCCA 172; 'Blackstock'; at [8]). However, the adoption of the maximum penalty for a corresponding statutory provision as a reference point does not 'fetter the discretion' to impose a sentence 'which remains at large' and can be greater than that maximum (Blackstock at [11]).*

57 Different aspects of the offence of wilful misconduct in public office were considered in the proceedings against Mr Macdonald and Mr Maitland. The trial judge, Adamson J, gave reasons for directions given to the jury with respect to the elements of the offence: *R v Macdonald; R v Maitland* [2017] NSWSC 337. Her Honour explained why the formulation used in *R v Obeid* was inapposite to the present case given its different circumstances (at [40]-[45]). Adamson J further explained the difference between the cases at [62]-[63]:

“[62] *The present case is to be distinguished from that of Mr Obeid, who was charged with making representations to a public official with a particular intention and R v Quach, in which a police officer was alleged to have wrongfully used his office to procure sexual penetration of a woman. A parliamentarian is entitled to make representations to public authorities on behalf of the public, or a sector of the public. The nature and extent of the duties and obligations of a Member of Parliament when making representations therefore needed to be articulated and proved, together with the alleged breach, as an element of the offence.*

[63] *The wilful misconduct alleged against the accused Macdonald belongs to a different category: the nature of the office of Minister and the limits on the motivations for which statutory powers such as those under the Mining*

*Act may be exercised are so well established as not to require articulation in terms of duties and obligations and their breach. The powers under ss 13(4) and 22 of the Mining Act are conferred on the Minister on the basis that they are to be exercised in the public interest and not for the personal advantage of the Minister or for the benefit of his or her friends, family or associates. It would inevitably be a breach of the duties and obligations of a Minister exercising power under ss 13(4) and 22 of the Mining Act for the Minister to be motivated to a significant degree by the desire to confer a benefit on a particular individual or company and not to be motivated to a significant degree by the furtherance of the interests of the State of New South Wales.”*

58 Mr Maitland was tried and convicted as an accessory before the fact to the two principal offences charged against Mr Macdonald. Her Honour’s judgment refers as well to the directions to be given to a jury where an accused is charged with being an accessory before the fact to an offence of wilful misconduct in public office (at [73]-[81]). The written directions provided to the jury as to the elements to be proved by the Crown as against Mr Macdonald and Mr Maitland are set out as an appendix to her Honour’s judgment.

*Intoxication, drug induced psychosis and the defence of mental illness*

59 In *R v Fang (No. 3)* [2017] NSWSC 28, the question arose as to whether the defence of mental illness should be left to the jury at a murder trial, where the evidence indicated that the accused (at the time of the killing) was intoxicated by methylamphetamine (Ice) and was subject to a drug induced psychosis. There was psychiatric evidence that the accused was subject to a defect of reason (a delusion) by reason of a disease of the mind (drug induced psychosis) at the time of the killing. There was no evidence that the accused otherwise suffered from a psychiatric condition nor was there any family history of mental illness.

60 The Court upheld the Crown application that the defence of mental illness should not be left to the jury. After considering a number of authorities, Johnson J concluded at [109]-[112]:

*“[109] The evidence in the present case indicated that the Accused had no family history or personal history of mental illness. The medical evidence pointed to such problems as he had as arising from his use of ‘lce’. This is not a case where there is evidence of an underlying existing mental illness in the Accused, which was triggered or exacerbated by his use of ‘lce’. It may be distinguished from a number of cases in Victoria and New South Wales, to which reference has been made, where there was a pre-existing mental illness which was accompanied by drug use leading to a drug-induced psychosis.*

*[110] The evidence indicated that any drug-induced psychosis, from which the Accused was suffering at the time of the killing, was the product of his use of ‘lce’ and that the Accused did not otherwise suffer from a disease of the mind. The Accused’s condition resolved spontaneously after he ceased using the drug. This was a temporary and not persisting state which flowed solely from the Accused’s use of prohibited drugs. The Accused has not adduced evidence that he was suffering from a ‘disease of the mind’ for the purpose of the common law test of mental illness.*

*[111] Even if there was doubt concerning this conclusion, the evidence here indicated that the ingestion of a significant quantity of ‘lce’ shortly before the killing played a highly significant role in the Accused’s state of mind at the time of the killing. Even if his condition prior to that ingestion could be characterised as a ‘disease of the mind’ (which I do not accept), what affected the Accused significantly was the actual use of ‘lce’ before the killing. But for the use of ‘lce’ before the killing, the medical evidence suggests that the Accused would not have experienced a drug-induced psychosis at the time when the killing occurred. The principles in the authorities which have been mentioned operate to exclude reliance upon the defence of mental illness in these circumstances.*

*[112] Accordingly, I was satisfied that the appropriate course was to decline to leave the defence of mental illness to the jury.”*

*Relevance on sentence of an Offender’s intoxication and the role of addiction and drug induced psychosis*

61 Mr Fang was found guilty of murder. On sentence, consideration was given to the relevance of his intoxication, addiction and drug induced psychosis: *R v Fang (No. 4)* [2017] NSWSC 323 at [70]ff.

62 On these issues, Johnson J said at [74]-[80]:

- [74] *The classification of a ‘disease of the mind’, for the purpose of the defence of mental illness, involves a legal question with a medical dimension: R v Fang (No. 3) at [62]-[63]. The defence of mental illness operates within relatively narrow parameters: R v Fang (No. 3) at [107]. A broader range of mental conditions may be taken into account on sentence: Director of Public Prosecutions (Cth) v De La Rosa [2010] NSWCCA 194; 79 NSWLR 1 at 43 [177]-[178]. Where the relevant mental condition arises, as in this case, from the person’s use of drugs and the person’s intoxication by use of a drug shortly before the commission of the offence, s.21A(5AA) has application together with the principles emerging from a number of cases to which I now turn.*
- [75] *Submissions were made on the question whether the Offender had awareness (at the time of the killing) that his use of Ice might lead to an act of violence directed to another person. A number of sentencing decisions (where a serious crime has been committed at the time of a drug induced psychosis) have indicated that an enquiry of that type is relevant on sentence: R v Gagalowicz [2005] NSWCCA 452 at [36]; R v Martin [2007] VSCA 291; 20 VR 14 at 19-20 [20]; Director of Public Prosecutions (Vic) v Arvanitidis [2008] VSCA 189; 202 A Crim R 300 at 310-314 [30]-[48]; Butler v State of Western Australia [2010] WASCA 104 at [8], [54]ff; Smith v State of Western Australia [2010] WASCA 176 at [69]; R v Gibson [2016] VSC 634 at [94]ff.*
- [76] *There is no evidence that the Offender appreciated that his use of Ice might lead to an act of violence, and certainly not homicidal violence. The evidence indicates behavioural changes which had been observed by members of his family, including outbursts of rage by him directed to family members (see [13] and [58] above). There is no sworn account from the Offender before the Court either at the trial or on sentence. If the Offender sought a favourable finding on this issue, it was for him to persuade the Court that he did not know, and could not have anticipated, what the effects of his ingestion of Ice might be: Mune v R [2011] VSCA 231 at [32].*
- [77] *Having considered the evidence which bears on this issue, I approach the sentencing of the Offender upon the basis that there is no evidence that he had prior knowledge that his use of Ice would lead to an act of violence on his part towards another person, although he was aware that his use of Ice had given rise to behavioural changes in him, including altered thought processes and rage directed to family members. It is necessary to keep in mind as well that the Offender had been using Ice for some months. He*

was about 35 years old and was not an inexperienced youth. He did not act upon his wife's sensible advice that he should seek medical assistance. Further, the Offender appears (from his criminal history) to have had past issues with alcohol use. These aspects do not help the Offender on sentence.

[78] *Although the Offender was aware that his use of Ice could result in adverse behavioural changes (including altered thought processes and rage), there is no evidence that he appreciated at the time of the killing that his Ice use might lead to an act of violence against another person. However, this finding does not mitigate the Offender's culpability for the killing. If the Offender realised that one of the effects of his Ice use might have been that he would act violently towards another person, this would have been a matter of serious aggravation: R v Gagalowicz at [36]; R v Martin at 22 [28]-[30]; Director of Public Prosecutions (Vic) v Arvanitidis at 308-311 [24]-[35].*

[79] *The fact that the Offender had developed an addiction to Ice is a relevant factor on sentence but is not, of itself, a mitigating circumstance: R v Henry[1999] NSWCCA 111; 46 NSWLR 346 at 381-386 [171]-[208]. The Offender had a choice whether to commence his use of Ice: R v Henry at 395 [257]. His decision to persist with drug use, rather than to seek assistance as advised by his wife, also involved a matter of choice: R v Henry at 385 [201]. The Offender was not a young and immature person with limited experience of life.*

[80] *I am satisfied that the Offender's state of self-induced intoxication does not operate to mitigate the circumstances of the offence itself. However, the fact that the Offender had commenced to use prohibited drugs in circumstances of personal stress provides assistance to the Offender's subjective case on sentence, in combination with the favourable findings which I have made with respect to his contrition and remorse, his facilitation of the course of justice and his favourable prospects of rehabilitation."*

#### *Requirements for prosecution notice under s.142 Criminal Procedure Act 1986*

63 In *R v LN; R v AW (No. 2)* [2017] NSWSC 153, consideration was given to the question whether a prosecution notice under s.142 *Criminal Procedure Act 1986* should include (or identify) recordings and transcripts of electronic evidence to be relied upon by the prosecution at a trial.

*[20] In my view, s.142 requires the prosecution to identify and make available recordings and transcripts of electronic evidence to be relied upon by the prosecution. At the least, there ought to be a clear statement in the notice of an intention to rely upon evidence of this type and of the steps being taken by the prosecution to allow for meaningful disclosure by the prosecution of this material and its preparation for trial.*

*[21] I am reinforced in this conclusion by s.143(2)(b) which relates to the defence response to the prosecution notice. This provision allows the Court to make a discretionary order that the defence indicate whether evidence obtained 'by means of surveillance' will require all prosecution witnesses to be called.*

*[22] In the Second Reading Speech for the Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013, the Attorney General said with respect to s.143(2)(b) (Hansard, Legislative Assembly, 13 March 2013):*

*'Proposed subsection 2(b), for example, requires the defence to confirm whether the prosecution is required to call witnesses to corroborate any surveillance on which it is intended to rely. Surveillance evidence within the meaning of the subsection is intended to have a broad meaning. It can include traditional surveillance evidence such as physical observations of suspects recorded in logs by the police, as well as that obtained under warrant, such as evidence resulting from the placing of a listening device in a particular location. This evidence may not be relevant in some cases and allowing the Court to make an order means that the Judge can tailor its terms to fit the type of evidence in question.'*

*[23] In addition, s.143(2)(d) allows the Court to make a discretionary order that, if the prosecutor disclosed an intention to tender at the trial 'any transcript', the defence response must indicate whether the Accused person accepts the transcript as being accurate and, if not, in what respect the transcript is disputed.*

*[24] These provisions confirm the view that the s.142 prosecution notice and the s.143 defence response are intended to assist identification of electronic evidence to be relied upon by the prosecution, and areas of dispute to be raised by the defence."*

65 The Court returned to this aspect at [29]-[33]:

- [29] *What has happened in this trial is not uncommon. In my capacity as Criminal List Judge, I am aware that late provision by the Crown (both State and Commonwealth) of telephone intercept and surveillance device evidence has, on occasions, delayed trials and, in some cases, caused the trial to be adjourned to a later date.*
- [30] *I make these observations against the background of s.134 Criminal Procedure Act 1986, which states that the purpose of the case management provisions, including ss.142, 143 and 144, is to reduce delays in proceedings on indictment by requiring certain pre-trial disclosure by the prosecution and defence and enabling the Court to undertake case management of the proceedings.*
- [31] *I note, as well, the existence of s.146(1) Criminal Procedure Act 1986, which provides that the Court may refuse to admit evidence in proceedings that is sought to be adduced by a party who failed to disclose the evidence to the other party in accordance with requirements for pre-trial disclosure imposed by provisions, including ss.142, 143 and 144. An argument of this type was referred to in *R v Turnbull (No. 25)* [2016] NSWSC 831 at [16] and [21].*
- [32] *I observe, as well, that the prosecution and defence disclosure obligations are ongoing: s.147 Criminal Procedure Act 1986.*
- [33] *It should be observed as well that the statutory disclosure regime in the Criminal Procedure Act 1986 is additional to the common law prosecution duty of disclosure considered in cases such as *Grey v The Queen* [2001] HCA 65; 75 ALJR 593; *R v Reardon (No 2)* [2004] NSWCCA 197; 60 NSWLR 454 and *Mallard v The Queen* [2005] HCA 68; 224 CLR 125 at 133 [17].”*

#### *Representation of a legally assisted accused in criminal trials*

66 In *Khalid v Legal Aid Commission (NSW)* [2016] NSWSC 1640, the accused was charged with a terrorist offence and had been represented for a period of time by a solicitor who was not a member of the Serious Criminal Law Panel established under s.50 *Legal Aid Commission Act 1979*. When legal aid was granted to the accused, Legal Aid NSW determined that the accused should be represented by a different solicitor who was a member of that panel. The plaintiff brought an administrative law challenge to that decision seeking to maintain his previous solicitor in the case on a legally aided basis. Bellew J



considered (amongst other things) s.12 and s.50 *Legal Aid Commission Act 1979* in the course of rejecting the plaintiff's challenge to the decision.

67 Legal Aid NSW has recently reminded all practitioners in legally aided criminal matters of the obligation of counsel to ensure the efficient conduct of matters and to comply with the terms of Rule 58 Legal Profession Uniform Conduct (Barristers) Rules 2015, which provides as follows:

*"A barrister must seek to ensure that work which the barrister is briefed to do in relation to a case is done so as to:*

- (a) confine the case to identified issues which are genuinely in Dispute,*
- (b) have the case ready to be heard as soon as practicable,*
- (c) present the identified issues in dispute clearly and succinctly,*
- (d) limit evidence, including cross-examination to that which is reasonably necessary to advance and protect the client's interests which are at stake in the case, and*
- (e) occupy as short a time in court as is reasonably necessary to advance and protect the client's interests which are at stake in the case."*

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