A CRIMINAL CHRONICLE

2010 - 2020

The Honourable Justice R A Hulme

14 September 2020

INTRODUCTION

This is a compilation of papers that have been presented at annual Local, District and Supreme Court conferences over the past 11 years. It comprises brief synopses of the multitude of appellate criminal cases decided in that period with the occasional comments that seemed appropriate at the time.

The cases are organised in descending chronological order under relevant subject headings. As may be expected over such a period, some of the oldest decisions have been qualified or overruled by later cases. The earlier cases have been retained in order to record and illustrate developments in the law on particular subjects.

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 of my tipstaves during this period who have made substantial contributions to the individual papers. I am particularly grateful to Ms Gan and Mr Robinson for the compilation of this "Mega Paper", its working title, or Henry's preference, "A Grimoire of Criminal Appeals". Many thanks to:

Mr Nazih Touma
Mr Eliot Olivier LLB (Hons) B Int S
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Mr William Bruffey BA LLB (Hons 1)
Mr Henry Robinson BA LLB (Hons)
Mr Nicholas Rozenberg
Mr Alexander Edwards BA LLB (Hons)
Ms Roisin McCarthy BA LLB
Ms Christina White BA (Hons) LLB (Hons)
Ms Kirsten Gan BIGS LLBS (Hons 1)

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Bail

1. BAIL

A. Principles

Show cause requirement under the Bail Act

The appellant in ***Barr (a pseudonym) v Director of Public Prosecutions (NSW*) [2018] NSWCA 47** was granted bail in the Local Court after being charged with historical child sexual offences. He pleaded guilty on the day of his trial, and the DPP made an oral detention application later that day. Because Barr had pleaded guilty to "show cause offences" under Div 1A of the *Bail Act*, the judge refused bail on the basis that Barr had failed to discharge the onus in s 16A to show cause why his detention would be unjustified. The appellant filed a summons in the Court of Appeal seeking judicial review and certiorari, as well as a bail application in the Supreme Court.

On the issue of whether the show cause requirement can be satisfied by the accused persuading the bail authority that there is no unacceptable risk, Leeming JA, with whom N Adams J agreed, disagreed with the reasons of McCallum J. By way of obiter dicta, Leeming JA and N Adams J held that the show cause requirement in Div 1A (ss 16A and 16B) is distinct from the unacceptable risk test in Div 2 (ss 17-20A). While Div 2 lists a number of criteria used to determine whether there is an unacceptable risk, no such criteria exist to determine the show cause test. *DPP (NSW) v Tikomaimaleya* [2015] NSWCA 83 was cited.

Leeming JA said (obiter) that there will be times when a court may form the view that an accused person who poses no unacceptable risk may nonetheless fail to show cause. N Adams J, agreeing with Leeming JA on this point, said that s 16A confers a wide discretion on the bail authority that cannot be met solely by an accused person persuading the bail authority that there is no unacceptable risk. A plea of guilty, her Honour noted, is a relevant factor to both tests: it can no longer be contended that the accused is entitled to the presumption of innocence or that any period on bail would exceed any sentence imposed.

Show cause (s 16A of the Bail Act) principles

The applicant in ***Moukhallaletti v Director of Public Prosecutions (NSW)* [2016] NSWCCA 314** was charged with fabricating false evidence and dealing with the proceeds of crime whilst on bail for offences relating to interfering with the administration of justice. Her release application was refused and the NSWCCA considered her further application. Button J found that the applicant failed to show cause why her detention was not justified, pursuant to s 16A of the Bail Act 2013 (NSW), and refused bail. His Honour set out six principles applying to the show cause requirement:

(1) The question is separate from the question of whether there would be unacceptable risks of certain things occurring if the applicant were granted bail (*Director of Public Prosecutions (NSW) v Tikomaimaleya* [2015] NSWCA 83 at [25]).

(2) Unlike factors relevant to the assessment of unacceptable risks, Parliament has not enumerated the facts that may show cause.

(3) There will often be a substantial overlap between the factors going to the show cause requirement and determination of unacceptable risks (*Tikomaimaleya* at [24]).

(4) Cause may be shown by a single powerful factor, or a powerful combination of factors (*R v S* [2016] NSWCCA 189 at [63]).

(5) One should refrain from placing a gloss on the words of the Bail Act (*Director of Public Prosecutions (NSW) v Mawad* [2015] NSWCCA 227 at [42]). It is not incumbent upon an applicant to show special or exceptional circumstances in order to show cause (cf s 22 of the Bail Act).

(6) There is little or no precedential value in decisions of a single judge of the Supreme Court finding that an applicant has shown cause or not, unless they contain a discussion of legal principles (*Director of Public Prosecutions (NSW) v Zaiter* [2016] NSWCCA 247 at [30]-[33]). Many such judgments concern the interplay of a multitude of factors and are not determinations of legal questions.

Bail decisions of the Supreme Court rarely of any precedential value

The respondent in ***Director of Public Prosecutions (NSW) v Zaiter*** **[2016] NSWCCA 247** was charged with serious drug supply and proceeds of crime offences. He was granted bail by the Supreme Court and the Crown filed a detention application shortly thereafter. R A Hulme J granted the application and bail was refused. His Honour paused to make the following observations concerning the commonplace reliance of parties on previous bail decisions. Judgments of single judges of the Supreme Court presiding in the Bails List do not often lay down anything of precedential value for bail authorities. Bail decisions involve a discretionary evaluative judgment on factors about which reasonable minds may differ and each judgment is very specifically directed to the facts and circumstances of the case at hand. Judgments published on the Caselaw website are no more authoritative than others that are not.

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.

Show cause and unacceptable risk tests under the Bail Act 2013 as amended

In ***Director of Public Prosecutions (NSW) v Tikomaimaleya*** **[2015] NSWCA 83** an offender had been found guilty after a trial of an offence listed in s 16B of the *Bail Act 2013* as a "show cause" offence. Bail was granted pending sentence but the DPP made a detention application to the Supreme Court which was referred to the Court of Appeal. An issue was whether the "show cause" and "unacceptable risk" tests in the Bail Act as amended early in 2015 are separate tests. It was held that the two tests should not be conflated. A particular reason for that in the case at hand was that the unacceptable risk test requires consideration of only the matters listed in s 18. A particular matter of significance in this case was that the respondent had been found guilty by a jury, thereby losing the presumption of innocence, and was facing an inevitable custodial sentence. Such matters are not permitted to be considered in relation to the unacceptable risk test because they are not listed in s 18. The Court did however accept that in many cases it may well be that matters that are relevant to the unacceptable risk test will also be relevant to the show cause test and that, if there is nothing else that appears to the bail authority to be relevant to either test, the consideration of the show cause requirement will, if resolved in favour of the accused person, necessarily resolve the unacceptable risk test in his or her favour as well.

(The Court also noted that the past practice of referring bail matters from the Common Law Division to the Court of Appeal should have ceased when the old Bail Act was amended in 2008 and had no place under the Bail Act 2013.)

Bail Act 1978 – pure weight, not gross weight, of drug relevant

Section 8A of the *Bail Act 1978* provided for a presumption against bail for certain offences, including Commonwealth drug offences over a certain weight. Latham J in ***R v Hay*** **[2010] NSWSC 14** held that the relevant consideration is the pure weight of the drug, not the gross weight.

B. Court of Criminal Appeal hearings

Release applications

Bail or stay sought pending special leave application

Mr Karout sought special leave to appeal to the High Court following the CCA's dismissal of his sentence appeal. In addition, he sought bail, or in the alternative a stay of his sentence, pending the application. In ***Karout v Director of Public Prosecutions (NSW)*** **[2020] NSWCCA 15**, Johnson J refused both applications. His Honour held that the Court had no jurisdiction under s 67(1)(d) of the *Bail Act 2013* (NSW), because that provision applied only to pending *appeals*, not special leave applications. His Honour refused the stay due to the special leave application's poor prospects of success.

The following month, the High Court refused an extension of time as the proposed grounds of appeal had insufficient prospects of success to warrant a grant of special leave: [2020] HCASL 56.

Bail pending appeal – relevance of the merits of the appeal to demonstrating special or exceptional circumstances

The applicant in ***El Khouli v R*** **[2019] NSWCCA 146** and his business partner set fire to their Hornsby café in order to obtain an insurance payout. He was found guilty by a jury of two offences and sentenced to imprisonment. He filed an appeal against his conviction; and in the meantime, filed a bail release application. In its reasons for refusing the application, the Court of Criminal Appeal noted that s 22 of the *Bail Act 2013* (NSW) was engaged – first, the applicant needs to demonstrate special or exceptional circumstances, and if found, the Court will then apply the unacceptable risk test.

In endeavouring to establish special or exceptional circumstances, the applicant relied on the strength of his appeal. The Court examined the relevance of the merits of the appeal as a factor in demonstrating special or exceptional circumstances. The Court analysed the authorities, noting that a distinction had been drawn between cases where the merits of the appeal factor was relied on in isolation and those in which there was reliance upon a combination of other factors. The Court noted that different tests had been applied, and that a less stringent test applied when the applicant relied on a combination of factors – of "whether the grounds relied upon by the applicant in the appeal were reasonably arguable or that there were reasonable prospects for the appeal." In any event, little turned on these considerations because of the way the applicant had framed the question – being whether the grounds of appeal were "strong". The Court held that the applicant had not made out special or exceptional circumstances because of his failure to demonstrate that the grounds of appeal were strong or that he was like to succeed in either the conviction or sentence appeal.

Construction of s 66(1) Bail Act 2013 (NSW) – power of Supreme Court to hear release application after granting detention application

The applicant's release application in ***Decision Restricted*** **[2019] NSWCCA 31** came before the Court of Criminal Appeal (CCA) by a somewhat longwinded route. He had been charged with several offences and initially refused bail. His first bail application to the Local Court was refused, but the second was granted. Subsequently, the Supreme Court granted a detention application made by the prosecutor. The applicant then made a release application to the Supreme Court. In correspondence with the applicant's legal representatives, the Registrar raised a jurisdictional question under s 66(1) *Bail Act 2013* (NSW) in which the Court "may hear a release application for an offence if bail for the offence has been refused by another court …". The most recent court to refuse bail was the Supreme Court itself; therefore, it would not have jurisdiction under s 66(1). As a result, the applicant filed a release application under s 67(2) to the Court of Criminal Appeal.

The Court refused the application on its merits. Basten JA considered the construction of s 66. His Honour found that "the operation of this provision is obscure in a critical respect",

and noted that the provision could be read in two ways. The strict reading means that as bail had been refused in another court (the Local Court), then the Supreme Court has jurisdiction, but with the consequence that s 74 – which provides rules for courts hearing multiple bail applications – did not apply. The alternative reading, which was in his Honour's view more attractive, considered the condition in s 66 to be addressed to the cause of the current status of the bail-refused applicant. This alternative reading was, however, complicated because in this matter, it would deny the Supreme Court power to hear the application, as bail had last been refused by the Supreme Court and not another court. Basten JA declined to consider the matter further, noting finally that it would be desirable if the CCA's jurisdiction under s 67(1)(e) to hear bail matters be infrequently invoked, as it might otherwise affect its swift discharge of appellate work.

s 22 Bail Act 2013 – "special or exceptional circumstances" requirement applies where bail applicant pursuing an appeal against Crown appeal against sentence

The applicant in ***HT v Direction of Public Prosecutions (NSW)*** **[2019] NSWCCA 141** was sentenced for dishonesty offences. A Crown appeal was upheld on the basis that the original sentence was inadequate. The applicant was then granted special leave to appeal to the High Court and made a release application to the Court of Criminal Appeal, pending the hearing and determination of the High Court appeal. The issue was whether s 22 of the Bail Act 2013 (NSW) applied. Originally, the applicant's written submissions addressed the ss 17-19 questions in relation to unacceptable risk. Later, the submissions in reply accepted that s 22 applied.

Hamill J (Bathurst CJ and Bell P agreeing) found that neither s 67 nor s 22 of the Bail Act 2013 distinguishes between appeals brought by an offender or prosecuting authority. The requirement that the applicant had to meet was whether there were "special or exceptional circumstances" to justify a decision to grant bail. Hamill J went on to approach the application on the basis of the principles set out in El-Hilli & Melville v R [2015] NSWCCA 146. Further, his Honour set out some relevant considerations noting that s 22 is a "significant hurdle"; that s 22 incorporates the exhaustive list of unacceptable risk factors in s 18; that "special or exceptional circumstances" may involve a combination of features not necessarily including that the appeal is "certain" to succeed; that it is relevant if the appeal is "arguable or enjoys reasonable prospects of success" and whether the sentence is likely to expire prior to the appeal being determined. Hamill J also noted that while special leave – granted on the basis of "reasonable prospects of success" – does not mean that the appealed decision should be seen as "provisional", it does give content to the concept of "special or exceptional circumstances".

Supreme Court has no jurisdiction to hear a bail application pending an appeal to the CCA where there has been no prior refusal of bail

The applicant in ***Noufl v Director of Public Prosecutions (NSW)*** **[2018] NSWSC 1238** was convicted and sentenced in the District Court of NSW for drug supply offences. He filed a notice of intention to appeal against sentence to the Court of Criminal Appeal and made a release application to the Supreme Court. No application for bail was made to the District Court. The Director of Public Prosecutions disputed that the Supreme Court had

jurisdiction, contending that s 48(3) empowered the District Court or the Court of Criminal Appeal or the District Court to hear the application but not the Supreme Court. Hamill J accepted that contention and refused the application for want of jurisdiction.

The Director drew his Honour's attention to the terms of s 28 of the repealed Bail Act 1978, which granted the Supreme Court a broader power than the current Act. His Honour considered the Second Reading speech for the *Bail Act 2013* and held that an unintended consequence of the reform of the *Bail Act 1978* was the removal of the power of a single judge to hear such an application. His Honour held that the provisions in ss 48(3), 61, 62, and 66(1) suggest that the Supreme Court could only have jurisdiction in the present case if a release application had been refused by another court. No such refusal had been made. A suggestion that the Court retained an inherent power was rejected.

CCA to take flexible approach to de novo bail hearings and can take into account judicial findings made on earlier applications

The applicant in ***Trinh v R*** **[2016] NSWCCA 110** was refused bail in the Local and Supreme Courts after being charged with a number of fraud offences. He then lodged a release application in the Court of Criminal Appeal pursuant to s 67(1)(e) of the *Bail Act 2013* ("the Act"). In determining the application, Basten JA considered the nature of the powers conferred on the CCA with respect to bail applications, including the application of s 75 of the Act headed "Fresh application to be dealt with as new hearing". His Honour observed that it is not entirely clear how broadly and in what circumstances that provision is intended to operate. There have been several statements by the CCA that an application is to be heard by the Court de novo. However, the form of "new hearing" is to be approached with a degree of flexibility, depending upon the circumstances presented in the particular case. At least in a case where oral evidence has been called at an earlier hearing, it seems inevitable that the CCA should be entitled to take account of findings, particularly as to the credibility of witnesses, made by the judge in the earlier proceedings.

The other members of the bench agreed with these conclusions, but further observations by his Honour did not attract the agreement of McCallum J, and Davies J deferred expressing a view as the issues were not argued by the parties.

Requirement to establish 'special or exceptional circumstances' in a release application where appeal pending in Court of Criminal Appeal

Mr El-Hilli and Ms Melville were convicted of offences of dishonestly obtaining a financial advantage by deception and were refused Supreme Court bail. They filed a notice of appeal and submissions in the Court of Criminal Appeal and then made a release application in that Court. In ***El Hilli & Melville v R*** **[2015] NSWCCA 146** the Court considered the operation of s 22 of the *Bail Act* which is concerned with the power of the Court to grant bail in circumstances where, inter alia, an appeal is pending in the Court of Criminal Appeal: s 22(1)(a). Hamill J explained that where s 22 is engaged, the applicant must demonstrate that there are "special and exceptional circumstances" to justify the grant of bail before the Court considers the unacceptable risk test. It was observed that he same factors may be relevant at both stages (as they would be if the Court was applying the 'show cause' test:

DPP (NSW) v Tikomaimaleya [2015] NSWCA 83 at [24]). The merit of the appeal will often be relevant to the special and exceptional circumstances requirement. However, it is not necessary that an applicant establish that their appeal will either "inevitably succeed" or that success is "virtually inevitable" (at [24]). It is sufficient to demonstrate that the proposed appeal has reasonable prospects of success. In this case, the Court was not satisfied that either Mr El-Hilli or Ms Melville had demonstrated "special and exceptional circumstances" and their release applications were refused.

Power of Court of Criminal Appeal to grant bail pending determination of leave to appeal sentence

Mr Milsom pleaded guilty to a single charge of armed robbery with wounding and was sentenced to a term of imprisonment of 6 years with a non-parole period of 2 years and 6 months. He sought leave to appeal his sentence. The Court of Criminal Appeal reserved its decision and indicated that it was minded to grant bail. A question arose as to whether a single judge could hear the bail application, made under the Bail Act 2013 (NSW). To avoid any doubt, three judges heard the application. In ***Milsom v R* [2014] NSWCCA 118** Beech-Jones J held that s 61 of the new Bail Act confers power on the Court of Criminal Appeal, comprised of three judges, to grant bail pending the determination of an application for leave to appeal against sentence. Beech-Jones found that it was not necessary to decide whether a single judge of the Supreme Court or a single judge of the Court of Criminal Appeal could determine an application for leave to appeal a sentence imposed by a court other than the Supreme Court, as was the case under the *Bail Act 1978* (NSW).

Crown detention applications

No "principle of restraint" to be applied in CCA determination of Crown detention applications

The respondent in ***R v Marcus* [2016] NSWCCA 237** was granted bail by the Supreme Court in respect of charges of shoot with intent to murder, discharge firearm with intent to cause grievous bodily harm and knowingly direct activities of a criminal group. The Crown filed a detention application following that decision. Hoeben CJ at CL granted the application and refused bail. In so doing, his Honour held that there is no "principle of restraint" to be applied by the Court of Criminal Appeal in hearing a Crown detention application following a successful release application before a single judge of the Supreme Court. Nothing in the *Bail Act 2013* supports the application of such a principle; the Court is required to determine applications on a de novo basis. Cases relied upon by the respondent in making a submission to the contrary are of historical interest only. The respondent's reliance upon the now abolished "double jeopardy" principle that formerly applied to the determination of Crown appeals against sentence was also rejected.

Chapter 2

Pre-trial

2. PRE-TRIAL

A. Pre-trial procedures

Committal

When do "proceedings commence" for the purposes of the transitional provisions to the Criminal Procedure Amendment (Sexual and Other Offences) Act 2006

***TJ v R* [2009] NSWCCA 257** was concerned with a question about the *Criminal Procedure Amendment (Sexual and Other Offences) Act 2006*. One provision limited the occasion for a judge to give a warning of the type that originated in *Longman v R* (1989) 168 CLR 79. TJ was arrested, charged and committed for trial before the amendments took effect but his trials commenced after. A transitional provision specified that the amendments did not apply to proceedings commenced before the amendments. The question was whether "proceedings" had commenced.

McClellan CJ at CL held that as the other provisions of the amending Act affected all "proceedings" from committal through to sentencing the only available approach to the meaning of "proceedings" in the transitional provisions was that it did not operate with respect to a trial which follows the arrest and charging of the offender before 1 January 2007, the date of commencement of the amendments.

Disclosure/subpoena

Where no legitimate forensic purpose behind subpoena for criminal histories of prosecution witnesses

In ***Mann v Commissioner of Police* [2020] NSWSC 369**, the offender appealed from a Local Court decision setting aside a subpoena for the production of criminal records of prosecution witnesses. The magistrate found that the offender had not shown that it was on the cards that the records would materially assist.

The appeal was rejected by Adamson J. Her Honour noted that no attempt had been made to tailor the subpoena to the issues. She distinguished *Bradley v Senior Constable Chilby* [2020] NSWSC 145 as a duty of disclosure case where the spectre of self-defence put the criminal record in issue. Her Honour also distinguished *R v Jenkin (No 2)* [2018] NSWSC 697 – there, it was accepted that there was legitimate forensic purpose and the Commissioner had already produced some documents. The issue was whether privacy could shield criminal histories from a subpoena, and Hamill J held that it could not. Adamson J found that this did not mandate the production of records in an average criminal case.

Local Court trial stayed due to prosecutor's lack of compliance with duty of disclosure

Mr Bradley was arrested in relation to biting a complainant's finger. He was interviewed, wherein he claimed self-defence. He sought to obtain documents from police relevant to

his trial, including his custody management record and the criminal history of the complainant (mainly violence and dishonesty offences). The magistrate refused to enforce the subpoena, denouncing the applicant's "classic fishing expedition" as an attempt to "frustrate the prosecution of this matter by putting the police to additional work" such that the "criminal justice system in New South Wales" would be brought "potentially to a grinding halt".

The decision was overturned on appeal: ***Bradley v Senior Constable Chilby*** **[2020] NSWSC 145**. Adamson J held that the magistrate misconstrued the duty of disclosure – the documents sought were relevant to important issues, in addition to being easy to provide. That a hearing "could" be conducted without these documents did not relieve the prosecutor of the duty. The magistrate's concern for police resources was misguided. Accordingly, the matter was remitted and the trial was stayed pending compliance with the duty of disclosure.

Extent of prosecutor's duty of disclosure – no duty to obtain and produce complainant's mental health records

The applicant was due to face trial charged with sexual intercourse without consent. The complainant was a UK resident on holiday in Australia. There was a note made by an ambulance officer which said: "ANXIETY, DEPRESSION - OFF MEDICATION FOR 4/12 SINCE -> AUSTRALIA". Pursuant to s 5F(3) of the Criminal Appeal Act 1912 (NSW), the applicant sought to appeal the trial judge's refusal to grant a temporary stay of proceedings until the prosecution obtained and produced the complainant's mental health records from the authorities in the United Kingdom. In ***Marwan v Director of Public Prosecutions*** **[2019] NSWCCA 161**, the Court of Criminal Appeal considered the nature of the prosecutor's duty of disclosure, and the circumstances in which it extended to the duty to make inquiries. The Court (Leeming JA, R A Hulme and Adamson JJ) declined to grant the stay, finding that there was no prosecution duty to obtain the complainant's mental health records.

Leeming J, with whom R A Hulme J agreed, examined the "duty of disclosure" noting it was a relatively recent creation. His Honour held that the duty is unusual in that the accused is entitled to a fair trial, and can insist on a stay if they can establish that it will not occur if the prosecution does not adhere to the duty – analogous to the position with respect to legal representation in *Dietrich v The Queen* (1992) 177 CLR 292 . The duty is accommodated alongside r 87 and 88 of the Barristers Rules and Guideline 18 issued by the DPP – but Leeming JA held that neither provided support for the applicant's submission that prosecutors have a positive obligation to obtain further material. Instead, the "right" of the accused "turns upon the risk of unfairness of the trial". Further, his Honour drew a distinction between a prosecutor's duty to disclose information in possession, which is distinct from the "obligation to take further steps to gain inherently confidential information not presently known by the prosecution". Leeming JA noted that there was a distinct absence of authority supporting the proposition. In addition, his Honour noted that if the obligation to investigate was accepted, this would give rise to difficulties – including the equitable and statutory obligations of confidentiality, the time and costs of undertaking the investigation, the privacy and autonomy of the witness, and the fact that the making of such inquiries may discourage complainants.

Assuming that the duty did in fact exist, Leeming JA went on to analyse whether the duty applied to the facts of the case – with reference to *Eastman v Director of Public Prosecutions (No 13)* [2016] ACTCA 65 – on the basis that "there is sound reason to suspect that material exists which might impinge upon credibility or reliability". As an example, this would be relevant if there was actual material in existence that provides a "sound reason" to suggest that an identification witness suffered from a mental illness causing them to see things that weren't there. Here, however, the evidence of the "panic attack" and the ambulance officer's observations did not come close to constituting the material relevant to ground a "sound reason" to suspect that mental health might impact on the credibility of the complainant.

Sexual assault communications privilege – earlier grant of leave to issue subpoena does not govern an application for access to documents produced

At first instance, a District Court judge (Yehia DCJ) granted the respondent leave pursuant to s 298(1) *Criminal Procedure Act 1986* (CP Act) to issue subpoenas to certain psychologists to produce protected counselling confidences. Once the documents were produced to the Court, Berman DCJ granted the respondent access over the objection of the PPC (the Principal Protected Confider within the meaning of the sexual assault communications privilege regime contained in Ch 6, Pt 5, Div 2 CP Act), on the basis that the only obligation of the Court at this point is to simply ascertain that the documents produced are "consistent with" the leave previously granted. Berman DCJ noted, however, that while consistent with the text of the relevant statutory provisions (in particular s 299B(3)), this seemed to be a "strange result" due to its inconsistency with the object of the legislation and the way it obviates the need to consider the matters in s 299D. (His Honour was led to this conclusion by the submissions of counsel very experienced in the criminal law.)

The PPC sought leave to appeal against the access order to the Court of Criminal Appeal, pursuant to s 5F(3AA) of the *Criminal Appeal Act 1912*, arguing that Berman DCJ should have inspected each document by reference to s 299D(1) of the CP Act (stipulating a substantial probative value test and a balancing exercise by reference to the competing public interests): ***PPC v Stylianou* [2018] NSWCCA 300**.

The appeal was allowed. Macfarlan JA accepted the respondent's construction of s 298(2), thereby rejecting the PPC's first argument. It was held that the respondent's application for access to the documents was not an application for leave under s 298(2), because "produce" in s 298(1) means production to the Court, a meaning thereby corresponding to that of "produced" in s 298(2). This conclusion is consistent with the Court's construction in *KS v Veitch (No 2)* (2012) 84 NSWLR 172. His Honour, however, accepted the PPC's second argument, finding that it was within the District Court's implied powers "to do what is necessary to enable it to act effectively within its jurisdiction" (per *Bogeta Pty Ltd v Wales* [1977] 1 NSWLR 139 at 148-149) to control access to documents produced on subpoena to the Court. This is a power that has "long been recognised as a necessary part of litigation procedure, both civil and criminal" (at [20]), and relevant common law principles are preserved by s 306(2) of the CP Act.

Rejecting the respondent's submissions, Macfarlan JA found that satisfaction of one of the stated conditions in s 299B is not a sufficient condition to entitle access to subpoenaed documents. Rather, the operation of s 299B instead "assumes the existence of a power of the Court to grant or withhold access and engrafts a stricture on the exercise of that power" (at [21]). To construe otherwise would be to leave a "significant gap" in the protection against the disclosure of documents containing protected confidences that is the object of the legislation. Accordingly, it would generally be necessary for the Court to inspect the documents and consider the various matters listed in s 299D.

Sexual assault communications privilege

The appellant in ***Rohan v R* [2018] NSWCCA 89** sought leave to issue subpoenas for the production of documents containing protected confidences in relation to sexual assaults he was alleged to have committed. Section 298 of the Criminal Procedure Act 1986 (NSW) provides that leave is required before a person can compel someone to produce a document containing a protected confidence. Section 299D sets out the elements necessary before a court can grant an application. Section 299B makes provision for a court to inspect documents in the event "a question arises under this Division relating to a document". The trial judge refused leave, holding in part that s 299B was irrelevant. The appellant appealed pursuant to s 5F(3) of the *Criminal Appeal Act 1912* (NSW).

R A Hulme J held that the judge had erred in disavowing the availability of the power under s 299B to order the production of the documents for inspection. His Honour considered that it was doubtful that Parliament had in mind the "strained logic" that a court may compel a person to produce documents in order to determine whether that person may be compelled to produce the documents but it was clear that KS v Veitch (No 2) [2012] NSWCCA 266 held that s 299B(4) could be used to determine a question of leave to issue a subpoena under s 298(1) when the documents were not yet available. However, in this case the trial judge was correct to refuse leave because the documents sought would not have had substantial probative value.

Prosecution witness excluded because of having had access to compulsorily acquired material during an ACC examination

A financial analyst from the ATO was seconded to the ACC and was present during the examinations of Messrs Seller and McCarthy prior to them having been charged in relation to an alleged tax minimisation scheme. After they were charged the examination evidence and related documents were disseminated to the Commonwealth DPP. It was held in *R v Seller; R v McCarthy* [2013] NSWCCA 42 that such dissemination should not have taken place. However, in that case a permanent stay of proceedings that had been granted was quashed and the matter was remitted for trial. The accused then sought various orders including that the financial analyst be prohibited from giving evidence in the proceedings and the application in that respect was upheld. The Crown appealed. In ***R v Seller; R v McCarthy* [2015] NSWCCA 76** it was held that if the analyst was to give evidence after having become aware of the compulsorily acquired material there would be an alteration of the accusatorial process inherent in a criminal trial in the fundamental sense described in *X7*

v Australian Crime Commission [2013] HCA 29; 248 CLR 92 and *Lee v R* [2014] HCA 20; 88 ALJR 65.

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

Jason Lee and Seong Won Lee were summoned to give evidence before the Crime Commission. At the time of Jason Lee's examination, the Commission gave a direction, in accordance with s 13(9) of the *New South Wales Crime Commission Act*, that the evidence was not to be published except as directed by the Commission. The same direction failed to be given at Seong Lee's examination but it was accepted that it should have been. Notwithstanding this, the evidence was made available to the DPP after the appellants had been charged, prior to their trial. The Court of Criminal Appeal found that no miscarriage of justice was occasioned because there had been no practical unfairness to the accused. A five-member bench of the High Court ***Lee & Lee v The Queen*** **[2014] HCA 20** overturned this decision. The companion rule to the principle that it is for the Crown to prove the guilt of an accused person is that an accused cannot be required to testify. The question of whether practical unfairness has occurred is not determinative given that the case concerns "the very nature of a criminal trial and its requirements in our system of criminal justice" (at [43]).

Neither express nor implied power for District Court to order costs upon the setting aside of a subpoena

While the applicant was an accused in criminal proceedings for sexual assault offences pending in the District Court, his solicitors issued a subpoena calling for various documents to be produced by the complainant. The trial judge set aside the subpoena at the request of the complainant's solicitors, and also ordered the applicant to pay costs. The ordering of costs was found by R A Hulme J in ***Stanizzo v Complainant*** **[2013] NSWCCA 295** to be beyond the power of the District Court. There is no express conferral of power to do so, and nor does the District Court possess inherent jurisdiction in this respect. The question was whether there was an implied power, "by a strict test of necessity" (at [12]). R A Hulme J referred to *R v Mosley* (1992) 28 NSWLR 735 in which it was confirmed that there is neither express nor implied power for a District Court to order costs in its criminal jurisdiction. Reference was also made to *DPP v Deeks* (1994) 34 NSWLR 523 where Kirby P observed (at 534) that the power to award costs in criminal proceedings must be "very clearly conferred". These two authorities take precedence over *Darcy v Pre-Term Foundation Clinic* [1983] 2 NSWLR 497 upon which the respondent had relied.

Probative value of protected confidence documents must be assessed individually

Mr Williams was charged with sexually assaulting a 14 year old girl. During the cross-examination of the complainant it was found that she was receiving antipsychotic medication. The jury was discharged. Mr Williams was then granted leave to issue a number of subpoenas relating to the complainant's medical history, which involved protected confidence documents. After the documents were produced, he sought access to them. The complainant opposed this. The trial judge subsequently granted access to most of the documents, some of which disclosed prior sexual history. Gleeson JA in ***PPC v***

Williams **[2013] NSWCCA 286** held that the trial judge erroneously assessed the probative value of the material by assessing the material as a whole, rather than each individual document. This approach was inconsistent with s 299D(1)(a) of the *Criminal Procedure Act 1986* (NSW), which sets out the restrictive approach to be adopted when considering whether to grant access to protected confidence documents. Furthermore, the trial judge failed to first determine whether the documents were admissible under s 293 of the Act.

Unlawful disclosure of evidence given before NSW Crime Commission before trial for related offences

The appellants in ***Lee v R; Lee v R*** **[2013] NSWCCA 68** were convicted of a number of drug and weapons offences. The offences related to their involvement in a syndicate that imported pseudoephedrine from Korea in the guise of washing machine powder. Before they were charged, the applicants (and another person who would become a Crown witness) had given evidence in Crime Commission proceedings relating to the syndicate. The Commissioner had provided transcripts of that evidence to the Crown. It was conceded by the Crown, on the appeal, that the dissemination of the transcripts was unlawful. But Basten JA did not find that possession of the material caused a miscarriage of justice. The salient reasons were as follows:

1. If the prosecution possesses inadmissible material potentially relevant to the defence of the accused the trial is not by default unfair,
2. There was no objective unfairness in the conduct of the trial resulting from the dissemination of the transcripts; and
3. No objection was taken at trial, despite the appellant being aware of all the material in the prosecution brief.

Whether availability of Crime Commission transcripts results in fundamental defect in trial for related offences

In a trial of two individuals for tax offences, the Commonwealth Director of Public Prosecutions ("CDPP") was provided with transcripts of evidence both accused had given in a private hearing of the Australian Crime Commission. After argument, the trial judge found that the transcripts should not have been disseminated: in contravention of s 25A(9) *Australian Crime Commission Act 2002* (Cth), the material had the potential to prejudice a fair trial. He granted a permanent stay of the proceedings and the Crown appealed. In ***R v Seller; R v McCarthy*** **[2013] NSWCCA 42**, Bathurst CJ held that the trial judge was right to decide that the transcripts should not have been disseminated, but that the bare risk of a resulting defect in the trial process did not entitle the accused to a stay. It must have been shown that a defect had in fact arisen. In this case, the CDPP case officer had not read the transcripts or known of their contents, and nor had CDPP counsel at trial. The stay was quashed.

Subpoenas and public interest immunity

In the context of a prosecution for cocaine supply a subpoena was issued to the registrar of the Local Court for production of documents to the District Court, including an application

for a search warrant. The Commissioner of Police raised a claim of public interest immunity. The claim was rejected and the Commissioner appealed: ***Derbas v R*** **[2012] NSWCCA 14**. Meagher JA held (at [31]-[32]) that the primary judge was correct in finding that it was "on the cards" that the search warrant application would set out why the police believed that the respondent had cocaine and firearms and the circumstances in which he had come into possession of them. However, the judge erred in only considering whether the identity of a confidential informer identified in the application would be relevant to defences raised, and not in considering the significance of this and other confidential information to the respondent's ability to pursue those defences. The primary judge also erred in taking into account the potential consequences of disclosing the informer's identity. It was held (at [36]) that this was not relevant to balancing the interests of the respondent and the public interest. After analysing the evidence, his Honour (at [44]) determined that the disclosure of the informer's identity "might" be of "some assistance", depending on what happened at trial, but that this was not sufficient to justify disclosure. The appeal was allowed.

FACS reports

Whether documents from Family and Community Services concerning a child are admissible in Supreme Court proceedings where an accused is charged on indictment with offences against that child

The appellant in ***Hayward v R*** **[2018] NSWCCA 104** was charged with various offences against a child. Prior to trial the appellant obtained reports from the Department of Family and Community Services concerning the victim. Section 29(1)(d) of the Children and Young Persons (Care and Protection) Act 1987 (NSW) provides that such reports are not admissible "in any proceedings other than the following proceedings". Certain types of proceedings are then listed. The list does not include proceedings in the District Court but it does include in s 29(1)(d)(iii), "proceedings in relation to a child or young person before the Supreme Court".

The Acting Chief Justice granted an exemption for the indictment to be presented in the Supreme Court, conditional upon the evidence derived from the FACS reports being held to be admissible there. The trial judge ruled that they were inadmissible. The accused sought leave to appeal under s 5F(3) of the *Criminal Appeal Act 1912*. A five-judge bench was constituted because of an arguably conflicting prior decision in the CCA (which the trial judge had not regarded as a binding precedent).

Bathurst CJ held that the phrase "any proceedings" in s 29(1)(d) encompassed criminal proceedings. The legislature had indicated with irresistible clearness an intention to exclude the production of reports or evidence of their contents in criminal proceedings. Further, the phrase "proceedings in relation to a child or young person before the Supreme Court" does not encompass proceedings on indictment for charges in relation to which a child was the victim. The phrase is a reference to proceedings which affect the legal rights and interests or concern the welfare of a child or young person.

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

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

Judge alone trial

Speculation in a judge alone trial application

The respondent ***in Director of Public Prosecutions (NSW) v Farrugia*** **[2017] NSWCCA 197** was charged with offences alleged to have been committed at the home of his former partner. On the day his trial was to be heard in a regional centre he pleaded not guilty and made an application for a judge-alone trial. The basis of the application was an assertion from the bar table that there would be cross-examination of the complainant as to conversations she had with the respondent when he was in custody on remand. The prosecutor consented to leave being granted for the application to be made out of the time permitted in s 132A(1) of the *Criminal Procedure Act 1986*. The trial judge granted the application because the jury would know it was unusual for a person to be refused bail in respect of such charges and they would speculate as to why.

Basten JA regarded this as purely speculative. There was no proper basis for the application to be granted. The judge had no evidence or explanation as to why the conversations were relevant; why it would be necessary to disclose that they occurred while he was in gaol; or why he was in gaol bail refused. No consideration was given to whether directions could cure any prejudice. The appeal was upheld and the judge-alone trial order was quashed.

Basten JA also questioned the appropriateness of the prosecutor having consented to leave being granted for the application to be made out of time. Any appearance that applications are made after the identity of the judge becomes known should be avoided.

Trial by judge alone

A decision to grant a judge alone trial was overturned following a Crown appeal in ***R v Belghar*** **[2012] NSWCCA 86**. The respondent was charged with offences of violence and he applied for a trial by judge alone pursuant to s 132 of the *Criminal Procedure Act 1986* on the basis that he may not get a fair trial before a jury. The offences were alleged to have been committed against his sister-in-law in the context of his conservative religious beliefs. McClellan CJ at CL found (at [104]) the respondent's submission that he feared not having a fair trial by a jury due to his religious beliefs was not supported by evidence before the trial judge. While there may be prejudices harboured by some Australians against Muslim people, there was no evidence before the trial judge that such a prejudice existed or that could not be neutralised by the directions to the jury. It was to be assumed that the normal protections afforded an accused would protect the respondent from an unjust trial. McClellan CJ at CL held that it was therefore not open to the trial judge to allow the application under s 132 (at [108]).

Election to be tried without jury cannot be withdrawn after commencement of trial

Grove J, as the trial judge, noted in ***R v Hevesi-Nagy*** **[2009] NSWSC 755** that there appears to be an absence of a capacity for an accused to withdraw an election to be tried without a jury after the commencement of the trial.

Separate trials

Separate trial application – agreed facts of one co-accused not prejudicial enough to cause real injustice and justify severing indictment – curable by jury directions

Three men were jointly tried for multiple child sex offences. There were agreed facts relating to one co-accused revealing that he had previously committed a child sexual offence, had admitted to a sexual interest in female children, and was on the child protection register. At trial, it emerged that the appellant had been aware of his co-accused's past at the time of their association. The appellant argued in ***DR v R*** **[2019] NSWCCA 320** that as the agreed facts were inadmissible but prejudicial to him, he should have been tried separately.

Brereton JA dismissed the appeal. His Honour held that there was no real injustice. To the extent that there was any prejudice, this was mitigated by the trial judge's directions. The only prejudice was guilt by association, which was both an illogical and improper way to reason. Moreover, the case against the appellant was still otherwise extensive and strong. It contained graphic descriptions of acts, which made the agreed facts less shocking and prejudicial by comparison. His Honour concluded that, since no objection or direction was sought, it was clear that the appellant's knowledge of his co-accused's past was of no real import at trial.

Separate trials not warranted where evidence for each count undermines defences to other counts

Mr Mac was found guilty of four offences: i) attempting to import a marketable quantity of heroin; ii) dealing with the proceeds of crime; iii) supply of large commercial quantities of heroin; and iv) methylamphetamine. He had attempted to collect a parcel containing heroin posted from Vietnam and addressed to his daughter. He claimed that he was unaware that it contained heroin. Upon arrest police found large amounts of cash and quantities of heroin and methylamphetamine in his home, as well as drug related paraphernalia. He claimed that he was minding the drugs for another person and that the money was obtained through gambling. He appealed his conviction on the basis that separate trials should have been ordered for each count. Hidden J in ***Mac v R*** **[2014] NSWCCA 24** dismissed the appeal. The critical issue relating to the attempted importation charge was whether the appellant knew that the package contained heroin or was reckless to that matter. Clearly the evidence relating to the other three counts (the cash, drugs and paraphernalia found in his home) was strongly probative on that question. Similar considerations arose for each count. The fact that the joint trial left the jury with a "great deal of scepticism" about his defences to each charge did not found a legitimate complaint. "A realistic assessment of each defence would not have been possible without the evidence relating to the other counts" (at [34]).

Stay of proceedings

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 empanelled, 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.

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

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

On 15 May 2015 an application for special leave was refused in the High Court: *X7 v The Queen* [2015] HCATrans 109. French CJ found that, "In our view, the absence of practical unfairness arising at trial is always a relevant consideration in the exercise of the discretion to refuse a permanent stay. We are of the view that no grounds have been disclosed which would warrant the grant of special leave".

Permanent stay of proceedings because delay caused difficulties for accused in obtaining evidence

The accused in ***RM v R*** **[2012] NSWCCA 35** was refused a permanent stay of a special hearing. It was alleged that he had committed child sexual assault offences between 1989 and 1992 when he was aged between 18 and 21. The matter was not reported to authorities until 2009. An issue in the special hearing was whether, at the time the offences were alleged to have occurred, he knew right from wrong. In this respect, he bore the onus of proof. He sought a stay of proceedings because of the loss of evidence and witnesses in relation to this issue. The trial judge refused to grant the stay.

The appeal was allowed but on the limited basis that the trial judge appeared not to have considered the application in the context of the appellant having lost evidence on an issue for which he bore the onus of proof. There was otherwise no error in the trial judge's assessment of the application insofar as it concerned the loss of evidence relating to the question as to whether the offences had been committed where the Crown bore the onus of proof. In the latter situation, a trial judge can give directions or warnings against the use of evidence or point to the danger, due to unacceptable delay, of a finding adverse to the accused. The Court remitted the matter for the trial judge to further consider.

Permanent stay of proceedings because of adverse publicity

In ***Dupas v R*** **[2010] HCA 20; 267 ALR 1**, the High Court of Australia dismissed an appeal against the refusal of a permanent stay of proceedings which had been sought in relation to the appellants retrial for murder. He had earlier been convicted of two other murders. It was held that the unfair consequences of prejudice or prejudgment were capable of being relieved by appropriate directions to the jury.

Chapter 3
Trial

3. TRIAL

A. Trial procedure

Arraignment

Arraignment of self-represented accused – trial not a nullity where judge directed that pleas of not guilty be entered

The applicant was a self-represented accused in a District Court trial for drug-related offences. He had been arraigned at an earlier stage in pre-trial proceedings (the February arraignment). At the re-arraignment stage of the trial, the applicant was told by the judge that he would not be asked to personally enter his pleas because he was not legally represented. Instead, the judge indicated that he would direct that pleas of not guilty be entered. The applicant was ultimately convicted. In ***Amagwula v R* [2019] NSWCCA 156**, one of the appeal points was that the trial was a nullity because of the trial judge's decision to direct that pleas of not guilty be entered for the applicant rather than the applicant personally answering "not guilty" as each charge was read.

Basten JA (with whom Lonergan J agreed, and Button J reaching the same conclusion but with different reasons) dismissed this ground. Basten JA first referred to facts in the English case of *R v Williams* [1976] 1 QB 373. The principle was extracted as follows: "[i]nsistence on an express plea of not guilty by the defendant himself is no longer a necessary safeguard of justice where that is the intended plea and where the ensuing proceedings are precisely what they would have been if the accused had himself made the plea in plain terms". Next, Basten JA held that as the requirement of arraignment is provided by s 130(3) of the *Criminal Procedure Act 1986* (NSW), the issue of consequences is a matter of statutory construction. His Honour held that as the statute did not prescribe a particular procedure, the legislature did not intend to disturb the way arraignments are conducted as a matter of general law. In conclusion, Basten JA held that "the expression of the plea by the accused is no longer a necessary safeguard of justice" for the following reasons: first, the principle in *Williams*; second, because the accused had made such a plea in identical terms at an earlier stage (the February arraignment); and finally, because the accused's silence when the judge directed the entry of the pleas should be treated as a waiver of the right.

No requirement to re-arraign accused following empanelment

In ***DS v R* [2012] NSWCCA 159** it was contended that the trial was a nullity because the accused had not been re-arraigned after the jury was empanelled. The Court rejected this rather novel argument.

Commonwealth trial procedure

Trial on indictment for Commonwealth offences must be by jury

Federal jurisdiction to try a person for a Commonwealth crime is conferred on the Supreme and District Courts under s 68 of the *Judiciary Act 1903* (Cth). Section 68 is expressly stated to be subject to s 80 of the Constitution, which provides that the trial on indictment for any Commonwealth offence "shall be by jury". The applicant in ***Alqudsi v The Queen*** **[2016] HCA 24; (2016) 258 CLR 203** was indicted on seven counts of a Commonwealth offence. He filed a notice of motion in the Supreme Court seeking a trial by judge alone order pursuant to s 132 of the *Criminal Procedure Act 1986* (NSW). The notice of motion was removed into the High Court to consider whether s 132(1)-(6) is incapable of being applied to the applicant's trial by s 68 of the Judiciary Act because their application would be inconsistent with s 80 of the Constitution. That question could only be answered favourably to the applicant by overruling *Brown v The Queen* (1986) 160 CLR 171. The Court held that s 132 was incapable of application to the applicant's trial. Kiefel, Bell and Keane JJ held that nothing in the decisions of the High Court since Brown supports the proposition that the plain words of s 80 may be read as subject to exception when a court assesses it to be in the interests of justice that the trial on indictment of a Commonwealth offence be by judge alone. The commands of s 80 are neither ambiguous nor qualified; they allow no mode of trial other than by jury. This is a sufficient reason for rejecting the invitation to re-open and to overrule Brown. Further, the contention that the Brown construction neglects consideration of constitutional context and purpose should be rejected.

Indictments

Courts should supervise Form 1 use in accordance with statute

The offender in ***Ghalbouni v R*** **[2020] NSWCCA 21** pleaded guilty to drug offences. Seven offences were taken into account on a Form 1, including the deemed supply of MDMA. However, this offence did not actually arise on the agreed facts as the MDMA was for personal use. Hidden AJ allowed the appeal and re-sentenced the offender, stressing the importance of courts and practitioners heeding the procedure for Form 1 offences outlined in s 33 *Crimes (Sentencing Procedure) Act 1999* (NSW).

No abuse of process in filing second ex officio indictment after proceedings discontinued on the first

Proceedings against the appellant in ***Derley v R*** **[2016] NSWCCA 60** were disjointed largely due to an ongoing police investigation including the inconsistent cooperation of a key witness. He was charged with drug supply and knowingly dealing with proceeds of crime. The charges were dismissed by a magistrate following committal proceedings. The DPP then filed an ex officio indictment. The appellant submitted a number of "no bill" applications but the DPP advised him the matter would proceed to trial. Over a month later, the DPP directed that no further action was to be taken in relation to the indictment and a court order was made to that effect. The DPP later filed a second ex officio indictment and the appellant made an application for a permanent stay of proceedings. The judge refused the application, finding the proceedings were not an abuse of process.

The appellant sought leave to appeal against that decision pursuant to s 5F(3) of the *Criminal Appeal Act 1912*. One of the grounds of appeal was that the judge did not refer to the issues of whether the filing of the second ex officio indictment was a form of double jeopardy or analogous to issue estoppel. Payne JA rejected the ground and dismissed the appeal. The primary judge correctly found that in all the circumstances the termination of the first ex officio indictment did not mean that the filing of the second one gave rise to double jeopardy. The order of the court bringing to an end the proceedings on the first ex officio indictment did not imply a failure on the part of the prosecution to make out the charge or some ingredient therein. Nor did his discharge at committal afford him protection from subsequent prosecution on an ex officio indictment based on the same facts. Furthermore, there are manifest difficulties in the way of accepting the appellant's submission that the judge did not consider an "analogy" between this matter and issue estoppel. For one, the principle of issue estoppel does not apply in the criminal law.

Change in law during period alleged in indictment

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

Legislative change did not affect conviction

The appeal against conviction in ***MJ v R* [2013] NSWCCA 250** arose because three counts of aggravated indecent assault brought against the appellant used the language of s 61E(1A) of the *Crimes Act 1900* (NSW). This provision was repealed on 17 March 1991 and replaced with ss 61L and 61M. The evidence was incapable of establishing whether the offence was committed before or after this date. The appellant accepted that the counts could be established under the new s 61M. However, he claimed that the counts failed to allege an offence known to the law (because neither provision covered the entire period referred to in the count) or alternatively were bad for duplicity (because two different offences were alleged). Macfarlan JA dismissed the appeal. He accepted the Crown's submission that the conduct charged in the counts was unlawful at all times in the period referred to "and the fact that the source of the unlawfulness changed did not invalidate the appellant's convictions" (at [29]). It was also recognised, as in *R v MAJW* [2007] NSWCCA 145; 171 A Crim R 407, that if the factual matters alleged would constitute offences under more than one legislative provision, the offender should be sentenced on the basis of the lower maximum penalty. Furthermore, there was no unfairness to the appellant arising out of the fact that the statutory provision which rendered the appellant's conduct unlawful was not identified; the essential factual ingredients of the charges were clear in the indictment.

Inadequately particularised charges of aggravated sexual assault

Mr Tonari was convicted of offences of sexual intercourse without consent in circumstances of aggravation (s 61J Crimes Act). The aggravating feature cited in the indictment was the threatened infliction of actual bodily harm to the victim. The indictment was defective in that it did not disclose that the prescribed aggravating feature required the threats to be conveyed "by means of an offensive weapon or instrument". The defect was not noticed at trial. Mr Tonari appealed his conviction before he was sentenced for the subject offences: ***Tonari v R*** **[2013] NSWCCA 232**. He relied, inter alia, on two grounds: that the indictment disclosed no offence known to law and the trial was a nullity; and that the defect led the trial judge to misdirect the jury.

Johnson J rejected the first ground. The indictment disclosed "an imperfect formulation of a known offence" (at [95]). It was a case of incorrect particularisation. But a real consequence was the jury was given incomplete directions of law on the circumstance of aggravation relied upon. There was some very slight evidence of an implement having been used, but the jury was not directed to make a finding on that issue because of the way the indictment was framed. The appropriate course was for the court to substitute verdicts for the non-aggravated form of the offence (s 61I) by means of s 7(2) *Criminal Appeal Act 1912* (Cth).

Duplicity

Chapman v R **[2013] NSWCCA 91** concerned a single charge that disclosed two separate offences. The kitchen pantry of Mr Chapman's house was found to contain 224 tablets of methylamphetamine. Five further tablets were found in his car, of a total weight less than that needed for deemed supply. He was charged with a drug supply offence. Mr Chapman moved for the charge to be quashed on the grounds of duplicity. His motion was refused, and he appealed to the Court of Criminal Appeal under s 5Fof the *Criminal Appeal Act 1912*.

Adamson J agreed that the indictment revealed duplicity. Mr Chapman could be convicted of the offence if the jury were satisfied that he was in possession of the deemed supply quantity in the pantry; or if he was in possession of the five tablets in the utility for the purpose of supply; or both. It would not be possible to ascertain definitively on what facts the jury reached their verdicts, or whether they were unanimously convinced of one ground. (On the appeal, the Crown indicated that it would not rely on the five tablets being for supply, rendering the point moot.)

Whether ex officio indictment filed after Local Court refuses leave to proceed on indictment is an abuse of process

Mr Iqbal was charged with recklessly causing grievous bodily harm. The police prosecutor did not elect to have the matter heard on indictment, and his trial was to proceed in the Local Court. Before the hearing date, the DPP took over the matter and applied for leave, under s 263(2) *Criminal Procedure Act*, to make a late election to have the matter proceed by way of indictment. The Court refused leave, but the DPP, evidently determined, filed an ex officio indictment in the District Court. Mr Iqbal sought a stay of the District Court

proceedings. He contended that the circumvention of the Local Court determination by the DPP was an abuse of process because of the adverse impact it had upon public confidence in the proper administration of justice. The stay was refused, and Mr Iqbal appealed.

In ***Iqbal v R*** **[2012] NSWCCA 72**, McClellan CJ at CL confirmed the refusal to grant a stay. First, his Honour held that the DPP had the necessary power. The applicant disavowed any argument that the legislative scheme excluded the filing of an ex officio indictment where s 263 leave was refused. His Honour drew a comparison between Mr Iqbal's circumstances and the situation where a magistrate declines to commit an accused person, both being decisions of the Local Court preventing a matter going to indictment. Since filing of an ex officio indictment is permissible in the latter case, there was no technical reason why it was not in relation to Mr Iqbal. Second, it was not an abuse of process. The applicant did not argue that unfair prejudice was occasioned by the ex officio indictment. In response to the allegation that public confidence would be impaired, McClellan CJ at CL merely observed, at [24]:

> "My present understanding of the facts to be alleged against the applicant are such that public confidence in the criminal justice system may be adversely impacted if the matter is not prosecuted on indictment."

Indictments - consequences of failure to present indictment within time

Section 129 of the *Criminal Procedure Act* 1986 provides that an indictment is to be presented within 4 weeks after the committal. If an indictment is presented out of time, the court has the discretion to proceed with the trial, adjourn, or take such other action as it thinks appropriate. In determining how to exercise the discretion not to proceed with the trial, the question is whether it was in the interests of justice to allow the trial to proceed notwithstanding that the indictment was out of time: ***JSM v R*** **[2010] NSWCCA 255**. In this case the delay was caused by protracted and ultimately unsuccessful negotiations on questions of the accused pleading guilty to lesser charges and giving evidence against co-offenders. McClellan CJ at CL (at [43]) identified some of the considerations relevant to the issue, such as the public interest in the appellant facing trial; the propriety in negotiation between an accused and the prosecutor and any agreement arising; and the potential prejudice to the appellant. The appeal against the trial judge's refusal of a permanent stay of proceedings was dismissed; the finding being that there was no relevant prejudice to the appellant.

Failure to aver essential element of an offence in an indictment:

In ***Doja v R*** **[2009] NSWCCA 303**, two of the charges against the accused were expressed without reference to the accused's knowledge or reckless disregard of the truth. These omissions were an oversight that was not appreciated by the judge or counsel at the trial. On appeal it was argued that the verdicts in relation to those counts were invalid.

The appeal was dismissed. Spigelman CJ held that the averment of the mental element could be said to be necessarily implied and that the defect could be said to be formal for the purposes of sections 16 and 17 of the *Criminal Procedure Act 1986*. McClellan CJ at CL, with

whom Grove J agreed, was of the view that the appellant was properly convicted whether by common law doctrine or the application of the proviso.

Judge alone trials

Warnings in judge-alone trials – unreliability of children s 165A(2) Evidence Act 1995 (NSW) – enough to expressly or implicitly take subject matter of warning into account in reasons

The offender in **GBB v R [2019] NSWCCA 296** was convicted in a judge-alone trial of sexually assaulting his 4-year-old half-sister. There was strong evidence of contemporaneous complaints to multiple people, as well as an "adamant" and "forthright" interview with police. The issue on appeal concerned a recantation made by the complainant at the end of cross-examination. The judge warned herself, in line with s 165A(2) Evidence Act 1995 (NSW) and s 133(3) Criminal Procedure Act 1986 (NSW), of the potential unreliability of this recantation. The offender contested that this warning applied to the whole of the evidence – not an isolated part – and was not meant to be used to undermine evidence favourable to the offender.

Basten JA accepted these propositions, but held that there was no miscarriage of justice and dismissed the appeal. It is the subject matter of the warning rather than the wording which must be taken into account. The trial judge was naturally required to assess reliability and weigh up the evidence in light of any unreliability. Provided that this was evident in the reasons, whether or not the judge actually warned herself was beside the point.

Reasons in trial by judge alone

***CJ v R* [2012] NSWCCA 258** was an appeal from a trial by judge alone for a number of sexual offences. There was no dispute at trial over whether the offences had been committed; the controversy was the availability of a special verdict arising from the accused's asserted mental illness. In refusing the mental illness defence, the trial judge rejected the evidence of Dr Nielssen, one of two experts, who had specialised knowledge in bipolar disorders, the relevant diagnosis. On the appeal, Hall J held that the trial judge's simple statement that he preferred one witness to another, without more, was not a proper exercise of judicial decision making.

Judge alone trial - extent to which a trial judge can ask questions of witnesses

In ***FB v R; R v FB* [2011] NSWCCA 217**, a ground of appeal concerned the trial judge's questioning of certain witnesses. It was contended that this was excessive; at times inappropriate, in that it bolstered the prosecution's case; and that it created a real danger that the trial was unfair. Whealy JA rejected the ground, finding (at [110]) that the trial judge's interventions were "moderate, balanced, necessary and proper in every respect". His Honour observed at [90]:

> "Most of the authorities which underline the caution to be properly exercised by the trial judge during a criminal trial relate to trials where there is a jury. On the other hand, as

might be expected, there are cases that recognise the greater latitude to be afforded to the questions asked by a trial judge in the context of a civil trial. […] In view of the statutory framework now surrounding criminal trials in New South Wales, it may be appropriate to restate the accepted principles, but with particular emphasis on the fact that it may be expected that henceforth more criminal trials will be conducted without the benefit of a jury. This may underline the proposition that, in appropriate circumstances, a judge sitting on a criminal trial without a jury will be entitled, within reasonable limits, to explore issues of fact with both Crown and defence witnesses."

Jurisdiction

Resident of another State charged with a State crime – s 80 of the Constitution has no application and majority verdict available

The appellant in ***Rizeq v Western Australia*** **[2017] HCA 23; (2017) 262 CLR 1** was charged with two offences against s 6(1)(a) of the *Misuse of Dugs Act 1981* (WA) in the District Court of Western Australia. The jury was unable to reach a unanimous verdict on either charge, but he was convicted after majority verdicts of guilty were taken for both offences. The appellant was a resident of New South Wales at all relevant times. The District Court was exercising federal jurisdiction under s 39(2) of the *Judiciary Act 1903* (Cth) because the trial involved a matter "between a State and a resident of another State": s 75(iv) of the Constitution. The appellant contended that, because the District Court was exercising federal jurisdiction, the *Misuse of Drugs Act* could not apply as a state law, and instead was picked up and applied as a law of the Commonwealth by operation of s 79 Judiciary Act. He thus argued that he was convicted of an offence against a law of the Commonwealth and the jury's verdicts had to be unanimous: s 80 Constitution. The High Court unanimously dismissed his appeal. Bell, Gageler, Keane, Nettle and Gordon JJ held that s 6(1)(a) of the Misuse of Drugs Act applied to impose criminal liability on him as a law of Western Australia despite the fact that the jurisdiction subsequently exercised by the District Court was federal jurisdiction. Section 79 of the Judiciary Act was not needed or engaged to pick up and apply the text of s 6(1)(a) of the *Misuse of Drugs Act* as a law of the Commonwealth. Section 80 of the Constitution had no application. Where s 79 of the Judiciary Act was engaged, was in picking up and applying the text of s 114(2) of the *Criminal Procedure Act 2004* (WA) as a law of the Commonwealth.

Mental health

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.

Sleeping accused not unfit to be tried

A large number of detainees at the Villawood Immigration Detention Centre, including Taleb Feili, were jointly tried for offences of riot and affray alleged to have occurred in April 2011. Well after the commencement of the trial in February 2013, Mr Feili's counsel raised a question as to Mr Feili's fitness to be tried on the basis that he was asleep at times during the trial. Psychiatric reports were obtained by both parties and after an inquiry into Mr Feili's fitness the trial judge concluded that he was not unfit to be tried. The trial resumed and Mr Feili was convicted. He subsequently appealed his conviction arguing that the trial judge erred in finding him fit to be tried; in the alterative that the trial judge failed to take into account that for a period of nine weeks Mr Feili was asleep and unable to participate in his trial and further in the alternative that the trial judge erred in identifying ameliorative measures that might be taken to ensure Mr Feili was awake for the duration of the trial. In ***Feili v R*** **[2015] NSWCCA 43** the Court dismissed the appeal, finding that the trial judge took the correct approach in determining the issue of fitness. The Court (Hoeben CJ at CL, Johnson and Davies JJ) described the approach of the trial judge as a "practical, reasonable and commonsense approach to the issues posed at the fitness inquiry" ([at 53]).

Miscellaneous court orders

Strip search footage of young Aboriginal woman – whether magistrate had power to order matter heard by female magistrate and exclude men from viewing evidence and courtroom

TR sought orders in the Children's Court that a matter be heard by a female magistrate, men be excluded from viewing the evidence and the venue changed accordingly. TR argued that the cultural shame arising from the viewing by men of sensitive parts of her body would scuttle her will and ability to defend the charges, and thereby threaten her right to a fair trial. The magistrate refused, noting that the footage might not need to be shown and, if it did, the sensitive parts could be pixelated.

TR appealed: ***TR v Constable Cox & Ors*** **[2020] NSWSC 389**. Wilson J held, dismissing the appeal, that most of the magistrate's rulings were not "interlocutory orders" and so were not appellable. In addition, the magistrate had no power to transfer the matter to a female magistrate, exclude men from the courtroom or suppress evidence only in relation to men – therefore, there was no error of law in refusing to do so. Wilson J endorsed a practical solution, noting that while the court must recognise an individual's interests in cultural

traditions, privacy and modesty, this recognition will be qualified by the public interest in resolving proceedings and the proper administration of justice.

Obligation to make confiscation order where defendant has benefited from drug trafficking

R v Hall **[2013] NSWCCA 47** concerned the making of a Drug Proceeds Order against Mr Hall, who had pleaded guilty to supplying cannabis and knowingly dealing with proceeds of crime. Conlon DCJ ordered the forfeiture of cash found in the possession of Mr Hall, but declined to grant the Drug Proceeds Order on the basis that the information before him was too scant to form a proper assessment. The Court of Criminal Appeal held that the judge must have been satisfied that the dealer had received a benefit from drug trafficking, because he had ordered the forfeiture of cash. The Court held that he should have gone on to make a Drug Proceeds Order. The *Confiscation of Proceeds of Crimes Act 1989* requires, once that conclusion is reached, an assessment of appropriate order having regard to the available information, notwithstanding that it may be vague or unsatisfactory.

Power of the District Court to make screening orders

In ***BUSB v Director-General of Security*** **[2011] NSWCA 49**, the appellant was charged with a number of offences arising out of an allegation that he shot at a police officer. At trial, the judge ordered that, inter alia, certain witnesses being ASIO officers give their evidence in such a way that the witnesses could not be seen by the appellant, but could be seen by all other persons permitted to be present in court. Ultimately, the jury could not agree on a verdict and the so a re-trial was ordered. Similar screening orders were made in respect of those witnesses by the new trial judge, and the orders were challenged by way of an appeal under s 5F of the *Criminal Appeal Act 1912*.

Spigelman CJ held (at [36]) that since the appellant accepted that the District Court had the power to make screening orders, it was unnecessary to consider the issue further. The Chief Justice observed (at [54]) that the question was "not one of power, but of the exercise of a power", and proceeded to consider whether the trial judge had erred in making the orders. His Honour (at [83] – [85]) outlined some of the competing interests involved, including the right to a fair trial (i.e. the prejudice to the accused, the protection of witnesses) and the administration of justice.

The Chief Justice at [81] rejected the submission that the orders impinged upon the effective cross-examination of the witnesses:

> "The only identified effect of the accused seeing the faces of the two ASIO eyewitnesses was the possibility that the accused's memory may be triggered about their ability to observe what they say they observed. I am not satisfied that the degree of impingement of effective cross-examination in the present case is of significance."

Non-publication/suppression orders

No jurisdiction to order costs in suppression applications within criminal jurisdiction

Messrs Martinez and Tortell were awaiting re-trial for murder, following a successful conviction appeal. Mr Tortell sought a non-publication order under the *Court Suppression and Non-publication Orders Act 2010* (NSW). This was opposed by Fairfax. The application was refused and Fairfax sought costs: ***R v Martinez; R v Tortell (No. 7)*** **[2020] NSWSC 361**. Johnson J held that the Court was exercising criminal jurisdiction when it dismissed the application, and that therefore there was no jurisdiction to order costs.

Non-publication orders – desirability of acting quickly and parties' obligation to assist the Court

The applicant was heard in the Court of Criminal Appeal on 26 September 2018, judgment allowing the appeal and remitting the matter for resentence in the District Court was handed down on 21 November 2018, but the Court was only alerted to non-publication and suppression order issues involving the applicant on 18 December 2018. Subsequently, the published judgment was taken down from Caselaw and a relevant Notice of Motion filed on 25 January 2019. On 31 January 2019, Culver DCJ resentenced the applicant and imposed non-publication and suppression orders. In ***Darren Brown (a pseudonym) v R (No 2)*** **[2019] NSWCCA 69**, the Court of Criminal Appeal asserted that the kind of practice at the NSW Police and DPP which led to this matter's particular procedural history should not happen again. The Court emphasized that it relies on the parties to bring applications for non-publication or suppression orders as well as relevant lower court orders or decisions to its attention prior to or at the hearing. The Court expressed concern as to the way Culver DCJ was placed in the "invidious" position of making orders affecting the present matter heard in the Court of Criminal Appeal, as well as the fact that the parties did not alert the Court to the fact that her Honour's orders had been made.

Non-publication orders: when is an order "necessary" to protect a person's safety?

Following negative publicity after the applicant was sentenced for historical sexual offences, the applicant applied to the District Court for a non-publication order pursuant to s 7 of the *Court Suppression and Non-Publication Orders Act 2010* (NSW). The applicant appealed to the Court of Criminal Appeal after a District Court judge refused to make the order. The Court allowed the appeal in ***AB (A pseudonym) v R (No 3)*** **[2019] NSWCCA 46**. Part of the Court's reasons dealt with the proper test for determining whether the making of an order is "necessary to protect the safety of any person" under s 8(1)(c). The Court rejected the "probable harm" approach taken by the District Court judge, preferring the "calculus of risk" approach.

To reach this conclusion, the Court approved the approach to the meaning of "necessary" taken by Basten JA in *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52; [2012] NSWCCA 125 at [46] in which the word "is used to describe the connection between the proposed order and an identified purpose", and where its meaning "depends on the context in which it is used". The Court approved Basten JA's approach in *Fairfax v Ibrahim* as consistent with the approved "calculus of risk" approach. This approach effectively advanced the "evident purpose" of s 8(1)(c) which was found to "provide a

mechanism to protect the safety of persons who would otherwise be endangered by publication of proceedings in accordance with the principles of open justice" and approved what was said by Nettle J in *AB (A Pseudonym) v CD (A Pseudonym)* [2019] HCA 6 at [15].

Thus, the Court held that the correct approach to the making of an application with reliance upon s 8(1)(c) required the Court to "consider the nature, imminence and degree of likelihood of harm occurring to the relevant person", which means an order may still be made if the risk isn't more than a mere possibility but that the prospective harm is very serious. In the present case, the Court held that the primary judge erred by adopting the "probable harm" approach by requiring the applicant to prove that a real risk to physical safety was probable, as well as by not taking account of evidence of the possibility of harm flowing from the applicant's and applicant's wife's mental conditions. The Court held that there was no intention in the statutory wording in s 8(1)(c) that it be limited to physical safety but includes psychological safety. On this basis, the Court considered that evidence of the risks to the applicant's psychological safety meant that it could potentially affect his physical safety and should have been taken into account by the District Court judge.

Not necessary to make non-publication order concerning offender's name when identification is already prohibited by legislation

The appellant in ***R v AB*** **[2018] NSWCCA 113** pleaded guilty to a number of historical child sex offences, some of which occurred when he was under the age of 18 such that publication of his name was prohibited under s 15A. Despite this the judge made an order under the *Courts Suppression and Non-publication Orders Act 2010* prohibiting the publication of the offender's name. The Crown appealed on the basis that the order was unnecessary for any purposes under the Act. It was held by Meagher JA that the order was not necessary. Section 15A of the *Children (Criminal Proceedings) Act 1987* (like s 578A of the *Crimes Act 1900* in relation to complainants in prescribed sexual offence proceedings) automatically prohibits publication of anything that would identify the person.

Non-publication orders – in extreme cases, orders can be made in relation to an entire criminal trial until the conclusion of a related trial – but take down orders will fail the test of necessity when they are futile.

There were two murder trials relating to the Brothers for Life "turf war" which the primary judge ordered to be heard separately, with the second trial to commence immediately after the first finished. ***Nationwide News Pty Ltd v Quami*** **[2016] NSWCCA 97** concerned orders made under the *Court Suppression and Non-publication Orders Act 2010*. The trial judge prohibited publication of all evidence and submissions in the first murder trial and also ordered certain media entities to remove specified articles from their websites. Nationwide News and the ABC sought leave to appeal against both the non-publication and take down orders.

The Court (Bathurst CJ, Beazley P and Hoeben CJ at CL) dismissed the appeal in relation to the non-publication order. The key issue was whether the orders made were "necessary" within the meaning of s 8 of the Act. The Court held that the non-publication order was necessary for the fair trial of the accused in the second trial. This was an exceptional case.

There were no practical alternatives capable of ensuring that that media coverage of the first trial did not prejudice the second trial. For example, delaying the second trial would prolong risks to witnesses; and using pseudonyms for the accused would fail to overcome the fact that the cases had unique identifiers allowing anyone following the media to make the connection between the two trials. On the trials being conducted back-to-back, the Court noted that the justification went well beyond administrative reasons; determining charges as soon as possible and protecting the integrity of evidence (from both threats to witnesses and fading memories) are fundamental to the administration of justice.

The Court allowed the appeal in relation to the take down orders. The main question on appeal was whether such orders can be made on the sole basis that a juror might defy a trial judge's direction not to conduct internet searches. The Court held that the take down orders would not result in the articles being sufficiently removed from the internet for the orders to be effective, rendering the orders futile. Whilst the removal of one item would have had an effect in reducing the information available on the internet, the Court pointed to two factors; first, much of the material was old, and second, a trial judge will be able to give adequate directions to jury that they must determine the matter on the evidence.

Non-publication order in the nature of an internet take down direction

A District Court judge made an order pursuant to the *Court Suppression and Non-publication Orders Act 2010* prohibiting publication within the Commonwealth of Australia of material containing any reference to other criminal proceedings or unlawful conduct with which three accused men had been involved. Section 8 of the Act provides the grounds upon orders may be made with each expressed in terms of whether they are "necessary" to achieve a certain purpose; for example, "necessary to prevent prejudice to the proper administration of justice" (s 8(1)(a)). An appeal was brought by media companies: ***Fairfax Digital Australia and New Zealand Pty v Ibrahim*** **[2012] NSWCCA 125**. Basten J (at [71] ff) identified a number of problems with the order, not limited to but including the terms in which it was expressed. One of the problems was that the order was ineffective and so, could not be said to be "necessary". The order was set aside.

Publication of the name of a deceased child

Two accused were charged with the manslaughter of their infant child: ***R v Thomas Sam; R v Manju Sam (No 1)*** **[2009] NSWSC 542**. The trial judge was called upon to consider the provisions of s 11 of the *Children (Criminal Proceedings) Act 1987*. Johnson J noted that the deceased child was obviously not in a position to be affected by any broadcast or publication. He held that the general public interest in open justice should prevail.

In ***R v BW & SW (No 2)*** **[2009] NSWSC 595** and ***R v PC; R v NLH*** **[2010] NSWSC 533** R A Hulme J considered the same issue in cases of parents charged over the death of their child. However, in those cases it was persuasive that there was potential for publication to have an adverse impact upon the deceased's sibling(s). In *BW & SW* the deceased was identified only by her middle name, Ebony. In *PC & NLH* the child was not identified at all.

Note that s 11 of the *Children (Criminal Proceedings) Act 1987* was repealed and replaced by sections 15A to 15G by the *Children (Criminal Proceedings) Amendment (Naming of Children) Act 2009* as of 11 December 2009 but in their practical effect the new provisions are not dramatically different.

B. Procedural fairness/right to a fair trial

Judgments

Disqualification of license removal orders – importance of giving adequate reasons

In ***Roads and Maritime Services v Farrell*** **[2019] NSWSC 552**, Roads and Maritime Services (RMS) brought six cases in which it asserted that the Local Court did not have jurisdiction to entertain applications purportedly brought under a scheme contained in Ch 7, Pt 7.4, Div 3A of *Road Transport Act 2013* (NSW), in which certain eligible disqualified drivers could apply to have disqualification periods removed under s 221B. The applicants in the six cases identified by the RMS in these proceedings were ineligible either because they had a certain serious offence on their record or because they had not served out the relevant offence-free period.

One of the issues in each of the six separate matters giving rise to Schmidt J's decision to quash the orders was that the magistrates had given inadequate reasons for the making of the orders. Referring to *DL v The Queen* [2018] HCA 26, her Honour noted that reasons will be inadequate "if a necessary step to the final conclusion is not explained". Because it is "an incident of the judicial process" (referring to *Housing Commission (NSW) v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 per Mahoney JA), this duty arises even when an application is uncontested. In relation to a s 221B application, Schmidt J held that a magistrate's reasons must include the basis of satisfaction of the Local Court's jurisdiction, consideration of the mandatory considerations under s 221B(2), and an explanation of why the Court's discretion has been exercised in the particular circumstance.

Revision of judgments

The respondent in ***R v Lazarus*** **[2017] NSWCCA 279** was acquitted after a judge-alone trial for an offence of sexual intercourse without consent knowing the complainant did not consent. In relation to the knowledge element, s 61HA(3) of the *Crimes Act 1900* states that the trier of fact is not to have regard to "any self-induced intoxication of the person".

In delivering her judgment, the trial judge stated that she was "not" entitled to take into account self-induced intoxication, yet at one point said, "I am entitled to take into account his level [of] self-induced intoxication". Her Honour revised the transcript of her judgment a number of times, and inserted "not" before "entitled". The Crown appealed against the acquittal. One issue was whether the trial judge was permitted to insert a word that she had not in fact said.

The Court of Criminal Appeal (per Bellew and Davies JJ, Hoeben CJ at CL dissenting on this point) dismissed the appeal. Bellew J noted that a judge has a restricted power to revise his or her reasons. His Honour cited *Spencer v Bamber* [2012] NSWCA 274 in which the Court of Appeal held that in deciding what is an impermissible alteration one must consider not only whether the alteration is substantial, but also where, because of the error, the reasons as expressed do not reflect what the judge in fact meant to say. The Court in Spencer held that the test of whether a revision is permissible is an objective one and requires consideration of the degree to which the reasons conform to the arguments presented in court. In this case it was held that there could be no doubt that the judge knew she could not take into account intoxication, and the revision conformed wholly to the arguments presented in court and her Honour's previous correct statement of the law.

Judgments - failure to give reasons in respect of a separate trial application

In ***Madubuko v R*** **[2011] NSWCCA 135**, the appellant was tried with two co-accused in relation to the importation of border controlled drugs. Evidence of a police interview of one of the co-accused was admitted (with directions that it was only admissible in respect of that co-accused). Following the admission of the evidence against the other co-accused (with his consent), the appellant applied for a separate trial but was refused. The trial judge indicated that reasons would be published later but they never were. The appellant appealed against the trial judge's failure to give reasons. Hodgson JA held that while the failure to give reasons generally constitutes an error of law, it does not necessarily require that an appeal be upheld. For that to be the case there needed to be "such a fundamental procedural irregularity… to warrant the setting aside the appellant's convictions" (at [24], citing *Evans v R* [2006] NSWCCA 277 at [272]). In this case, the Court could determine for itself whether the decision was correct. It was.

Procedural fairness issues

Prosecution must present case fully and fairly – mixed evidence should not be withheld for strategic reasons

The applicant in ***Nguyen v The Queen*** **[2020] HCA 23** threw two beer bottles at the complainant. In his police interview, he admitted to throwing the bottles but said that he did so in self-defence. The prosecutor decided not to lead the interview for forensic reasons – namely, the accused would be forced to give evidence in order to raise self-defence. The majority in the High Court (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ) held that this was impermissible, there being a fundamental prosecutorial duty to present the Crown case fully and fairly. Evidence that is both inculpatory and exculpatory must be led by the Crown, even where doing so would be forensically disadvantageous.

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.

Denial of procedural fairness

In a defended hearing on the charge of disobeying a red traffic light, the prosecutor indicated to the magistrate that he intended to call four police witnesses. When her Honour was informed that only two of the officers witnessed the offence, she indicated that she did not want to hear from the other two, although they were able give evidence to resolve an issue about whether it was the defendant's vehicle that was involved in the offence. She said that calling the additional officers would not assist and that she believed the first two officers were not credible. The charge was dismissed and the DPP appealed.

In ***DPP (NSW) v Elskaf*** **[2012] NSWSC 21**, Garling J found that the prosecution had been denied procedural fairness by the magistrate peremptorily refusing to admit the evidence of the two officers. His Honour held (at [44]) that the magistrate should have permitted the witnesses to be called and, if the evidence was not relevant, it could have been objected to. Alternatively, its relevance could have been tested on a voir dire. At [42], Garling J stated:

> "It is no part of the a presiding judicial officer's function to take over the conduct of the case of one or other party and, in effect, summarily to prevent the calling by the prosecutor of any evidence where the prosecutor considered the evidence to be relevant to making out the charge: see Director of Public Prosecutions v Wunderland [2004] NSWSC 182 at [21] per Sully J."

Recusal

Application for recusal for ostensible bias arising from confusion

Ms Gurung pleaded guilty to an offence after she had been placed in the charge of a jury at trial in the District Court. Before sentencing, she filed a Notice of Motion seeking to withdraw her plea. That motion came before the original trial judge, where it was also foreshadowed that an application for bail would be made. The trial judge indicated that the

motion would entail an attack on Ms Gurung's original barrister, and also mentioned that the prospects for bail were unfavourable. Ms Gurung's advocate asked the trial judge to recuse himself in relation to the application to withdraw the plea. He cited what the trial judge had said in relation to the bail application, and what had been said in relation to the plea withdrawal application. Confusion ensued. In any event, the recusal application was refused.

The matter was heard as an urgent appeal in ***Gurung v R*** **[2012] NSWCCA 201**. McClellan CJ at CL (McCallum J dissenting, Garling J agreeing) held, first, that a refusal by a judge to accede to a submission that he disqualify himself is not itself a judgment or an order of the court that can be appealed from. Second, because the first point was not fully argued in the expedited circumstances, a careful reading of the transcript revealed nothing a reasonable bystander would regard as bias.

(It appears that s 157 of the *Criminal Procedure Act 1986* was not brought to the Court's attention. A guilty plea entered after the accused is in the charge of the jury is taken to have effect as if it were the verdict of the jury. The trial judge did not have jurisdiction to entertain the motion in the first place.)

Withdrawal of counsel

Likelihood of fair trial was the critical question in a jury discharge application following withdrawal of counsel

Defence counsel withdrew from a matter, without leave and seven days into the trial, citing coronavirus fears. Counsel was 69 years old and immunocompromised, while his client and instructing solicitor were both displaying flu-like symptoms. The client, finding himself unrepresented, sought an urgent s 5F appeal against the trial judge's refusal to discharge the jury and vacate the trial.

In ***Kahil v R*** **[2020] NSWCCA 56** Adamson J held that the trial judge's discretion miscarried as a result of not addressing the issue of unfairness. The key question was not whether the withdrawal was reasonable but whether, now that he was unrepresented through no fault of his own, the applicant would receive a fair trial. Harrison J noted that no alternatives – continuing with the solicitor, retaining new counsel or trial counsel appearing by AVL – could mitigate the unfairness.

Kahil cited ***Croke v R*** **[2020] NSWCCA 8**, which agitated a similar issue. Croke's counsel withdrew shortly before his trial – the trial judge refused to vacate on the basis that a witness had been, with difficulty, brought from the US; Croke had an experienced solicitor; and Croke himself was an experienced criminal law practitioner. Croke's erstwhile counsel had agreed to a unique funding arrangement, which made securing new counsel difficult. The Court (Adamson, Beech-Jones and Ierace JJ) embraced the *Dietrich* test of asking whether the accused, unrepresented through no fault of their own, is likely to receive a fair trial. The Court vacated the hearing.

C. Evidence

Admissions

Admissions of a co-accused must be in furtherance of common purpose reflected in charged offence to be admissible

The applicant in ***Higgins v R*** **[2020] NSWCCA 149** was convicted, in his third trial, of three historical child sex offences committed against a student at the school where he taught. A co-accused had died between trials. One of the issues on appeal was whether this co-accused made admissions on behalf of the applicant when pressuring the complainant to lie. Payne JA held that the admission by the co-accused was inadmissible in the applicant's trial because it was not made in pursuit of a common purpose constituting a charged offence (and was otherwise irrelevant).

Section 87 of the Evidence Act is not directed to the admission of evidence in the substantive proceedings

The accused in ***R v Dolding*** **[2018] NSWCCA 127** was alleged to have supplied drugs to M on three occasions, who then supplied the drugs to a registered source. The conversations between M and the source were covertly recorded. The Crown tendered the recordings pursuant to s 87(1)(c) of the *Evidence Act* but the trial judge rejected them. The Crown appealed pursuant to s 5F(3A) of the *Criminal Appeal Act*.

Section 87 provides, relevantly:

> "(1) For the purpose of determining whether a previous representation made by a person is also taken to be an admission by a party, the court is to admit the representation if it is reasonably open to find that … (c) the representation was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party or one or more persons including the party".

Simpson AJA, with whom the other members of the Court agreed, allowed the appeal. At trial, the parties approached the application of s 87 on the assumption that it is directed to the final determination of the admissibility of the evidence in the substantive proceedings. Her Honour held that s 87 is directed to an intermediate question of whether a representation by a third party should be taken to be an admission by a party to the proceedings. If it is, there remains the question of whether it is admissible as such. Her Honour observed that in this case subsequent questions concerning ss 84, 85 and 86 and ss 135 and 137 may need consideration.

Admissions – discretion to exclude – s 90 Evidence Act – whilst some covertly recorded conversations between the complainant and accused may need to be excluded due to unfairness, such a circumstance alone is unlikely to give rise to unfairness for the purposes of s 90

The respondent in ***R v DRF*** **[2015] NSWCCA 181** (a judgment which only became publicly available in 2017) was charged with several sexual offences committed against his step-son, relating to sexual abuse over three years (1979-1982) when the complainant was 9-12 years old. In 2011 the complainant reported the abuse to police. The respondent declined to be interviewed by police. Pursuant to a warrant issued under the *Surveillance Devices Act 2007* (the Act), the police fitted the complainant with listening devices and took him to the respondent's home. In a recorded conversation that ensued between the complainant and the respondent, the respondent made statements said to amount to admissions. The trial judge excluded that evidence and the Crown appealed pursuant to s 5F(3A) of the *Criminal Appeal Act 1912*. Simpson JA allowed the appeal, finding that the decision to exclude the evidence had to be set aside because the trial judge's interpretation of the Act was erroneous.

The Court also considered whether the evidence should be excluded under s 90 of the *Evidence Act 1995*. Simpson JA held that the evidence was admissible; the circumstances in which the evidence was obtained did not render it unfair for the Crown to use the evidence at the respondent's trial. Her Honour held that police arranging for a complainant to secretly record a conversation with an alleged offender does not alone cause unfairness, even if the offender has refused to be interviewed by police: *Em v The Queen* [2007] HCA 46; 232 CLR 67. Her Honour found that calling evidence such as this (ie. obtained lawfully and on the express authorisation of a judge fully informed of the relevant facts) as "unfair" would subvert the "statutory scheme involving judicially sanctioned covert surveillance as an aid to the detection of crime" adopted by the legislature and endorsed by the High Court in Em. She clarified that she was not suggesting that evidence obtained in these circumstances could never be excluded under s 90.

Leeming JA preferred not to decide the question of whether these tactics amounted to unfairness. First he said this was not an ideal test case because the Crown conceded the complainant was an "agent of the state". Next, he observed that there is always an element of deception because the complainant knows about the recording but the accused does not. He raised several scenarios where it would be unfair to admit evidence obtained by a complainant recording a conversation with the perpetrator (eg. when the conversation took place at a time when the accused was vulnerable or when the complainant used words that had a special meaning or were deliberately ambiguous).

Admissions made during telephone conversation instigated by police wrongly excluded

The respondent in ***R v Burton*** **[2013] NSWCCA 335** was charged with having sexual intercourse with the complainant without consent. During the investigation and before he was charged, the complainant called the respondent at the instigation of the police. The conversation was recorded pursuant to a listening device. The Crown contended that admissions were made. The respondent sought to have the evidence excluded under, among other provisions, s 90 *Evidence Act*. The trial judge found that it should have been excluded under this section, primarily because the complainant elicited responses from the respondent whilst acting as an "agent of the state". In deciding whether a person is acting as an "agent of the state" in this context, the question is whether the conversation would have taken place in the form and manner it did, but for the intervention of the police. The

trial judge also found that: the conversation amounted to an unfair derogation of the respondent's right to silence; the police were exploiting a special relationship; and the police conveyed the key questions they wanted the complainant to ask. Simpson J found that the evidence should not have been excluded and rejected all of these findings. It was wrong for the trial judge to have characterised the complainant as an "agent of the state". Given the nature of the relationship between the complainant and the respondent, it was not the case that the conversation would not have taken place but for the involvement of the police. Nor did the complainant elicit responses from the respondent.

Admissibility and prejudice – recording of police interview including accused declining to answer questions

A man was found guilty by a jury of sexually assaulting the daughter of his partner. He had participated in a recorded police interview and the whole of the recording was admitted in evidence. It included him responding "no comment" to numerous questions. On appeal, it was argued that those sections if the interview should not have been admitted under s 89 of the *Evidence Act*.

In ***Ross v R*** **[2012] NSWCCA 207**, Allsop P concluded (at [54]) that there was no error in admitting the entire interview. The trial judge had clearly directed the jury that the appellant was entitled to say nothing to police and no adverse inference could be drawn from that fact. Further, it could be concluded that the purpose of the evidence was other than to draw an impermissible inference from the appellant's silence. Counsel for the appellant sought to rely on the record of interview to demonstrate his client's reactions as he became aware of the allegations against him.

Also, the final questions in the interview showed that the appellant did not believe that his questioning had been fair. Submissions on appeal were focused on whether the whole record of interview was admissible to prove the fairness of the police interview, relying on cases such as *R v Reeves* (1992) 29 NSWLR 109 and *Plevac v R* (1995) 84 A Crim R 570. It was indicated by Allsop P (at [53]) and Hidden J (at [69]) that these authorities decided pre-*Evidence Act* may need to be reconsidered, but this was not an appropriate case to do so.

Admissibility of admissions made in course of mental health assessment at police station

The accused in ***R v Leung*** **[2012] NSWSC 1451** had made certain statements to a clinical nurse specialist in the course of a mental health assessment subsequent to his arrest. The Crown sought to rely on the content of those statements. Price J ruled that the communication between the accused and the clinical nurse specialist was a protected confidence under the terms of s 126A *Evidence Act 1995*, and could not be admitted.

Admissibility of admissions by 15 year old to community support person

The appellant in ***JB v R*** **[2012] NSWCCA 12** was a convicted of murder. He was 15 years old at the time of the offence and of Sudanese background. At the police station after his arrest, J told a Sudanese youth liaison officer that he had stabbed someone. At trial, the judge allowed evidence of that admission to be led by the Crown after it was determined

that there was no unfairness in admitting the evidence pursuant to s 90 of the Evidence Act 1995. On appeal, Whealy JA rejected (at [29]) argument that it was unfair to admit the evidence of admissions made to someone in the "unique position" of a support person. The relationship between a young accused and support person does not fall in any of categories of relationship protected by legislation. His Honour held (at [30]) that it could be distinguished from those special relationships, such as between lawyer and client, that receive "legislative protection because it is central to the function of those relationships that free and frank disclosure exist between the two persons involved." Whealy JA noted (at [37]) that there may be certain circumstances where s 90 would prevent an admission made to a support person being admitted, for example where the accused had been "cajoled or tricked" into giving the admission. However, in dismissing the appeal his Honour held that the trial judge was correct in finding the admission was an unguarded incriminating statement and his Honour was correct in allowing the Crown to lead the evidence.

(For a disturbing subsequent development in this case, see ***JB v R* [2015] NSWCCA 182**.]

Confession to custody manager – whether made in the course of "official questioning"

In ***Bryant v R* [2011] NSWCCA 26**, the appeal enlivened the question of whether evidence of a confession by an accused to a custody manager was considered to be made in the course of "official questioning" and therefore inadmissible pursuant to s 281 of the *Evidence Act 1995*. Under the Act, "in the course of "official questioning"' means "in connection with the investigation of the commission or possible commission of an offence". Howie AJ (at [139]) was prepared (albeit with heavy reservation) to accept that the police officer was "questioning" the suspect. However, giving effect to the broad meaning of "questioning" contemplated by s 281, his Honour rejected the proposition that the confession was made in the course of "official questioning". The police officer had no involvement in the investigation of the offences in question other than to ask the suspect the formal questions at the end of the recorded interview and as custody manager. Furthermore, his Honour found that the questions asked were, in essence, merely a part of supplying the appellant with information about the bail proceedings.

Inadmissibility of an admission recorded on police in car video

It was held in ***Carlton v R* [2010] NSWCCA 81; (2010) 199 A Crim R 591** per Howie J at [14] – [19] that a recording of admissions that were made by a person who had been arrested and cautioned in respect of a drug offence was made in breach of (now repealed) s 108E *Law Enforcement (Powers and Responsibilities) Act 2002*. The point was not taken at trial. Section 108E(a) provided that "a conversation between a police officer and a person must not be recorded under this Part after the person has been arrested". Howie J described the provision as "very curious indeed", particularly given that a recording of the conversation made by a separate tape recorder would not only have been lawful but would have been required for the conversation to be admitted into evidence. In the result, the proviso was applied and the appeal dismissed. The section was repealed in 2014.

Admissibility of admissions made during siege negotiations

In ***R v Naa*** **[2009] NSWSC 851**, Howie J ruled in a murder trial that evidence of unrecorded conversations between the accused and police officers negotiating with him in the course of talking down an armed offender. His Honour rejected a contention that the conversations amounted to "official questioning" under s 281 of the *Criminal Procedure Act 1986* and so there should have been an electronic recording made ([76] – [80]). He further held that even if s 281 did apply, there was a "reasonable excuse" for the police not making a recording ([81] – [89]). He rejected a contention that the accused should have been cautioned on the basis that the conversation did not amount to "questioning" for the purpose of s 139 of the Evidence Act 1995 ([97] – [101]). Even if the conversation did constitute questioning, the weight of considerations in s 138 of that Act (discretion to admit illegally or improperly obtained evidence) fell very substantially in favour of admitting the evidence ([102] – [106]).

Browne v Dunn

Warning against making proposition unsupported by evidence and cross-examination is distinct from rule in Browne v Dunn

Partway through Mr Petryk's trial, his lawyers had to withdraw. New counsel changed course, suggesting in his closing address that a Crown witness (who had received immunity from prosecution) had fudged her evidence to minimise the role of her partner, the co-accused. Counsel was warned by the trial judge not to stray into suggestions that were not put to the witness. On appeal, Mr Petryk impugned this warning, arguing that *Browne v Dunn* was not strictly applicable to criminal trials: ***Petryk v R*** **[2020] NSWCCA 157**. The Court dismissed the appeal, holding that the trial judge was reminding counsel of how the case had progressed before he was briefed, and preventing him from making a submission without evidence or support from cross-examination. It was not an application of the rule in *Browne v Dunn*, and its propriety was accepted by counsel at trial in any event.

Application of Browne v Dunn

In ***Llewellyn v R*** **[2011] NSWCCA 66**, the appellant was tried for an offence of sexual intercourse without consent. The appellant's defence at trial was that the complainant was a willing participant. In cross-examination, counsel for the appellant put it to the complainant that one of a number of ways in which she had indicated her consent was that she had "helped push down his pants", without actually putting to her the manner in which she had done so. The appellant subsequently gave evidence that the complainant had used her feet on the outer sides of his legs to remove his jeans. The Crown Prosecutor put to the appellant that there was no suggestion in the cross-examination of the complainant that this is what had occurred, a question which was objected to but allowed by the trial judge. In re-examination, the appellant confirmed that he had given instructions to his counsel before the trial consistent with his evidence. The Crown Prosecutor never suggested that the appellant's evidence was a recent invention.

Hall J (McClellan CJ at CL agreeing, Garling J also but with different reasoning) held that the rule of *Browne v Dunn* was not breached by the appellant's counsel in failing to put to the complainant whether she had used her feet in pushing down the appellant's pants. His Honour reasoned that the proposition as to whether the complainant had helped the defendant remove his pants was squarely put to the complainant, despite not expressly putting to her the alleged use of her feet.

Application of Browne v Dunn

In ***Khamis v R* [2010] NSWCCA 179**, the accused was tried before a jury in respect of an alleged sexual assault. During his evidence in chief he attempted to give evidence about a matter that had not been put in cross-examination to the complainant or to members of her family. The trial judge upheld an objection by the Crown and refused to allow the accused to give such evidence. Issues relating to this ruling comprised grounds of appeal against conviction. Whealy J (at [42] – [46]) discussed various consequences of a breach of the rule in *Browne v Dunn*. He held (at [53]) that the rule in *Browne v Dunn* is not a preclusive rule of evidence. Its breach does not necessarily dictate that evidence may not be called in contradiction. It should not be used, except as a last resort, to exclude evidence going to the question of a person's guilt of a criminal charge. In this case the trial judge erred in failing to consider any option other than exclusion of the evidence.

Character evidence

Good character rebuttal – s 110 Evidence Act – excluded tendency evidence may still be used

The appellant in ***Clegg v R* [2017] NSWCCA 125** was charged with sexual offences against 4 boarders at the school where he was a teacher. The judge allowed a joint trial on the basis of admissible tendency evidence in relation to 3 of the complainants but excluded the 4th on a s 101 *Evidence Act* basis (probative value did not substantially outweigh prejudicial effect). Mr Clegg then sought an advance ruling on evidence the judge would allow if he raised character. The judge said she would allow the Crown to call evidence from the 4th complainant in rebuttal. In the end, Mr Clegg did not raise his character but argued on an appeal against his convictions that the judge's ruling was wrong because she had already held that the 4th complainant's evidence was inadmissible as tendency evidence.

Payne JA rejected the argument. Section 110(2) and (3) provide, inter alia, that the tendency rule does not apply to evidence rebutting a claim of good character. Further, if s 101 applied the evidence would have been admissible under s 101(3) as it would contradict evidence led by Mr Clegg that raised his good character via tendency reasoning (the character evidence was to the effect that the appellant did not have a tendency to act inappropriately towards young boys in his care). But generally, evidence excluded as tendency evidence is capable of being adduced to rebut evidence of good character, unless a relevant rule of exclusion or a discretion under the Evidence Act applies. It is not the case that once evidence is excluded as tendency evidence, that evidence is necessarily inadmissible to rebut evidence of good character.

Circumstantial evidence

Evidence of indicia of drug supply admissible when an accused is charged with drug supply even though such evidence may also suggest a tendency towards crime

At the trial of the respondent in ***The Queen v Falzon*** **(2018) 92 ALJR 701; [2018] HCA 29** on charges of cultivating and trafficking cannabis, the respondent objected to the admission of evidence that $120,800 cash was found in his possession on the basis that it was irrelevant or that its prejudicial effect outweighed its probative value. The trial judge ruled the evidence admissible but on appeal the Victorian Court of Appeal (Whelan JA dissenting) held that the evidence should not have been admitted. The Crown appealed.

The High Court allowed the appeal and ordered that the appeal to the Court of Appeal be dismissed. The High Court agreed with Whelan JA that evidence of the cash was admissible as an item of circumstantial evidence that, alongside other indicia of trafficking, was capable of founding an inference that the respondent was carrying on a supply business. The fact that the cash was likely to have come from previous sales logically supported the view that the drugs found at the search were intended for supply. The Court of Appeal was wrong to view the evidence as merely propensity or tendency evidence; rather, the evidence was capable of proving that the accused was carrying on a supply business and that the seized drugs were intended for supply. Authorities supported the proposition that (subject to s 137) circumstantial evidence that the accused was carrying on a business of supply is relevant and admissible to prove that the drugs were possessed for supply.

(See also: ***The Queen v Baden-Clay*** **[2016] HCA 35; 258 CLR 308** [Chapter 5 – B. Conviction appeal – Inconsistent/unreasonable verdicts (appeal ground)])

Coincidence

Coincidence evidence – admissibility in a circumstantial case

Three elderly residents of an aged care home were injected with high doses of insulin without a medical need – two died and the other remained in hospital before dying of unrelated causes. In a judge alone trial, the applicant was found guilty of two counts of murder and one count of administer poison with intent to murder. One of the grounds of appeal against conviction in ***Davis v R*** **[2018] NSWCCA 277** was that the trial judge erred in admitting evidence for a coincidence purpose.

Hoeben CJ at CL (with whom Harrison J and Schmidt J agreed, but with additional reasons) rejected the applicant's submissions on the interpretation of the coincidence rule in s 98 *Evidence Act 1995*, finding it to be unsupported by the wording of the provision and not justified by authority. In essence, His Honour held that direct evidence showing that the applicant was responsible for one of the episodes involving the wrongful injection of insulin was not required before coincidence reasoning could be used to infer that because the applicant was guilty on one count, he was guilty on all three counts. There is no

requirement for satisfaction to the criminal standard of proof that the applicant was responsible for one of the insulin episodes before admitting coincidence evidence, because ss 98 and 101 only relate to the admissibility of coincidence evidence. Hoeben CJ at CL went on to confirm that the trial judge's approach to coincidence evidence in a circumstantial case, based on the chain of reasoning advanced by the Crown, was correct (and in line with the Court of Criminal Appeal's approach in *R v Ceissman* [2010] NSWCCA 50). It was open for the trial judge to use the similarities surrounding each of the insulin injection episodes as coincidence evidence to infer that the offences were committed by a single offender. It was then open to conclude that the applicant was that single offender established beyond reasonable doubt by the circumstantial evidence.

Coincidence evidence – distinguished from transaction evidence

In ***Haines v R* [2018] NSWCCA 269**, the appellant appealed her conviction for two counts of murder. The Crown alleged that the appellant, a registered nurse at an aged care facility, administered insulin to two elderly residents leading to their deaths. On appeal, the appellant submitted that the Crown had relied on tendency and coincidence reasoning but had not sought leave from the judge to rely on the served coincidence notice as it was required to do pursuant to ss 98(1)(b) and 101 of the *Evidence Act 1995*. Therefore, the appellant alleged that the trial judge erred by treating evidence for the two counts as cross-admissible in his summing up, there was a failure to properly direct the jury that evidence for each count must be assessed separately when in returning its verdict, and as a result, the trial miscarried.

The Court (Hoeben CJ at CL, Davies and Button JJ) noted the first and fundamental problem was that this ground was precluded by r 4 of the Criminal Appeal Rules, subject to the leave of the Court, because the appellant had not objected to or made submissions in relation to the admissibility of the evidence at trial. Second, the Court held that the Crown case at trial had not been put forward on the basis of coincidence evidence enlivening s 98 *Evidence Act 1995*, but instead had made its case on the basis that the two murders formed part of a single transaction. The evidence relied upon by the Crown was transaction evidence (common law), not coincidence evidence. It was "evidence of a connected course of conduct" [224], and was admissible pursuant to s 55 of the *Evidence Act 1995*. Transaction evidence can be distinguished from coincidence evidence because ([226]):

> "Transaction evidence is not used to prove that a particular person did a particular act or had a particular state of mind on the basis that it is improbable that two or more related events occurred coincidentally. Where there is one transaction, "two or more related events" do not exist."

Here, the Crown case proceeded on the basis that the two murders were part of a single transaction, "where each murder could not truly be understood without reference to the evidence of the other" [229]. The Crown contended that the elderly residents of the aged care home were murdered by the same person because their deaths were part of the one transaction. The link between the deaths was that both were injected with insulin by the same person. The applicant was linked to the deaths by motive and opportunity and from all the circumstances, was the person who murdered them. A further indication that the

two murders could be treated as part of a single transaction was that holding a separate trial for each count would have rendered the Crown unable to explain why each murder was detected, despite the supposed "undetectability" of a death by insulin overdose [229]. Finally, while the Crown's address contained consideration of the probability of coincidence, the Court held that this did not constitute coincidence reasoning but that the Crown was simply rebutting other hypotheses inconsistent with a verdict of guilty. As transaction evidence relating to each count was admissible for the other count, this ground of appeal was not made out.

Coincidence evidence – s 98 Evidence Act - dissimilarities only detract from the probative value if they undercut the improbability of the two events being a coincidence

The applicant in ***Selby v R*** **[2017] NSWCCA 40** was convicted by a jury of demanding money with menaces. This arose from the first of two events, where the same victim was threatened in the same location by a man with a gun who demanded money. The applicant pleaded guilty to one count of intimidation in relation to the second event. The trial judge ruled that evidence of the second event was admissible as coincidence evidence. The applicant appealed against his conviction. Unusually, the admissibility of the coincidence evidence was not challenged. Rather, the applicant submitted that the trial judge erred in directing the jury that they could use coincidence evidence reasoning when it was not open on the evidence for s 98 of the *Evidence Act* to be engaged. This was based upon dissimilarities of the two events (eg. the assailant having a goatee in one, but clean shaven in the other).

The Court (Leeming JA, Schmidt and Wilson JJ) held that it was open to the trial judge to find that coincidence reasoning was open to the jury. The applicant's submission that the similarities were outweighed by dissimilarities was rejected. Not all dissimilarities have a bearing on the process of inferential reasoning permitted by s 98. The question is whether the dissimilarities are relevant, i.e. whether they detract from the strength of the inferential mode of reasoning permitted for coincidence evidence: *El-Haddad v The Queen* (2015) 88 NSWLR 93; NSWCCA 10 at [74]-[75]. See also *Page v The Queen* [2015] VSCA 357 at [59]. If certain similarities raise the improbability of coincidence, thus giving the evidence its probative value, the existence of dissimilarities will not necessarily alter that position. Unlike some differences (eg the perpetrator being an amputee/able-bodied) the dissimilarities identified regarding the assailant's voice and the hand in which he held the gun did not undercut the improbability that the same victim was targeted in such similar circumstances by different people.

Admissibility of tendency and coincidence evidence – modus operandi

A trial judge rejected the admissibility of tendency and coincidence evidence in ***R v Ceissman*** **[2010] NSWCCA 50**. The Crown called the co-offender to give evidence of five robberies and relied upon it as tendency and coincidence evidence. The trial judge was concerned that the related events could be otherwise explained by the fact that they represented the co-offender's "modus operandi". An appeal by the Crown pursuant to s 5F(3A) of the *Criminal Appeal Act 1912* was allowed. Latham J (at [13] – [18]) described the

correct approach that should have been taken in assessing the question of admissibility of such evidence and demonstrated the erroneous approach taken by the trial judge.

Compellability

Admissibility where witness advised of s 18 Evidence Act after completion of evidence

The offender in ***Jurd v R*** **[2020] NSWCCA 91** was accused of a child sexual offence. His de facto partner gave a police statement and then oral evidence. She was not advised about a potential s 18 objection until after she had given evidence. This was likely for forensic reasons – her oral evidence was more exculpatory than her police statement, which would have been admitted if she was not compellable. She stated on voir dire that she would not have given evidence had she known she could object. On appeal, Price J held that the section could not be complied with retrospectively. Nevertheless, the rest of the evidence was strong enough that there was no miscarriage of justice – the appeal was dismissed.

Section 18 Evidence Act 1995 – witness (spouse of accused) compellable to give evidence in relation to some topics and not others

A husband was on trial for murdering a man. The Crown proposed to call the accused's wife to give evidence. She objected pursuant to s 18 of the *Evidence Act 1995*. There were a number of topics of proposed evidence; one particular topic concerned certain conduct of the deceased and there was evidence substantiating the wife's legitimate fear of harm if required to give evidence about that conduct. The issue dealt with in ***R v A1 (No 2)*** **[2019] NSWSC 663** was whether a s 18 objection could be upheld in part – to excise the topic giving rise to the fear of physical harm – while otherwise compelling the wife to give evidence on other topics.

In respect of the evidence on the sensitive topic, Johnson J considered the balancing exercise set out in s 18(6): a witness must not be required to give evidence if there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives the evidence, and the nature and extent of that harm outweighs the desirability of having the evidence given. Relevant to this exercise are the non-exhaustive mandatory factors set out in s 18(7). Having considered that there was a real risk of harm to the wife, and where there was other evidence in the case going to the accused's belief as to the conduct of the deceased which constituted the motive for the murder, Johnson J was satisfied that the wife was not compellable in this respect.

His Honour considered that as there was only one confined topic of evidence which gave rise to the risk of harm to the wife, the question was then whether s 18 permitted the court to sever that topic but otherwise overrule the s 18 objection, thus requiring the wife to give evidence on other topics. Counsel did not object to this construction of s 18, but it was submitted that it was a matter for the court to determine if this course was open in accordance with the principles of statutory interpretation. The other available construction was what Johnson J termed the "all-or-nothing approach" – that is, whether the

determination of a s 18 objection requires a ruling that either the wife give evidence on all topics or no topics.

Johnson J examined the terms of s 18(7), considering that the language did not appear to be "intractable" in requiring an "all-or-nothing approach", nor was there anything in the extrinsic material bearing on this issue. Further, his Honour did not consider that the language of s 18(2)(b), which related to the subject of communications between the proposed witness and the accused, gave rise to an interpretation that it was the only severable category of evidence. In addition, Johnson J considered that the consequences of taking an "all-or-nothing approach" to compel the wife to give evidence on all topics would give rise to a risk of harm to her; while to rule that she not give evidence at all would prejudice the Crown and be contrary to the public interest in having available evidence in a trial for murder. Given that counsel for the wife conceded that the sensitive topic could be severed from the other topics, Johnson J overruled the s 18 objection but for that topic.

Objections pursuant to s 18 Evidence Act – accused has standing in hearings

In ***Tran v R*** **[2018] NSWCCA 145** there was a trial for drug offences in which the Crown proposed to call the applicant's father to give evidence. The father objected pursuant to s 18 of the *Evidence Act 1995* (NSW). The trial judge refused to allow the applicant's counsel to make submissions about the objection, and subsequently refused to uphold the objection. Leave to appeal against that interlocutory order was sought pursuant to s 5F of the *Criminal Appeal Act 1912* (NSW). One of the grounds for determination was "Whether the trial judge denied the applicant procedural fairness by finding that she lacked standing on the application". The ground was upheld.

Payne JA (Schmidt and Button JJ agreeing) held that the applicant had standing in her own criminal trial. His Honour held that obligation of procedural fairness was enlivened by the fact that a judge's determination under s 18 will affect an accused's legal interests – specifically, the evidence available to be presented at her trial. Payne JA noted in particular that there may be circumstances in which the accused is the only party who can address the relevant issues raised by s 18(7) and to refuse to allow submissions in this case was a denial of procedural fairness. In addition, the parties were unable to point to a case which supported the proposition that the accused was not party to a s 18 hearing – but rather that the authorities support that the accused is a party to s 18 objection hearings conducted within his or her own criminal trial.

Compellability of spouses and others – s 18 of the Evidence Act – spouse's evidence not inadmissible due to an asserted failure to comply with s 18

The appellant in ***Mulvihill v R*** **[2016] NSWCCA 259** was convicted of murder. At the trial his estranged wife gave evidence for the prosecution. At trial there was no reference made to s 18 of the *Evidence Act 1995* (NSW). Ms Mulvihill never objected to giving evidence. On appeal, it was contended that her evidence was inadmissible because the procedure in s 18 was not followed. It was submitted for the appellant that, despite Ms Mulvihill's apparent willingness to assist the Crown, s 18(4) required the trial judge to satisfy herself that Ms Mulvihill was aware of her right to object to giving evidence. It was asserted that the trial

judge did not do so as there was nothing to that effect in the transcript. The Court (Ward JA, Beech-Jones and Fagan JJ) refused leave to raise this ground. It cannot be inferred from the fact that the trial judge did not expressly refer to s 18(4) that her Honour was not so satisfied. The Court said it was doubtful whether the failure of a trial judge to form the opinion in s 18(4) renders evidence inadmissible. The Court differentiated the present case from *Demirok v The Queen* (1977) 137 CLR 20; HCA 21, which involved a spouse reticent to give evidence and s 400(2) of the Crimes Act 1958 (Vic). It could not be said that Ms Mulvihill's evidence would not have been adduced if s 18 was complied with. There was no basis to conclude either that she would have objected once informed of her right to do so, or that the process in s 18(6) would have led to her being excused. Leave to raise this ground was refused.

Comments by prosecutor on failure of accused's spouse to give evidence

In ***DJF v R* [2011] NSWCCA 6**, the appellant was charged with a number of counts involving the alleged sexual assault of a child. During the trial, the Crown Prosecutor made the following statement concerning the failure of the accused's then-wife to give evidence:

> "You've heard the evidence from the officer that there's no statement [having] been obtained from … the wife of the accused who you may have … expected would have been called, considering the incident which is alleged to have occurred in the spa."

Following his conviction, the appellant appealed to the Court of Criminal Appeal on the ground that the Crown Prosecutor's comment contravened s 20(3) of the *Evidence Act 1995* and resulted in a miscarriage of justice. The appeal was allowed. Giles JA held that the statement contravened s 20. His Honour was of the view that the statement did not confine itself to failure by the Crown to call the appellant's then–wife, but rather could also be taken to include the defence's failure to call her.

Competence

Competence – child giving evidence by way of pre-recorded interview

The appellant in ***Tikomaimaleya v R* [2017] NSWCCA 214** was convicted of sexual intercourse with a child under 10. The complainant was 4 years old when she participated in a recorded interview soon after the offence and was 6½ at trial. Her pre-recorded interview constituted her evidence-in-chief, pursuant to s 306V(1) of the *Criminal Procedure Act 1986*. The trial judge found that she was competent to give sworn evidence at trial but no issue was raised about her competence to give evidence at the time of the pre-recording. On appeal, the appellant contended that s 61(1) of the *Evidence Act 1995* required that the complainant was competent at the time of the pre-recorded interview. Section 61 is concerned with exceptions to the hearsay rule in Ch 3 Pt 3.2 (i.e. ss 59-75).

Dismissing the appeal, Simpson JA said s 61 of the Evidence Act was irrelevant. Whilst the complainant's answers in the pre-recorded interview were previous representations within s 59 and prima facie inadmissible by the hearsay rule, the evidence was not made admissible

by any of the exceptions in Pt 3.2 of the *Evidence Act*; rather, it was made admissible by the specific provisions of s 306V(1) of the *Criminal Procedure Act*. Further, Simpson JA noted it was merely an untested and unproven assumption that the complainant was not competent to give evidence about a relevant fact at the time of the interview. It was not part of the appellant's case at trial that the complainant lacked either of the required capacities. Had the question been raised, the trial judge would have been obliged to make a finding about the complainant's capacity at the time of the interview. However, since no such issue was raised about the complainant's capacity or competence at the time of the interview, the trial judge was not asked to make any determination as to her competence at that time.

Unsworn evidence

The Queen v GW **[2016] HCA 6; (2016) 258 CLR 108** 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.)

Assessing competence of a child witness to give unsworn evidence

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

Strict compliance with s 13 of the Evidence Act required before a witness can give unsworn evidence

In ***SH v R* [2012] NSWCCA 79** it was held by Basten JA that before a witness is competent to give unsworn evidence it is necessary that s 13(5) of the *Evidence Act 1995* is strictly complied with. The case concerned a charge of sexual intercourse with a child under 10 years and the trial judge permitted the complainant to give unsworn evidence. However, the judge failed to tell her that she should feel no pressure to agree with statements that she believed were untrue as required by s 13(5)(c).

Basten JA stated (at [13]) that the basis for s 13(5)(c) is a concern that a witness without the capacity to give sworn evidence may "feel under pressure to agree with statements put by adults in wigs and robes", regardless of whether they are correct. The section is not directed at the form of instruction to be given to the witness, but rather to its effect. There was no error in trial judge giving the other required instructions by way of questions put to the witness (at [33]). However, his Honour held (at [35]) that it was necessary that the directions required by s 13(5) be given in full, regardless of whether there was any substantial miscarriage of justice. The error in failing to give the instruction pursuant to paragraph (c) could not be rectified by the prosecutor telling the witness that she should not feel under any pressure "because we are grown-ups in funny clothes".

Consciousness of guilt

Flight – consciousness of guilt – of "the offence charged"?

Jason Grogan entered the home of a 72 year old man and punched him, causing him to fall to the floor unconscious. He then stole some property and left the house. A short time later he was seen by a patrolling police officer but decamped. The victim died some three months later. Mr Grogan was tried for murder (the conviction for which was held on appeal to be unreasonable and a retrial for manslaughter directed). The Crown relied upon flight as a basis for inferring a consciousness of guilt. A ground of appeal asserted that the trial judge should not have admitted the evidence of flight as one of the conditions for admissibility was that it was capable of supporting an inference that the flight was occasioned by consciousness of guilt of the offence charged, namely murder. Relying upon *R v Cook* [2004] NSWCCA 52 it was submitted that because homicide was not complete until the victim died three months later, the evidence was incapable of supporting that inference. It was only capable of supporting an inference of consciousness of guilt of a serious assault and theft of property.

Ward JA, Davies J and RS Hulme AJ held in ***Grogan v R* [2016] NSWCCA 168** that there was no error. The requirement that the post-offence conduct was indicative of consciousness of guilt of the offence charged was appropriate in the circumstances in *R v Cook* [2004] NSWCCA 52 but all that was required according to *Edwards v The Queen* (1993) 178 CLR 193 at 209 was that the conduct related to a material issue and could implicate the accused in the offence charged. See also *Penza and Di Maria v R* [2013] NSWCCA 21 at [191].

Context and relationship evidence

Admissibility of evidence of single act as context evidence

CA was charged with five counts of aggravated indecent assault, three having occurred between June 2006 and June 2007, and two between 2011 and 2012. The complainant also alleged a further incident which took place between those two periods (in 2009) in Victoria. CA contended that the judge erred in admitting this as context evidence but the appeal was dismissed: ***CA v R* [2017] NSWCCA 324**.

N Adams J extensively reviewed the relevant case law and held that the trial judge was correct to conclude that the evidence was relevant and significantly probative because it offered a link between the two periods of offending – "without the evidence a jury may well be left with an unrealistic and/or misleading picture as to the two series of apparently unconnected indecent assaults committed upon the complainant". She distinguished the case from R v Young (1996) 90 A Crim R 80, and rejected the appellant's submission that one incident alone is incapable of being relevant as context evidence.

Examining "relationship evidence" for relevance

***Norman v R* [2012] NSWCCA 230** was an appeal by a man convicted of three offences of sexual intercourse without consent committed against his wife. Evidence of two incidents of violence committed by the appellant against his wife, albeit not ones characterised by a sexual dimension, in the course of their 14-year relationship were admitted at trial. The Crown did not purport to rely on any part of that particular "relationship evidence" as demonstrating a propensity to commit the offences the appellant was ultimately found guilty of. One of the grounds of appeal subsequently relied upon by the appellant was that this evidence should not have been admitted. In the Court of Criminal Appeal, Macfarlan JA cautioned that relationship evidence, where not used to demonstrate propensity, should be carefully examined for relevance. The two physical assaults were not directly relevant to, nor did they place in context, any fact in issue, and evidence of their occurrence should not have been admitted. (The appeal was dismissed on the proviso.)

(Special leave to appeal was refused on 7 June 2013: *Norman v The Queen* [2013] HCATrans 142.)

Desirable, not necessary, to warn against tendency reasoning when adducing context evidence from single complainant

In ***Toalepai v R* [2009] NSWCCA 270**, context evidence of sexual misconduct was adduced to re-establish the complainant's credit. The trial judge directed the jury that they were not to have regard to this as a substitute for evidence of the specific offences charged. The appellant contended that a full tendency direction was required as a matter of law where any evidence of uncharged acts was raised. Howie J held, dismissed the appeal, that while a

tendency direction may have been desirable, there was no risk here of the jury engaging in tendency reasoning.

Credibility

Admissibility of prior inconsistent statement as evidence in its own right

Ms Scott lived with her de facto partner, Mr Col. She suffered serious burns one evening as a result of an incident involving ignited methylated spirits. She gave a statement to police in which she said that Mr Col had deliberately doused her in the spirit and set it alight. Mr Col was charged with causing grievous bodily harm with intent. He maintained that he had found Ms Scott in bed, saw a smouldering fire, and had accidentally splashed her with spirits, thinking it was water.

Before trial, Ms Scott told police she had no recollection of the events and, that fact notwithstanding, asserted that the version recorded in the statement was "not the truth". The prosecutor cross-examined Ms Scott as an unfavourable witness and, over objection, tendered her statement in evidence. Mr Col was found guilty and, on appeal, argued, inter alia, that the trial judge made an error of law in admitting the statement: ***Col v R* [2013] NSWCCA 302**. Latham J dismissed the appeal. The contents of the statement were admissible pursuant to ss 103 (cross-examination as to credibility) and 106 (prior inconsistent evidence) of the *Evidence Act 1995* and there was no miscarriage arising from the tender.

Prohibition on cross-examination on credit where based on evidence with little probative value

Mr Montgomery was convicted of conspiring to import a commercial quantity of cocaine. At trial, one of his alibi witnesses, a Mr Potter, had been subject to cross-examination as to credit by the Crown Prosecutor. That cross-examination had included reference to Mr Potter's past criminal convictions, including a rape charge that he was acquitted of on appeal. The Crown Prosecutor had not been aware of the acquittal before he commenced his cross-examination. The remaining offences had occurred, regardless, in the area of 50 years ago. Notice was not given to the defence of the cross-examination, nor was permission sought from the trial judge. Mr Montgomery appealed his conviction and argued, among other things, that the conduct of the prosecutor was unfair.

On the appeal, Simpson J (McClellan CJ at CL agreeing) held that the prosecutor should have sought a ruling under s 103(1) Evidence Act from the trial judge, or given defence notice of his intention to cross-examine on past convictions: ***Montgomery v R* [2013] NSWCCA 73**. Her Honour called the conduct, at [6], "a serious departure from proper standards of conduct required of a Crown Prosecutor". This was especially so because, having regard to the age of the convictions and the mistake as to the rape acquittal, permission to cross-examine would not have been forthcoming. Simpson J (McClellan CJ at CL) concluded, however, that there was no miscarriage of justice. Fullerton J was of the view that there was a miscarriage but favoured application of the proviso.

DNA evidence

Using DNA evidence where analysis reveals relatively common profile

MK was charged with the kidnapping and aggravated indecent assault of a 6-year-old girl. DNA swabs taken from the victim's underpants yielded two male profiles. MK could not be excluded as the contributor of one of the two profiles, but neither could anyone from his paternal line. The profile was also unable to exclude an estimated 1 in 630 unrelated males in the general population (or 1 in 512 in the defence expert's calculation). The trial judge held that the probative value of the DNA evidence was so weak as to "verging on unreliable and meaningless". He excluded the evidence pursuant to ss 135 and 137 *Evidence Act*. In ***R v MK*** **[2012] NSWCCA 110**, the Court held he was wrong to do so. The DNA ratio evidence formed part of the matrix of facts from which the jury might draw an adverse conclusion against MK. In this case, other possibly identifying facts included the sighting of MK's car in the neighbourhood, and unusual cheek piercings noticed by the victim's playmate. The DNA evidence was "conceptually no different" (at [46]) to these identifying characteristics.

DNA evidence: admissibility of interpretation of by way of exclusion percentage

The appellant in ***Aytugrul v R*** **[2010] NSWCCA 272** was convicted of murder. The prosecution at trial had linked him to the killing with a hair found under the deceased's thumbnail that matched his DNA. An expert interpreted the results of the DNA analysis in two ways: first, 1 in 1600 people had the same DNA profile as that found in the hair (a frequency ratio); and second, 99.9% of people would not have a matching DNA profile (an exclusion percentage). On appeal, it was argued that the DNA evidence was presented in a prejudicial way because of the use of the exclusion percentage. There was no question that the evidence of the DNA analysis was correct. Simpson J (Fullerton J agreeing) held that the interpretation of the DNA evidence was appropriately put before the jury. McClellan CJ at CL, dissenting, regarded (at [99]) the expression of the interpretation of the evidence by way of exclusion percentages as being "too compelling". In his Honour's view this involved prejudice that substantially outweighed the probative value of the evidence, and it should have been excluded.

Mr Aytugrul appealed to the High Court, submitting that the DNA analysis expressed as an exclusion percentage should have been rejected pursuant to either s 135 or s 137 of the Evidence Act 1995. The appeal was dismissed: ***Aytugrul v The Queen*** **[2012] HCA 15; (2012) 247 CLR 170** French CJ, Hayne, Crennan and Bell JJ (Heydon J agreeing with separate reasons). Their Honours held (at [20]-[22]) that there was not a sufficient basis for a general rule that DNA evidence expressed as an exclusion percentage should always be inadmissible because its probative value is always outweighed by unfair prejudice to the defendant. There was research identified by McClellan CJ at CL in his Court of Criminal Appeal judgment demonstrating that some formulations of DNA results could be more persuasive than others. However, the Court found that those results had not attained general acceptance to a level that would permit judicial notice pursuant to s 144 of the *Evidence Act* and no proof was put forward to support the proposed general principle.

Their Honours (at [23]) also rejected the more specific question of whether the exclusion percentage in this case, accompanied as it was by a frequency ratio, should have been excluded pursuant to s 135 or s 137. It was noted that the argument that unfairness may derive from "the subliminal impact of raw percentage figures" would carry some weight if the exclusion percentage had been considered in isolation. There are some circumstances where reliance on an exclusion percentage to express DNA analysis may demand consideration of the application of s 135 or s 137. However in this case, where the percentage was accompanied with the frequency ratio and there was an explanation of the relationship between them, there was no error in allowing the evidence.

Examination, cross-examination, re-examination

Special Caution – s 89A Evidence Act 1995 – offender must be cross-examined on silence before adverse inferences drawn – Crown cross-examination incurably and unfairly prejudicial

In 2016, Hogg was arrested and cautioned in relation to a sexual assault alleged to have occurred in 1988. In the presence of his solicitor, he was given a "special caution" pursuant to s 89A *Evidence Act 1995* (NSW). Having consulted with his solicitor, Hogg exercised his right to silence. At trial, he relied on a version of events he had not told police. He was not cross-examined on his reliance on legal advice to justify his silence.

In ***Hogg v R*** **[2019] NSWCCA 323**, White JA upheld the appeal, quashed the conviction and acquitted Hogg. His Honour held that, where reliance on legal advice is raised to explain silence in the face of a special caution, the question then becomes the reasonableness (or, in his Honour's preferred view, genuineness) of that reliance. This is a matter for the Crown to disprove, and the Crown did not cross-examine Hogg to this effect (that the legal advice was, say, a shield for the later invention of an alibi). Acquittal was entered because Hogg had already served most of his sentence, though Wilson J would have preferred a new trial.

Furthermore, the Crown cross-examined Hogg's character witnesses, suggesting that vulnerable children were more likely to be targets of sexual abuse due to their isolation. The effect was to cast suspicion on Hogg on the basis that he worked with vulnerable children. White JA held that this strategy gave rise to a miscarriage of justice by way of unfair prejudice that could not have been mitigated by a direction, even if one had been sought.

Cross-examining towards a Birks comment – need for prosecutors to exercise caution

Two complainants in respect of sexual assault allegations had responded to online advertisements for a flat mate posted by the applicant. Prior to viewing the apartment, both of them were encouraged to consume alcohol at a bar, before returning to the applicant's bedroom under the pretext of viewing the apartment. During the course of cross-examination at his trial he was questioned about some evidence he had given in chief and the fact that those matters had not been raised in cross-examination of the

complainants. These matters were briefly mentioned by the Crown in closing but were not mentioned at all in the judge's summing up. One of the grounds of appeal in ***Hofer v R* [2019] NSWCCA 244** was that those questions and comments in the Crown's cross-examination of the applicant were impermissible and improper and caused a miscarriage of justice.

A majority of the Court of Criminal Appeal (Fagan J, Fullerton J agreeing with additional reasons; Macfarlan J dissenting) dismissed this ground following close analysis of the impugned aspects of the cross-examination, finding that they were sometimes incomplete, or of no consequence, or did not create prejudice. Likewise, the impugned passages in cross-examination alongside the restrained closing address did not – in contrast to the cross-examination and closing address case of *Picker v R* [2002] NSWCCA 78 – evince the unmistakable gist that the applicant had recently invented his evidence. While experienced criminal advocates know that "if purported details of a sexual assault are not put in cross-examination of the complainant and if they first emerge in the accused's evidence, they are likely to be a departure from the instructions upon which the cross-examination took place", this may not have been perceived by the jury in that way. Birks reasoning, the shorthand given by Fagan J, is not intuitive and the implication of recent invention and attack on the applicant's credit would not have suggested itself from the impugned passages. The ground was rejected. Furthermore, if his Honour was in error on this point, the proviso applied because the questioning did not go to the root of the trial, and even if it was impermissible and prejudicial, it would not have been of significance to the jury given the strength of the Crown case on the issue that the applicant knew the complainants' were not consenting.

Both Fullerton J and Fagan J sought to provide practical guidance on how prosecutors might approach a cross-examination of an accused when evidence has been given in the absence of a matter having been raised in cross-examination of the complainant: see Fullerton J at [106]-[118] and Fagan J at [202]-[205].

Cross-examination of an unfavourable witness

The appellant in ***Odisho v R* [2018] NSWCCA 19** was charged with being party to a joint criminal enterprise to wound a person by shooting him in the legs with intent to cause grievous bodily harm. The victim gave statements to police in which he said that the appellant was in a car where he, the victim, was shot. He retracted this at trial. The trial judge granted leave under s 38(1) to cross-examine the victim as an unfavourable witness, but refused leave under s 38(3) (to question on matters relevant "only" to credibility) on the ground that it was unnecessary. The Crown then cross-examined the victim about various matters relating to the retraction of his story, including matters going to credibility. The appellant contended on appeal that there was a miscarriage of justice because of the credibility cross-examination without the Crown having been granted leave.

Price and Bellew JJ (Hamill J dissenting) dismissed the appeal on the basis that there was no miscarriage of justice although they differed in their reasoning. Bellew J held that cross-examination "about" matters under s 38(1) permits a wide range of questioning. Leave under s 38(3) is not required where the cross-examiner seeks to challenge the credibility of answers given by the witness in respect of the subjects about which leave has been granted

under s 38(1). However, his Honour considered that the trial judge was in error by allowing the Crown to cross-examine beyond that wide scope in s 38(1). His Honour held that because the Crown had put to the victim that he had lied because he was angry at police for charging him with additional offences, refusing bail, and granting an indemnity to another witness, the Crown's questions traversed the subjects about which leave had been granted. However, his Honour concluded that the error did not amount to a miscarriage of justice.

Price J took the view that there was no error because leave under s 38(3) was not required. His Honour found that the Crown's cross-examination as to the prior inconsistent statements and the reasons for the victim's retraction were not relevant only to the witness's credibility.

Whether cross examination of accused as to veracity of witness accounts permissible

BJS was a former Catholic priest charged with numerous counts of indecent assault against various complainants. He gave evidence at his trial. As part of his cross-examination by the Crown, he was asked whether a number of witnesses were wrong in having given evidence that he stayed in the home of one of the victims on three occasions. After he was convicted, BJS appealed, one of the grounds being that the jury should have been discharged after this exchange: ***BJS v R* [2013] NSWCCA 123**. He relied upon the principle in Palmer v R [2009] HCA 2; 193 CLR 1 that asking an accused if a complainant had a motive to lie invites the jury to accept that complainant's evidence unless positively disproved.

Hoeben CJ at CL dismissed the ground of appeal. The accused was asked if the witnesses were wrong, not why their evidence was wrong. While in cross-examination the word "mistaken" was used once, it was clear in the context that it was used to mean "wrong". Hoeben CJ at CL also observed that counsel for BJS had dealt with the concern by successfully seeking a specific direction on the subject of motive to lie.

Exclusions

Improperly/illegally obtained evidence – whether desirability of admitting outweighs undesirability – remoteness from illegal conduct

***Kadir v The Queen; Grech v The Queen* [2020] HCA 1** concerned the live-baiting of greyhounds. An activist organisation employed an investigator to illegally record surveillance footage of the alleged conduct. These recordings were supplied to the RSPCA, who obtained and executed a search warrant. Finally, the investigator posed as a prospective trainer and elicited admissions from Kadir. The appellants submitted that these three bodies of evidence were tainted and inadmissible due to the illegality of the surveillance recordings.

The High Court (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ) held that the surveillance footage should be excluded, as it was obtained in repeated and deliberate contraventions of law. The search warrant and admission evidence was also held to have been gathered improperly, but the Court found that the desirability of admitting the evidence outweighed

the undesirability of admitting evidence obtained in the way it was: s 138 *Evidence Act 1995* (NSW). Critical factors included the highly probative nature of the evidence, the seriousness of the charges, the importance of the evidence in making out those charges and the remoteness of the evidence from the impropriety – the RSPCA did not know, when executing the search warrant, that the recordings were obtained illegally. Neither did the admissions depend on anything captured in the unlawful recordings.

Whether admissions said to be ambiguous should be excluded under s 137 of the Evidence Act

The appellant in ***Flood-Smith v R*** **[2018] NSWCCA 103** was found guilty of recklessly causing grievous bodily harm to his two year old daughter. The Crown relied on a number of statements made by the appellant like, "I don't know what happened, I don't know what I've done". They were admitted without objection but it was contended on appeal that the evidence was wrongly admitted in that s 137 of the *Evidence Act* required the evidence to be excluded because of its ambiguity and equivocality.

In dismissing the appeal, Hoeben CJ at CL applied the decision of *R v Burton* [2013] NSWCCA 335 in which Simpson J (as she then was) held that where an item of evidence is capable of different interpretations, its actual probative value will depend upon what interpretation is placed on it by the jury; it is no part of the judge's function to make that assessment when determining admissibility. His Honour also noted that there is considerable authority that s 137 has no application where the impugned evidence was not objected to at trial: *Perish v R* (2016) NSWLR 161; [2016] NSWCCA 89.

Exclusion of evidence as a result of a failure to caution

In ***Director of Public Prosecutions (NSW) v Owen*** **[2017] NSWSC 1550**, police were called to a hotel at 2 o'clock in the morning and discovered Mr Owen intoxicated and agitated. Upon learning that there was an outstanding warrant for having failed to appear in court, police officers informed Owen that he would be placed under arrest. He was not cautioned. He became violent and was subsequently charged with assaulting and resisting the officers. A magistrate excluded the police officers' evidence of what Owen did to resist arrest and dismissed the charges on the basis that the failure to caution rendered the evidence "improperly obtained": ss 138 and 139 of the *Evidence Act*. She placed significant weight on the Police Code of Practice, which advises that "although the requirement to caution an arrested person is enlivened upon questioning, it is good practice to question a person when they are arrested, whether or not there is to be any questioning".

Allowing the appeal, R A Hulme J held that the evidence was not "taken to have been obtained improperly" under either ss 138 or 139, referring to the description of what amounts to improper conduct provided by Mason CJ, Deane and Dawson JJ in *Ridgeway v The Queen* (1995) 184 CLR 19. His Honour held that even if the conduct amounted to impropriety, s 138 is only engaged when there is a link between the impropriety and the obtaining of the evidence. There was no link in this case between the procurement of evidence (i.e. the officers' accounts of Owen's violent behaviour after arrest) and the failure to caution. With respect to s 139, it was held that because Owen was not "under arrest for

an offence" pursuant to s 139(1)(a) and was not being questioned, the provision was not engaged.

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].

Search warrants and s 138 of the Evidence Act 1995

The prosecution of the accused in ***R v Sibraa*** **[2012] NSWCCA 19** for child pornography style offences depended upon materials seized when his home was searched pursuant to a search warrant. The search warrant turned out to be invalid because the issuing magistrate had neglected to date it. The trial judge excluded the evidence pursuant to s 138 of the *Evidence Act 1995*. He was critical of the police officers involved in the search for failing to satisfy themselves that the warrant was valid. He regarded their conduct as "reckless". The prosecution appealed.

It was held by R S Hulme J ([18] – [26]) that the judge's findings in relation to the officers were erroneous. It was the purported execution of an invalid warrant that constituted the impropriety, not the failure of the officers to check it. It was not insignificant that the origin of the impropriety was the accidental omission of the issuing magistrate. Had the omission been detected, it could easily have been rectified. But for the defect in the warrant, the intrusion into the respondent's home would have been legal. There was no deliberate or conscious undertaking of a risk by the officers. It was not necessarily unreasonable for the officers to expect that the magistrate would have carried out the simple task of signing, sealing and dating the warrant without the need for any oversight. It was unrealistic to expect that each of the police officers involved in the search should have checked to ensure that all "i"s have been dotted and "t's crossed as some of the trial judge's remarks suggest. The finding of "recklessness" was unwarranted.

Discretion to admit unlawfully obtained evidence

The respondent in ***DPP v Langford*** **[2012] NSWSC 310** was a driver involved in a serious road accident. Despite her demonstrating heavy intoxication, alcohol was not registered by

two roadside breath tests. She was taken for blood and urine sample tests by police, who (mistakenly) believed that they were acting pursuant to the *Road Transport (Safety and Traffic Management) Act 1999*, and she was subsequently charged with high range drink driving after testing positive to alcohol. However, a magistrate ruled that the Act did not authorise her detention and compulsory testing, and that the evidence from the tests was unlawfully obtained. The magistrate refused to admit the evidence and dismissed the charge.

Fullerton J, allowing the DPP's appeal, found (at [32]) that the magistrate had erred by placing undue weight on broad policy considerations, at the expense of those factors which are required to be taken into account pursuant to s 138(3) when determining whether to admit unlawfully obtained evidence. The magistrate was entitled to consider the need for police to adhere strictly to the statutory limits of their powers. However, her Honour failed to consider the gravity of the breach as required by s 138(3)(d). Citing McClellan CJ at CL in *R v Camilleri* [2007] NSWCCA 36 at [28]-[31], Fullerton J held that the intention of the arresting authorities was relevant in determine the seriousness of the contravention. In this case, the senior officer who directed the samples be taken had formed a genuine but mistaken belief about his authority to do so. Her Honour stated (at [38]) that where a contravention of the law is innocent and alleged offence is serious, there would need to be "powerful countervailing considerations before the evidence is rejected".

Exclusion of evidence where unfairly prejudicial despite no objection to admissibility

***Chand v R* [2011] NSWCCA 53** concerned an alleged offence of violence committed by the appellant against a neighbour. A police officer gave evidence regarding a number of COPS entries concerning complaints made by the appellant against neighbours. Notwithstanding that no objection was taken to the evidence, Hoeben J held that the evidence should have been excluded. There was a risk of unfair prejudice in that the jury could have been led to believe that the appellant was a vexatious complainant; a person suffering from some paranoia or otherwise undiagnosed mental illness; a person who felt victimised by neighbours; or a person whose credibility due to his beliefs was diminished. No reference was made to *R v FDP* (2008) 74 NSWLR 645; [2008] NSWCCA 317, where it was held that there was no duty upon a trial judge to reject evidence where no objection was taken.

Decision as to whether police have acted improperly is discretionary

In ***Fleming v R* [2009] NSWCCA 233**, the accused was charged with a murder committed in 1984. The investigation had been reopened and police duped the accused into providing them with a DNA sample, which matched with semen recovered from the deceased's body. McClellan CJ at CL held that the trial judge's decision was discretionary and that it was open to him to have found no impropriety.

Expert evidence

Crown's duty to call witnesses that flesh out the narrative - not obliged to call defence expert where nothing added to narrative

The applicants in ***WG v R; KG v R*** **[2020] NSWCCA 155** were parents of the complainant, who was aged between 5 and 19 at the time of the offending. WG was convicted of 73 counts of violent sexual assaults and KG was convicted of 13 counts of sexual offending. The second ground of appeal alleged a miscarriage of justice flowing from the Crown's refusal to call a defence expert. Both the Crown and defence expert examined the complainant at the same time - they agreed on observations but differed on their conclusions. The Defence, for forensic reasons, did not call the expert themselves.

Bathurst CJ held, hesitantly, that the Crown had no obligation to call a defence expert where she contributed nothing to the narrative. A difference in opinion but not in observation did not enliven any obligation to call. Even if the Crown should have called the expert, there was no miscarriage of justice because the Defence could've called her but chose not to for forensic reasons. His Honour noted that an appeal report from the expert, which reviewed the trial transcript, was of limited utility because the focus was on her evidence at trial. Fullerton J agreed.

Fagan J agreed, adding that the expert had been engaged by defence, was ready and willing to give evidence for the defence and was not called. His Honour noted that juries are directed on evaluating competing expert evidence without regard to who has engaged them. Also, because the expert was qualified by the applicants, the Crown could not have called her without impeding on privilege. The appeal was dismissed, Fagan J dissenting on the unreasonableness of the verdict where there was no contemporaneous complaint.

Expert evidence – whether physics formula sufficient to raise doubt in prosecution of camera detected speeding offence

Mr Noble-Hiblen was driving down O'Connell Street, Parramatta, at 2.50pm on a weekday. A speed camera recorded his speed as 118km/h. After pleading not guilty in the Local Court, Mr Noble-Hiblen gave evidence based on the physics formula that "Speed = Distance over Time". The "Time" between the two points at which the car crossed was 0.68 seconds (according to the time-stamps on the images). The "Distance" was measured by both satellite image and Mr Noble-Hiblen's personal measurement of the width of the intersection. Applying the calculation, his "Speed" could not have exceeded 61km/h. The Magistrate accepted this evidence – including Mr Noble-Hiblin's assertion in cross-examination that "You can't bend the laws of physics" – and acquitted him of the charge. The Roads and Maritime Service appealed: ***Roads & Maritime Services v Noble-Hiblen*** **[2019] NSWSC 1230**.

The *Road Transport Act 2013* deals with evidence of camera-detected speeding offences. Sections 137 and 138 deal with the admissibility of images as prima facie evidence, and sections 140 and 141 concern the form in which evidence to rebut the prima facie image evidence. Per s 141(2), Campbell J held that Mr Noble-Hiblin's assertion contradicting or challenging the accuracy, reliability or correct operation of the device concerned or the accuracy or the reliability of information (including a photograph) derived was insufficient.

To engage s 141(2), what was required was expert evidence admitted in accordance with s 79 of the *Evidence Act 1995* (NSW). Campbell J did not consider the calculations presented to be expert evidence – either on the basis that they were adduced from a person with relevant specialised knowledge, or based on specialised knowledge attained from training, study and experience. The matter was remitted to the Local Court for redetermination.

OBSERVATION: The proposition that the respondent drove in O'Connell St, Parramatta at 2.50pm on a weekday afternoon at 118 km/h itself involves two possibilities: he was either travelling at a grossly dangerous speed or something had gone awry with the speed camera. The magistrate accepted his contention as to the latter. It is unfortunate that the respondent filed a submitting appearance on the appeal, leaving the judge without the benefit of a contradictor.

It is uncontroversial that expert evidence was required before a doubt could be raised as to the accuracy and reliability of the speed camera: s 141(2) of the *Road Transport Act*. Why could the respondent not qualify as an expert? The determination of the appeal appears to have turned more on the absence of evidence before the magistrate to establish the qualification than on whether the respondent could have so qualified. Evidence as to how he had sourced his knowledge of a law of physics (study at high school, perhaps) may have led to his evidence being treated as expert evidence.

Admissibility of expert evidence of translator where errors in translation alleged and where translator had not read or agreed to be bound by the Expert Witness Code of Conduct

***Chen v R* [2018] NSWCCA 106** concerned a conviction for drug supply where telephone intercepts had been admitted at trial. They had been translated from another language and the appellant had challenged the admissibility of the translations on the basis of the translator's lack of expertise, lack of impartiality, bias, and the inaccuracy of her translations. After they had been ruled admissible, the appellant sought to have them withdrawn from the jury when it emerged that the translator was not familiar with the Expert Witness Code of Conduct. On appeal the appellant contended that the evidence was inadmissible under s 79 of the *Evidence Act*, that it should have been excluded under ss 135 or 137 or that the trial judge should have withdrawn the evidence once it became known that the translator had not agreed to be bound by the Expert Witness Code of Conduct. The appeal was dismissed.

The Court applied ***Wood v R* (2012) 84 NSWLR 581**, where it was held that while there is no rule that precludes the admissibility of expert evidence which fails to comply with the Code, the Code is relevant when considering the exclusionary rules in ss 135-137 of the Act. That is, the expert witness's failure may result in the probative value of their evidence being substantially outweighed by the danger of unfair prejudice. The Court held in this case that Part 75 r 3J of the Supreme Court Rules did not confine the operation of s 79 such that a failure to comply with the Code mandated the exclusion of the witness's evidence. The Court held that the trial judge correctly approached the application for the withdrawal of the evidence as a matter relevant to the determination under ss 135-137. The Court held that the issues surrounding the non-compliance with the Code were not unfairly prejudicial but rather raised questions which properly fell to the jury to determine.

Expert evidence – admissibility not dependent upon proof of the truth of assumptions upon which the opinion is based

A forensic chemist gave evidence in a drug manufacturing trial that items found in a clandestine laboratory contained waste product of separate instances of manufacturing of methylamphetamine and that, based on the quantity of the waste product, more than 1 kg of the drug had been produced. (The prescribed large commercial quantity for methylamphetamine at the time was 1 kg.) The grounds of appeal in ***Taub v R*** **[2017] NSWCCA 198** included that the trial judge erred in admitting the expert evidence because *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 required that the assumptions upon which the opinion was based had to be proved.

Simpson JA analysed the principles in Makita and in *Dasreef Pty Ltd v Hawchar* [2011] HCA 21; 243 CLR 588 and held that it is not a condition of admissibility of expert evidence that the tendering party prove the truth of the assumptions on which the opinion is based and so the evidence was correctly admitted. (However, a concession made in the evidence of the expert that the quantity manufactured could have been less than 1 kg meant that the conviction should be quashed and a verdict of manufacturing not less than the commercial quantity be substituted.)

Identification – voice - ad hoc expert – admissible under s 79 of the Evidence Act 1995 where police officer repeatedly listened to recordings

The applicant in ***Nguyen v R*** **[2017] NSWCCA 4** was convicted of supplying methylamphetamine. The Crown relied on a number of intercepted phone calls involving a female voice which the Crown claimed was the applicant's. At trial, a police officer who had listened to the recorded conversations and the applicant's record of interview gave evidence that it was indeed the applicant's voice. He had spent a significant amount of time listening to the recordings; including two weeks replaying certain calls and five days reviewing the calls alongside transcripts to ensure accuracy for Court. He gave evidence on common voice characteristics (a loud female voice, speaking English with a Vietnamese accent but sometimes lapsing into Vietnamese, and a distinct high-rising inflection) and use of common references like "down west".

The applicant appealed against her convictions with one ground being that the police officer's evidence was inadmissible. It was submitted that s 79 of the *Evidence Act 1995* was not engaged because the officer was in no better position than the jury to compare the voices in the intercept material with the applicant's police interview. Basten JA, R A Hulme and Schmidt JJ all held it was relevant and admissible. R A Hulme J (Schmidt J agreeing) held that it was admissible under s 79. Whilst jurors could have made their own assessment of two of the three bases for the identification (common voice characteristics and common references), the officer also relied on the overall sound of the voice and the amount of time the officer had invested in listening to the two sources would have been impractical for the jury to replicate. Therefore the evidence was relevant and admissible.

Ad hoc expert voice identification evidence inadmissible under s 79 of the Evidence Act 1995 where jury could make the same comparisons

The appellant in ***Nasrallah v R; R v Nasrallah*** **[2015] NSWCCA 188** appealed his conviction of four counts of importing a border controlled drug. There were 21 recordings of telephone calls made to DHL inquiring as to the progress of three packages (two were the subject of counts on the indictment, and one was a related consignment delivered to the appellant). The content of those calls implicated the caller in the importation of the three packages. The trial judge admitted evidence from a Federal Agent to the effect that the appellant's voice was the voice of the caller of the DHL calls. The agent's evidence was admitted as ad hoc expert voice identification evidence under s 79 of the *Evidence Act 1995* (NSW). The agent had listened to the appellant's voice in recordings of the appellant's phone calls from prison and in two direct conversations between the agent and the appellant.

McCallum J distinguished the present case from *R v Leung & Wong* [1999] NSWCCA 287; 47 NSWLR 405 and *Irani v R* [2008] NSWCCA 217, both cases allowing the admission of ad hoc expert evidence. Her Honour noted an important qualification to the admissibility of such evidence in Leung at [44]-[45]. Her Honour held that the Federal Agent's evidence was irrelevant and should not have been admitted, applying *Smith v The Queen* [2001] HCA 50; 206 CLR 650 at [10]-[12]. The Crown acknowledged that the jury could make the same comparison between the DHL calls and the prison calls themselves. Other than the agent's asserted knowledge of "Arabic persons speaking English", his opinion was based on material no different to that available to the jury. McCallum J found that his asserted specialised knowledge went little further in identifying particular features of the voice than noting the use of the word "youse" and, if anything, his knowledge would have only qualified him to give evidence on whether the voice was speaking with a Lebanese accent. Her Honour allowed the appellant's appeal, quashed the conviction and ordered a new trial. It was therefore not necessary to determine the Crown's appeal.

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.

Expert evidence on shared anatomical features between persons

***Honeysett v R* [2013] NSWCCA 135** concerned the evidence of Professor Henneberg, the slightly controversial anatomical expert previously the subject of extensive argument in *Morgan v R* [2011] NSWCCA 257. The finding in the latter case, in summary, was that Professor Henneberg's evidence that two photographs showed persons bearing a "high degree of anatomical similarity" was not an expert opinion, rather one that could be made by the jury for themselves, and lent an undesirable "white coat effect" to what was a lay observation. In *Honeysett*, Professor Henneberg gave evidence that a man depicted robbing a hotel on CCTV and a man photographed at a police station shared particular anatomical features. It was the Crown case that the images depicted the same person: Mr Honeysett. Mr Honeysett was convicted and appealed, arguing that the decision in Morgan required the ground relating to Professor Henneberg's evidence to be upheld.

Macfarlan JA disagreed with the appellant. Unlike in *Morgan*, Professor Henneberg did not state in this case that the two persons displayed a "high degree of anatomical similarity". In this case, Professor Henneberg did not give evidence of any conclusions to be drawn from his observations of identified common characteristics. And his evidence in this case, as to the characterisation of the shape of the head and face of a person wearing a balaclava, was clearly based on the evidence before him and his own specialised knowledge.

(The appellant had disavowed any reliance upon lack of relevance or the discretionary considerations in ss 135 and 137, making two rulings in Morgan, that the jury could make these observations for themselves and the undesirability of the "white coat effect", moot in this case.)

Admissibility of "body mapping" evidence

In ***Morgan v R* [2011] NSWCCA 257** the prosecution sought to rely upon the evidence of a "biological anthropologist and anatomist", Dr Maciej Henneberg. Through a process he described as a "morphological approach to anatomical examination" he expressed the opinion that "there is a high level of anatomical similarity between the offender [depicted in CCTV images] and the suspect". The trial judge admitted the evidence over objection and after a voir dire in which the defence called 3 experts who were critical of Dr Henneberg's approach. It was held on appeal that the doctor's comparison of the images was a task which the jury could have undertaken for themselves. The opinion evidence was dressed up in technical jargon but when stripped of this it was simplistic. Hidden J concluded on the subject by saying that "it tended to cloak evidence of similarity in a mantle of expertise, described by Mr Stratton [SC] as a 'white coat effect', which it did not deserve".

Generally

Treatment of substantial documentary evidence in trials – appropriate approach consistent with case management principles

In ***Roach v R*** **[2019] NSWCCA 160**, the applicant was tried for conspiracy to dishonestly obtain a financial advantage, and related offences including a director supplying misleading information concerning the affairs of a company to the ASX and falsifying company books. As part of the Crown's opening address, two volumes of documents (comprising 1200 pages) were tendered without objection. At the pre-trial stage, a certificate had been issued pursuant to s 140 of the *Criminal Procedure Act 1986* (NSW), in which the applicant consented to the tender of the Crown's "proposed tender bundle, which comprises two volumes of documents". On appeal, it was contended by (different) counsel for the applicant that the prosecution should not have been permitted to tender the Court Book during the Crown's opening, mixing address and evidence.

The Court (Bathurst CJ, Bell P and Johnson J) dismissed this ground. The Court noted that for white collar criminal trials involving substantial documentary evidence, the common practice is to prepare and tender folders of those documents at an early stage, prepare summary documents, as well as to rely on s 50 *Evidence Act* for proof of voluminous or complex documents. This is consistent with the orderly presentation of documentary evidence emphasised in *R v Milne (No 1)* (2010) 260 FLR 166. Further, the Court noted that in these cases it is also important that the selection of documents is appropriate, consistent with the parties' adherence to case management requirements that aim to reduce delay and allow parties to identify the real issues. The Court noted that the provisions in Div 3, Pt 3 of the *Criminal Procedure Act*, including s 140 pre-trial conferences, were of particular use in such trials. It considered that the way in which the documents had been tendered was appropriate, and that taking any alternative approach would have been inconsistent with the pre-trial and trial management statutory regimes. In addition, the adopted approach was consistent with both trial counsel's professional and ethical obligations in ss 134-149F *Criminal Procedure Act* and r 58 *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW).

Whether pre-recorded statement in domestic violence proceedings must be tendered for it to become evidence

The respondent in ***Director of Public Prosecutions (NSW) v Al-Zuhairi*** **[2018] NSWCCA 151** was charged with a domestic violence offence. The alleged victim made a pre-recorded (DVEC) statement pursuant to s 289F of the Criminal Procedure Act. In the Local Court the recording was played and marked for identification but not tendered. On appeal to the District Court, the judge held that the recording was not properly before the court and set aside the conviction. The judge stated a case to the Court of Criminal Appeal at the Director's request.

The Court, per Payne JA, quashed the order setting aside the conviction. His Honour held that the playing of the recording in the Local Court was sufficient to make it evidence in those proceedings for the purpose of an appeal to the District Court. His Honour held that the contents of the exhibit, once "viewed" or "heard" in the Local Court, met the description

of "evidence given in the original Local Court proceedings" for the purpose of s 18(1) of the *Crimes (Appeal and Review) Act*.

The words "not admissible" in the Evidence Act 1995 mean "not admissible over objection"

The first named applicant ("Perish") in ***Perish, Anthony v R; Perish, Andrew v R; Lawton, Matthew v R*** **[2016] NSWCCA 89** was convicted of murder and of conspiracy to murder. Evidence was led in the trial that was second-hand hearsay not admissible under s 59 of the *Evidence Act 1995* ("the Act"). Counsel for Perish did not object because the evidence was crucial to his defence. Nonetheless, his conviction appeal contained a ground alleging that admission of the evidence occasioned a miscarriage of justice. The Court (Bathurst CJ, Hoeben CJ at CL and Bellew J) dismissed the appeal holding that, in accordance with a consistent line of authority, the words "not admissible" where they appear in the Act mean "not admissible over objection". These decisions have not been uncontroversial and there are a number of matters which it may be said suggest a contrary conclusion, most obvious of which is the fact that the words "not admissible" in s 59 are not expressly qualified by the words "over objection". Nonetheless, the Court is not satisfied that the construction is plainly wrong. The better view is that it is correct. The Court is fortified in its conclusion for two reasons. First, it is consistent with the adversarial nature of a trial; it is for the parties to choose the evidence to which they will take objection. Second, such a construction does not relieve the trial judge of his or her overriding obligation to ensure a fair trial according to law. To the extent necessary, this obligation would extend to requiring the trial judge on his or her own motion to exclude inadmissible evidence, the effect of which would deny a fair trial, and in other circumstances to direct the jury not to take account of a particular piece of evidence which would have been rejected had objection been taken. In the present case, the admission of the evidence resulted from a rational forensic decision made by trial counsel.

Hearsay

Hearsay – maker unavailable exception – admissibility of contemporaneous representations of sexual assault

A 13-year-old girl was punched then sexually assaulted in 1994. After making her way home, she reported the assault and was taken to hospital. The examining doctor took a history from the girl, and compiled a report a month later. The girl was then taken to the police station, where she made and signed a more detailed police statement. The girl died in 2004. Many years later, the appellant's DNA was matched to a semen sample taken from the girl, and he was charged with the offence of assault occasioning actual bodily harm and aggravated sexual assault. At his trial in 2017, he objected to evidence of the complainant's prior representations to the doctor and police officer on the basis of hearsay. The trial judge overruled the objection, and admitted the evidence pursuant to s 65(2)(b) of the *Evidence Act 1995*. One of the grounds of appeal in ***Priday v R*** **[2019] NSWCCA 272**, was that the trial judge erred by admitting the hearsay representations made by the complainant – either on the basis that all of the circumstances in which the representations were made were not considered (s 65(2)(b)), or because the trial judge took a

"compendious approach" inconsistent with authority in *Sio v The Queen* (2016) 259 CLR 47; [2016] HCA 32.

The appeal was dismissed. In respect of the issue of whether the trial judge failed to take into account certain circumstances in his assessment of s 65(2)(b), Macfarlan JA considered each circumstance – which had not been the subject of submissions to the trial judge – in turn. The first circumstance concerned six inconsistencies between the two accounts, which his Honour considered were explicable having regard to the complainant's distressed state. The second concerned the lies told by the complainant to her caregivers as to where she was going on the day of the assault – these could not be characterised as evidence of the circumstances of the representations but rather as relevant to the complainant's credibility. His Honour dismissed a number of other asserted circumstances as neutral, and held that – as the representations were made very soon after the event, to persons of authority, while in a distressed state, exhibiting injuries consistent with the account, in a formal setting and (in the case of the police statement) formally acknowledging the correctness of her account – the circumstances were as such that it rendered the representations unlikely to be fabrications.

As to whether the trial judge impermissibly took a "compendious approach" to his consideration of s 65(2)(b), Macfarlan JA examined the approaches taken to other sub-sections in s 65(2) in *R v Ambrosoli* (2002) 55 NSWLR 603; [2002] NSWCCA 386 and *Sio v The Queen* (2016) 259 CLR 47; [2016] HCA 32. In particular, he had regard to the High Court's conclusion in *Sio* that "instead of a compendious approach, each material fact to be proved by a hearsay statement must be identified and the statute applied to it is of general application". His Honour noted that the trial judge was cognisant that the material hearsay representations were relevant to Count 1 (as the applicant pleaded not guilty to punching the complainant) and Count 2 (as the applicant's case was that the intercourse was consensual). His Honour considered that the trial judge's reasoning and observations were directed to those two matters and were not affected by impermissible reasoning in a compendious fashion.

Criminal Procedure Act 1986 (NSW), Ch 6, Pt 4B does not eliminate application of s 65 Evidence Act 1995 (NSW)

In ***Director of Public Prosecutions (NSW) v Banks*** **[2019] NSWSC 363**, a Magistrate excluded a recorded statement given by the complainant in a domestic violence matter because the complainant did not attend to give evidence and her unavailability for cross examination was regarded by the Magistrate to be procedurally unfair. The police prosecutor then sought to have the recorded statement admitted under s 65(2) *Evidence Act 1995* (NSW), however the Magistrate accepted the respondent's argument that this provision was overridden by Pt 4B of Ch 6 of the *Criminal Procedure Act 1986* (NSW) (CPA). The issue on appeal was the proper construction of s 289F(1), the operative provision in Pt 4B CPA. The plaintiff submitted that s 289F(1) only concerned "the form of evidence in chief by a complainant", and that s 65(2) of the *Evidence Act* continues to apply. The respondent submitted that s 289F(1) determined the circumstances in which such a statement could be tendered in evidence, to the exclusion of s 65(2) of *the Evidence Act*.

The appeal was upheld. Ierace J referred to *DPP v Al-Zuhairi* [2018] NSWCCA 151 in support of finding that s 289F is concerned only with the form of evidence. In addition, his Honour noted that s 289E preserves the application of the *Evidence Act*. With reference to the Second Reading Speech, Ierace J noted that the purpose of Pt 4B is to enable evidence of complainants in a different form, and that it contained nothing that supported the respondent's submission that it was intended to effectively eliminate the use of maker unavailable hearsay evidence. In addition, his Honour was wary of the illogical consequences of the construction submitted by the respondent, which would permit prior representations in written form, but exclude video or sound recordings. Finally, it was considered that the issue of unfairness could be addressed by existing *Evidence Act* provisions, such as the conditions in s 65(2), as well as ss 135 and 137.

Complaint evidence in sexual assault cases – whether "fresh in the memory" for the purposes of s 66 of the Evidence Act

Another ground of appeal in T***he Queen v Bauer (a pseudonym)*** **[2018] HCA 40; 92 ALJR 846** concerned the admissibility of evidence of disclosure of the alleged assaults by the victim RC to her friend, AF, when she was 15 years old. The Victorian Court of Appeal held the trial judge wrongly admitted the evidence because there was no evidence the relevant fact was "fresh in the memory" of the complainant when the statement was made and that the evidence was generic and non-specific.

The High Court held that there was evidence to infer the facts were fresh in the complainant's memory and that such facts were specific. It was very probable that the events disclosed to AF were vivid in RC's recollection and would remain so for years to come. Further, it was not fatal to the admissibility of the evidence that RC's disclosure was in response to leading questions by AF as to what sex acts the respondent made RC perform; that went to the weight of the evidence which was a matter for the jury.

Admissibility of hearsay evidence if maker is unavailable – s 65

Mr Sio was convicted of aggravated robbery in company, having been acquitted of the primary charge of murder. Mr Filihia pleaded guilty to murder and agreed to give evidence for the prosecution at the trial of Mr Sio (he had participated in a number of police interviews). However, when called at the trial Mr Filihia refused to give evidence, refused to make an oath or affirmation and maintained his refusal when threatened with contempt. The trial judge ruled that the police recordings of interviews with Mr Filihia were admissible as an exception to the hearsay rule pursuant to s 65 *Evidence Act* on the basis that the statements were evidence of previous representations made against Mr Filihia's interests and were made in circumstances that made it likely the representations were reliable. In an appeal against conviction, Mr Sio contended the statements were inadmissible. The primary issue in ***Sio v R*** **[2015] NSWCCA 42** was whether the statements were made in circumstances that made it likely that they were reliable: s 65(2)(d)(ii).

Leeming JA (at [24]-[30]) made the following points about s 65(2)(d) in light of the 2009 amendments following *R v Suteski* [2002] NSWCCA 509; 56 NSWLR 182.

The assessment of reliability in s 65(2)(d)(ii) adds an additional hurdle to the prima facie admissibility of firsthand hearsay evidence of a representation against interest whose maker is unavailable.

The test in subs (d)(ii), "make it likely" is less onerous than the "make it highly probable" threshold in subs (c).

Subsections (b), (c) and (d) are directed to the reliability of the representation as a whole and the circumstances of the making of the representation extend to later statements or conduct.

While subsections (b) and (d) contain examples of circumstances which may increase the likely reliability of a representation (contemporaneity and against interest), they should not be read as exhausting the circumstances to which regard might be had.

Even if s 65(2) is satisfied, it is open to a judge to exclude the evidence under ss 135 and 137. Additionally, it may be that a direction to the jury will be sufficient to address any prejudice arising from the admissibility of the evidence.

Appellate review of a ruling on evidence made pursuant to s 65(2)(d)(ii) requires the court to determine for itself whether the circumstances are such as to make the representation reliable. It is a binary question.

Leeming JA was satisfied that in the present case all of the circumstances indicated likely reliability and dismissed the appeal.

"Fresh in the memory" in s 66 of the Evidence Act 1995

In ***R v XY [2010] NSWCCA 181***, it was alleged that the accused committed four offences of sexual intercourse with a child under the age of 10 in a period from June 2003 to September 2005. Evidence of complaints by the complainant to a friend in late 2007 and to his parents in June 2009 was held to be inadmissible as they were not made at a time when the occurrence of the asserted fact was fresh in his memory. The trial judge referred to discrepancies as to when the offences occurred, and the period over which they occurred and held that for reasons of such "inexactness" it was difficult to know how much time elapsed from the occurrence of the alleged offences and the making of the complaints. Accordingly, there was uncertainty as to whether the incidents were "fresh in the memory".

The Crown successfully appealed pursuant to s 5F(3A) of the *Criminal Appeal Act 1912*, contending that the judge had misconstrued s 66(2A) of the Evidence Act 1995. Whealy J held that the phrase "fresh in the memory" is no longer to be taken as an indication that it means "recent" or "immediate" (as was the position in *Graham v R* (1998) 195 CLR 606, prior to the insertion of s 66(2A)). The "nature of the event concerned" is now an important consideration in the factors to be considered. In this case the representations to the friend and to the complainant's parents were sufficiently detailed and consistent with the account he had provided to the police shortly after the latter to indicate that the events were indeed "fresh in the memory" on both occasions.

Identification

Identification in court – an unusual case in which there was no error

A witness was asked how he could identify the accused and replied, "I know he is one of the boys of the next door family. I can recognise him. I am positive it is that man there". On appeal it was contended that the jury should have been discharged because of the in court identification of the appellant: ***Fadel v R* [2017] NSWCCA 134**.

Simpson JA rejected the argument. She referred to the general recognition in the common law of dangers in relation to identification evidence, and of in-court identification in particular: for example, *Alexander v The Queen* (1981) 145 CLR 395; *Festa v The Queen* (2001) 208 CLR 593. But in this case, before the evidence in question was given, the witness had already said that the man (the appellant) who he later saw being arrested had carried out certain acts of violence in the course of a neighbourhood melee and he knew he was one of "the boys of the family living in number 94". This was not a case in which the identification was made by a witness previously unacquainted or unfamiliar with the person identified. It was given by a person who had frequented the premises next door to those of the appellant, who knew and recognised, although not by name, the appellant and members of his family, and who had witnessed at close range the events in question and their immediate aftermath, including the appellant's arrest. If it was in-court identification, it was of an unusual and special kind that was not subject to all of the same weaknesses often associated with such evidence.

Miscarriage caused by in-court identification

***Aslett v R* [2009] NSWCCA 188** concerned a trial for offences relating to a robbery and kidnapping. A security guard who had failed to identify the accused from photographs unexpectedly identified him in the dock. The trial judge refused an application to discharge the jury. An appeal against conviction was allowed. Kirby J held that the jury should have been discharged. The evidence was inadmissible as it had little probative value and was highly prejudicial. It converted a circumstantial evidence case to one in which there was direct evidence of the accused's involvement. The trial had only just begun. The security guard gave evidence on the first day so there was little inconvenience in recommencing.

Opinion

Victim's interpretation of intent of blackmailer not admissible as lay opinion

Ivan Petch, former mayor of Ryde, was charged with blackmail offences for attempting to coerce the council's general manager into settling a costs dispute against him. On appeal, Petch argued, inter alia, that the trial judge erred in admitting lay opinion evidence (over objection) of what the manager understood Petch to be implying: ***Petch v R* [2020] NSWCCA 133**. Hamill J distinguished such opinion evidence from evidence of victims' reactions. He

found that the opinion was not based on what the victim saw, heard or perceived, and was not necessary to understand the events. The conviction was quashed and no re-trial ordered in light of Petch's age, likely delay (he had served most of his sentence), and opprobrium suffered.

Photographs

Drawing inferences from photographs to prove facts

The offender in ***Amante v R*** **[2020] NSWCCA 34** set fire to his ex-partner's apartment (part of a Department of Housing complex). An agreed statement of facts and photographs of the damage, including holes in the roof, were put before the sentencing judge. No expert was called. The sentencing judge purported to take judicial notice from the photographs that the fire – having gotten into the roof void – seriously threatened the structural integrity of the building.

On appeal, N Adams J held that the sentencing judge had not taken judicial notice but merely drawn an inference. Her Honour further held, dismissing the appeal, that the inference was open on all the evidence, including the photo. Beech-Jones J held, agreeing, that the *Evidence Act 1995* (NSW) had overridden most principles relating to the admissibility and weight of photographic evidence. The Court's role, therefore, was simply to determine whether the inference was open or mistaken.

Privileges

Section 125(2) Evidence Act 1995 – test for loss of client legal privilege due to misconduct

Izod and his solicitor, Zreika, were charged with perverting the course of justice. Izod gave false symptoms to a doctor to obtain a medical certificate, which Zreika (aware of the falsity) used to obtain an adjournment. Zreika's culpability for the offence lay in his advice to Izod in relation to the false certificate, such advice being founded upon intercepted telephone communications. The magistrate upheld a privilege claim over the intercepted communications, finding that the misconduct was not established.

This was overturned on appeal: ***DPP (NSW) v Izod; DPP (NSW) v Zreika*** **[2020] NSWSC 381**. Simpson AJ held that the magistrate had applied a "test of finality". What was required was far less conclusive – an evaluation of evidence to determine whether there was a basis for a conclusion that there were reasonable grounds for finding that the communications were made in furtherance of the misconduct.

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

In ***KH v R*** **[2014] NSWCCA 294** a trial judge granted leave to the prosecutor to cross-examine a prosecution witness who gave evidence favourable to the defence. In the presence of the

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

Privilege against self-incrimination when party giving evidence in chief

In ***Song v Ying*** **[2010] NSWCA 237**, Hodgson JA held that a party to proceedings, who gives evidence in chief in response to questions from that person's lawyer, and who wishes to give that evidence but only after a certificate under s 128 of the *Evidence Act* 1995 has been granted, does not "object" to giving that evidence within the meaning of s 128(1). This is because there is no element of compulsion or potential compulsion which makes the expression "objects" apposite. It follows that s 128 cannot be relied upon in such circumstances to obtain a certificate against self-incrimination.

Relevance

Relevance of bullets found in a car in which there were drugs alleged to be in the driver's possession for supply

The appellant in ***Radi v R*** **[2010] NSWCCA 265** was charged with an offence of supplying a commercial quantity of a prohibited drug. The drugs had been found in his car together with four mobile phones, $2800 in cash and a box of bullets. No firearm was found. The appellant denied possession of the drugs and denied knowledge of the presence of the bullets. It was contended on appeal that the evidence concerning the bullets was not relevant and should not have been admitted because it disclosed only a tendency to engage in some irrelevant criminal behaviour. Reliance was placed on *Thompson and Wran v R* [1968] HCA 21; 117 CLR 313. The appeal against conviction was dismissed. Hoeben J held that the evidence of the finding of the box of bullets was relevant because it constituted an indicium of the offence with which the applicant had been charged. It had been implicitly accepted by the appellant that if a firearm had been found, then evidence of such would have been admissible. Hoeben J could not see any real distinction as both a firearm, and bullets which could only be used in a firearm, had the same relevance. In separate judgments, Simpson J and I provided slightly different analyses leading to the same conclusion.

s 137 prejudice/probative value

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

The appellant in ***IMM v The Queen*** **[2016] HCA 14; (2016) 257 CLR 300** 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.

Evidence Act s 137 – whether existence of competing inferences relevant to the assessment of probative value

Exclusion of the evidence pursuant to s 137 of the *Evidence Act 1995* was also a matter considered in ***R v Burton*** **[2013] NSWCCA 335**. The trial judge held that the probative value of the evidence concerning the telephone conversation was "extremely weak" on the basis that there was some ambiguity in what the respondent had said: were they admissions of criminal conduct or just of some moral wrongdoing? A jury might find such wrongdoing reprehensible and discreditable and so the danger of unfair prejudice was not outweighed by the probative value. The judge's approach was found to be erroneous. There was a failure to identify the fact in issue (consent) to which the evidence related and there was an error in taking into account an alternative explanation for the respondent's utterances. The existence of competing inferences does not have any part to play in the assessment of probative value under s 137. Only two of the five judges who sat in *R v XY* endorsed the

relevance of competing inferences in relation to s 137; they are relevant in assessing the admissibility of coincidence evidence: *DJS v DPP (Cth); NS v DPP (Cth)* [2012] NSWCCA 9.

Probative value of evidence in relation to s 137

The respondent in ***R v XY*** **[2013] NSWCCA 121** was charged with a number of child sex offences allegedly committed against the complainant when she was 8 years old. The Crown sought to tender two recorded telephone conversations between the respondent and the complainant, in which, it alleged, the respondent had made admissions. Defence objected to the tender of the conversations on a number of grounds, including under s 137 *Evidence Act*. The recording allowed an inference that the respondent was not sure whom he was talking to, and that he was referring to sexual activity with a high school student. The asserted prejudice was that the jury would engage in tendency reasoning if aware of this last-mentioned confession. The trial judge excluded evidence of the conversations on the basis that its probative value was outweighed by the danger of unfair prejudice. The Crown appealed that ruling pursuant to s 5F(3A) of the *Criminal Appeal Act 1912*.

The grounds relied upon by the Crown raised a question of whether the trial judge had been mistaken, in excluding the conversations under s 137, in evaluating the weight of the evidence, not just its objective probative value. That is, he found that the probative value of the admissions was reduced by the circumstances in which they were made. The Court of Criminal Appeal convened a full bench, because the appeal required a consideration of whether the Court should be bound by *R v Shamouil* [2006] NSWCCA 112; 66 NSWLR 228, which had since been held to be wrongly decided in Victoria in *Dupas v The Queen* [2012] VSCA 328. The controversy was that *Shamouil* was argued to stand for the proposition that a trial judge should not take into account the weight a jury might give to evidence when considering whether to exclude it under s 137, while *Dupas* suggested a trial judge should make that assessment. Their Honours each delivered separate judgments.

Basten JA and Simpson J held that the correct approach in NSW was that identified in *Shamouil*. Basten JA summarised the principles, at [66], in the following way:

> "(1) in determining inadmissibility under s 137, the judge should assess the evidence proffered by the prosecution on the basis of its capacity to advance the prosecution case;
>
> (2) it follows from (1) that the judge should deal with the evidence on the basis of any inference or direct support for a fact in issue which would be available to a reasonable jury considering the proffered evidence, without speculating as to whether the jury would in fact accept the evidence and give it particular weight;
>
> (3) it also follows from (1) that the judge should not make his or her own findings as to whether or not to accept the inference or give the evidence particular weight."

Hoeben CJ at CL agreed with the conclusion of Basten JA and Simpson J regarding the authority of Shamouil, and expressed specific approval of Basten JA's extraction of principles reproduced above.

But Hoeben CJ at CL was not in complete agreement with the judgments of Basten JA and Simpson J. Against their conclusions on the actual decision to reject the evidence, he instead agreed with Blanch and Price JJ that the probative value of the evidence was outweighed by the danger of unfair prejudice. In explaining his disagreement, he held, at [88]-[89] that the fact of competing available inferences may be taken into account, as distinct from deciding which of those inferences might be preferred. This view appears to have been taken by Blanch J, at [207], who held that competing inferences objectively affected the capacity of the evidence to prove a fact in issue. Price J did not endorse any particular view, and simply decided that the evidence was inherently weak.

(Note: Basten JA decided, at [40] that in the face of the controversy between *Shamouil* and *Dupas*, the Court should "determine for itself the correct approach to the statutory provision, giving proper consideration to the reasoning and conclusions of earlier authorities, both in this Court and in the Victorian Court of Appeal", rather than a technical approach requiring a conclusion that the court in *Dupas* was wrong in holding *Shamouil* wrong. Simpson J expressly agreed with that conclusion (at [159]) and Hoeben CJ at CL's agreement that *Shamouil* applied (at [86]-[87]) appears to support that conclusion. This decision may have an effect on resolving disagreements between Australian intermediate courts of appeal, at least in NSW.)

Contemporaneous statements and the presumption of continuance

R v Salami **[2013] NSWCCA 96** concerned the admissibility of a phone call made by an accused moments before an alleged offence. Mr Salami was charged with entering a dwelling with intent to commit a serious indictable offence in circumstances of aggravation (amongst other charges). The Crown alleged he entered the victim's home with a knife with the purpose of intimidating her into relinquishing an apprehended violence order. At trial, a translated transcript of a menacing telephone call by Mr Salami to the victim shortly before he entered the home was excluded by the trial judge pursuant to s 137 of the *Evidence Act*. His Honour had concluded that the phone call, made outside the home, was incapable of proving the conduct of Mr Salami inside the home. On the appeal, R S Hulme AJ held this finding was in error. By reference to the presumption of continuance, the occurrence of an event is inherently capable of being proved by circumstances occurring contemporaneous with it or shortly before. His Honour also observed that the relevant question, in this case, was the intention manifested by Mr Salami before he entered the premises.

Sexual offence proceedings

Notes of counselling of sexual assault victim are "protected confidences" - cannot subpoena without regard to ss 295 - 299D of the Criminal Procedure Act

Mr Bonanno, charged with sexual offences, was granted a subpoena over documents belonging to the complainant's psychologist. The protected confider appealed on the ground that the trial judge failed to consider the requirements in ss 295 to 299D *Criminal Procedure Act* predicating production of protected confidences: ***R v Bonanno; ex parte***

Protected Confider **[2020] NSWCCA 156**. Adamson J set aside the subpoena, noting that the trial judge failed to have regard to the statute.

Evidence of previous false allegations inadmissible under s 293 Criminal Procedure Act

In ***Jackmain (a pseudonym) v R*** **[2020] NSWCCA 150**, evidence that the complainant – the applicant's former partner – had previously concocted 12 complaints was ruled inadmissible by the trial judge, who declined to stay the proceedings under s 192A *Evidence Act 1995*. A 5-Judge bench was called upon to consider the validity of s 293 of the *Criminal Procedure Act*, despite failed attempts to impugn it in the past.

Bathurst CJ dismissed the appeal, finding that evidence led to show the complainant had made false allegations of previous sexual activity would necessarily also be evidence that she had not, in fact, taken part in that activity. Therefore, it would be inadmissible pursuant to s 293 of the *Criminal Procedure Act*. The assail upon the validity of the provision also failed.

Evidence of prior sexual experience – s 293 Criminal Procedure Act – whether evidence of false sexual complaints by complainant admissible

At trial, the jury found the applicant not guilty of three out of four counts of sexual offences allegedly committed on an intellectually disabled 14 year old girl in his care at a crisis centre for high needs young people. In ***Adams v R*** **[2018] NSWCCA 303**, the applicant sought leave to appeal his conviction on the remaining count on the basis that the trial judge erred in excluding evidence, pursuant to s 293 *Criminal Procedure Act 1986* ('CP Act'), of false complaints of sexual assault made by the complainant over a ten month period leading up to the offences in question. Campbell J held (Hoeben CJ at CL and N Adams J agreeing, each with additional reasons) that the trial judge erred in excluding the complainant's previous false sexual complaint evidence. Here, evidence of the false complaints did satisfy the temporal (s 293(4)(a)(i)) and relationship (s 293(4)(a)(ii)) requirements so that it is not inadmissible. As Campbell J clarified (following Basten JA in *GEH v R* (2012) 228 A Crim R 32), the "events" referred to in s 293(4(ii)) may extend to non-events (like false complaints) because of the reference to sexual activity or lack thereof.

Campbell J found that the trial judge erred in separately evaluating the temporal relationship between the events/non-events and the alleged offending. First, His Honour found that when the elements are read together (following what Basten JA said in *GEH v R*) as a series of false complaints over a 10 month period leading up to the alleged offending, with the continuum representing a "connected set of circumstances", the evidence can be treated as having occurred "at or about the time" of the alleged offending. Second, His Honour held the events needed to be "found to be so connected to the circumstances of the offence that it bore on the objective likelihood of the offence having been committed" (approving Beech-Jones J in *GEH v R* at [82]). Here, His Honour held that the evidence of false complaints showed that three sets of sexual complaints (two non-events plus the alleged offending) were made over four days, finding that the trial judge had erred in not finding that the non-events in question did form part of the "connected set of

circumstances", when they were circumstances that were relevant to the likelihood of the offences having been committed.

N Adams J, though agreeing with Campbell J, made additional comments on this point. She noted that the legislative wording of s 293(4)(a)(ii) requiring that the events forming part of a connected set of circumstances in which the alleged prescribed sexual offending was committed means that the events need to relate to the circumstances of the alleged offending, not the complainant's general conduct. In addition, the result of finding that the evidence is admissible under s 293(4) simply means that the evidence is not inadmissible and the Evidence Act would still apply.

Section 293 Criminal Procedure Act - disclosure in the Crown case that the complainant was a prostitute – cross-examination as to alleged prior false accusations of sexual assault not permissible

The applicant in ***Allan v R*** **[2017] NSWCCA 6** was convicted of sexual intercourse without consent, an attempt at same, and arming himself with a knife intending to commit assault. The complainant was a prostitute who had agreed to engage in limited sexual acts, but the applicant was said to have continued with other acts against her will. At trial, the applicant sought to rely on s 293(6) of the *Criminal Procedure Act 1986* for permission to cross-examine the complainant on previous false allegations she was said to have made of sexual assault. It was asserted that the Crown's disclosure that the complainant was a prostitute triggered the operation of subs (6). The trial judge did not permit cross-examination on the alleged prior false allegations. On appeal it was contended that the jury was unable to make a realistic or informed assessment of the complainant's credibility as a result.

The contention was rejected. Whilst Harrison J did find that the material related to previous complaints was capable of substantially affecting the complainant's credibility, and thus the applicant was likely to be unfairly prejudiced without cross-examination on the subject, his Honour held that the precondition in s 293(6)(b) was not met. The unfair prejudice must arise from the inability to cross-examine "in relation to the disclosure or implication". The only relevant disclosure in the Crown case was that the complainant was a prostitute. The evidence sought to be raised in cross-examination was not about the complainant's work, but rather a tendency to make false allegations. The making of false complaints of sexual assault does not arise in relation to the disclosure that the complainant was a prostitute or even by implication from it. Indeed, as the trial judge found, they were "far removed". The appeal was dismissed.

Section 293 Criminal Procedure Act – cross-examination about prior sexual experience or activity

It was contended in ***GP v R*** **[2016] NSWCCA 150** that a trial judge erred by refusing to allow cross-examination of a 12 year-old complainant witness about prior sexual experience or activity involving her cousin. The trial concerned alleged sexual assaults committed by the complainant's uncle when she was aged 3 or 4. Her first disclosure was made tearfully to family members when she was aged 9. When she was interviewed by police a short time afterwards she first spoke of sexual interference by her cousin but also spoke of the assaults

by GP. The evidence of the complainant's distress was left to the jury on the basis that, if other explanations could be excluded, it showed consistency of conduct. It was submitted that the proposed cross-examination came with an exception in s 293(4)(c) of the *Criminal Procedure Act* because it was evidence "relevant to whether … injury was attributable to the sexual intercourse alleged to have been had by the accused person". The "injury" was said to be "fear" and "anxiety" evident from the complainant's distress upon making her disclosure. Payne JA held that two cases said to support a "broad interpretation" of s 293(4)(c) (*R v Dimian* (1995) 83 A Crim R 358 and *JAD v R* [2012] NSWCCA 73) were factually very different and did not establish any principle which would have the effect that evidence of a complainant crying or exhibiting fear and anxiety when describing an alleged sexual assault years after the event is a relevant "injury". The judgment of Payne JA includes a discussion of the approach to construction of s 293.

Admissibility of evidence relating to sexual experience – s 293 Criminal Procedure Act

A 17 year-old woman alleged that a man committed sexual offences against her in a park. A medical examination the following day, in which swabs were taken, revealed bruising said to be consistent with the complaint. Unidentified male DNA was found on a bra provided some days later to the police and in one of the swabs. There was also evidence in the trial of text messages exchanged between the complainant and other men on the night of the assault and in the following days, some of which were sexually explicit and/or flirtatious. A ground of appeal against conviction asserted that evidence of other sexual activity engaged in by the complainant was wrongly excluded. In ***Taleb v R* [2015] NSWCCA 105**, the Court considered the circumstances in which evidence relating to a complainant's sexual experience or activity might be admissible. Davies J, in dismissing the appeal, made the following observations regarding those circumstances and their application to these facts.

The reference to "sexual intercourse alleged" in s 293(4)(c)(i) refers to the physical act of intercourse, the issue of consent having no relevance. Mr Taleb conceded that that act took place and could therefore not rely on s 293(4)(c)(i) which provides an exception where the sexual intercourse so alleged is not conceded.

Section 293(4)(a) provides for an exception in circumstances where there is other sexual activity that took place "at or about the time of the commission" of the offence charged and that the evidence of such activity formed part of a "connected set of circumstances" in which the offence charged was committed. Mr Taleb relied upon DNA evidence and the text messages to suggest the complainant was involved in other sexual activity. However, in respect of the temporal requirement, the evidence was purely speculative, and it was not established that there was any connection between other sexual activity and the events associated with the assault.

There is a further exception in s 293(6) where it can be shown that the prosecution case disclosed or implied that the complainant had or had not taken part in sexual activity and that the accused might be unfairly prejudiced if the complainant could not be cross-examined in relation to that disclosure. When questioned by a doctor, the complainant had said that she had not had sexual intercourse within 7 days of the examination. The Crown

said that it would not be relying upon that statement. This is distinct from the Crown disclosing that the material would be led in court, and thus s 293(6) was not engaged.

Covertly recorded conversation between victim of sexual offences and perpetrator not excluded by Surveillance Devices Act 2007 (NSW)

DW was found guilty of 15 sexual assault offences against his natural daughter. Among other things, the offences related to DW touching the complainant's breasts and demanding to see her naked body. The complainant recorded a conversation with her father in which he said "I want you to show me these regularly over the next week or so without me asking you OK", while pointing at her breasts. DW argued at trial that the recording breached s 7(1)(b) of the *Surveillance Devices Act 2007* (NSW). The evidence was admitted and DW appealed his conviction on the same basis. Ward JA dismissed the appeal in ***DW v R* [2014] NSWCCA 28**. The recording was "reasonably necessary for the protection of the lawful interests" of the complainant (s 7(3)(b)(i)), meaning that the prohibition in s 7(1) did not apply. The appellant was 14 years old at the time the recording was made and could not be expected to have understood the legal avenues open to her. The assaults were ongoing and the recording was made prior to any police investigation. It was accepted that the complainant was afraid of the appellant, and this was acknowledged to be the reason for the complainant denying knowledge of the offences to DOCS. In these circumstances it was not practicable for the complainant to contact police in order to seek to arrange a warrant to record the conversations with her father. (*Sepulveda v R* [2006] NSWCCA 379 distinguished).

Evidence of sexual interest has no bearing on consent to later sexual activity with another party

Another aspect of ***R v Burton* [2013] NSWCCA 335** concerned the admissibility of evidence of the complainant's alleged sexual interest in a person other than the respondent. The alleged sexual assault occurred after Mr Burton, the complainant and a third man had been out drinking. The trial judge made a pre-trial ruling allowing cross-examination of the complainant about the interest she was said to have displayed in another man she met that night. Section 293 *Criminal Procedure Act* renders inadmissible evidence relating to sexual experience, but it was found that this evidence fell within the exception provided by s 293(4)(a). Simpson J found that the evidence was not relevant and in any event should have been excluded by s 293. The fact in issue that the evidence was said to be rationally capable of affecting was that the complainant did not consent to the sexual activity. It is proper to inquire whether the respondent believed that the complainant was consenting or not. But whether the complainant had exhibited sexual interest in another man "is irrelevant to any question concerning her consent to sexual engagement with the respondent" (at [68]). Furthermore, s 293(3) was not properly considered. The evidence did not disclose or imply sexual experience or activity, or lack thereof. Even if it did, it did not fall within the exception in s 293(4)(a) – the alleged encounter with the man at the bar did not take place "at or about the time" of the events giving rise to the charge (s 293(4)(a)(i)); and there was no relevant connection between the two events (s 293(4)(a)(ii)).

Admissibility of recorded evidence of complainant at special hearing

In ***EK v R*** **[2010] NSWCCA 199**, an issue arose as to whether evidence given by a complainant during trial proceedings (which were ultimately aborted) could be tendered pursuant to s 306I of the *Criminal Procedure Act 1986* in a subsequent special hearing. The appellant contended that a special hearing was not a trial, and that the section only enabled the prosecutor to tender the recording in "new trial proceedings". Simpson J found that the evidence was admissible. Section 21(1) of the *Mental Health (Forensic Provisions) Act 1990* provides that a special hearing is to be conducted "as nearly as possible as if it were a trial of criminal proceedings". It follows, in the absence of any compelling reasons to otherwise find, the evidentiary rules applicable to a "new trial" (including s 306I) apply to a special hearing.

When evidence is "disclosed … in the case of the prosecution" for the purpose of s 293(6) of the Criminal Procedure Act 1986

Spratt v DPP **[2010] NSWSC 355** was a case in which an accused sought relief in the Supreme Court in respect of the refusal of a magistrate to direct the attendance of the complainant for cross-examination in committal proceedings. In statements of the complainant served upon the accused it was said that she was a virgin before having been sexually assaulted. Such references were edited out of the material tendered by the DPP to the magistrate. Nevertheless, the accused contended that the complainant's virginity had been "disclosed" in the case for the prosecution. Hidden J held that the material in question did not become part of the prosecution case simply because it was served.

Incompetence of counsel – cross-examination of a complainant about on-going relationship with offender

In ***Taylor v R*** **[2009] NSWCCA 180**; **78 NSWLR 198** the accused and the complainant continued a relationship up until the trial some 15 months after the offending. Counsel recognised that evidence concerning the sexual component of the relationship was inadmissible unless it could be brought within one of the exceptions in s 293(4) of the Criminal Procedure Act 1986 but failed to identify an appropriate exception.

Campbell JA held that the evidence was within the exception in s 293(4)(b), being evidence relating to the relationship between the accused and the complainant at the time of the alleged offence ([29] – [43]; [65] – [74]). The miscarriage of justice that resulted from counsel's incompetence could have been avoided if the correct procedure for making the application to cross-examine had been followed.

Telephone intercept evidence

Admissibility of telephone intercepts obtained in an investigation not involving accused

A trial judge refused to admit two telephone intercepts legally obtained pursuant to the *Telecommunications (Interception and Access) Act 1979* (Cth) because they were obtained

during an investigation into offences not involving H. In ***R v Zhi Qiang Han*** **[2011] NSWCCA 120** the Court of Criminal Appeal allowed an appeal by the Crown pursuant to s 5F of the Criminal Appeal Act and held that the evidence was admissible. At [9] the Court found that intercepts were legally obtained as they were made under a warrant, and they fell within an exception to the prohibition against the interception of telecommunications (s 7(2)(b) of the Act). The Court then turned to consider whether admitting the intercepted evidence at trial was an exception to the prohibition against dealing with intercepted information under the Act (at [10]). Section 74(1) provides:

> "A person may give lawfully intercepted information (other than foreign intelligence information) in evidence in an exempt proceeding."

Under the Act, an "exempt proceeding" includes a prosecution for any offence punishable by a maximum of at least three year (s 5(1)). As the trial was concerned with alleged offences punishable by a maximum of 10 years, there was authority to admit the intercepts under s 74. The Court held that there was no basis for reading a requirement into s 74 that there be a connection between the exempt proceeding and the information intercepted pursuant to the warrant (at [17]-[18]).

Tendency

2020
Admissibility of tendency evidence – similarities between tendency act and alleged act – probative value where identity in issue

The offender in ***Vagg v R*** **[2020] NSWCCA 134** was convicted of child sex offences, having assaulted the child of a client he was cleaning windows at a domestic home. Tendency evidence was led from another young girl about the offender twice luring her to a secluded bathroom and exposing (or attempting to expose) himself. On appeal, the offender argued that the tendency evidence was inadmissible by contending, inter alia, that the tendency act and the indicted act were too dissimilar. Simpson AJA, dismissing the appeal, found the evidence was capable of showing that the offender had a sexual interest in young girls and would act on that interest in secluded locations. Moreover, the evidence had significant probative value in circumstances where it might dispel doubts as to the offender's identity.

Standard of proof in tendency evidence – multiple counts, multiple complainants and tendency witness

In ***Jackson v R*** **[2020] NSWCCA 5**, the offender was tried on six counts of child sexual assault. He was found guilty of two counts (one against each complainant) and not guilty of the remaining counts. The Crown led evidence of uncharged acts from a tendency witness. In addition, the Crown relied on the acts against each complainant establishing a tendency that could be used in relation to the other. The trial judge gave directions to the jury that they had to be satisfied beyond reasonable doubt of: each tendency act; that it established the tendency (namely, a sexual interest in young males known to him through familial or personal relations); and that Jackson acted upon that tendency.

Jackson appealed, somewhat confusingly, on the grounds that the trial judge overestimated the standard of proof required. His concern was, inter alia, that by requiring the tendency acts to be proven beyond reasonable doubt, they were elevated in the minds of the jury and therefore would be perceived as having a probative value that outweighed the risk of unfair prejudice. As Price J noted at [114], it was unsurprising the defence did not object to the direction during the summing up.

2019
Tendency evidence – Crown not required to prove beyond reasonable doubt – no onus or standard of proof for the defence at all

The issue in ***Decision Restricted*** **[2019] NSWCCA 30** concerned the relevant onus and standard of proof for tendency evidence adduced by an accused in order to establish the opposite of the tendency contended for by the Crown. Adamson J identified two errors of the trial judge. First, citing *The Queen v Bauer* [2018] HCA 40; 92 ALJR 846 at [80] and *Shepherd v The Queen* (1990) 170 CLR 573, she observed that the judge was wrong to direct the jury that they needed to be satisfied beyond reasonable doubt of the acts relied upon by the Crown and of the conclusion that those acts established the tendency the Crown alleged. Secondly, whilst the judge was correct in directing the jury that the standard of proof of beyond reasonable doubt did not apply to the accused, she was wrong in saying, "You only need to be satisfied that it is likely". No particular standard of proof applied to the accused because the accused has no onus of proof at all in a criminal trial.

2018
Tendency evidence – assessment of whether sexual interest in children has significant probative value

The Crown alleged that a man committed certain sexual offences against his daughter. It served a tendency notice referring to evidence establishing the respondent's sexual interest in pre-pubescent children and toddlers over a period of 20 years. The trial judge rejected the evidence as inadmissible and the Crown appealed (successfully) pursuant to s 5F(3A) of the *Criminal Appeal Act 1912*: ***DPP (NSW) v RDT*** **[2018] NSWCCA 293**.

Basten JA held that the trial judge had erred in his reliance on a dissenting judgment in the CCA and a transcript of argument in the High Court in respect of the then reserved decision in *McPhillamy v The Queen* [2018] HCA 52. Just because tendency evidence does not show that the accused had acted on that tendency does not mean it lacks probative value. Rather, the correct approach is that consistent with what the High Court said in *Hughes v The Queen* [2017] HCA 20 at [57] and [60]. While the reasoning "will depend upon the nature of the alleged offending and the nature of the tendency evidence", Basten JA held that the factors in the present case demonstrated the significant probative value of the evidence. Of relevance is that a man's interest in female toddlers is qualitatively different from an interest in teenage boys (as in *McPhillamy*); that the respondent accused had admitted this interest persisted over a period spanning over 20 years during evidence on the voir dire; and that the accused had entered guilty pleas to four relevant charges in 2015.

Basten JA concluded that because the accused had accepted the underlying propensity operated over an extended period, "its probative value is likely to be significant, even if the occasions upon which he acted upon the propensity were few and far between".

Tendency evidence – probative value where 10 year gap between unchallenged misconduct and alleged offending

The appellant in ***McPhillamy v The Queen*** **[2018] HCA 52; 92 ALJR 1045** was charged with sexually assaulting A, when A was an 11 year old altar boy. At trial the prosecution was permitted to lead tendency evidence from B and C. Their unchallenged allegations were that the appellant had also indecently and sexually assaulted them as children at a boarding school.

The High Court (Kiefel CJ, Bell, Keane, Nettle JJ, Edelman J agreeing with additional reasons) allowed the appeal. It was held that (per Hughes) the assessment of the probative value of tendency evidence requires the court to determine the extent to which the evidence is capable of proving the tendency and the extent to which proof of the tendency increases the likelihood that the offences were committed. In this case the evidence of B and C was capable of establishing that the appellant had a sexual interest in young boys, which may meet the basal test of relevance, but that the prosecution was also required to prove a tendency to act upon that interest. The Court held that in the absence of evidence that the appellant had acted on his sexual interest in young boys in the decade following the incidents with B and C, the inference that he had a tendency to act on his interest was weak.

The Court held that where, as here, the tendency relates to sexual misconduct with a person other than the complainant, it is usually necessary to identify some feature of the other sexual misconduct which serves to link the two together. The Court distinguished the two sets of circumstances in which the alleged offences occurred and held that proof of the offending against B and C was not capable of affecting the assessment of the likelihood that the appellant committed the offences against A to a significant extent.

Tendency evidence – no onus or standard of proof for defence

In ***R v Basanovic, Michael; R v Basanovic, Wade*** **[2018] NSWCCA 246**, both appellants at a trial for murder had relied upon tendency evidence in relation to the deceased: that he was a man who used extreme violence. One submitted that the judge should direct the jury that this needed to be proved on the balance of probabilities and the other was silent on the subject. But on appeal, they each contended that the judge was in error in directing that they had any onus of proof. The Crown conceded the point. Simpson AJA upheld the ground, saying (at [61]), "there is no onus of proof on an accused person, and there is no standard or proof applicable to evidence called by an accused".

Tendency evidence – probative value of evidence concerning the accused's conduct as an 11-year-old boy acquitted of sexual assault on the basis of doli incapax

When the appellant in ***DS v R*** **[2018] NSWCCA 195** was 11 years old, he was found by a magistrate to have committed a sexual assault against his niece but was acquitted on the

basis of doli incapax. He later faced trial charged with sexually assaulting his nephew when the appellant was aged 15-18. The trial judge admitted the evidence of the prior charge (and acquittal) and the appellant was found guilty on one count. An appeal against conviction was allowed.

Basten JA held that the question of admissibility of tendency evidence in this case involved three steps. First, the prosecutor cannot rely upon conduct resulting in an acquittal if it would controvert the acquittal, but the scope of that principle depends on the basis of the acquittal; here, the principle of doli incapax. Second, the acquittal does not mean the conduct the subject of the charge is not relevant but it is necessary to have careful regard to the basis upon which it is used. Where, as here, it is used for tendency reasoning, it is necessary to consider the operation of ss 97 and 101. Third, the evidence of the conduct leading to the charge and acquittal gives rise to a question whether there is an objective basis to conclude that the way a child of 11 years behaves can reliably indicate a tendency to sexually abuse his niece eight years later. It is also necessary to consider whether it is right to expect a jury to have any experience in such matters so as to draw inferences in the context of a criminal trial.

Basten JA held that there is little basis to conclude that tendency to act in a particular sexual manner at an early age, without the necessary understanding of its wrongfulness, would continue to affect the person's behaviour after attaining an understanding of its wrongfulness. The evidence lacked probative value and attracted a significant risk of prejudicial effect.

Tendency evidence law clarified

The offender in ***The Queen v Bauer (a pseudonym)*** **[2018] HCA 40; 92 ALJR 846** was found guilty at trial in the Victorian County Court of 18 sexual offences committed over an 11 year period against his foster daughter. At trial the Crown led tendency evidence that B had a tendency to have a sexual interest in the victim (RC) and a willingness to act upon it. The offender appealed to the Victorian Court of Appeal contending that the tendency evidence should not have been admitted and that count 2 (which relied on evidence of RC's sister) should have been severed. The appeal was allowed and a retrial ordered. The Crown appealed.

The High Court unanimously allowed the appeal. The Court held that the trial judge was correct to admit the evidence and to refuse to sever charge 2. The Court held (at [48]) that "henceforth" it should be understood that a complainant's evidence of uncharged acts may be admissible as tendency evidence in proof of charged acts whether or not the uncharged acts have some special , particular or unusual feature of the kind mentioned in IMM and Hughes. In multiple complainant cases (such as Hughes) there must ordinarily be some feature of or about the offending against one complainant links it to the offending against another complainant for it to have significant probative value: [58]. But in single complainant cases such as this there is ordinarily no need for a particular feature of the offending to render the evidence of one offence significantly probative of the others. When a person demonstrates a sexual attraction towards another by the commission of a sexual

offence, it is more likely the person will continue to seek to fulfil the attraction by committing further sexual offences as the occasion presents: [60].

The Court then considered the admissibility of the evidence of RC's sister (TB), who gave evidence that she directly witnessed the offence in charge 2. The offender argued that there was such a significant possibility of contamination, concoction or collusion in relation to TB's evidence that it was deprived of significant probative value. The Court held that unless the risk of contamination, concoction or collusion is so great that it would not be open to the jury rationally to accept the evidence, the determination of probative value excludes consideration of credibility and reliability: [69].

The Court also held that proof of the accused's tendency to act in a particular way will not be an indispensable intermediate step in reasoning to guilt (*Shepherd v The Queen* (1990) 170 CLR 573 at 585-585) and so proof of uncharged acts to the standard of beyond reasonable is not required: [80], [86].

The Court provided a summary of directions that should be given to a jury in single complainant trials where uncharged acts are relied upon to establish a sexual interest in the complainant and a tendency to act upon it: see [86].

Tendency evidence – determination of whether there is significant probative value is a matter for the appellate court

In *DAO v R* (2011) 81 NSWLR 568 the Court of Criminal Appeal held that review of a decision to admit tendency evidence under s 97 was to be made in accordance with *House v R* (1936) 55 CLR 499 and not by the appellate court's own judgment. In ***The Queen v Bauer (a pseudonym)*** **[2018] HCA 40; 92 ALJR 846**, the unanimous members of the High Court held (at [61]) to the contrary:

> "… in an appeal against conviction to an intermediate court of appeal, or on a subsequent appeal to this Court, it is for the court itself to determine whether evidence is of significant probative value, as opposed to deciding whether it was open to the trial judge to conclude that it was."

Tendency evidence – error in having regard to the offence charged in assessing the strength of the evidence establishing the tendency

Two men were alleged to have jointly committed a bank robbery in a Sydney suburb. The Crown relied upon various items of circumstantial evidence including an assertion that they had a tendency to act in a particular way. It asserted that they had a tendency to be involved in the armed robbery of banking institutions; to be involved in such robberies with two nominated co-offenders; to do so whilst armed with dangerous weapons including a sledgehammer and a screwdriver; to threaten the staff within the bank; to do so whilst wearing a disguise; to do so whilst in possession of a stolen high performance luxury motor vehicle and to use same; and to leave the said vehicle in a carpark once the robbery is completed. To prove this, the Crown relied upon evidence that the accused had committed an armed robbery in similar circumstances upon a bank in Melbourne in 2003.

The trial judge found that the evidence of the 2003 robbery had the capacity to reveal the tendency for the three men, when together, to commit an armed bank robbery with the circumstances described in the tendency notice. She said that those circumstances exist between the 2003 robbery and the robbery charged. In ***Decision Restricted*** **[2018] NSWCCA 164**, Bathurst CJ held that such reasoning was erroneous. The judge should have considered whether the 2003 robbery was, without more, sufficient to support the tendency alleged. Secondly, in relying upon the similarities between the two robberies, she engaged in impermissible reasoning by assuming that the tendency could be established by reliance on the robbery for which the men were charged.

Court of Criminal Appeal overturns trial judge's decision to exclude tendency and coincidence evidence

The respondent in ***R v Chase (a pseudonym)*** **[2018] NSWCCA 71** was charged with two offences of possessing drugs for the purpose of supply. The prosecution sought to tender evidence that the defendant was previously convicted of drug supply offences (he was found in possession of drugs and ran away from police, later claiming he only did so because he was on parole). The trial judge excluded the evidence; the appellant proposed to appeal his earlier conviction and so allowing the evidence to be called on the new charges would cause prejudice not substantially outweighed by its probative value.

The appeal was allowed. Basten JA held that the trial judge had erred by taking into account three aspects which did not constitute relevant prejudice. The first aspect was revisiting the verdict of a judge alone. Basten JA held that although revisiting a verdict might be a challenge to the finality of the verdict, it does not constitute prejudice to the appellant. The second aspect was whether, if the evidence was admitted, the appellant would be "forced" to give evidence again as to his reason for running from police (being on parole). Basten JA held that that would be a forensic decision for the appellant that would not involve unfair prejudice. The third aspect was whether there was a possibility of pre-empting things that might be said on an outstanding appeal. Basten JA did not find any relevant prejudice in this respect. His Honour noted that a more difficult situation could arise if the appeal was successful and a retrial was ordered; there would be no way of telling whether a jury verdict on the later charges would involve disbelief of his account or whether that evidence had been merely put to one side. Nonetheless, Basten JA held that it was unclear how that could prejudice the retrial.

2017
Assessing the probative value of proposed tendency evidence

Armstrong was charged with the assault and sexual assault of his partner. At trial the judge admitted evidence of a prior assault against his partner for which Armstrong had been convicted. He appealed on the basis that the tendency evidence was wrongly admitted because it did not have significant probative value and that its probative value did not substantially outweigh its prejudicial effect: ***Armstrong v R*** **[2017] NSWCCA 323.**

The Court dismissed the appeal. Meagher JA held that it is not necessary that tendency evidence directly establish all elements of an offence charged. The Court had regard to the decision of the High Court in *Hughes v The Queen* (2017) 344 ALR 187 where the High Court held that the test in s 97(1)(b) is that the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence, but that it is not necessary that the disputed evidence has this effect by itself. The High Court considered the decision in *Ford* (2009) 201 A Crim R 451, and held that it is sufficient if the disputed evidence together with other evidence makes significantly more likely any facts making up the elements of the offence. Meagher JA concluded that, in light of Hughes, it is not to the point that the tendency evidence may not directly establish all the elements of an offence charged.

Whether evidence of possible concoction or contamination relevant to assessment of probative value of tendency evidence

The appellant in ***BM v R* [2017] NSWCCA 253** was charged with 15 counts of sexual misconduct in relation to three child complainants. There was some evidence that the complainants had spoken to one another about the misconduct before reporting the incidents to the police. The appellant sought leave to appeal pursuant to s 5F(3) of the *Criminal Appeal Act* after the trial judge rejected the appellant's motion for separate trials. On appeal, the appellant argued that the judge erred in his finding that the proposed tendency evidence had significant probative value and that the probative value substantially outweighed any prejudice to the appellant. The appeal was dismissed.

Bathurst CJ considered what the High Court said in *IMM v The Queen*, that it is not the task of a trial judge in assessing the extent of the relevance of evidence to consider questions of credibility or reliability, but that there may be "a limiting case in which evidence is so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury". His Honour cited with approval the decision of Bellew J in *Jones v R* [2014] NSWCCA 280 that in assessing probative value pursuant to ss 97 and 101, the court may take into account such "competing inferences" as arise from the evidence. Bathurst CJ then affirmed what Hoeben CJ at CL said in *GM v R* [2016] NSWCCA 78. In *GM*, Hoeben CJ at CL held that the possibility of concoction or contamination is a relevant consideration in determining probative value, and that it is an error to determine issues of concoction separately from the issue of whether evidence has significant probative value. Bathurst CJ held that it was not appropriate for the Court to depart from that approach taken by the Court of Criminal Appeal where the plurality in *IMM* reserved the question of the role concoction could play with regard to the test in s 101. Bathurst CJ held that the principle to be applied is whether there are competing inferences which deprive the evidence of significant probative value.

Tendency evidence – s 97 Evidence Act – no need for have similar features to the act in issue for there to be "significant probative value"

The appellant in ***Hughes v The Queen* (2017) 263 CLR 338; [2017] HCA 20** was charged with 11 counts of sexual offences against young girls. There were five complainants aged between 6 and 15 at the time of the offending. The acts giving rise to the charges varied, as did the circumstances in which they were committed. At trial, the Crown sought to adduce

the evidence of each complainant and six other witnesses (three from the appellant's workplace and three who had been at the appellant's home as young girls; all described sexual touching or indecent exposure) as tendency evidence in the trial of each count. The identified tendencies were (i) having a sexual interest in female children under 16, and (ii) using his social and familial relationships to obtain access to underage girls so he could engage in sexual activities with them. The tendency notice particularised conduct occurring within the vicinity of another adult. The trial judge allowed the tendency evidence in part (the evidence of the workplace witnesses only admissible in relation to one count which also occurred at the appellant's workplace). The jury convicted on 10 counts. On appeal to the CCA the appellant contended that the breadth of the asserted tendency deprived the tendency evidence of significant probative value, relying on the statement in *Velkoski v The Queen* [2014] VSCA 121; 45 VR 680 at 682 [3] that tendency evidence must possess "sufficient common or similar features with the conduct in the charge in issue so as to demonstrate a pattern that cogently increases the likelihood of the occurrence of that conduct". The CCA declined to follow *Velkoski* and dismissed the appeal.

The appellant appealed to the High Court. The crux of the two grounds of appeal was one issue: is tendency evidence required to display features of similarity with the facts in issue before it can be said to have "significant probative value"? A majority of the High Court (Kiefel CJ, Bell, Keane and Edelman JJ) held that there is no such requirement.

One ground asserted error in the CCA's refusal to follow the approach in *Velkoski* to the assessment of significant probative value. The majority rejected this ground, holding that *Velkoski* evinces an unduly restrictive approach to the admission of tendency evidence. The Victorian Court of Appeal's decision, couched in common law language, is inconsistent with Part 3.6 of the *Evidence Act*. Section 97(1) does not condition the admissibility of tendency evidence on the court's assessment of operative features of similarity with the conduct in issue. An "underlying unity" or "pattern of conduct" need not be established before tendency evidence can be said to have significant probative value. The majority noted that tendency evidence does not have to make the establishment of the relevant fact more likely by itself; that effect can be assessed together with other evidence. The assessment of whether evidence has significant probative value involves two interrelated but separate matters: (i) the extent to which the evidence supports the tendency, and (ii) the extent to which the tendency makes more likely the facts making up the charged offence.

The other ground of appeal asserted error in the conclusion that the tendency evidence possessed "significant probative value". The appellant's submissions focussed on dissimilarity in the facts and circumstances of each event relied upon, noting particularly age of the child, location, and type of sexual conduct. The majority held that such a view ignored the tendency which the evidence was adduced to prove. In this case, the evidence as a whole was capable of proving that the appellant was a person with a tendency to engage in sexually predatory conduct with underage girls as and when an opportunity presented itself in order to obtain fleeting gratification, notwithstanding a high risk of detection. Whilst significant probative value is often established by a "modus operandi" or a "pattern of behaviour", it can be otherwise demonstrated. The separate acts in this case had in common a high degree of opportunism and a level of disinhibited regard of the risk of discovery; the alleged interactions courted a substantial risk of discovery by friends, family

members, workmates, or casual passers-by. The significant probative value of the tendency evidence is not diminished by the fact that the acts were opportunistic (and for precisely that reason could not be said to be a pattern of behaviour) or the fact that the appellant expressed his interest in underage girls in different ways. On the second question for assessing probative value, whether the established tendency makes the elements of the offence charged more likely, the majority observed that whilst a tendency expressed at a high level of generality might mean that all the tendency evidence supports that tendency, it will also mean that the tendency cannot establish anything more than relevance. The majority held that the CCA did not err and the appeal was dismissed.

2016

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

The appellant in ***IMM v The Queen*** **(2016) 257 CLR 300; [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.

Erroneous approach to determining admissibility of tendency evidence and the possibility of concoction or contamination

Complaints of historical sexual assaults were made by four sisters and an unrelated complainant against the respondent in ***R v GM*** **[2016] NSWCCA 78** (restricted decision). An indictment containing six counts relating to three of the complainants was presented against him. The Crown sought to rely on as tendency evidence, not only evidence from the two remaining witnesses, but also evidence of each of the complainants named on the indictment in respect of all other counts on the indictment. The trial judge severed three counts from the other three and ordered that tendency evidence would not be admitted. The Crown appealed pursuant to s 5F of the *Criminal Appeal Act 1912* on the basis that the judge erred in applying ss 97 and 101 of the *Evidence Act 1995*.

Hoeben CJ at CL (Button J agreeing with additional remarks) allowed the appeal holding that there were a number of errors in the judge's approach to the admissibility of the evidence. Her Honour erred by not taking into account the possibility of concoction or contamination as a relevant consideration when determining whether the evidence had significant probative value under s 97. Her Honour also erred by determining the issue of concoction or contamination separately from the issue of whether the tendency evidence had significant probative value in an approach akin to that of the pre-*Evidence Act* decision of *Hoch v The Queen*. Her Honour also erred by applying the *Hoch v The Queen* test in her approach to s 101 and by applying a "no rational view" test when considering the possibility of concoction or contamination. Finally, her Honour erred in making assessments of credibility and reliability when determining the admissibility of the tendency evidence, thereby improperly engaging in a fact finding exercise to form a view whether the jury would in fact find the evidence to be of significant probative value.

2015
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.

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.

2014
Significant probative value of tendency and coincidence evidence

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

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

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

Temporal nature of tendency evidence

RH pleaded guilty to five counts of aggravated indecent assault involving his foster daughter, L, committed between December 2005 and November 2006, when she was 11 years' old. This was led as tendency evidence in relation to offences committed against two other foster daughters, J and K, alleged to have occurred in 1989-93 and 2003 respectively. The appellant argued that since the acts in question did not occur within a confined time period and were subsequent to those that had been charged, the probative value was significantly reduced and the evidence should not have been admitted. There may have been an explanation for the later acts that did not apply to the earlier ones, such as RH's depression that developed in 2002-3. The principle argument was that the jury was invited to find a tendency at an earlier time based on the same facts that the tendency was led to prove. Ward JA in ***RH v R* [2014] NSWCCA 71** held that the evidence was admissible as tendency evidence. If the jury was satisfied beyond reasonable doubt of the appellant's tendency in

2005-6, there was nothing wrong with the conclusion that he had the same tendency 2 or 3 years earlier. In relation to K, the jury was also entitled to take into account the conduct against J, provided they were satisfied of it beyond reasonable doubt. The same applied to the conduct alleged against K in respect of J.

Tendency evidence wrongly admitted

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

2013
Relevance of risk of contamination to tendency evidence

In ***BJS v R*** **[2013] NSWCCA 123**, the charges against the accused in respect of different complainants proceeded as a joint trial, and the Crown relied upon certain similarities in the evidence of the complainants as tendency evidence. There was some evidence that the complainants had seen publicity regarding the criminal charges, and that two (who were sisters) had had some discussion of their allegations. On his appeal, BJS argued that the risk of contamination between the accounts of the complainants meant that the Crown should not have been able to rely on tendency reasoning. Hoeben CJ at CL rejected this argument. The chance of contamination was established only to a speculative concern, not a “real risk”. The submission that this meant the evidence should have been excluded was to assert that the trial judge should go considerably beyond the tendency evidence balancing exercise in ss 97 and 101 *Evidence Act* and so usurp the function of the jury.

2012
Tendency evidence: assessment of admissibility

The appellants in ***DSJ v R; NS v R*** **[2012] NSWCCA 9** were charged with a number of insider trading offences. The Crown had sought to rely on the evidence relating to each offence as coincidence evidence to support the other counts, pursuant to s 98 of the Evidence Act 1995. The trial judge dismissed an application on behalf of the appellants that the charges be tried separately, and before a five judge bench of the Court of Criminal Appeal it was argued that the trial judge had erred in his approach to determining the probative value of the coincidence evidence. Whealy JA (McClellan CJ at CL and McCallum J agreeing, Bathurst CJ and Allsop P agreeing with additional comments) held (at [130]) that the decision should be set aside as the trial judge had fallen into error by "rejecting altogether the need to recognise, in the evaluation process, the existence of alternative inferences inconsistent with guilt arising from the Crown evidence."

Bathurst CJ (at [5]-[9]) set out the process of inquiry required of a trial judge by s 98. Once the judge has determined that coincidence evidence is relevant, the judge must determine whether the evidence "could rationally affect the assessment of the probability of the existence of a fact in issue to a significant extent." That determination is to be made considering the evidence on its own or having regard to the other evidence adduced by the party seeking to tender it.

The Court was asked to reconsider the judgment of Simpson J in *R v Zhang* [2005] NSWCCA 437. It was held that her Honour's approach to s 98 was the right one. However, Whealy JA clarified (at [71]-[72]) that the appropriate interpretation of that judgment was not that a trial judge is required to "second-guess a jury", but rather that the judge is to take the coincidence evidence at its highest and determine if it could be of importance in establishing a fact in issue. Whealy JA admitted that there was a tension between Simpson J's formulation and that of Allsop P in *DAO* [2011] NSWCA 63. However, he found that in substance the two approaches to s 98 were the same: the task of the trial judge is to rule on the capacity of the evidence to be important in establishing a fact in issue.

Whealy JA noted (at [78]-[81]) that when deciding whether the coincidence evidence has significant probative value, by reference to the evidence itself or with regard to other evidence adduced by the tendering party, the trial judge must consider whether there is a real possibility of an alternative explanation arising on the evidence other than the guilt of the accused. It must then be asked whether that possibility alters the assessment of the probative value of the evidence. However, at no stage may the judge assess the actual probability of the alternative theory, or make any comparison between the Crown's theory and the alternative one. The duty of weighing the evidence rests solely with the jury.

2010-2011
Tendency evidence and related issues

In ***Stubley v Western Australia*** **(2011) 242 CLR 374; [2011] HCA 7**, the appellant, a psychiatrist, stood trial in the Supreme Court of Western Australia and was convicted of multiple sexual offences committed against two female complainants during treatment sessions. The Crown sought to lead evidence of three other women who alleged that the appellant engaged in sexual activity with them as patients. The prosecutor contended that the evidence was relevant to establish a tendency to act in a particular way namely

"bringing about a situation where sexual activity occurs, without consent in its legal sense but without opposition or resistance from the particular complainant." The trial judge held the evidence to be admissible as propensity or relationship evidence within the meaning of s 31A of the *Evidence Act 1906* (WA). That section is in different terms to s 97 of the *Evidence Act 1995* (NSW) but in common is the requirement for "significant probative value".

The High Court (Gummow, Crennan, Kiefel and Bell JJ in a joint judgment; Heydon J dissenting) allowed the appeal and set aside the convictions. It was noted that the only live issue at trial was the consent of the complainants and so the evidence ceased to have probative value once the fact that these sexual acts took place was no longer challenged.

In ***RWC v R* [2010] NSWCCA 332**, the appellant was convicted of three counts of aggravated sexual intercourse without consent and one of aggravated act of indecency against the complainant, being his daughter aged 9-11 at the time. Evidence was tendered from the complainant's sister, older by 18 months, of the appellant favouring the complainant over herself and that there was inappropriate physical conduct between the two, such as holding hands, cuddling on the couch, him touching her thighs affectionately and kissing her on the lips. During the trial, the Crown did not identify the purpose for which the evidence was tendered. The appeal was allowed. Simpson J held (at [130]) that the evidence was tendered for a tendency purpose, that being the only relevance the evidence could have had in the circumstances.

***BP v R* [2010] NSWCCA 303** provides an interesting and useful analysis of the probative value and prejudicial effect of tendency evidence that was said to establish that the appellant had a sexual interest in young children. See particularly the judgment of Hodgson JA at [106] to [115].

In ***Jiang v R* [2010] NSWCCA 277**, there was evidence of inappropriate touching by the appellant during the course of giving the complainant a massage. Some, but not all, of this touching was relied upon as supporting various sexual assault charges. It was raised for the first time on appeal that the judge should have warned the jury against substitution or tendency reasoning. It was concluded that there was no possibility of the jury having adopted any form of impermissible reasoning. The evidence was relevant as to the appellant's state of mind at the time. Rule 4 was applied.

In ***DJS v R* [2010] NSWCCA 200**, the appellant was charged with various sexual assault offences against the complainant, his step daughter. The Crown relied on tendency evidence to support a finding that DJS had a sexual interest in the complainant. The trial judge did not direct the jury that, before they could use that tendency evidence to support the Crown case, they must be satisfied of those matters beyond reasonable doubt. An appeal against conviction was dismissed by application of the proviso in s 6 of the *Criminal Appeal Act 1912*. In respect of the tendency direction, Hodgson JA held (at [55]) that where particular incidents are relied on by the Crown to establish a sexual interest of an accused in the complainant, the jury should be directed that they cannot treat those incidents as supporting such a finding unless they are satisfied beyond reasonable doubt that those incidents occurred.

***RG v R* [2010] NSWCCA 173** concerned a trial for aggravated indecent assault. The 11 year old daughter of the appellant alleged that he slept in the same bed with her during an access visit and that during the night he touched her indecently. She also gave evidence that he regularly touched her indecently when they slept together. The trial judge gave appropriate directions for "context" evidence and warned against the use of the evidence as establishing a "tendency" on the part of the accused to commit an offence of the type charged. No exception was taken to this approach but on appeal it was contended that the evidence was, in reality, tendency evidence and so subject to s 97 of the *Evidence Act 1995*.

Simpson J held (at [26] – [44]) that the evidence was admitted, not to establish a tendency on the part of the appellant, but to establish the context in which the event occurred. So much was made clear in the atmosphere of the trial where the Crown's express purpose for tendering the evidence (being as contextual or relationship evidence) was made manifestly clear. While it is open to a court to test the true purpose of the evidence (that is, whether it is indeed adduced to establish a tendency), there was no reason to do so in this case. The evidence, if believed, established a pattern of behaviour in which the complainant was relatively unsurprised by the conduct the subject of the charge, and made no response, nor any subsequent report. In that respect, it explained the complainant's behaviour, which may otherwise have appeared surprising and therefore implausible to the jury.

The appellant in ***LJW v R* [2010] NSWCCA 114** was charged with having committed acts of anal intercourse and fellatio upon a 12 year old boy one night in Muswellbrook. There was also evidence that during the car trip to Muswellbrook that day he had masturbated whilst driving and the complainant had seen this from the back seat. Hodgson JA held (at [45] – [53]) that the evidence as admissible as it could rationally support an inference that on the day of the trip to Muswellbrook the appellant was in a state of mind such that he had an interest in and lack of inhibition from engaging in sexual activity in the presence of the complainant and that there was a probability that this state of mind continued. The evidence was also admissibility as tendency evidence in relation to alleged offences occurring on other occasions.

Views

Entitlement of an accused to attend a view

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

(Note: *Jamal v R* [2012] NSWCCA 198 was not referred to, where Hidden J held that s 53(2)(a) meant that an accused had a right to be present at a view).

Accused to be permitted reasonable opportunity to be present at view

A man was on trial by a jury for a drive-by shooting for which he was convicted. During the trial a view had been conducted at the location where the offence was alleged to have occurred. The accused was on remand and classified as an "extreme high risk" inmate, and the trial judge was informed that he would be shackled in orange prison overalls in the cage of a corrective services vehicle during the view. In those circumstances, the judge determined that he should not be present during the view and it was sufficient that he was represented by counsel, even though the accused had expressed a strong desire to attend.

On appeal in ***Jamal v R* [2012] NSWCCA 198**, Hidden J found (at [34]) that this decision had breached the statutory requirement under s 53(2)(a) of the *Evidence Act* that a judge is not to order a view unless satisfied that the parties will be given a "reasonable opportunity" to be present. This is a mandatory requirement, in addition to it being a factor to be taken into account under s 53(3). His Honour found (at [46]) that this error was fatal to the trial and the conviction was set aside.

Voice identification 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].

Witnesses generally

Section 306P Criminal Procedure Act does not require an explicit positive finding by court where all parties consent

Mr Dogan was charged with various violence and robbery offences committed against his neighbour, who was cognitively and physically impaired. The complainant's evidence was

given by recording and AVL pursuant to s 306S *Criminal Procedure Act 306S*. Three defence counsel raised no objection. On appeal, Dogan contended the trial miscarried because the trial judge was not positively satisfied, under s 306P, that "the facts of the case may be better ascertained" by this method of giving evidence: ***Dogan v R* [2020] NSWCCA 151**. R A Hulme, Fagan and Cavanagh JJ rejected this argument, holding that as the provision is for the protection of the vulnerable person, it does not need a positive and express finding by the court. Leave was refused.

Use of "answer cards" by child complainants under s 26 Evidence Act 1995 (NSW)

ABR was convicted before a jury of multiple indecent assaults against his ex-partner's daughter. The complainant appeared distraught and struggled to give evidence in cross-examination, so – at the Crown's suggestion and over objection – she was permitted to answer by pointing to cards reading "yes", "no" or "I don't know". The complainant used the cards twice. Ground 12 – of the 23 grounds of appeal – alleged that this gave rise to a miscarriage of justice. In ***ABR v R* [2020] NSWCCA 33**[1], Meagher JA dismissed the appeal, holding that s 26 of the *Evidence Act 1995* (NSW) gave the trial judge the power to allow answer cards (that were, in any event, barely used).

Admissibility of a recording of the evidence of a witness who was not a complainant in an aborted trial in a subsequent trial

In an aborted child sexual assault trial the complainant's sister gave evidence of having witnessed an event which was the subject of one of the counts. At a subsequent trial which led to the offender being found guilty the Crown tendered without objection the recording of the evidence of the sister. However it was complained on appeal in ***WC v R* [2015] NSWCCA 52** that the recording of the evidence was not admissible and that a substantial miscarriage of justice had resulted. (The provisions of Ch 6 Pt 5 Div 4 of the Criminal Procedure Act concerning subsequent trials of sexual offence proceedings are only concerned with the admissibility of evidence previously given by a complainant.) It was held by Meagher JA that there was no miscarriage of justice because "not admissible" (as the evidence was per the hearsay rule in s 59 of the *Evidence Act 1995*) meant, "not admissible over objection".

Evidence given by a cognitively impaired person

A cognitively impaired person may give evidence by way of pre-recorded police interview and from a remote room via CCTV in the same way a child may give evidence: Ch 6 Pt 6 of the *Criminal Procedure Act 1986*. In ***Panchal v R; R v Panchal* [2014] NSWCCA 275** it was contended that in a judge-alone trial there was error in the judge not having expressed satisfaction of the requirement in s 306P(2) that the provisions apply "only if the court is satisfied that the facts of the case may be better ascertained if the person's evidence is given in" the manner provided for in Ch 6 Pt 6. Although there was no dispute about it, on appeal it was asserted to have been a "fundamental defect" requiring the verdict to be quashed. It was held by the Court (Leeming JA, Fullerton and Bellew JJ) that there was no

[1] The full case title includes that "ABR" is a pseudonym, but it would appear unnecessary to point that out.

requirement for the judge to have expressly recorded satisfaction of this matter. But the appeal was dismissed on the basis of another section within Ch 6 Pt 6, namely s 306ZJ, which provides that "the failure of a vulnerable person to give evidence in accordance with this Part does not affect the validity of any proceeding or any decision made in connection with that proceeding". (Query whether a "failure of a vulnerable person to give evidence in accordance with this Part" encompasses a vulnerable person giving evidence in accordance with the Part as the complainant did in this case.)

Inadmissibility of evidence of the charge for which a co-offender witness has been dealt with

***Santa v R* [2009] NSWCCA 269** concerned a trial for robbery in company. The accused's cousin had been present at the incident and for his involvement had pleaded guilty to assault occasioning actual bodily harm and had been placed on a bond. He was called as a witness for the defence. The trial judge had earlier indicated that there could be evidence that he was an alleged co-offender and that he had been dealt with but that the jury should not be told what the charge against him was or the outcome of his case. During the course of his cross-examination, however, he mentioned unresponsively that he had pleaded guilty and had been sentenced. Defence counsel sought in re-examination to explain that answer but the trial judge declined to permit her to do so.

Hidden J held (at [38] – [46]) that the nature and outcome of the proceedings against the accused's cousin were not relevant and that the trial was not attended by any exceptional feature that made them relevant.

D. Police powers

Police powers

Arrest to question but not charge remains unlawful

Constable Smith was investigating the alleged breach of an AVO. The appellant, Mr Robinson, had sent an email to an employee of the protected person. Mr Robinson attended the police station, where he was arrested, interviewed and then released without charge. He brought an action against NSW claiming wrongful arrest and false imprisonment. In evidence, Constable Smith conceded that he had had no intention to charge Mr Robinson with an offence because he needed more evidence. The trial judge dismissed, the Court of Appeal overturned, and NSW appealed to the High Court: ***New South Wales v Robinson* [2019] HCA 46; 94 ALJR 10**.

The majority (Bell, Gageler, Gordon and Edelman JJ) dismissed the appeal and upheld Mr Robinson's claim. They held that nothing in LEPRA or its amendments displaced the rule in *Bales v Parmeter* (1935) 35 SR (NSW) 182 at 188-190 that an arrest merely to ask questions is unlawful. Part 9 of LEPRA, relating to detention for investigation, only allows for detention following a lawful arrest – it does not, of itself, create a new power to arrest. Section 99(3), requiring an arrested person to be brought before an authorised officer, confirms that a police officer must have an intention to charge at the time of arrest.

Kiefel CJ, Keane and Nettle JJ dissented, reasoning inter alia that the statutory ability to discontinue an arrest (s 105, cross-referenced in note to s 99(3)) envisaged an officer arresting someone on suspicion of committing an offence, detaining them for the investigation period and then, as a result of that investigation, ceasing the arrest.

Seizure of property to prevent breach of the peace

Police found Mr Semaan at an apartment block where drug activity was detected. He was not arrested, but he was informed that he might be charged with trespass. To this advice Mr Semaan responded, "Oh come on get fucked, we will see about this, you wait and see, you're fucked now" and began dialling on his mobile phone. An officer attempted to remove the phone, and Mr Semaan did not comply. He was charged and convicted in the Local Court of resisting a police officer in the execution of his duty. The officer gave evidence that he had seized the phone because he was concerned that it would be used to summon other men and cause a breach of the peace. Mr Semaan appealed his conviction in accordance with s 52 *Crimes (Appeal and Review) Act 2001*.

In ***Semaan v Poidevin*** **[2013] NSWSC 226**, Rothman J allowed the appeal. There were three reasons why the conviction was wrong:

1. The officer did not inform Mr Semaan of his reason for seizing the phone. The prosecution did not provide that Mr Semaan did not make an honest and reasonable mistake as to the intention of the officer when he acted in defence of his property. The Magistrate did not give this consideration, so an error of law was established.

2. The phone itself could not be property that could cause a breach of the peace. The incipient breach of the peace was said to originate in a communication that had not yet been made. While this point was not argued on the appeal, Rothman J concluded it raised an issue of lawfulness, requiring the prosecutor to negative an honest and reasonable belief that the actions of the officer were not lawful.

3. Section 201(2) LEPRA states that the time for compliance with the requirement to provide reasons for the exercise of police powers does not arise until it is not impractical to comply. The prosecution did not prove at trial when the time for compliance with LEPRA arose, so could not rely on the lawfulness of the actions (if they were indeed lawful).

The decision is also notable for the opening sentence, "A woman walks into a bar".

Reasonable grounds to suspect or believe

Hyder v Commonwealth **[2012] NSWCA 336** was an appeal concerning an action for wrongful arrest and false imprisonment. Mr Hyder was arrested by an AFP officer, without a warrant, in relation to a fraud. The primary issue at trial was whether the officer had had

the power under s 3W(1)(a) of the *Crimes Act 1914*. The section provides a power to arrest without a warrant where the officer believes on "reasonable grounds" that a person had committed a federal offence. (This provision is similar to s 99(2) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).) The trial judge held that the officer had held an honest belief that Mr Hyder had committed the offence on reasonable grounds.

McColl JA (Hoeben JA agreeing and Basten JA dissenting) dismissed the appeal, set out (at [15]) a number of propositions about "reasonable grounds to suspect and believe" that enliven to police powers to search and arrest:

(1) "Reasonable grounds" for belief requires there to be sufficient facts to support that requisite belief.

(2) The arresting officer must form the belief or suspicion him or herself.

(3) Proposition (2) is to hold the arresting officer accountable.

(4) There must be a factual basis for the suspicion or belief. It may be material that would be inadmissible in court proceedings but must have some probative value.

(5) Circumstances supporting the belief must point towards it, but need not be evidence sufficient to prove the belief.

(6) Belief is "an inclination of the mind towards assenting to, rather than rejecting, a proposition" and the grounds for that inclination may still eave room for surmise or conjecture.

(7) Reasonable grounds should be assessed against what was, or could reasonably have been, know at the time.

(8) An officer can form the relevant state of mind on the basis of what they have been told, but it must be assessed in light of all the surrounding circumstances and what inference a reasonable person would draw from that information.

(9) "The identification of a particular source, who is reasonably likely to have knowledge of the relevant fact, will ordinarily be sufficient to permit the Court to assess the weight to be given to the basis of the expressed [state of mind] and, therefore, to determine that reasonable grounds for [it] exist": *New South Wales Crime Commission v Vu* [2009] NSWCA 349 at [46].

(10) The lawfulness of an arrest without warrant also depends on the effective exercise of the executive discretion to arrest alluded to by the word "may" in s 3W(1)(a).

Exercise of a police officer's powers of arrest

Section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* provides for the power of police officers to arrest without a warrant. Section 99(2) provides a general power to arrest without warrant if an officer suspects on reasonable grounds that a person has committed an offence, while s 99(3) provides that a police officer must not arrest a person unless the officer suspects on reasonable grounds that it is necessary to achieve one or more of the purposes set out in (a) – (f). In ***Williams v DPP (NSW)*** **[2011] NSWSC 1085** the issue arose as to whether a magistrate, in considering the question of whether police officers had acted in the execution of their duty when arresting a man without a warrant for a shoplifting offence allegedly committed three weeks earlier, was required to have regard to s 99(3). It raised the question as to the interplay between ss 99(2) and 99(3). Associate Justice Harrison held (at [23]) that s 99(3) restricts the circumstances in which the power under s 99(2) may be exercised. Consequently, the magistrate erred in failing to apply s 99(3) when determining the whether the police officers had acted in the execution of their duty.

E. State offences (elements)

Assault causing death while intoxicated

Assault causing death while intoxicated an offence known to law; unnecessary to determine constitutional challenge to s 25B of the Crimes Act prescribing mandatory minimum sentence

By an indictment presented at the District Court, the applicant in ***Garth v R*** **[2016] NSWCCA 203** was charged with an offence of assault causing death while intoxicated contrary to s 25A(2) of the *Crimes Act 1900*. He sought an order in that Court that the charge be quashed on the ground that it did not disclose an offence known to law. He submitted that s 25B – which prescribes a mandatory minimum sentence, and non-parole period, of 8 years for an offence under s 25A(2) – was constitutionally invalid because it was repugnant to the judicial process to a fundamental degree. The primary judge dismissed the motion and the applicant appealed.

Bathurst CJ held that the primary judge was correct in concluding that the charge disclosed an offence known to law. The essence of the applicant's argument was that, as s 25B was constitutionally invalid, the offence charged was not one punishable by law. The difficulty with this argument was that the offence is punishable by s 25A(2) itself, which provides for a maximum penalty of 25 years. Section 25B does not impose a punishment. Rather, it operates to impose a constraint on the sentence which can be imposed. Even if the constraint is constitutionally invalid, an offence under s 25A(2) remains an offence punishable by law. The applicant sought to overcome this difficulty by submitting that s 25B was inextricably intertwined with s 25A(2) and with the creation of the offence. The difficulty with this argument was that it did not reflect the structure of the legislation; the legislature deliberately separated the offence-creating provision from the constraint. Having reached the conclusion that s 25A(2) discloses an offence known to law, it was unnecessary to resolve the constitutional challenge to s 25B in accordance with the well-

established practice of declining to deal with a constitutional issue unless it is necessary to do so in order to determine the rights of the parties.

Assault occasioning ABH

"One punch" assaults and drunken violence

***Pattalis v R* [2013] NSWCCA 171** was an appeal against a sentence imposed for an offence of assault occasioning actual bodily harm. Mr Pattalis had exited a Sydney nightclub at 3:25am, drunk, and struck another patron in the face for no apparent reason (nor one he could later recall). He pleaded guilty to the charge, and was sentenced to two years imprisonment with a non-parole period of one year. He appealed on the sole ground of manifest excess. In refusing leave to appeal, Hoeben CJ at CL remarked, at [23]:

> "It is now notorious (as his Honour recognised) that a single punch can not only cause catastrophic injuries but also death. For offences of this kind, the community has the rightful expectation that judicial officers will impose meaningful penalties."

Blackmail

Intent to threaten is essential element of blackmail

In ***Petch v R* [2020] NSWCCA 133**, Hamill J considered a direction on the mental element of blackmail. Petch argued that the trial judge misdirected the jury by not requiring proof of an intention to menace – that being: an intention to threaten with detrimental action that would cause an individual of normal courage in the complainant's position to act unwillingly. His Honour held that this intent to threaten, implicitly or explicitly, was essential to establishing the "menaces" element, and the applicant lost a chance of acquittal because of this misdirection. His Honour upheld this ground of appeal and entered a verdict of acquittal.

Breaking and/or entering/entry (generally)

Aggravated break and enter and commit serious indictable offence – "break" in s 112 Crimes Act 1900 encompasses constructive breaking at common law

In ***Singh v R* [2019] NSWCCA 110**, an appeal against conviction for aggravated break and enter and commit serious indictable was dismissed. The applicant had pleaded guilty to knocking on the door of a residence occupied by the 95 year old victim, then when the door was opened, pushing the victim inside onto a milk crate and robbing him of $6,250 in cash.

A ground of appeal asserted that as the applicant had not committed an actual break on the basis of the agreed facts, the charge was not supported causing a miscarriage of justice. This ground was withdrawn by counsel for the applicant at the start of the hearing. The

basis for this decision was, as Payne JA discussed, in the face of the fact that it is well settled that s 112 of the *Crimes Act 1900* (NSW) uses "break" in the same sense as used at common law. "Break" encompasses "constructive breaking", which includes the circumstances set out in the agreed facts: that is, "to knock at a door of a house with intent to rob its occupants and, upon the door being opened, to rush into the house". Payne JA noted that the rationale for a concept of "constructive break" at common law is because "the law will not suffer itself to be trifled with" (at [31]).

Break and enter – no "break" if permission to enter has been obtained without trick, artifice or threat

The appellants in ***Hussein Ghamrawi v R; Khaled Ghamrawi v R; Mustapha Ghamrawi v R; Omar Ghamrawi v R*** **[2017] NSWCCA 195** were four brothers, each convicted of aggravated break and enter and commit serous indictable offence, contrary to s 112(2) *Crimes Act 1900.* The property they entered was occupied by Mustapha Ghamrawi's sister-in-law. The defence said that the brothers were invited in to the premises. The trial judge directed the jury that "If the person intends to commit an unlawful act at the time that they are given permission to enter the house, then there is a breaking, because the permission or invitation to enter is only if it is for a lawful purpose." At issue on appeal was whether this was an accurate statement of law.

Allowing the appeal, Leeming JA held that there is no actual breaking if the person has express or implied permission to enter through a closed (but unlocked) door, even if the person had felonious intent at the time they entered. His Honour's judgment provides an interesting discussion of the history of the common law offence and statutory provisions. He noted the concerns of Simpson J in *R v Stanford* (2007) 70 NSWLR 474; [2007] NSWCCA 370 at [24]-[25] as to the lack of statutory definition of "break" and her Honour's comment that it may be time for s 112 to gain law reform attention, observing that the same issues continue to affect the materially unamended section a decade later.

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.

Wounding as both an element and aggravating circumstance of a break-in

The appellant in ***Firbank v R*** **[2011] NSWCCA 171** had been convicted of breaking into a dwelling-place and committing a serious indictable offence (sub-s 112(1)(a)), being reckless

wounding, in circumstances of special aggravation (sub-s 112(3)). The indictment specified the circumstances of aggravation as wounding (s 105A). One ground of appeal was that the indictment disclosed no offence known to law in that the purported circumstance of special aggravation was an essential element of the serious indictable offence of reckless wounding.

The Court of Criminal Appeal rejected that ground of appeal (upholding the appeal on another ground). McClellan CJ at CL, following *R v Donoghue* [2005] NSWCCA 62; 151 A Crim R 597, held, firstly, that the De Simoni principle allowed the court to consider all conduct of the offender, except circumstances of aggravation that would have warranted a conviction for a more serious offence. (It is not made explicit by his Honour at [48], but the maximum penalty under s 122(3) is significantly higher than that for reckless wounding.) Secondly, McClellan CJ at CL held that the reckless wounding was a mere particular of the offence. The relevant element to which it referred was the committing of a serious indictable offence.

Note: In submissions the Court of Criminal Appeal was presented with two conflicting decisions. In *R v Price* [2005] NSWCCA 285, Simpson J, confronted with a sentence appeal on a similar ground, held at [31] that the violence constituting the serious indictable offence was an element of the charge and could not also be an aggravating circumstance. As mentioned above, the court followed a different view stated in *R v Donoghue*, preferring that decision as it was a conviction appeal. The appellant did not seek leave to challenge the correctness of the decision in *R v Donoghue*.

Entering inclosed lands without consent of the owner and without lawful excuse

In ***Director of Public Prosecutions (DPP) (NSW) v Strang*** **[2011] NSWSC 259**, the accused was notified that he was prohibited from entering any Best & Less store due to some unspecified inappropriate behaviour. He was later found to have entered a Best & Less store that was located within a shopping mall. At the conclusion of the Crown case, a magistrate held that there was no prima facie case. The issue on appeal was whether the premises were "inclosed lands" under the definition in s 3 of the *Inclosed Lands Protection Act 1901*. Johnson J held that while the premises did not fall within the meaning of "prescribed premises" in s 3(a), they were within the more general description in s 3(b). His Honour applied an expansive construction of the definition and found (at [64]) that the definition of inclosed lands does not purport to exclude commercial or retail premises; nor does it purport to exclude premises which are contained within a larger building such as a commercial shopping centre or complex; nor does it require that the boundaries exclude members of the public. The appeal was allowed and the matter remitted.

Child abuse material

Child abuse material offences - meaning of "breasts of a female person" in the definition of "private parts"

Turner v R **[2017] NSWCCA 304** concerned an appeal against the severity of sentences imposed on the appellant, who was convicted of producing child abuse material contrary to

s 91G(1)(a) of the *Crimes Act 1900*. The appellant also sought to appeal against two convictions relating to the contravention of s 91G(1)(a). One offence was committed when the appellant lifted up the shirt of a 9 year old girl and photographed her chest. "Child abuse material" is defined in s 91FB of the Act, and includes material that depicts the "private parts of a person who is, appears to be, or is implied to be, a child". Private parts include "the breasts of a female person". The question was whether an image of a 9-year-old girl's chest area depicted "the breasts of a female person".

A majority of the Court allowed the appeal. Basten JA, with whom Bellew J agreed, held that the use of the term "breasts" connotes a "visible degree of sexual development". Basten JA held that the ordinary meaning of the term "breasts of a female person" suggests at least the commencement of sexual development or pubescence, which should be visible, but need not have reached a particular stage of development.

Note: If "breasts" for the purpose of this provision were intended to be confined to those having some level of sexual development, the words "of a female person" are left with no work to do. By the *Justice Legislation Amendment (No 2) Act 2018* (Sch 1.4); the definition now includes "whether or not the breasts are sexually developed".

Consorting

Consorting - for the purposes of s 93X of the Crimes Act 1900 "consorts" means intentionally seeking something in the nature of companionship; it does not include a casual conversation on the street

The plaintiff in ***Forster v Director of Public Prosecutions*** **[2017] NSWSC 458** was convicted in the Local Court of habitual consorting contrary to s 93X of the *Crimes Act 1900*. He appealed against his conviction, contending that the magistrate construed the term "consorts" in s 93X too broadly. McCallum J allowed the appeal. From *Tajjour v New South Wales* (2014) 254 CLR 508; HCA 35 it is clear that a casual conversation on the street with an acquaintance cannot itself amount to consorting. Tajjour supports the proposition that the essence of consorting is the intentional seeking of something in the nature of companionship, not mere conversation. Such a view is also supported by the fact that the maximum penalty for the offence is 3 years. Her Honour found that the magistrate erroneously construed the section. Whilst the magistrate's language appeared to follow Tajjour, his consideration of the facts indicated an extremely narrow view as to what constitutes a casual encounter. The decision reflects a view that whilst a casual encounter not involving conversation (eg. a smile/nod) is not consorting, by embarking on a conversation of any kind the person evinces an unequivocal "intentional seeking out" of the kind of companionship proscribed in the section.

Next, McCallum J addressed the requirement that the consorting be habitual. The section plainly requires magistrates to separately consider whether individual acts of consorting amount to habitual consorting. Her Honour held that the bare proof of a number of conversations meeting the minimum requirements in s 93X(2) does not necessarily establish the offence in s 93X; the Court must make an evaluative judgment about the conduct. In

the present case, the number of encounters relied upon by the prosecution scarcely established a habit. The first three encounters occurred within 24 hours and the fourth was almost a month later. The conviction was quashed.

Conspiracy

Conspiracy - conflict between state and federal law

In ***Dickson v R*** **[2010] HCA 30; (2010) 241 CLR 491**, the appellant was tried in Victoria on an allegation of conspiracy to steal contrary to s 321(1) of the *Crimes Act 1958* (Vic). It was alleged that he was a party to a conspiracy to steal cigarettes. The cigarettes had been seized by, and were in the possession of, Customs. An appeal to the Victorian Court of Appeal failed. A point was raised for the first time in the High Court where the appellant argued that there was an inconsistency between state and federal law per s 109 of the Constitution in that s 321 renders conduct criminal that was not caught by, and indeed deliberately excluded from, s 11.5 of the *Criminal Code 1995* (Cth). In short, the common law crime of conspiracy which is picked up by s 321 is broader in scope than is s 11.5. The High Court allowed the appeal, holding (at [30]) that in the present case, in its concurrent field of operation in respect of the conduct (conspiracy to steal), s 321 *Crimes Act* attaches criminal liability to conduct which falls outside of s 11.5 of the Criminal Code and in that sense alters, impairs or detracts from the operation of the federal legislation and so directly collides with it.

Complicity

Joint criminal enterprise for specially aggravated break, enter and commit serious indictable offence – what intention is required?

Messrs Ford and Francis attacked Mr Meurant in his home at the urging of Ms Makin. Makin was Francis' partner and was once the victim's stepdaughter. On appeal, Ford established doubt as to whether he or Francis (who cooperated with the Crown) was the principal assailant: ***Ford v R*** **[2020] NSWCCA 99**. His conviction was not overturned, however, because Brereton JA found that there was a joint criminal enterprise to attack Mr Meurant using a bottle and a lamp, which contemplated (the special aggravating circumstance of) wounding.

No marital immunity from conspiracy in the Criminal Code

Ms Namoa appealed her conviction for conspiring to do acts in preparation for a terrorist attack: ***Namoa v R*** **[2020] NSWCCA 62**. Her co-conspirator, Mr Bayda, gave evidence at his sentencing hearing that he never intended to carry out a suicide-attack. He stated that his talk of an "extremist operation" was a deceptive bid to win back the affections of Ms Namoa, lest she marry another man. The conspirators, aged 18, married on 30 December 2015. On New Year's Eve, Mr Bayda unsuccessfully attempted to set fire to a bush. The appeal proceeded on two grounds – firstly, that Mr Bayda's sentencing evidence was "fresh"

evidence that would have acquitted Ms Namoa before a jury, and secondly that she was immune to conspiracy under the Criminal Code by virtue of her marriage.

Payne JA dismissed the appeal. His Honour held that while the evidence was fresh, there was no significant possibility the jury would have acquitted Ms Namoa had they known about it. The fact that she was mistaken as to the scale of the attack did not alter the fact that she conspired to carry one out. On the second ground, his Honour held that the spousal defence to conspiracy was founded in the "one will" legal fiction (whereby a married couple are considered the one legal entity). His Honour held that that fiction had been abandoned before the inception of the Criminal Code.

Accessory at the fact – higher threshold of proof of offence for secondary offender than for principal offender in sexual assault case

The applicant was one of a group of men alleged to have participated in, or were present at, the aggravated sexual assault of a woman that was recorded on a GoPro. The trial was beset with confusion regarding the basis on which the applicant was being prosecuted – whether as a participant in a joint criminal enterprise or as a principal in the second degree. Despite the lack of clarity in the judge's summing up and written directions – including the requisite mental element required to be proved – the applicant was found guilty by a jury and convicted. The basis of the applicant's appeal against his conviction in ***Decision Restricted*** **[2019] NSWCCA 226** was that, given the Crown's concession that the case went to the jury on the basis that the applicant was an aider and abettor (not as a participant in a joint criminal enterprise), the judge erred by not directing that the mental element the Crown needed to prove was that the applicant actually knew the complainant was not consenting – as opposed to recklessness.

The appeal was allowed and the conviction quashed. After discussing the cases of *Osland* (murder), *Giorgianni* (strict liability dangerous driving occasioning death) and *Phan* (murder), Payne JA said that the mental element for aiding and abetting is "the applicant could not be convicted unless, knowing all the essential facts which made what was done a crime, he intentionally aided, abetted, counselled or procured the acts of the principal offender. Neither negligence nor recklessness was sufficient." Therefore, the requisite mental element was that the Crown needed to prove the applicant knew the complainant was not consenting. However, there was error in that the jury were told on a number of occasions that recklessness was sufficient.

OBSERVATION: The practical consequence of the holding in this case is that the principal offender could be found guilty on the basis that he was reckless as to whether the alleged victim consented, or that he had no reasonable grounds for believing that she consented. By virtue of the statutory provision, he thereby knew that she did not consent. However, a higher standard of proof for the Crown was said to apply to an aider and abettor in that he/she had to have actual knowledge of the complainant's lack of consent.

None of the cases referred to by his Honour dealt with the rather unique provisions applying to sexual assault on the question of knowledge of consent. *Osland v The Queen* and *R v Phan* were both concerned with the offence of murder. *Giorgianni v The Queen* was

concerned with the strict liability offence of dangerous driving occasioning death. It appears to have been the view of the court that the statutory provision relating to an expanded meaning of knowledge about consent was not applicable to an aider and abettor.

Accessory before the fact to murder – directions as to elements of the offence

In ***Blundell v R*** **[2019] NSWCCA 3**, the appellant appealed against his conviction for the offence of being an accessory before the fact for providing encouragement and assistance through words alone and without being present at the scene, in circumstances where the deceased was murdered by the principal offender (PO) after being beaten with a tomahawk. The appellant's case was that while he had encouraged the PO to engage in anti-social behaviour towards the deceased, this did not extend to the infliction of grievous bodily harm. In addition, the appellant contended that he was not aware of the essential facts that would have made him privy to the PO's intention to cause grievous bodily harm to the deceased at the time of his encouragement, including the nature and timing of the attack. The appellant contended that he could not have foreseen the killing as it was the PO's own spontaneous folly.

N Adams J held that the trial judge's written and oral directions to the jury were deficient in four out of five of the issues raised by the appellant on appeal.

Ground 1(a) contended that the judge erred by directing the jury that it was not necessary to prove that the principal offender was actually encouraged. N Adams J rejected the appellant's submission that the Crown must prove actual encouragement by the accused accessory before the fact, finding that none of the cases supported this proposition – indeed, such a "subjective concept" would be difficult to prove beyond reasonable doubt.

Ground 1(b), however, was upheld, as Her Honour found that the trial judge's directions inadequately explained the fact that the Crown needed to prove that the appellant's words constituted intentional encouragement or assistance, a reference to which includes the doing of an act capable of encouraging the principal offender to inflict grievous bodily harm upon the deceased.

N Adams J also accepted the appellant's arguments in respect of Ground 1(c), which impugned the trial judge's directions to the jury that assisting and encouraging is a "continuous act" that persists until the substantive offence is committed. This was an incorrect direction which should not have been given, perhaps at all, because the statement of principle upon which it was based (*R v Robert Millar (Contractors) Pty Ltd* [1970] 2 QB 54 at 73; [1970] 1 All ER 577) was not of general application. Her Honour held the trial judge's direction caused unfairness as it was apt to undermine the defence case that the appellant could not have foreseen that the principal offender would have the opportunities to carry out the acts leading to the killing of the deceased. Her Honour also upheld

Ground 1(d), finding that the trial judge fell into error by directing that the jury must be satisfied beyond reasonable doubt that the appellant knew "all the essential facts and circumstances necessary" to show that the principal offender "intended to assault and inflict upon the victim grievous bodily harm". Rather, N Adams J held that the correct knowledge

element is for the Crown to prove the appellant "knew" the principal offender was "going to" intentionally inflict grievous bodily harm on the victim.

Ground 2 was also allowed, with her Honour finding that the trial judge fell into error by including terms such as "enterprise", "design", "participation", "withdrawal" and assault "with a view" to inflicting grievous bodily harm in the directions. This was apt to confuse the jury because the terms form part of the standalone doctrine of (extended) joint criminal enterprise, separate from principles of accessorial liability.

Joint criminal enterprise liability – presence at the offence is not the only way to establish participation

The applicant in ***Dickson v R*** **[2017] NSWCCA 78** was convicted of five offences relating to break and enters. The Crown case was that there was a joint criminal enterprise to enter homes and steal property in order to sell it and divide the proceeds. No witnesses observed the applicant or his three co-offenders break and enter the houses or steal any property. The Crown case largely rested on intercepted phone calls between the co-offenders (which were said to evidence the formation and participation in the criminal agreement) and mobile phone tower data indicating that the applicant travelled to the suburb where the burglaries happened on the night they occurred. The applicant appealed his conviction, contending that the verdict was unreasonable or could not be supported having regard to the evidence because it was not proved that he was present when the offences were committed. Bathurst CJ reviewed the principles on joint criminal enterprise, which emphasise that a person is only liable if they participated in the commission of the offence. Presence at the actual commission of the crime is sufficient but not necessary. A party to an agreement to commit a crime can still be liable if they participated in the furtherance of the enterprise in some other way. The Chief Justice gave the examples of someone who agrees to murder a victim and supplies the poison to the other party but is not present when the poison is administered; or someone who creates a fraudulent instrument in an agreement to defraud a victim but is not there when the instrument is used. The verdict was open to the jury and the appeal was dismissed.

Accessory after the fact to murder directions

Kevin Gall shot and killed a man in the presence of his father, Bruce Gall. Bruce later hosed away blood from the crime scene. Kevin Gall was found guilty of murder and his father was found guilty of being an accessory after the fact. It was not raised at trial, but only on appeal, that the directions given to the jury concerning accessory after the fact were erroneous. It was held in ***Gall v R; Gall v R*** **[2015] NSWCCA 69** that the jury should have been directed that Bruce must have known that at the time Kevin shot the deceased, Kevin had one of the mental states necessary to establish murder. Further, it was an error to direct the jury, in effect, that they could only consider a verdict for accessory after manslaughter for Bruce if they acquitted Kevin of murder. The judgment of Hoeben CJ at CL (at [163]-[171]) includes observations about the paucity of authority on the subject. The judgment of R A Hulme J [[249]-[257]) includes observations about the unsatisfactory state of the law, in part referring to a Law Reform Commission recommendation in 2010 that has not been taken up by government.

Directions on joint criminal enterprise

Mr Youkhana was tried and convicted of robbery in company. He was part of a group of three men who sat in front or behind the victim on a train, punched him and stole his iPad. The men then fled from the train. In circumstances where the Crown relied upon the doctrine of joint criminal enterprise, the trial judge directed the jury that the case against Mr Youkhana only required proof that he was party to the agreement to rob the victim. Mr Youkhana argued on appeal that, in addition, the judge should have directed the jury that he participated by assisting or encouraging the other men to commit the robbery. In ***Youkhana v R*** **[2015] NSWCCA 41**, Meagher JA explained that the doctrine of joint criminal enterprise operates to attach liability to all parties to an agreement to commit a crime, regardless of their role in its execution. Thus the court was satisfied that there was no error in the trial judge's directions. It was sufficient that Mr Youkhana was present when the robbery was committed. It was not necessary to separately establish that he assisted or encouraged the other men in the commission of the offence.

Confusing direction on extended joint criminal enterprise

In ***May v R*** **[2012] NSWCCA 111**, Bathurst CJ (Simpson J agreeing) found that a trial judge had erred by leaving murder to the jury on the basis of extended joint criminal enterprise (at [260]). At issue was whether the accused would be guilty of murder if the jury were satisfied that there was an agreement between him and one Burnes that the latter would shoot the deceased on the accused's signal, but that the signal had not been given. Bathurst CJ held that if the jury found the accused was aware that Burnes could shoot the deceased absent the signal, they could have found him guilty of a joint criminal enterprise to murder the deceased (at [251]). However, this was not a case of extended joint criminal enterprise.

For liability to arise on the basis of extended joint criminal enterprise there must be an agreement between the accused and another person to commit an offence (the foundational offence), and then the other person commits a different offence (the actual offence) where the accused knew of the possibility that the actual offence might be committed. In this case the foundational offence and actual offence were the same, namely the murder of the deceased. By directing the jury to consider extended joint criminal enterprise, the trial judge invited the jury to consider an agreement between the accused and Burnes other than one to kill the deceased. Bathurst CJ held that this would have likely caused confusion in the minds of the jury (at [260], [269]).

Damaging property

Destroying or damaging property (s 195(1) Crimes Act 1900 (NSW): evidence of conduct that alters the physical integrity required to prove "damage"

The appellant attached himself to a ship loader at a coal terminal by way of a harness, which meant that the ship loader was not safe to operate, and thereby inoperable, for two hours

until he was removed. He was charged under s 195(1) of the *Crimes Act 1900* with destroying or damaging property belonging to another. After he failed in his appeal to the District Court, a question of law was referred to the Court of Criminal Appeal which held that the "destroys or damages" element of the offence could be satisfied by proof of "physical interference causing property to be inoperable".

The High Court in ***Grajewski v Director of Public Prosecutions (NSW)*** **[2019] HCA 8; (2019) 93 ALJR 405** allowed an appeal, finding that "damage" is something that alters the physical integrity of the object. In the present case, in which the ship loader was rendered inoperable by way of the appellant's attachment by harness, the High Court held "[i]noperability may be a product of damage done to property but it does not, of itself, constitute damage to property". As there was no physical alteration to the integrity of the ship loader, the "damage" element of the offence was not made out.

Reckless damage or destruction of property

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

Is spitting on a bench "damaging property"?

Mr Hammond was arrested and taken to the local police station. While in the dock, he expectorated upon the stainless steel bench he was sitting on. He was charged with an offence under s 195(1)(a) *Crimes Act 1900*, of maliciously damaging the property of another. He was convicted and his appeal to the District Court was dismissed, but Lerve DCJ referred a question of a law to the Court of Criminal Appeal for determination in ***Hammond v R*** **[2013] NSWCCA 93**.

Slattery J held that, in this case, Mr Hammond could not have committed the offence charged because the element that "a person damages" requires proof of either physical harm or functional interference. The only evidence that any cost could or would be incurred was a hearsay assertion from a police officer that a professional cleaner would have to be engaged. Slattery J was obviously not convinced that this was so (at [74]): "these findings are quite consistent with an employee at the police station merely wiping a damp cloth over the seat to clear it of spittle/mucus in the course of otherwise required routine cleaning".

Dangerous driving

Causation between death of child born prematurely due to car accident and the subsequent death of the child

A man was convicted of dangerous driving occasioning death under the *Crimes Act 1900*, s 52A(1). He was the driver involved in a car accident, causing a woman travelling in the other car who was 24 weeks pregnant to give birth prematurely. The baby died 33 days later. The medical evidence was that his death was not caused by the accident, but by necrotizing enterocolitis to which preterm babies are highly susceptible. It was contended on appeal that the trial judge had erred by refusing to direct the jury to acquit and that occasioning of actual injury to the foetus in utero was a necessary element to satisfy the requirements of s 52A: ***Whelan v R* [2012] NSWCCA 147**.

Schmidt J (Allsop P agreeing with additional reasons) dismissed the appeal. An element of s 52A(1) is that the impact of the vehicle must occasion the death of another person. Her Honour held that in the current scenario, that element would be made out if it could be shown that (1) the child was in utero at the time of the impact, (2) it was born alive due to the impact, and (3) it subsequently died as a result of the impact. In this case, it was a matter for the jury to determine whether impact between the two vehicles was a substantial and significant cause of the child's death.

Her Honour stated at [88]:

> "[E]ven if a premature birth is not itself considered to be an injury to a foetus, if the child is born alive as a result of the impact, but later dies because of the immaturity of its organs and systems at the birth which the impact caused, such a death may be treated as if it were the result of the impact."

Dangerous navigation

Dangerous navigation occasioning death: what does "navigate" mean?

***Small v R* [2013] NSWCCA 165** concerned a collision between a workboat and a much larger fishing trawler in Sydney Harbour in the early hours of the morning. Six passengers on the workboat were killed. Mr Small had taken the helm before the accident at the invitation of the skipper, Mr Reynolds. Mr Small was not an experienced boat operator and was intoxicated. He was charged and convicted of six counts of dangerous navigation occasioning death in contravention of s 52B *Crimes Act*. He appealed, arguing that mere physical control of the helm did not constitute "navigation" and that Mr Reynolds, as skipper, was the one navigating the workboat. Emmett JA held that the term extended to persons directing, steering, or helming vessels, and other more nautical aspects of the term, such as captaincy or a person who plots a route, depending on the circumstances. He was guided in his determination of the breadth of the term by its ordinary English meaning, and the clear intention of Parliament to re-enact the provisions of s 52A (motor vehicles) in s 52B (vessels). The appeal was dismissed.

Domestic violence

Intimidation with intent to cause fear of physical harm under s 13 of the Crimes (Domestic and Personal Violence) Act 2007 is an offence of specific intent

The applicant in ***McIlwraith v R*** **[2017] NSWCCA 13** was intoxicated at the time of the offending, which required the trial judge to determine whether the offence of intimidation under s 13 of the *Crimes (Domestic and Personal Violence) Act 2007* was an offence of specific intent. The trial judge held it was not, but found in the alternative that even if intoxication was taken into account the applicant still formed the requisite intent. On appeal, Basten JA held that it is an offence of specific intent. His Honour discussed the relationship between s 13(1) (which, if read in isolation, would clearly constitute an offence of specific intent) and s 13(3) (which uses language associated with reckless indifferences). His Honour concluded that the language of subs (3) is closely analogous to the particular state of mind necessary for specific intent. Whilst it is not a form of intention per se, it is a state of mind with a specific or particular focus, and thus distinguishable from general intent. Given the trial judge's alternative finding of fact, the appeal was dismissed.

Drug offences

Drug manufacture – meaning of "manufacture"

The applicant in ***Cashel v R*** **[2018] NSWCCA 292** pleaded guilty to an offence of manufacturing a commercial quantity of methylamphetamine (Count 2). On appeal he contended that Count 2 should be quashed because it was not supported by the evidence; specifically that while significant quantities of precursor chemicals were found, he had never actually manufactured a commercial quantity of methylamphetamine because of his arrest before achieving that outcome. The issue for the Court was whether the physical element of the offence of manufacturing a prohibited drug centres on the process or outcome of manufacturing. Button J (Beazley P agreeing, RA Hulme J agreeing with short additional reasons) upheld the appeal, holding that the offence of manufacturing a prohibited drug requires the offender to have actually produced the prohibited drug. A verdict for the offence of knowingly taking part in the manufacture of a commercial quantity of that prohibited drug was substituted.

Button J's reasons primarily took account of the existence of the offence of knowingly taking part in the manufacture of a prohibited drug without actually producing the drug, which encapsulates the criminality in question, a conceptually separate offence reinforced by the structure of the "offences-creating provision" in s 24 of the *Drug Misuse and Trafficking Act 1985* (DMT Act). His Honour further considered the reference to "process" in the definition of "manufacture" was not determinative, nor was there any significant distinction between the transitive verbs "manufactures" and "produces", which in this context are included as "catch-all" synonyms. In addition, His Honour found there is no need to stretch the meaning of "manufacture" in s 24 where the common law offence of attempting to commit

an offence created by statute is available, nor where there is no evidence of express Parliamentary intention, i.e. expressed in the second reading speech, to create a broad offence. His Honour then held that the most natural meaning of the verb "to manufacture" is where something comes into existence, and found that the Macquarie Dictionary definition of "to manufacture", while not conclusive, tends to support the natural meaning above. His Honour noted that the Crown was unable to provide authorities contradicting the above construction.

Supplying a large commercial quantity of a prohibited drug – mental element

The respondent in ***R v Busby*** **[2018] NSWCCA 136** pleaded guilty to two offences contrary to s 25 of the *Drug Misuse and Trafficking Act* for supplying more than 20kg of ecstasy and more than 2kg of cocaine, both being found in a suitcase in his possession. He told police and gave evidence at sentencing that he believed the suitcase actually contained cannabis. The large commercial quantity of ecstasy is 0.5kg and the large commercial quantity for cocaine is 1kg, whereas the large commercial quantity of cannabis leaf is 100kg. Senior counsel for the respondent had advised him that pleas of guilty were appropriate because they were founded upon an intention to involve himself in the supply of drugs and he was aware that the weight was in excess of 1.5kg, which objectively amounted to the large commercial quantity for the drugs that were in fact in the suitcase. On appeal the Crown contended the sentence was manifestly inadequate, but when the appeal was heard an issue arose as to the propriety of the pleas of guilty. In an unusual outcome for a Crown appeal against sentence, the pleas of guilty were rejected, the convictions quashed and the charges were remitted for trial.

Button J set out a number of propositions. First, an offender is guilty of a drug offence even if the drug actually supplied was different from the drug the offender believed the substance to be. Second, in order to prove an offence under the Act that is aggravated by virtue of its quantity being a commercial or large commercial quantity, the prosecution must prove not only an intention to do that act but also an intention to do so with regard to that alleged quantity. Applying *Yousef Jidah v R* [2014] NSWCCA 270, to make out the offence, the drug one intends to supply and the drug the aggravated quantity of which one intends to supply, must be identical. His Honour held that for the respondent to be guilty he needed to believe that the suitcase contained a prohibited drug and for him to believe that it contained not less than the large commercial quantity applicable to the drug that he believed it to be.

Drug manufacture - extracting cocaine from paper falls within the definition of "manufacture" in the Drug Misuse and Trafficking Act 1985 (NSW)

In ***R v Bucic*** **[2016] NSWCCA 297** the respondent allegedly took steps to separate cocaine from A4 sheets of paper which were impregnated with the drug. Cocaine hydrochloride (the common form of cocaine) is soluble in water or alcohol, and according to expert evidence at trial it goes in and out of paper in exactly the same form. The respondent was charged with knowingly taking part in the manufacture of cocaine, contrary to s 24(1) of the *Drug Misuse and Trafficking Act 1985* (the DMTA). At trial, defence counsel relied on *Beqiri v R* (2013) 37 VR 219; VSCA 39 which found that extracting cocaine from towels through

evaporation was not "manufacture" in s 305.1 of the Criminal Code 1995 (Cth). The primary judge noted that it dealt with different legislation but had "remarkably similar" facts, and found the decision "highly persuasive". The trial judge directed the jury to return a verdict of not guilty on the basis that separating cocaine from paper is not "manufacture". Her Honour referred to the ordinary English meaning of "manufacture" as making something different. Her Honour did not refer to the definition of "manufacture" in s 3 of the DMTA, which includes "the process of extracting or refining the prohibited drug".

The CCA allowed the Crown appeal and ordered a new trial. Campbell J held that separating cocaine from paper it is contained in is a process of extraction for the purpose of the DMTA. The ordinary English meaning of "manufacture" is not definitive. Campbell J noted High Court authority to the effect that it would be impermissible (and circular) to construe the words of a definition by reference to the term defined. Further, the use of "includes" in the definition indicates a more expansive definition than would otherwise be included in the notion of manufacture. Campbell J found that *Beqiri* has no application to the interpretation of the DMTA; the definitions of manufacture in the Commonwealth Code and the DMTA are different.

Supply prohibited drug – LSD – including cardboard and liquid in which drug impregnated and dissolved in weight of the drug

The appellant in ***Finch v R*** **[2016] NSWCCA 133** was convicted by a jury of two drug offences including the supply of a large commercial quantity of LSD contrary to s 25(2) of the *Drug Misuse and Trafficking Act 1985* ("the Act"). The LSD was found in two forms: in vials of liquid containing the drug as well as in cardboard tabs impregnated with it. The appellant appealed his conviction for the LSD offence, inter alia, on the ground that the judge erred by directing the jury that both the cardboard tabs and the liquid containing LSD were included in the overall weight of the LSD. He submitted that because the liquid is intended to be evaporated before the use of the LSD and because the cardboard is not intended to be swallowed, neither the cardboard nor the liquid should be considered as falling within s 4 of the Act. That provision states that "a reference in the Act to a prohibited drug includes a reference to any preparation, admixture, extract or other substance containing any proportion of the prohibited drug." Payne JA refused leave to appeal on this ground under r 4 of the Criminal Appeal Rules, as trial counsel for the appellant did not apply for any re-direction. With respect to the liquid, the appellant submitted that the liquid was not a "substance" containing LSD because a user would intend that the liquid would be dried or evaporated from the cardboard as part of the process of impregnating the cardboard with LSD. Even if this procedure was correct, the text of s 4 makes clear that the liquid LSD is to be regarded as a "preparation", an "admixture" or "other substance" and thus a prohibited drug. With respect to the tabs, in circumstances where the only relevant evidence at trial was to the effect that cardboard LSD is swallowed – and that evidence was admitted without objection – cardboard impregnated with LSD is clearly a "preparation" or an "other substance" within the meaning of s 4.

It should be noted that on appeal, submissions focused on the legal effect of s 4 if the evidence was different to the evidence in this case, namely that LSD is ingested by placing a tab under the tongue and then spitting the cardboard out. In those circumstances, it was

submitted that the cardboard was analogous to a syringe or other delivery mechanism. Payne JA preferred not to express a view in the present case because it was not squarely raised on the evidence.

Manufacture prohibited drug - mental element for the offence not established by knowledge/belief the substance is a precursor

The appellant in ***Siafakas v R*** **[2016] NSWCCA 100** was charged with drug offences including a count of knowingly taking part in the manufacture of a prohibited drug contrary to s 24(2) of the *Drug Misuse and Trafficking Act 1985*. The drug was MDP2P, which is both a precursor and a prohibited drug. The appellant's case at trial was the he was knowingly involved in the manufacture of a precursor, without knowing which precursor it was and without knowing it was, in fact, a prohibited drug as well. The trial judge accepted the Crown's submission that the mental element of the offence was satisfied by knowledge that a precursor was being manufactured. The appellant appealed against his conviction of this offence on the basis that that finding was erroneous.

On appeal, the Crown propounded an even broader submission, which was that it was sufficient that a person knows that what he or she was doing was unlawful. In contrast, the appellant submitted that, given that the precursor (MDP2P) was itself a prohibited drug, there were only two possible ways for the Crown to prove the mental element: (1) by proving that the person knew he or she was manufacturing a prohibited drug (without knowing precisely which one); or (2) by proving that the person knew he or she was manufacturing MDP2P specifically (where a belief that it was only a precursor and not a prohibited drug would not stand in the way of satisfaction of this element of the offence). Leeming JA (Harrison J agreeing, Schmidt J dissenting) accepted the appellant's submission and held that the judge applied an erroneous test. A consideration of relevant statute and case law shows that the mental element of the offence created by s 24(2) requires knowledge or belief concerning a prohibited drug; knowledge or belief concerning a precursor is insufficient.

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

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

unanimously held that while there were similarities in the elements of each offence, the whole criminality of the supply offence was not entirely captured in the possession offence.

Section 25(2) of the Drug Misuse and Trafficking Act can operate concurrently with s 233B of the Customs Act

In ***Gedeon v R*** **[2013] NSWCCA 257** the appellant was charged with two counts of supplying cocaine in contravention of s 25(2) of the *Drug Misuse and Trafficking Act 1985* (NSW). On appeal he claimed that this section is directly inconsistent with s 233B of the *Customs Act 1901* (Cth), thereby violating s 109 of the Australian Constitution, which invalidates State legislation insofar as it is inconsistent with Commonwealth legislation. The appellant argued that both Acts criminalise possession of narcotics. The inconsistency arises since the *Drug Act* does not provide for the defence of reasonable excuse, whereas the *Customs Act* does, the State act thereby denying a right or privilege conferred by a Commonwealth law.

Bathurst CJ dismissed the appeal. The test is whether the State Act alters, impairs or detracts from the operation of the federal Act: *State of Victoria v The Commonwealth (The Kakariki)* (1937) 58 CLR 618 at 630 (Dixon J). Section 233B of the *Customs Act* relates to imported goods. To establish an offence under that section the prosecution must prove beyond reasonable doubt that the accused knew that he or she possessed the goods: *He Kaw Teh v The Queen* (1984) 157 CLR 523 at 545, 584, 589 and 603. The *Drug Act* deals with the supply of drugs. The necessary element is intention to supply. Once possession for supply is established it is hard to see how a defence of reasonable excuse for possession could be made out. In addition, the reasonable excuse defence is co-extensive with defences at common law, the only difference being that under the *Customs Act* the onus is clearly on the defendant.

Part 9.1 of the Criminal Code Act 1995 (Cth) does not cover the field in regards to supply

This appeal in ***Buckman v R*** **[2013] NSWCCA 258** was heard simultaneously with ***Ratcliff v R*** **[2013] NSWCCA 259**, which raised identical issues. The appellant contended that the provision under which he was charged, s 25 of the *Drug Misuse and Trafficking Act 1985* (NSW), is inconsistent with Pt 9.1 of the *Criminal Code Act 1995* (Cth). Thus it was argued that the NSW provision infringes s 109 of the Australian Constitution. The appellant relied on the High Court decision of *Dickson v The Queen* [2010] HCA 30; (2010) 241 CLR 491, submitting that, just as there, the two Acts in issue are directed at controlling the same activities, drug possession and supply (at [36]). Since the Drug Act renders unlawful many acts not covered by the Criminal Code, it was argued that it acts to alter, impair or detract from the operation of the Criminal Code.

Bathurst CJ dismissed the appeal. He noted (at [78]) that s 300.4 of the Criminal Code "explicitly seeks to preserve concurrent operation even when the same act or omission is an offence under the Criminal Code and a State law and the penalty and fault element in the State law is different". This indicates that the Commonwealth did not intend to cover the field. All that the *Drug Act* does is treat possession with an intention to supply gratuitously to a third person as a more serious offence. Section 300.4 does not operate to eliminate direct inconsistency but allows for federal law to be read and construed as not disclosing a

subject matter or purpose with which it deals exhaustively and exclusively (citing *Momcilovic v The Queen* [2011] HCA 34; (2011) 245 CLR 1 at [272]).

No constitutional invalidity of an offence of supplying a large commercial quantity of pseudoephedrine

In ***R v El Helou*** **[2010] NSWCCA 111**, Allsop P rejected a contention that s 25(2) of the *Drugs Misuse and Trafficking Act 1985* was constitutionally invalid. The appellant had contended that the provision was inconsistent with a law of the Commonwealth (s 306.2 of the *Criminal Code* (Cth) which creates an offence of pre-trafficking commercial quantities of controlled precursors) and also that prosecution of him for the offence against s 25(2) was incompatible with the District Court's capability to exercise the judicial power of the Commonwealth.

Female genital mutilation

Female genital mutilation – meaning of "mutilates in Crimes Act, s 45(1)(a)

R v A2 **[2019] HCA 35; (2019) 93 ALJR 1106** was a Crown appeal from a CCA decision which overturned the trial judge's pre-trial ruling on charges of female genital mutilation contrary to s 45(1)(a) of the Crimes Act 1900. This arose from a ceremony performed on two young girls involving the cutting or nicking of each girl's clitoris. That ruling related to the meaning of the word "mutilates" as used in s 45(1)(a) – "excises, infibulates or otherwise mutilates the whole or any part of the labia majora or labia minora or clitoris of another person" – as meaning "injure to any extent", including a nick or cut, but not necessarily serious injury. The other issue was the trial judge's direction that clitoris included the clitoral hood (prepuce), not the labia minora. The CCA held that the trial judge's rulings were wrong on both counts. Rather, the ordinary meaning of "mutilates" connotes more than superficial injury or damage and which renders the subject body part imperfect or irreparably damaged. Likewise, the trial judge should not have directed the jury that clitoris includes the clitoral hood.

The appeal was allowed by a majority of the High Court (Kiefel CJ and Keane J; Nettle and Gordon JJ; Edelman J agreeing; Bell and Gageler JJ dissenting). Kiefel CJ and Keane J applied the well-settled approach to construction that gives effect to the purpose of, and mischief to which, the criminal offence provision is directed. On that basis, by reference to the purpose of s 45 (to prohibit the practice of FGM on female children and achieve its cessation), the heading of the provision and extrinsic materials, including the 1994 Family Law Council report "Female Genital Mutilation: A Report to the Attorney-General prepared by the Family Law Counsel" which condemns practices injurious to a female child, the direction given by the trial judge was legally correct. Likewise, though medical dictionaries differentiate between the prepuce and the clitoris, the context and purpose of s 45 did not require a "narrow or technical meaning" be applied to the identification of anatomical structures where they are closely interrelated. The trial judge approach was preferred over that of the CCA because it promoted the purpose of s 45(1).

Bell and Gageler JJ dissented. Their argument rested on the premise that the purpose of s 45 needs to be read in accordance with its settled meaning at enactment in 1995. Having conducted an extensive review of the extrinsic materials, their Honours did not consider that at the time, "female genital mutilation" did not encompass "ritualised practices" like cutting or nicking. This is supported by the fact that "otherwise mutilates" was used instead of "otherwise injures" thereby not extending conduct that results in not more than transient injury. It was therefore appropriate to give "otherwise mutilates" its ordinary meaning.

Firearms, weapons and offensive instrument offences

Firearms offences – whether and when imitation firearm should be "identified as a children's toy" – ascertainment by reference to matters including use and intention at the time (not past or future uses)

Employees at a car hire company refused to allow a man to hire a car and asked him to leave the premises. He reached into his suitcase, pulled out an item and pointed it at the complainants. They "freaked out" and ran inside to call the police. When the police arrived, they discovered that he possessed two lightweight plastic pistols with an orange trigger and plug in the muzzle. Two of the charges on the indictment at his trial concerned possession of an imitation self-loading pistol without authorization, contrary to s 7(1) of the Firearms Act 1996. Section 4D(4) provides that an "imitation firearm does not include any such object that is produced and identified as a children's toy". An issue in the conviction appeal in ***Darestani v R*** **[2019] NSWCCA 248** concerned the matters to be taken into account when considering whether an object alleged to be an imitation firearm should in fact be "identified as a children's toy".

Price J rejected the construction proffered by the applicant, in which the circumstances in which the object is used is irrelevant to the exception in s 4D(4). Rather, the verb "identified" relates to ascertaining what a thing is, and that ascertainment raises "matters intrinsic to the object, the use of the object and the intention of the person using it, if the object is being used at the time it is asserted to be in the person's possession". Furthermore, the applicant's construction is not consistent with the s 3 purposes of the *Firearms Act*, including to "to improve and ensure public safety". Price J went on to indicate that this identification "is confined to the time of possession and the past and future use of the object is an irrelevant consideration".

The applicant accepted verdicts of guilty on two counts of intimidation in relation to the staff members. But he contended that the verdicts of guilty for the two counts of possession were unreasonable. The Crown based its case for those counts on the time the applicant was found to be in possession of the items by police, as opposed to the time they were produced to the staff members which was therefore irrelevant. The officers had immediately regarded the items as toys. The Crown had not excluded the possibility that, at that time, each was produced and identified as a toy. Accordingly, the convictions for the possession counts were quashed.

"Prohibited firearm" – no statutory definition for shortened firearms

The appellant in ***Baxter v R*** **[2018] NSWCCA 281** pleaded guilty to four offences, including the attempted supply of a prohibited firearm (s 36(1) *Firearms Act 1996*) and possession of a prohibited firearm (s 7(1) *Firearms Act*). He had initially appealed on the basis that the sentence was manifestly excessive, but the Crown conceded that the convictions for the firearms offences were unsustainable at law. The firearm in issue was a shortened single barrel 12 gauge shotgun measuring 32 cm. The evidence, however, was not capable of establishing that the firearm fell within the meaning of the expression "prohibited firearms". This is because "prohibited firearms" are defined under s 4 of the *Firearms Act* by reference to Schedule 1, which lists firearms that are "prohibited firearms". Clause 16 of Schedule 1 extends that definition to include those firearms with dimensions less than that prescribed by the regulations. The only regulation relevant to the minimum dimensions of firearms found was reg 152 of the *Firearms Regulation 2017*, which makes prescriptions for the purposes of s 62(2) *Firearms Act* only, and could not be construed to extend to making prescriptions relevant to cl 16, Sch 1 referred to above.

As there was no relevant definition of a "prohibited firearm" that applied, the Court of Criminal Appeal held that the appellant's convictions for the offences were unsustainable and therefore quashed. The aggregate sentence was also quashed, and the matter was remitted to the District Court for sentencing on the remaining two offences.

OBSERVATION: It does not necessarily follow that the quashing of an aggregate sentence that follows the quashing of a conviction for one of the component offences will mean that the matter needs to be remitted to the original sentencing court: *JM v R* [2014] NSWCCA 297 at [40](10).

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.

An unassembled crossbow is not a prohibited weapon

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

Possession of a prohibited weapon – mental element

The DPP appealed against a magistrate's dismissal of a charge of possessing a prohibited weapon, namely a flick knife, contrary to s 7(1) of the *Weapons Prohibition Act 1998*: ***DPP (NSW) v Fairbanks*** **[2012] NSWSC 150**. The defendant was found to have the flick knife in a backpack when he attended an airport to catch a flight. He knew that he owned a flick knife but had packed hurriedly when his travel plans were changed at short notice and he had forgotten that it was in the backpack. That explanation was accepted.

"Possession of a prohibited weapon" is defined in s 4(1) to include any case in which a person knowingly (a) has custody of the weapon, or (b) has the weapon in the custody of another person, or (c) has the weapon in or on any premises, place, vehicle, vessel or aircraft, whether or not belonging to or occupied by the person.

Rothman J referred to *He Kaw Teh v The Queen* (1985) 157 CLR 523 for the proposition that knowledge of the accused is necessary in proof of possession; although the *Weapons Prohibition Act* definition itself has that requirement by the use of "knowingly". In this case, the defendant knew that he owned and possessed the knife; albeit that he did not know that it was in his bag at the airport. His Honour also referred to *R v Martindale* [1986] 3 All ER 25 which held that possession does not depend upon the alleged possessor's powers of memory and nor does possession come and go as memory revives or fails. It was observed that if that were the case, a person with a poor memory would be acquitted whereas the person with a good memory would be convicted. Here, the defendant was knowingly in possession of the weapon, even if he thought that the weapon was at home and not in his bag at the airport. The magistrate had wrongly applied a test that required the prosecutor to prove that the defendant knew that the knife was in the bag.

The definition of knuckle-dusters in the Weapons Prohibition Act 1998

While being ***DPP v Starr*** **[2012] NSWSC 315** screened on arrival at Sydney Airport, the respondent in was found with a belt buckle in the shape of knuckle-dusters. Knuckle-dusters are defined by cl 2(19), Sch 1 of the *Weapons Prohibition Act 1998*:

> "Knuckle-dusters or any other similar article that is made of any hard substance and that can be fitted over 2 or more knuckles of the hand of the user to protect the knuckles and increase the effect of a punch or other blow or that is adapted for use as such."

Starr was charged with possessing a prohibited weapon in contravention of s 7 of the Act. At trial, the magistrate found that the item likely fell within the definition but there was doubt whether the item would actually fit the hand of the defendant, being "the user". On that basis, the charge was dismissed and the Director of Public Prosecutions appealed to the Supreme Court.

Adamson J (allowing the appeal) held it was not necessary to satisfy s 7 that a knuckle-duster in possession of a defendant actually fit the defendant's hand. Her Honour found (at [47]) that in a possession case, "the user" in the definition at cl 2(19) "must, as a matter of construction, refer to a notional user or members of a notional class of user rather than to a specific user, there being no actual user who is subject of the operative provision in s 7." An alternative construction, which permitted the possession of knuckle-dusters by large-handed individuals whom they did not fit, would frustrate the underlying purpose of the Act to improve public safety and strictly control the possession of such weapons.

Financial crimes

Dishonestly obtaining a financial advantage by deception on an entity (s 192E Crimes Act 1900 (NSW)): misrepresentation operating on a natural person of the deceived entity not necessary to prove

In ***Decision Restricted*** **[2019] NSWCCA 43**, the Court of Criminal Appeal allowed a Crown appeal against the directed acquittal of the respondents, who were charged with offences against s 192E(1)(b) *Crimes Act 1900* (NSW) of dishonestly obtaining a financial advantage by deception. Adamson J held that the trial judge fell into error by requiring the Crown to prove that a misrepresentation actually deceived an entity by calling a natural person (acting as a human agent of the company) who was deceived to give evidence as to their thought processes.

Her Honour said that "[t]he form of the deception influences the mode of its proof". Her Honour noted that commonly deception occurs by way of a misrepresentation proved by direct evidence from the deceived person, but that this mode of proof is "not a universal rule". It can also be proved by circumstantial evidence to exclude hypotheses consistent with an innocent explanation, if "the facts are such that the alleged false pretence is the only reason which could be suggested as having been the operative inducement". It was sufficient in this case that there was evidence capable of establishing that the respondents had obtained a financial advantage by dishonest means and where it could be inferred that the operative cause was deception.

Fraud - there is no deception if a bank allows a person to overdraw their account

The appellant in ***Moore v R*** **[2016] NSWCCA 260** was found guilty of dishonestly obtaining a financial advantage by deception, contrary to s 192E(1)(b) of the *Crimes Act 1900* (NSW). The appellant had opened and account (ironically called a "Complete Freedom" account)

with St George Bank. He made numerous withdrawals and debits such that by the time the account was closed there was a negative balance exceeding $2.1 million. The appellant's case, at trial and on appeal, was that he was authorised, albeit by an oversight, to act on the account as he did. The appellant made no false representations to the bank inducing the bank to continue to lend him money. The Crown relied on an expanded statutory definition of deception. Under s 192B(1)(b) of the *Crimes Act*, "deception" includes "conduct by a person that causes a computer, a machine or any electronic device to make a response that the person is not authorised to cause it to make". The Crown submitted that s 192B(1)(b) involved no element of deception; it stood alone and amounted to a deemed deception.

Leeming JA found that the appeal could be resolved by assuming, but not deciding, that no element of deception need be involved. To resolve the appeal the Court asked whether the appellant was "authorised" to make the withdrawals and debits, which turned on the terms and conditions of the relevant account. Those terms and conditions expressly permitted the bank to allow withdrawals in excess of the available balance and set out obligations regarding fees, interest and repayment. Leeming JA thus found the ongoing withdrawals and debits to be the requests for further loans and the bank acceding to those requests. The Court concluded that the transactions were authorised and allowed the appeal.

Conspiracy to defraud – elements of the offence

The applicant in ***Jeyavel Thangavelautham v R*** **[2016] NSWCCA 141** was convicted of several offences relating to his position as the ringleader in a conspiracy to use equipment including card skimming devices to obtain banking and other personal information. He appealed against his conviction for the common law offence of conspiracy to defraud on the basis that the verdict was unreasonable because the evidence left open the possibility that the object of the conspiracy was to on-sell the customers' data once it had been harvested, rather than to use the data personally. Bathurst CJ dismissed the conviction appeal (although the applicant succeeded in appealing against his sentence). For the offence of conspiracy to defraud to be made out, it is necessary for the conspirators to have an intention to defraud; it is not enough that they have an expectation that the offence of fraud will be committed. Conspiracy to defraud involves an agreement to bring about a situation prejudicing or imperilling existing legal rights or interests of others. It is sufficient that the conspirators intend to take some advantage to themselves by putting another's property at risk or depriving a person of a lawful opportunity to obtain or protect property. The taking of credit card information put at risk the underlying accounts to which the cards related by providing the means for unauthorised access to those accounts. Where this risk was produced either by selling the data or using it personally, and by means that were admittedly deceptive and dishonest, the offence of conspiracy to defraud was made out.

Obtaining financial advantage by deception – bank loans obtained making false statements about income

In ***Elias v Director of Public Prosecution (NSW)*** **[2012] NSWCA 302** made loan applications with two banks in which he overstated his income and was convicted of two counts of obtaining financial advantage by deception in the Local Court. He had provided security above the value of the loans and had made all of his repayments on time. The District Court

refused an appeal and Mr Elias sought judicial review of that decision under s 69 of the *Supreme Court Act 1970*. He argued that he had received no financial advantage.

Basten JA (at [20]) dismissed the argument that a loan could not constitute a financial advantage. Blanch J considered the elements of the offence of obtaining financial advantage by deception (at [38]-[45]). First, the obligation to repay a loan does not cancel out the intention to permanently deprive the lender of the loans. Even where the loans would actually be repaid, the offence could still be made out. The basis of the offence is that the offender obtains financial advantage as a result of the deception; it is immaterial that the deceived person suffers no disadvantage. Second, there is no requirement that there be dishonest intent, although deception will often be strong indicator of dishonesty. Third, the falsity constituting the deception must go to something material. A false statement will be will be material if it is relevant to the purpose for which it was made and may be taken into account by the deceived person. Last, at [46] Blanch J agreed with Basten JA that a loan could constitute a financial advantage. They found that the District Court judge had been correct refuse to allow the appeal.

Grievous bodily harm

Grievous bodily harm - infliction of HIV

The appellant in ***Aubrey v R*** **[2017] HCA 18; (2017) 260 CLR 305** knew he was HIV positive and had unprotected sexual intercourse with the complainant, who was then infected with HIV. The appellant was charged with two offences, the alternative count was maliciously inflicting grievous bodily harm contrary to s 35(1)(b) of the *Crimes Act 1900* (as the provision then was). One issue on appeal was whether having sexual intercourse with another person and thereby causing the other person to contract a grievous bodily disease was capable of amounting to the infliction of grievous bodily harm within the meaning of s 35(1)(b).

The majority (Kiefel CJ, Keane, Nettle and Edelman JJ) held that the question should be answered in the affirmative. *R v Clarence* (1888) 22 QBD 23 held that inflicting grievous bodily harm required proof of the direct causing of injury and the uncertain and delayed effect of infection from sexual intercourse was insufficient. *Clarence* has long been regarded as doubtful. The majority listed several reasons why *Clarence* should not be followed, including the fact it was based on a rudimentary understanding of infectious diseases; as well as the contemporaneous presumption of a married woman's consent to intercourse with her husband, and some judge's failure to distinguish between consent to intercourse and consent to infection. The majority of the High Court saw no sufficient reason to disagree with later authority contrary to *Clarence*.

The appellant contended that the NSW Parliament should be taken to have intended for s 35 to operate in accordance with *Clarence* by virtue of the fact that s 36 (a separate provision on causing grievous bodily disease) was added separately, rather than amending s 35. This submission was rejected. Section 36 was enacted because *Clarence* was seen to have caused some doubt as to whether contracting a disease constituted bodily harm. This doubt does not suggest Parliament intended that s 35 be restricted in the way suggested by

Clarence. The majority found that the principle of construing statute in favour of the subject in the face of doubt was a rule of last resort. The language of s 35 has a level of generality that attracts the operation of the "always speaking" approach, so it therefore includes the reckless infliction of a sexual disease: *R v Dica* [2004] EWCA Crim 1103; QB 1257.

Grievous bodily harm – injury did not amount to GBH – verdict unreasonable

The appellant in ***Swan v R*** **[2016] NSWCCA 79** was convicted of affray and recklessly causing grievous bodily harm contrary to s 35(1) of the *Crimes Act 1900*. He appealed against the second of those convictions submitting that the guilty verdict was unreasonable or cannot be supported by the evidence because the Court must entertain a reasonable doubt that the victim suffered grievous bodily harm. The relevant injury was a fracture to the traverse process of the L3 vertebra. The fracture was "stable" meaning it did not go into the part of the vertebra containing the spinal cord and the surrounding muscles prevented the bone fragment from moving. Garling J (R A Hulme J agreeing; Wilson J dissenting) allowed the appeal, quashed the conviction and substituted a verdict of guilty to the alternative offence on the Indictment, namely assault occasioning actual bodily harm. While the type of injury suffered by the victim is capable of amounting to grievous bodily harm, a number of features indicate that this specific injury in fact did not. These include that there was no displacement of the fracture; it did not require operative or other treatment; it was not permanent; the victim was hospitalised for only 48 hours; the treating doctor described it as "minor"; and the victim did not receive any treatment following his release from hospital. Beyond those factors, the victim's own subjective account failed to support a description of "serious bodily injury" let alone "really serious bodily injury".

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.

Mens rea for reckless wounding in company by joint criminal enterprise

The appellant in ***Prince v R*** **[2013] NSWCCA 274** was found guilty by a jury of offences of affray and wounding with intent to cause grievous bodily harm. The primary charge was

brought under s 33(1)(a) *Crimes Act 1900*, and a statutory alternative was provided under s 35(3). Both charges were put on alternative bases, direct liability and joint criminal enterprise. It was conceded that the trial judged erred in his directions for the s 35(3) offence when put on the joint criminal enterprise basis. The jury was directed that the person inflicting the wound must have been reckless, and also that the appellant intended that the person would inflict the wound recklessly. Instead, what the Crown had to prove was that the wound was inflicted recklessly by one of the appellant's co-offenders; that the appellant had agreed to attack the victim; that he was acting in company with his co-offenders who he knew were armed; that he realised the victim might be harmed; and that he continued to act in furtherance of the enterprise. However, the trial judge directed the jury to consider the statutory alternative only in the event that the jury acquitted the appellant of the primary offence, which they did not. Furthermore, the misdirection favoured the appellant by overstating the mens rea requirement, and so no miscarriage of justice could have flowed.

There was no reference in the judgment (presumably because neither counsel raised it) to *Blackwell v R* [2011] NSWCCA 93 where an error in directing as to the elements of an alternative offence resulted in a successful appeal, notwithstanding the appellant was found guilty of the primary offence.

Intent to cause harm and "reckless wounding"

***Chen v R* [2013] NSWCCA 116** concerned a finding that the appellant, who had been convicted of reckless wounding contrary to s 35(3) *Crimes Act*, had intended to cause some injury. The appeal was conducted on the basis that the finding was inconsistent with the meaning of "recklessness" as defined in *Blackwell v R* [2011] NSWCCA 93; (2011) 81 NSWLR 119. The appeal was dismissed by Button J (Hoeben JA agreeing, Campbell J finding it unnecessary to decide). Blackwell was concerned with the offence of recklessly causing grievous bodily harm. It decided that, to commit that offence, an offender must have foreseen the possibility of the infliction of grievous bodily harm, not merely actual bodily harm; it had no application to the mental elements of reckless wounding.

Deficient advice to plead guilty to an offence of recklessly causing grievous bodily harm

The appellant had pleaded guilty and was sentenced for recklessly causing grievous bodily harm pursuant to s 35(2) of the *Crimes Act 1900*. His account of the incident was that he had impulsively struck the victim when the victim entered his field of vision during a fight with a third person. The victim fell and hit his head, causing serious injury. His solicitor advised him that a plea of guilty was appropriate on this version of the events. Schmidt J (RS Hulme J agreeing, Basten JA agreeing with separate reasons) held in ***Lawton v R* [2012] NSWCCA 16** that the advice was wrong.

In *Blackwell v R* [2011] NSWCCA 93, handed down three weeks after the appellant was sentenced, it was explained (at [82]) that to prove recklessly causing grievous bodily harm, it is necessary that the offender had foresight that his recklessness might cause grievous bodily harm to the victim. However, it had been submitted for Mr Lawton in the District Court that, because he was involved in an unlawful act, he was guilty of anything flowing as

a consequence. Schmidt J held (at [32]) that this supported the conclusion the legal advice was not in accordance with the position in Blackwell. Further, the appellant's affidavit disputed that he had foresight that his recklessness might cause grievous bodily harm. As a result, the Court found that there had been a miscarriage of justice as the plea of guilty was made without a full understanding of the nature of the charge or admitting all elements of the offence. Leave was granted to withdraw the plea of guilty and the conviction and sentence were set aside.

Intimidate

Intimidate police officer (s 60 Crimes Act) - meaning of "intimidates" – 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.

Kidnapping

Kidnapping - recklessness as to the lack of consent

An essential element of kidnapping (s 86 *Crimes Act*) is that the accused must know that the victim is not consenting. In ***Castle v R*** **[2016] NSWCCA 148** the trial judge directed the jury that this could be established if the accused (1) failed to consider whether or not there was consent and went ahead, even if the risk of non-consent would have been obvious if he had turned his mind to it, or (2) realised that there was a risk of non-consent but went ahead regardless. It was contended on appeal that the first way in which recklessness could be established was erroneous. Bathurst CJ, Hall J agreeing, held that recklessness for an offence against s 86 could be made out (a) by a knowing disregard of an appreciated risk that the victim was not consenting, or (b) by the accused intending to detain the victim "willy-nilly", not caring whether there was consent or no (*Banditt v The Queen* [2005] HCA 80; 224 CLR 262). Further, it was held (R A Hulme J dissenting) that recklessness for this

offence was not satisfied where the accused simply failed to consider the issue in circumstances where lack of consent would have been obvious to a person with the accused's mental capacity if he or she had considered it. As a result, the concept of recklessness for kidnapping is now more confined than for sexual assault offences

Manslaughter

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.

Manslaughter – whether supplier guilty where deceased voluntarily ingested fatal drug

Mr Hay had voluntarily taken a drug supplied to him by the appellant in ***Burns v R* [2012] HCA 35; (2012) 290 ALR 713**. He had an adverse reaction and left the appellant's house at her request. Mr Hay was subsequently found dead and the appellant was convicted of manslaughter. The High Court allowed her appeal against conviction. It was held (at [76]) that supplying the drug to Mr Hay could not constitute manslaughter by unlawful and dangerous act. Although the act of supply was unlawful it was not dangerous; any danger lay in the ingestion of the drug. The deceased Mr Hay had done so by making a voluntary and informed decision.

Also, the appellant did not owe a legal duty to obtain medical assistance for the deceased and her failure to do so did not make her liable for manslaughter by gross negligence. At [106], it was said that the supply of prohibited drugs attracted severe punishment under the criminal law. To impose a duty on a supplier to take reasonable care for a user would be incongruous with that prohibition. Furthermore, there is absent the element of control that

exists in relationships, for example between a doctor and patient, where the law imposes a duty on a person to preserve the other's life.

Medical assault

Consent to surgery in a medical assault case

Former doctor Mr Reeves was convicted of malicious infliction of grievous bodily harm with intent. He was sentenced on the basis that he did not have the complainant's consent to surgically remove her entire genitalia. The issue on appeal to the Court of Criminal Appeal was whether the trial judge provided erroneous directions to the jury on the issue of consent.

Dr Reeves performed surgery upon the genitalia of one of his patients. The surgery involved the removal of the patient's labia and clitoris. The procedure was grossly excessive, and expert evidence showed that small excision would have been sufficient. Dr Reeves was found guilty of maliciously inflicting grievous bodily harm with intent to cause grievous bodily harm. It was clear that the patient had not been aware of, and had not had explained to her, the full extent of the procedure. The trial judge had instructed the jury that Dr Reeves would not be guilty if the Crown could not prove that the surgery was conducted without lawful cause or excuse. One of the elements of "lawful cause or excuse", the trial judge said, was that Dr Reeves had the patient's "informed consent". Dr Reeves appealed against the verdict, contending that, amongst other things, "informed consent" was relevant to negligence and was a misdirection in a criminal prosecution.

In ***Reeves v R; R v Reeves*** **[2013] NSWCCA 34**, Bathurst CJ (Hall and R A Hulme JJ agreeing) upheld this ground of appeal. A failure to explain to a patient the possible risks contingent on a procedure does not vitiate consent in an action for civil trespass or criminal battery; nor does a failure to expand upon alternative treatment options. The impugned direction gave rise to a real risk that the jury would convict on the basis that an incorrectly stringent level of consent had not been met. (The appeal was dismissed by application of the proviso.)

The High Court in ***Reeves v R*** **[2013] HCA 57** found that the Court of Criminal Appeal formulated the correct test. The CCA was correct to find that the trial judge was wrong to direct that the practitioner had to explain the "possible major consequences of the operation" together with "options" and "alternative treatments" in order for there to be "informed consent". All that is needed in order to negative the offence of battery is consent to the nature of the procedure, in broad terms. (This is not necessarily enough to protect against liability in negligence, however). The appellant argued that Bathurst CJ formulated a more demanding test, by requiring consent to the "nature and extent of the procedure". The High Court ruled that this was irrelevant since neither formulation could be said to have been agreed to on the facts.

Meaning of "malicious intent" in context of surgical procedure

Reeves v R; R v Reeves **[2013] NSWCCA 34** also concerned, in part, a Crown appeal against a sentence for Dr Reeves, who had performed grossly excessive surgery on a patient. The offender had been sentenced for maliciously inflicting grievous bodily harm with intent to cause grievous bodily harm, contrary to s 33 Crimes Act. A ground of appeal was that the judge had allowed for the possibility that the offender had, in conducting surgery upon the complainant, not acted in malice. That is, the offender believed wrongly but honestly that the surgery was necessary. The Crown argument was that this contradicted the "malicious" element of the offence, as it was then. Hall J held that the trial judge had not been mistaken. Proof of malicious intent was not necessary in this case. Surgery often involves the intentional infliction of really serious bodily harm. The intentional infliction of harm in that context is "malicious" only if it is done without lawful excuse (which it was in this case).

Misconduct in a public office

Wilful misconduct in public office – mental element is based on a causative test

On appeal in ***Maitland v R; Macdonald v R*** **[2019] NSWCCA 32**, it was contended that the trial judge had misdirected the jury as to the mental element of the common law offence of wilful misconduct in public office. The misconduct was alleged to have arisen when Macdonald (as Minister for Mineral Resources) granted Doyles Creek Mining (of which Maitland was a shareholder and chairman) consent to apply for an exploration license, and later granting the company said license under the Mining Act 1992. Broadly, the applicants disputed the trial judge's formulation of element (4) in the written directions (the formulation of which was explained in *R v Macdonald; R v Maitland* [2017] NSWSC 337), submitting that the appropriate test for the mental element of the offence is a causation test.

A joint judgment was handed down by Bathurst CJ, Beazley P, Ward CJ in Eq, Hamill and N Adams JJ. While acknowledging that authority on the issue of the mental element to be proved is "relatively limited" (see eg *R v Llewellyn-Jones* (1967) 51 Cr App R 4; *R v Dytham* [1979] QB 722; *R v Speechley* [2005] 2 Cr App Rep (S) 75), the Court held that the correct direction on the mental element must be based on a 'but for' or causation test. In reaching this conclusion, the Court identified the purpose of the common law offence as "to prevent public officers (in the case of misfeasance) from exercising their power in a corrupt and partial manner" (at [67]-[71]). It was concluded from a survey of the principles concerning the rationale for the offence in relevant cases that it was not necessary for the improper purpose to be the sole purpose. Therefore, in the circumstances of this case, the correct direction to the jury would be that Mr Macdonald could only be found guilty if the power to grant consent to apply for an exploration licence and the power to grant the exploration licence would not have been exercised, except for the illegitimate purpose of conferring a benefit on Mr Maitland and Doyles Creek Mining. This formulation was considered to be consistent with cases involving breaches of fiduciary duties (*Mills v Mills* (1938) 60 CLR 150; *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285), as well as the approach adopted to determine whether administrative officers had exercised their powers for a purpose foreign to which it was conferred.

The applicants also took issue with the trial judge's use of the concepts of "substantially motivated" (4(a))) and "not motivated by any significant degree" (4(b)) in her written directions. While the Court did not find that the jury were diverted by the trial judge's use of the word motivation, because it had the same meaning as purpose in this context, the Court found that the 4(a) and 4(b) directions potentially led the jury to improperly focus on the task of weighing up the significance of any proper purpose with the improper purpose in decision-making. Furthermore, leaving the issue of what amounts to a "significant degree" to jury judgment is inappropriate because it does not make clear where the line is to be drawn. Finally, the Court took issue with the oral directions in the trial judge's summing up because it invited the jury to speculate as to the significance of the competing motives". The appeals were allowed and a retrial ordered.

Misconduct in public office committed by a Parliamentarian

In ***Obeid v R*** **[2017] NSWCCA 221; (2017) 96 NSWLR 155** the Court of Criminal Appeal was faced with an array of legal and factual challenges to the offender's conviction for misconduct in public office which occurred while he was a member of the Legislative Council of New South Wales. The offence was constituted by the offender making representations to a public servant with the intention of securing an outcome which would result in pecuniary benefits to him and his family. It was held that such conduct, which amounted to a breach of the duty of trust owed by a public officer, was capable of making out the offence provided the elements of wilfulness and seriousness were made out (which they were). A challenge to the jurisdiction of the Supreme Court to hear the charge, it being contended that the matter was in the exclusive cognisance of Parliament, also failed.

(Special leave to appeal to the High Court was refused: [2018] HCATrans 54.)

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; (2015) 91 NSWLR 226** 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.

Special leave to appeal to the High Court was sought as well as a stay pending the hearing of the application. The stay was refused by Gageler J who observed that neither of the

contentions sought to be advanced was so obviously compelling as to warrant interference with the trial process: *Obeid v R* [2016] HCA 9; 329 ALR 372.

Murder

Murder – s 18 Crimes Act does not apply to self-killing

The appellant in ***IL v The Queen*** **[2017] HCA 27; (2017) 262 CLR 268** was tried for murder and manufacturing a large commercial quantity of methylamphetamine. The manufacturing was carried out in a suburban house. A ring burner attached to a gas cylinder was lit which caused the ignition of flammable vapours. The deceased, a co-participant in the joint enterprise of manufacturing, died in the ensuing fire. The case was one of constructive murder (killing in the course of committing an offence punishable by imprisonment for life or 25 years). The Crown allowed for the deceased having been the one to have lit the ring burner but contended that IL was criminally liable for all acts carried out in the enterprise; thus she was criminally liable for the consequences of the act of the deceased.

The trial judge directed an acquittal on the basis that IL's liability was derivative as a principal in the second degree. As the deceased could not be convicted of his own murder, IL was not liable. The Court of Criminal Appeal held that the judge had erred in holding that IL's liability was derivative. It was said that the correct question was whether the ignition of the ring burner was within the scope of the joint enterprise, or within contemplation; if so, both participants were responsible for that act and liable for its consequences.

The High Court (by a majority of 5/7) set aside the orders of the CCA and substituted an order that the appeal to that Court be dismissed. It held that the trial judge was correct, even though his reasoning was incorrect.

Kiefel CJ, Keane and Edelman JJ allowed the appeal upon the simple basis that s 18 is not engaged if a person kills himself or herself intentionally. Nor is it engaged if the person kills himself or herself in the course of committing a crime punishable by imprisonment for life or 25 years, or by an unlawful and dangerous act. Their Honours also held, as did Bell and Nettle JJ, that IL was not liable on joint criminal enterprise principles given that it is the acts of each person to effect the common purpose which are attributed to the others, not the liability. As Bell and Nettle JJ put it (at [66]): "It is not open under the doctrine of joint criminal enterprise liability to attribute criminal liability to one participant in a joint criminal enterprise for an act committed by another participant in the course of carrying out the enterprise unless the act is or is part of the actus reus of a crime".

In dissent, Gageler J said that it was irrelevant whether that the act of the accomplice amounted to an element of a crime committed by the accomplice, citing Osland v The Queen [1998] HCA 75; 197 CLR 316. The criminal responsibility of IL for the constructive murder of the deceased did not depend on whether he was a constructive murderer of himself.

Also in dissent, Gordon J said that because the act of the other party in carrying out the joint enterprise is attributed to the accused, then if the act of the other party causes the death charged and the act was done in an attempt to commit, or during or immediately after the commission of, the foundational offence, then the accused would be liable for constructive murder.

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.

Attempt to set fire to a person with intent to murder - an offence known to law?

The appellant in ***Park v R*** **[2010] NSWCCA 151** was found guilty by a jury in respect of a charge that he did attempt to set fire to his wife with intent to murder her. He contended on appeal that the indictment did not disclose an offence known to law because it did not plead an allegation of "attempt to murder" as required by s 30 of the Crimes Act 1900. It pleaded an attempt to do an act with the intent of murder.

McClellan CJ at CL held that despite the indictment not specifically alleging an attempt to murder, the offence was sufficiently pleaded. Reference was made (at [39]) to the obligation of the Crown when pleading an indictment to identify the essential factual ingredients of the offence: *John L Pty Ltd v A-G* (NSW) (1987) 163 CLR 508 per Mason CJ, Deane and Dawson JJ at 519; *Lodhi v R* [2006] NSWCCA 121; (2006) 199 FLR 303 per McClellan CJ at CL at [97]. Here the essential ingredients consisted of the elements identified by the definition of murder contained in s 18 of the *Crimes Act 1900*. The indictment satisfied those elements.

No need for precise act

In ***R v PL*** **[2009] NSWCCA 256**, Spigelman CJ held that there was no requirement for the Crown to establish the precise act causing death in a murder/manslaughter prosecution ([46]-[52]).

Navigation offences

Reckless and negligent navigation offences against the Marine Safety Act 1998

The respondent in ***Maritime Authority of New South Wales v Rofe*** **[2012] NSWSC 5** was responsible for conducting exercises on Lake Burrinjuck with officer cadets of the Australian Defence Force Academy, using an inflatable boat with an unguarded propeller motor. On a joy ride after a day's exercises, a cadet fell from the boat and suffered horrific injuries from the propeller. A magistrate dismissed two charges brought under the *Marine Safety Act 1998* of operating a commercial vessel negligently occasioning grievous bodily harm (s 13(1)(a)), and of operating a commercial vessel recklessly occasioning grievous bodily harm (s 13(1)(b)).

The appellant argued that the magistrate had erred in holding, first, that the existence of a possibility of serious harm was insufficient to sustain a find of negligence or recklessness; and secondly, the degree of negligence required to contravene s 13(1)(a) was one of significant culpability, and higher than the civil law standard. Brereton J rejected the first ground, holding (at [122]) that regardless of how serious the potential consequences of an action, the risk of those consequences occurring must be "at least real, obvious and serious". Similarly, mere foreseeability was an insufficient ground for a finding of criminal negligence under the Act.

Conversely, his Honour found that the second ground was made out and that the magistrate had misdirected herself by demanding a higher degree of negligence to satisfy s 13(1)(a) than in a civil case. However, this point was not taken in the court below and, dismissing the appeal, Brereton J held that it would not be in the interests of justice for the appeal to be upheld on that ground alone.

Public justice offences

Influencing a witness to withhold true evidence

In ***Vasilevski v R*** **[2019] NSWCCA 277** it was contended that there was inconsistency between an acquittal for sexual assault and a conviction for persuading the complainant to withhold true evidence. The appellant had compelled the complainant to make a statutory declaration retracting her "false rape" allegations. It was submitted that the acquittal meant that the jury found the sexual assault allegation was in fact false; therefore she had not been influenced to withhold evidence which was true. It was held that the acquittal must have been on the basis that the appellant was not proven to have known that the complainant was not consenting, not that the complainant was not in fact consenting.

The Court (Bell P, Simpson AJA and Fullerton J) made useful observations about the nature of the offence in s 323 of the *Crimes Act 1900* headed "Influencing witnesses and jurors". In obiter dicta, there was discussion about whether "true evidence" meant "objectively true evidence" as opposed to evidence that the witness believed to be true and was prepared to give under oath (seemingly preferring the latter). Observations were also made about the need for prosecutors to take care in formulating such a charge, suggesting that the terminology in the section itself should be preferred over that used in the heading of the section.

Perjury – whether principle of incontrovertibility applied to prosecution of a perjury charge related to evidence given in earlier trial resulting in an acquittal

The applicant was acquitted of offences in the Local Court. Evidence later emerged which led to the applicant being charged with four further offences, including a perjury charge related to his allegedly false evidence in the Local Court proceedings. Relevantly, the evidence the subject of the perjury charge was material but not determinative of the acquittal. The applicant filed a notice of motion for a permanent stay of the perjury charge on the basis that by the charge, the Crown was seeking to controvert the applicant's acquittal. In ***Decision Restricted*** **[2019] NSWCCA 124**, Macfarlan JA (Harrison and Hamill JJ agreeing with additional reasons) granted leave pursuant to s 5F(3)(a) *Criminal Appeal Act 1912* (NSW), but dismissed the appeal. The applicant contended that there had been error in not asking "whether the perjury charge, or the evidence called in support of it, would "call into question" or "tend to overturn" the applicant's acquittal", following Barwick CJ in *Garrett v The Queen* (1977) 139 CLR 437 at 445; [1977] HCA 67. The additional issue was "that the primary judge erred in rejecting the applicant's submission that 'the findings of the magistrate … are inextricably linked to the acquittal such that to relitigate those findings constitutes an abuse of the process of the District Court'".

In dismissing both grounds, Macfarlan JA first reviewed the principles relevant to the issue, holding that the "extended principle" stated by Barwick CJ in *Garrett* was not authoritative. Second, his Honour held that even if it were to be accepted as authoritative, when applied to the facts, the principle does not assist the applicant because at its highest, the "perjury charge might cause a reasonable person to wonder or even doubt whether the earlier acquittal was correct". The impeachment of "material, but not necessarily decisive evidence" is not sufficient to attract the incontrovertibility principle. It follows then, as his Honour held, that proceeding on the charge and adducing the relevant evidence would not be an abuse of process. Harrison J agreed, stating also that while the evidence in the perjury charge contradicted the earlier evidence, it did not necessarily contradict the acquittal because the acquittal "did not depend solely or even importantly upon what is now alleged to be his untruthful evidence". Hamill J also agreed with Macfarlan JA and Harrison J's additional comments. His Honour said that while there was a factual connection between the Local Court evidence and the perjury charge, "that evidence neither disproved an element of the offence nor proved to be critical to the Magistrate's reasoning" – thus not attracting the principle of incontrovertibility nor the general principle of double jeopardy. Hamill J also emphasised that a permanent stay of proceedings "is an exceptional remedy granted only in extreme cases".

Perverting the course of justice contrary to s 319 Crimes Act 1900 (NSW) – elements of the statutory offence differ from the common law offence

The appellant in ***Johnston v R*** **[2019] NSWCCA 108** was an off-duty police officer who, following a jury trial, had been convicted of an offence of doing an act intended to pervert the course of justice, contrary to s 319 of the *Crimes Act 1900* (NSW). After being pulled over for an RBT, the appellant dissuaded a probationary constable from administering a breath test by telling him that because they worked at the same station, to do so would involve a "conflict of interest". Ground 1 asserted that the trial judge had made an error of law because he had omitted an element of the offence – that the act or omission had a tendency to pervert the course of justice – from his directions to the jury.

The issue was whether a tendency to pervert the course of justice was an element of an offence contrary to s 319 of the *Crimes Act*. To begin with, Simpson AJA noted that the common law offence of perverting the course of justice had been abolished by s 341 of the *Crimes (Public Justice) Amendment Act 1990* (NSW), which also introduced the offence in question under s 319. Having regard to the deliberate omission of tendency from the statutory formulation of the offence, in a context where the drafters would have been aware of the history, inadequacies, and deficiencies of the common law regime, Simpson AJA rejected the appellant's contention that s 319 required proof that the relevant conduct has a tendency to pervert the course of justice. Notwithstanding that there are some authorities against this view (including the three judgments in *R v Charles* (Court of Criminal Appeal (NSW), 23 March 1998, unrep) and *Beckett v R* (2015) 256 CLR 305; [2015] HCA 38 per Nettle J), Simpson AJA held that the approach of the plurality in *Beckett* (which were the terms which the trial judge used in his directions) should be followed. Therefore, tendency is not an element of the s 319 offence, and what must be proved is 1) that the accused did the act or omission, and 2) the accused had an intention to obstruct, prevent, pervert or defeat the course of justice.

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

The issue in ***The Queen v Beckett*** **[2015] HCA 38; (2015) 256 CLR 305** 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]).

Whether Police Integrity Commission proceedings unable to support perjury charges because of legal error in appointment of counsel

R v Vos **[2011] NSWCCA 172** stemmed from the prosecution of Mr Vos for offences of knowingly giving false or misleading information to the Police Integrity Commission ("PIC"). He moved the District Court for a permanent stay on the basis that the PIC proceedings were a nullity. Section 12 of the *Police Integrity Commission Act 1996* allows an Australian legal practitioner to be appointed as counsel assisting the Commission. Mr Errol Ryan was appointed as counsel assisting the Commission in the course of PIC proceedings in 2008, when Mr Vos gave evidence. Mr Ryan was a Senior Investigator with PIC, but not a qualified Australian legal practitioner. The trial judge held this error was so fundamental as to render the proceedings a nullity, and granted a stay to Mr Vos.

On the appeal, McClellan CJ at CL decided that while the Police Integrity Commission Act envisages counsel assisting asking questions of witnesses in the course of proceedings, it was nonetheless made clear by s 40 that all questions were asked with the authority of the Commissioner. The fact that Mr Ryan could not have been authorised to make such inquiries on his own did not make the proceedings a nullity. Furthermore, the relevant provisions for appointment of counsel assisting were concerned with facilitating the task of the PIC, not affecting the constitution of its investigations. Mr Vos's responses Mr Ryan's questions were capable of being evidence in his prosecution.

Perverting the course of justice

The accused in ***Regina v OM*** **[2011] NSWCCA 109** was charged with offences concerned with the damaging of property as well as two offences of doing an act with the intention of perverting the course of justice (s 319 of the *Crimes Act 1900*). When police were investigating the former offences, it was alleged that the accused had asked two people to give false evidence to the investigators. The accused sought an advance ruling pursuant to s 192A of the *Evidence Act 1995* that the evidence was incapable of establishing a prima facie case. The judge, in effect, agreed with that contention. The Crown appealed.

The Court was compelled to dismiss the appeal for lack of jurisdiction (because the trial judge had not in fact made an advance ruling, or any order amenable to appeal). Nevertheless, Whealy JA held that the trial judge had made a clear and substantial error in relation to the scope of s 319. His Honour referred to the decisions of *Einfeld v R* (2008) 71 NSWLR 31 and *The Queen v Rogerson* (1992) 174 CLR 268 and observed that whilst the scope of the offence under s 319 had not been enlarged beyond the common law concept, neither had it been diminished.

> "In other words, if the Crown, in the present matter, could establish that the respondent's actions were intended to deflect the police from prosecuting him for the criminal offence that he had allegedly committed, or from adducing evidence of the true facts relating to the alleged offence, the prosecution was clearly capable of being maintained. The fact that no judicial proceedings had been commenced at the time when the respondent spoke to Ms Ullah and Mr Sundarjee, did not preclude the finding of a prima facie case." ([49])

Poisoning

Causing another person to take a poison or other destructive or noxious thing so as to endanger life – meaning of "cause to be taken"

Two of the offences for which the appellant in ***Riley v R*** **[2011] NSWCCA 238** was convicted were against s 39 *Crimes Act 1900*. (The terms of the offence were recast in 2008 but the concept of causing another person to take remains). The allegation was that the appellant had provided prescription drugs to the victims which had dangerous effects when they were taken in combination. There was also a manslaughter charge in relation to another victim which also required consideration of the concept of "cause to be taken". The trial judge directed the jury that the victim must have been "substantially influenced" by the accused in taking the substances. This was held to have been erroneous. The reasoning of Howie J in *R v Wilhelm* [2010] NSWSC 334 was accepted as being correct. That is, there is a difference between a person being in a position of influence over a person and a person influencing the other person. "Cause to be taken" is to cover a situation where a person in authority over another (e.g. an adult over a child) orders, commands, or directs the other person to take the substance.

Meaning of "cause to be taken"

In ***R v Wilhelm*** **[2010] NSWSC 334**, the deceased asked to try some of the drug "fantasy", which the accused was preparing to take himself. The drug killed the deceased, and the accused ended up pleading guilty in the alternative to causing the deceased to take a noxious substance. Holding that the facts did not make out the offence, Howie J said that the use of the words "causes another person to take" is to cover a situation where a person in authority over another commands or directs that person to take the substance. In this case, Wilhelm may have offered the deceased the drug and what he did and said may have influenced her to take it, but it was her act in taking the drug. Wilhelm did not cause her to take it.

Riot

Riot – the meaning of the element "present together"

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

distance of each other. The concept was directed to people being in the same place as each other.

Sexual offences

Sexual offences – statutory provisions relating to consent differ as between sexual intercourse without consent and indecent assault offences

A trial judge gave the jury the same direction as to knowledge of the lack of consent in respect of offences of aggravated sexual intercourse without consent and aggravated indecent assault offences. The direction included that the accused may have believed the complainant was consenting but had no reasonable grounds for that belief. It was held on appeal in ***Holt v R* [2019] NSWCCA 50** that the direction was erroneous. Section 61HA of the *Crimes Act 1900* ("Consent in relation to sexual assault offences") specifically applies to offences against ss 61I, 61J and 61JA, and not to indecent assault offences such as in s 61M. For indecent assault offences it is necessary under the common law for the Crown to prove that the accused knew the complainant was not consenting, or at least the accused was indifferent to the absence of consent (e.g. *Greenhalgh v R* [2017] NSWCCA 94 at [5] (Basten JA)).

Procuring a child for unlawful sexual activity (s 66EB(2) Crimes Act) - meaning of "procure"

The applicant in ***ZA v R* [2018] NSWCCA 116** arranged for a 26-year-old man, AC, to marry his 12-year-old daughter, MG, in a traditional Islamic marriage. Following the ceremony MG began living with AC and they had sexual intercourse. The applicant was convicted of procuring a child under 14 years of age for unlawful sexual activity with another person contrary to s 66EB(2)(a) and being an accessory before the fact to the offence of sexual intercourse with a child aged 10-14 contrary to ss 66C(1) and 346. In (unsuccessfully) seeking an extension to appeal out of time it was contended that the trial judge had erred in her interpretation of the word "procure" in s 66EB(2)(a).

The applicant contended that the meaning of "procure" in s 66EB(2) required some positive "care and effort" to bring about the desired end; the Crown argued that the broader meaning of procure was to "effect, cause, or bring about". Adamson J rejected the applicant's interpretation and held that the Court must prefer a construction of the provision which will advance its purpose. Her Honour considered the context of s 66EB(2) and held that the term should be afforded the broader meaning contended by the Crown. In doing so, Adamson J distinguished the case from *Truong v The Queen* (2004) 223 CLR 122, which dealt with the term "procure" in a different statutory provision alongside the words "aids, abets, counsels…" Her Honour held that the trial judge had not erred by finding that the word "procure" in s 66EB(2) meant "to cause or bring about".

Sexual intercourse with another person who is under "special care" and is aged 17

In ***R v PJ* [2017] NSWCCA 290**, the defendant was charged under s 73 of the *Crimes Act* with having sexual intercourse with a former pupil at which time he was still a teacher. The

Crown appealed against a permanent stay of proceedings which had been ordered on the basis that there was insufficient evidence to establish the offence; specifically, that the intercourse could not be shown to have occurred while the defendant was in a position of authority in respect of the complainant. The appeal was dismissed.

Latham J held that criminal liability does not arise unless sexual intercourse takes place while the position of authority is being exercised by way of the provision of instruction relevant to ss 73(2)-(3). Her Honour accepted the respondent's submission that there must be a temporal connection between the personal relationship and the sexual intercourse. Latham J held that the wording of the provision ("in connection with") requires that the personal relationship between the offender and the child is both a result of the provision of instruction and confined to the ongoing provision of instruction.

(Parliament moved quickly to amend the definition of "special care" in s 73 in response to this decision: see Sch 1.4 [1]-[2] of the *Justice Legislation Amendment Act 2018*.)

Sexual intercourse without consent – the element of knowledge of no consent

The respondent in ***R v Lazarus*** **[2017] NSWCCA 279** was acquitted after a judge-alone trial of sexual intercourse without consent contrary to s 61I of the *Crimes Act*. An issue in the Crown's appeal concerned the element of the offence that the person must "know that the other person does not consent". Section s 61HA(3) provides that a person is to be taken to know that there is no consent if: (a) the person knows there is no consent; (b) if the person is reckless as to whether the other person consents; or, (c) the person has no reasonable grounds for believing that the other person consents. In determining the knowledge of the accused, s 61HA(3)(d) states that the trier of fact must have regard to all the circumstances of the case, including "any steps taken by the person to ascertain whether the other person consents to the sexual intercourse".

The trial judge concluded that there were reasonable grounds for the respondent to have formed the belief that the complainant was consenting. The Crown contended that the judge had erred by failing to identify steps the respondent had actually taken to ascertain whether or not the complainant was consenting, and had failed to include reference to the principles of law her Honour had applied.

The CCA found error on the part of the trial judge but dismissed the appeal. Bellew J held that "steps" for the purpose of s 61HA(3)(d) must involve the taking of some positive act, which includes a person's consideration of, or reasoning in response to, things or events which he or she perceives. Bellew J held that the trial judge erred by failing to make any reference to s 61HA(3)(d) or state the steps taken by the respondent to form a reasonable belief that the complainant was consenting. (The appeal was dismissed in the exercise of the Court's discretion.)

Persistent sexual abuse of a child – when multiple incidents alleged judge should ask jury which incidents were proven

The appellant in ***Chiro v The Queen*** **[2017] HCA 37; (2017) 260 CLR 425** was found guilty by a jury of persistent sexual exploitation of a child contrary to s 50(1) of the *Criminal Law Consolidation Act 1935* (SA) (similar but not identical to persistent sexual abuse of a child in s 66EA *Crimes Act 1900* (NSW)). The Crown alleged multiple underlying incidents of abuse, more than the minimum number for the offence to be made out (ranging in seriousness, from kissing to digital penetration and fellatio). The trial judge did not ask the jury which incidents were proved. On sentence, the judge found that all the alleged acts had been proved and sentenced him upon that basis. The High Court considered whether, in such circumstances, the judge should question the jury to identify which underlying incidents the jury found to be proved. (NB. At the time s 50 was silent on extended unanimity, which was required at common law. The NSW provision s 66EA(6)(c) requires that "all the members of the jury must be so satisfied about the same 3 occasions").

The majority of the High Court (Kiefel CJ, Keane and Nettle JJ, Bell J agreeing with separate reasons) held that where the jury return a general verdict of guilty, the judge should question the jury to identify the underlying acts of "sexual exploitation" which the jury found to be proved. It also would be appropriate for the judge to tell the jury before they retire that, if their verdict was guilty, they would be asked to state which of the alleged acts of sexual exploitation had been proved. Such an approach would not engender uncertainty and dissuade them from convicting an offender, as the Crown contended. The judge could reiterate the elements of the offence.

The Crown also submitted that injustice could arise if the jury do not deliberate beyond finding the minimum number of underlying acts, even though more acts were proved beyond reasonable doubt. The majority rejected this argument; the actus reus of the offence is comprised of discrete underlying acts of sexual exploitation and an accused is not to be convicted or sentenced on any basis other than having committed only those acts of sexual exploitation which the jury are agreed have been proved.

In relation to the sentence, the majority held that, given the judge had not ascertained which acts the jury found were proved, the appellant should have been sentenced on the view of the facts most favourable to him (namely that the offence was made out based upon the less serious acts, namely kissing).

N.B. Section 66EA was significantly recast by the Criminal Legislation Amendment (Child Sexual Abuse) Act 2018.

Sexual intercourse without consent in circumstances of aggravation (under authority)

The offender in ***Kennedy v R*** **[2017] NSWCCA 193** was sentenced for four offences of aggravated sexual intercourse without consent committed against the daughter of his partner when the daughter was aged 15 to 18. The circumstances of aggravation were that the daughter was under the age of 16 (count 1) and was under his authority (counts 2 – 4). The offence in count 4 occurred after the offender's relationship with the complainant's mother had broken down and they had separated. It occurred on a day upon which he had been looking after two children who had been born as a result of the offences in counts 1 and 2. Leave to appeal against conviction in relation to count 4 was sought on the basis that

the agreed facts did not make out the "under authority" element because he was not in a relationship of step-father/daughter with the complainant at the time.

Davies J rejected this contention. There was nothing to impugn the integrity of the plea as an admission of all of the elements of the offence. The offender was in the best position to know whether he continued to be in a position of authority at the time of the last offence. As a father to her children he could also be regarded as having de facto authority over the complainant because he had the ability to take or retain custody of those children.

Can a de facto partner of a child's parent be a "foster parent"?

JAD was charged with a number of aggravated sexual offences under s 73 of the *Crimes Act 1900* and was the de facto partner of the complainant's mother. He was convicted on the basis that he fell within the definition of the child's "foster parent/father". He appealed on the basis the relationship was not one capable of being described as one of foster parent and foster child: ***JAD v R* [2012] NSWCCA 73**. It had been held in *R v Miller* 127 A Crim 344 that the de facto partner of a child's mother was not the child's "step-father".

Simpson J (with Hoeben J agreeing, allowing the appeal on another ground) held (at [166]) that the term "foster parent" may include a de facto of a natural parent of a child for the purposes of s 73, where the de facto is shown to play a role in the child's upbringing. Having recourse to a purposive approach to statutory construction, her Honour stated (at [148]) that a construction of s 73 that excluded a de facto in the position of JAD from the definition of "foster parent" would result in an interpretation that "failed to remedy the mischief that Parliament intended to deal with". In response to the argument that this may stretch the definition of "foster parent", she stated that this was a case where such a construction was justified. The failure to include persons in the position of the appellant in s 73 was the result of inadvertence and should be rectified by reading "foster parent" as extending to include that class of person (at [164]). Regardless, her Honour found that even on a literal approach a de facto, living in a familial relationship and shown to play a role in the child's upbringing, would fall within the definition (at [145]).

Indecent assault/act of indecency - evidence of surrounding circumstances is relevant to whether an act is indecent

In ***Eades v Director of Public Prosecutions (NSW)* [2010] NSWCA 241**, the appellant was the subject of a charge of inciting a person under the age of 16 years to an act of indecency. The circumstances were that the appellant had exchanged text messages with a 13 year old girl, in the course of which he incited her to send him a nude photograph of herself. The issue on appeal was whether the act of indecency (the sending of the nude photograph) should be considered in isolation from its context. Campbell JA held that there may be surrounding circumstances that are relevant to the determination of whether an act is indecent (that is, whether it is contrary to community standards of decency), and that it is the task of the fact-finder to assess whether a right-minded person would take such circumstances into account. His Honour proceeded to identify in a non-exhaustive way some circumstances that could be relevant where an act is performed in response to a

request, such as the terms of the request; the identities of the addresser and addressee of the request; their respective ages; their relationship or social roles; and the like.

Old statute – attempt offence provision (s 61P) did not fall within proof of knowledge of consent provision (s 61HA)

Section 61HA made provisions for the proof of knowledge about consent in respect of certain sexual assault offences. Subsection (1) specifically provided that "this section applies for the purposes of the offences under sections 61I, 61J and 61JA". In ***WO v Director of Public Prosecutions (NSW)*** **[2009] NSWCCA 275**, the accused was charged with an offence under s 61P of attempting to commit an offence under s 61I (attempt to have sexual intercourse without consent). Basten JA held (at [73] – [80]) on a s 5F appeal that s 61HA did not apply to an offence charged under s 61P, notwithstanding that such offence was against one of the sections specifically nominated in s 61HA(1).

Traffic 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.

F. Cth offences (elements)

Child sex tourism

Encouraging non-Australians outside Australia to engage in child sex tourism

Section 50DB of the *Crimes Act 1914* (Cth) (see now the Criminal Code (Cth)) made it an offence to encourage a person to commit an offence against Part 3A of the Act. Section 50BA made it an offence for a person, while outside Australia, to engage in sexual

intercourse with a person under the age of 16 years. But s 50AD provided that a person was not to be charged with an offence against Part 3A unless that person was, relevantly:

(a) an Australian citizen; or
(b) a resident of Australia …

The appellant in ***Cargnello v DPP (Cth)*** **[2012] NSWCCA 162** was convicted of a number of offences against Part 3A, including encouraging a person to have sexual intercourse with someone under the age of 16, based on emails he had sent to unidentified persons. It was contended that he could not have contravened s 50DB as it had not been established that the person he had encouraged was an Australian citizen or resident. It was argued that the limitation provided by s 50AD on prosecution created at least a sufficient ambiguity about the operation of s 50DB that the appeal should be resolved in favour of the appellant: see *Beckwith v The Queen* [1976] HCA 55.

The appeal was dismissed. Basten JA held that is was not a requirement that the recipient of the encouragement envisioned by s 50DB must be an Australian citizen or resident who would be liable for prosecution if they committed the encouraged offences (at [29]). He reasoned (at [24]-[28]) first that liability for an offence against s 50DB did not depend on another person committing an offence, so it should not be read down on the basis that a particular person could not have been prosecuted for the encouraged offence, had it been committed. Secondly, the provision criminalised encouragement to a general audience and it would be perverse to restrict it merely because it was directed at individuals in this case. Thirdly, s 50AD does not lead to a conclusion that Australian citizenship or residency is an element of an offence against s 50BA. It merely limited the scope of those who may be prosecuted.

Child pornography material

Whether definition of "child pornography material" in s 473.1 of the Commonwealth Criminal Code extends to communications concerning future sexual activity

In several online messaging exchanges the appellant in ***Innes v R*** **[2018] NSWCCA 90** described to a person whom he thought was a 30 year old single mother (in fact a police officer) the sexual activities he wanted to engage in with her and her 11-year-old daughter. Three particular chats describing the appellant's fantasies were alleged to constitute child pornography material. The appellant argued the use of present tense verbs in the definition of "child pornography material" in s 473.1 of the Criminal Code suggested that "child pornography material" could not include future imagined activity.

Johnson J held that the use of the present tense verb "describes" in the definition of child pornography material in s 473.1 was used to achieve harmonious interaction with the offence provision in s 474.19. His Honour found that although the words are in the present tense, those words are intended to encompass present descriptions of past, present and future sexual activity. His Honour concluded that a narrow construction would lead to an

absurd result in which a description in the present tense would constitute an offence but a description in a future tense would not. The appeal was dismissed.

Conspiracy

Conspiracy – underlying agreement formed before the period alleged in the indictment

The accused in ***Agius v R*** **[2011] NSWCCA 119** were charged with two counts of conspiracy. Count 1 was said to have existed from 1 January 1997 to about 23 May 2001 whilst count 2 was said to have existed from 24 May 2001 to about 10 April 2008. The trial judge refused an application for a permanent stay of count 2 upon a contention that it was foredoomed to fail because the agreement was alleged to have been entered before the dates specified in the indictment. An appeal was brought under s 5F of the *Criminal Appeal Act 1912*. Johnson J agreed (at [62]) with the observations of the trial judge as to the nature of conspiracy being a "continuing offence" such that the offence depends upon the existence of, or participation in, an agreement, and not the precise timing of its formation.

There was also discussion of the differences between the common law offence of conspiracy and s 11.5 of the *Criminal Code 1995* (Cth). Counsel for the accused argued that the provision had the effect such that it was necessary for the Crown to establish that the agreement was entered into after the date of its commencement. Johnson J observed that "the only presently relevant alteration to the common law [by the provision enacted in the *Criminal Code 1995* (Cth)] is that effected by s 135.4(9)(c), which requires proof of the commission of an overt act pursuant to an agreement". His Honour concluded [(at 74)] that to suggest that an agreement entered into before the commencement of the provision, but that then continued thereafter, could not be prosecuted because the conspirators failed to renew their agreement would lead to a highly artificial and absurd result.

Conspiracy to commit an offence that has recklessness as its fault element under the Criminal Code (Cth)

It was contended in the High Court of Australia in ***Ansari v R; Ansari v R*** **[2010] HCA 18; 266 ALR 466** that an offence of conspiring to commit a money laundering offence, that being dealing with money and being reckless as to the risk that the money would be used as an instrument of crime, was bad in law. The basis of this contention was that there was an inconsistency inherent in proving that an accused conspirator intends that a circumstance will exist (intention being the fault element of conspiracy) and simultaneously intends that he or she would be reckless as to the existence of that circumstance.

In ***R v LK; R v RK*** **[2010] HCA 17; 266 ALR 399** the issue was whether the offence of conspiracy is committed when there is an agreement to commit the offence of dealing with money that is the proceeds of crime where recklessness as to that fact is an element of the substantive offence. It was held that conspiracy under the *Criminal Code* (Cth) requires the prosecution to prove intention in relation to each physical element of the substantive offence, even if the fault element for that offence is a lesser one, such as recklessness:

French CJ at [1] and [75] – [79], Gummow, Hayne, Crennan, Kiefel and Bell JJ at [141], and Heydon J agreeing with the plurality at [145].

Drug offences

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.

Import crimes

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

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

In ***El-Haddad v R*** **[2015] NSWCCA 10** the trial judge adopted too broad an approach by regarding "any dealing in a substance once it has reached this country" including re-exporting it or distributing it. Leeming JA held that paragraph (b) of the definition could include physical processes and legal processes such as a sale by payment and physical

delivery or a merely sale by deed. In this case, involvement of the appellant in the freight forwarder being directed to hold the goods for another entity was sufficient in that it caused there to be a change in the character of the actual possession such that a different entity had the right to delivery of the goods. An inquiry about what was required to release a package from a bond warehouse was not sufficient.

Attempt to import a border-controlled drug where drug has been seized and not actually imported

Venezuelan authorities intercepted a cocaine package destined for Mr Onuorah and swapped the cocaine for an innocuous substance, then alerted Australian authorities. Once the package was tracked to Onuorah, he was arrested. He appealed his conviction on the grounds that the substance actually imported was not a border-controlled drug, as a result of the switch. In ***Onuorah v R* [2009] NSWCCA 238**,

Hodgson JA dismissed the appeal. His Honour held that, for an attempt offence, an accused must intend each element of the relevant crime, and in pursuance of that intention, do acts that are not merely preparatory but are sufficiently proximate to the intended commission of the crime. Where an element of the relevant offence is that there be a border-controlled drug that has been imported into Australia, then for there to be an attempt there must be an intention that there be such a drug that has been imported; but it is not necessary that this actually be the case.

Money laundering

Offence of 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.

People smuggling

People smuggling - knowledge of destination as an element of the offence

***Taru Ali v R* [2013] NSWCCA 211** concerned an Indonesian national who was steering a vessel when it was intercepted by the Royal Australian Navy off Ashmore Reef. Fifty-two illegal immigrants were aboard. He was charged and convicted for an offence of aggravated people smuggling contrary to s 233C of the *Migration Act 1958* (Cth). His case at trial had been that he thought the passengers were going on a holiday to Bali, and that after it became clear that the boat was not going to Bali, he had no idea of the destination. He said he had not heard of Australia or Ashmore Reef. In addressing the mental element of the offence, the trial judge directed the jury that "the accused meant to do what he did if he knew that by steering the boat and taking the group to the place that he did he was helping to take the group to Australia". Mr Taru Ali appealed his conviction, arguing that the trial judge should have also directed the jury that the Crown had to prove he knew Ashmore Reef was part of Australia. On appeal, reliance for this proposition was placed upon decisions such as *Alomalu v R* [2012] NSWCCA 255 and *Sunanda v R; Jaru v R* [2012] NSWCCA 187.

R A Hulme J undertook an analysis of the evidence in the trial. Some passengers gave evidence that Mr Taru Ali indicated that their destination was Ashmore Reef; that they were entering Australian waters; and that the "Australian Navy will come and collect you guys" and that "when the Australian Navy [come] they will put us in jail and you guys will be free". *Alomalu* and *Sunanda* were cases where the evidence was only capable of establishing that the accused knew the immediate destination of the passengers. This was not so with respect to Mr Taru Ali. As he knew the ultimate destination of the passengers was Australia, and that bringing them to Ashmore Reef facilitated their arrival at their ultimate destination, it was not necessary to prove any intent with respect to whether he knew Ashmore Reef was part of Australia. R A Hulme J held that there had been no misdirection.

Elements of offence of people smuggling

***Alomalu v R* [2012] NSWCCA 255** was an appeal from a people smuggling conviction following the decision of the Court of Criminal Appeal in Sunanda v R; Jaru v R [2012] NSWCCA 187. The decision is a reminder that the offence of people smuggling requires proof that the accused believed that the destination to which passengers were being smuggled was part of Australia.

Using postal service

Using a postal service in a way reasonable persons would regard as offensive – constitutional validity of the offence

Letters were sent to the wives and relatives of military personnel killed in Afghanistan that were critical of the involvement of Australian troops in that country and referred to the deceased in a denigrating and derogatory fashion. Two men were charged with using a postal service in a way that reasonable persons would regard as offensive (one as a principal in the first degree and the other for aiding and abetting). It was contended that the offence

infringed the implied constitutional freedom of political communication. The trial judge rejected this and refused to quash the indictments. The accused appealed pursuant to s 5F Criminal Appeal Act 1912: *Monis v R; Droudis v R* [2011] NSWCCA 231. Bathurst CJ, Allsop P and McClellan CJ at CL delivered separate judgments but each held that the offence in s 471.12 of the Criminal Code 1995 (Cth) was not constitutionally invalid.

In ***Monis v The Queen, Droudis v The Queen*** **[2013] HCA 4**, the High Court agreed that s 471.12 infringed on the right of political communication, but was split 3-3 on whether it did so permissibly. Accordingly, under s 23(2)(a) *Judiciary Act 1903* (Cth), the decision of the Court of Criminal Appeal was affirmed.

G. Defences (elements)

Automatism

Automatism and unsound minds

Woodbridge v R **[2010] NSWCCA 185** raised for consideration the meaning of sane, as opposed to insane, automatism and what constitutes an unsound mind, a disease of the mind, or insanity. The case involved motor manslaughter. The appellant's version was that she was intoxicated at the time of driving because she had commenced drinking excessively after receiving distressing telephone calls from her ex-husband. Psychiatrists gave evidence for the Crown and the defence.

Professor Quadrio, called by the defence, said the appellant was in a state of dissociation at the time of driving and that this was triggered by her reaction to the phone calls. She opined that the appellant suffered from a major depressive disorder, a dissociative disorder, a post-traumatic stress disorder and a cluster B personality disorder. She was of the view that the appellant had manifested symptoms of these disorders for some time. In her opinion, the case involved sane automatism, which she said was generally a product of external stimuli, whereas insane automatism was not. She was also of the view that it was not a case of insane automatism because the mental disorders were not mental illnesses or conditions that constituted insanity. She regarded the latter as encompassing psychotic disturbances such as schizophrenia and bipolar disorders.

On the other hand, Dr Allnutt was of the view that if the appellant was acting in an automatic state at the time of driving, the case was one of insane automatism. The trial judge withdrew sane automatism from the jury and that constituted the ground of appeal.

Davies J held that the trial judge was correct to withdraw sane automatism. On the difference between the two forms of automatism he referred to a number of authorities, but most particularly to *Radford v R* (1945) 42 SASR 266 where King CJ, in a passage subsequently approved by the High Court in *R v Falconer* (1990) 171 CLR 30, described the distinction being "the reaction of a unsound mind to its own delusions or to external stimuli on the one hand and the reaction of a sound mind to external stimuli, including stress

producing factors, on the other hand". Adopting that distinction Davies J concluded that Professor Quadrio's understanding of the concept was incorrect.

Davies J also held that the professor was wrong on the question of whether a mind is sound or unsound. He noted that what constitutes a mental disease or natural mental infirmity is a matter of law: *R v Falconer* per Deane and Dawson JJ at [60]. After referring to other authorities, Davies J (at [92]) concluded that the expression "disease of the mind" is not to be narrowly construed and is not restricted to the psychotic disturbances of which the professor had spoken. "The expression encompasses a temporary mental disorder or disturbance prone to recur. The dichotomy is not between a mind affected by psychotic disturbances and a mind affected by less serious ailments but between those minds which are healthy and those suffering from an underlying pathological infirmity".

Criminal responsibility – Doli incapax

Doli incapax – nature of evidence capable of rebutting the presumption

In ***BC v R* [2019] NSWCCA 111**, the applicant was found guilty at trial of 20 counts of child sexual assault committed between 1994 and 2011 against four different complainants. Ground 1 on appeal asserted that the verdicts in relation to counts 1-3 (which occurred when the applicant was aged about 12) were unreasonable on the basis that the Crown had not rebutted the presumption of doli incapax.

In its consideration of the issues, the Court relied on the decision of the High Court in *RP v The Queen* (2016) 259 CLR 641; [2016] HCA 53. In that case, the joint judgment of Kiefel, Bell, Keane and Gordon JJ affirmed that the principle presumes that a child under 14 "is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong and thus lacks the capacity for mens rea", but that this presumption can be rebutted by "evidence that the child knew that it was morally wrong to engage in the conduct" (or "seriously wrong" or "gravely wrong") as distinguished from an "awareness that his or her conduct is merely naughty or mischievous". As to the quality or nature of the evidence which would satisfy this, the members of the joint judgment favoured adducing "evidence of the child's education and the environment in which the child has been raised" (at [9]), while in a separate judgement Gageler J said that the presumption could be rebutted with evidence of "circumstances of the acts that constituted the offence" (at [41]).

The Crown in the present case sought to rely on three matters – the age of the complainant, the applicant's reaction when he heard the adult come home, and the applicant's warning to the complainant not to say anything otherwise the complainant would get in trouble – as evidence of the "circumstances of the acts that constituted the offence". The Court rejected the first matter on the basis that the relevant age between the complainant and applicant reveals nothing in the absence of evidence as to the applicant's contemporaneous maturity; the second matter because it was not probative to whether the applicant knew that it was "seriously wrong" as opposed to "naughty or mischievous"; and the final matter because it was insufficient to satisfy a jury beyond reasonable doubt that the presumption could be rebutted. It was held that the Crown had failed to rebut the presumption of doli incapax.

Doli incapax presumption – to rebut, the Crown must adduce evidence separate from the circumstances of the offence which proves that the child's development is such that they knew the conduct to be morally wrong.

The appellant in ***RP v The Queen*** **[2016] HCA 53; (2016) 259 CLR 641** was aged between 11½ and 12 years old at the time of the offending. He was convicted of sexual intercourse with a child under 10 (x2) and aggravated indecent assault (x1). The Crown adduced no evidence apart from the circumstances of the offences. The trial judge held that the presumption of doli incapax had been rebutted by the circumstances in which one of the offences was committed. The CCA upheld the convictions of sexual intercourse without consent, but quashed the conviction of aggravated indecent assault. The High Court allowed the appeal and quashed the remaining two convictions. The plurality (Kiefel, Bell, Keane and Gordon JJ), Gageler J agreeing, held that the CCA erred by finding the presumption of doli incapax had been rebutted.

The plurality held that the presumption of doli incapax cannot be rebutted merely by an inference from the doing of the act(s) which constitute the offence, no matter how obviously wrong the act(s) may be. Evidence is required from which an inference can be drawn that the child's development is such that they knew it was morally wrong. The plurality directed attention to the child's education and the environment in which the child has been raised. A child's awareness that their conduct is merely naughty or mischievous is insufficient; there must be proof that the child knew the conduct was "seriously wrong" or "gravely wrong". What constitutes sufficient evidence to rebut the presumption will vary depending on the nature of the allegation and the child. A child will more readily understand the seriousness of an act if it relates to values they have had direct personal experience with. Answers given in a police interview may establish the requisite knowledge in some cases but in others, evidence of the child's progress at school and home life will be required. The plurality criticised suggestions that the strength of evidence required depends on the child's age on the basis that they imply children mature at a uniform rate. Rebuttal of the presumption must focus on the intellectual and moral development of a particular child. On what can be inferred from child sexual behaviour, the plurality said children who engage in sexual play may try to keep it secret because they know it is naughty, and it cannot necessarily be inferred they know it to be morally wrong. In the present case, the appellant's conduct went well beyond normal childish sexual experimentation, but that does not mean he knew it was morally wrong.

Duress

Erroneous withholding of the defence of duress from the jury's consideration

The applicant in ***Mirzazadeh v R*** **[2016] NSWCCA 65** was convicted of an offence of attempting to possess a commercial quantity of unlawfully imported methamphetamine contrary to s 307.5 of the Criminal Code (Cth). The sole issue in the trial was duress; the applicant gave evidence that he became involved in the offending because of threats made to his family living in Iran. At the conclusion of the defence case, the judge ruled that he

would not leave duress to the jury because no jury could otherwise than conclude that there was a reasonable way to effectively nullify the threat without the applicant carrying out the crime (namely, by notifying the police). The applicant then pleaded guilty. He subsequently appealed against his conviction on the basis that the judge applied the wrong test or otherwise erred in failing to leave duress to the jury.

Relevant to the appeal was s 13.3 of the Code, which details the application and definition of an evidential burden. The applicant submitted that the question, when one applies that provision, is not whether there is a reasonable possibility that a matter exists or whether there is a reasonable possibility that a jury could accept that a matter exists. Rather, the word "suggests" in s 13.3(6) indicates that all the applicant had to do was to suggest the reasonable possibility of the existence of duress. Hoeben CJ at CL accepted those submissions and allowed the appeal. The trial judge was not made aware of s 13.3 nor of the decision in *The Queen v Khazaal* [2012] HCA 26. His Honour consequently failed to apply s 13.3 and thereby applied too stringent a test. Further, by challenging the evidence of the applicant as to his process of reasoning, the judge went beyond what was required by s 10.2 (the duress provision) and trespassed on the function of the jury. The applicant's evidence, taken at its most favourable to him, was sufficient to discharge his slender evidentiary burden. It then became a matter for the jury to assess that evidence.

Failure to notify police often fatal to defence of compulsion

In ***Taipa v R* [2009] HCA 53; (2009) 261 ALR 488**, the trial judge withdrew the (Queensland statutory) defence of compulsion from the jury's consideration. Taipa's appeals to the Queensland Court of Appeal and the High Court were dismissed. There was no merit in the reasons he advanced for not going to the police, and he had otherwise conceded he had ample opportunity to do so. This failure to nullify the threats was fatal to the availability of the defence.

"Lawful correction"

"Defence" of lawful correction – defendant bears the onus of proof on the balance of probabilities

The respondent in ***Director of Public Prosecutions v FD* [2017] NSWSC 679** was charged with assault occasioning actual bodily harm against his son. He did not deny striking his son on the legs and abdomen with a belt, but claimed he was lawfully reprimanding his son. He raised the statutory defence of lawful correction: s 61AA of the *Crimes Act 1900*. The magistrate dismissed proceedings on the basis that she was "not satisfied beyond reasonable doubt that lawful chastisement and correction was not intended by the defendant". The DPP appealed to the Supreme Court, contending that the magistrate failed to apply the correct onus of proof on the question of whether the s 61AA defence had been established.

Lonergan J held that the magistrate did err. Rather than determining whether the defendant had established the statutory defence on the balance of probabilities (s 141(2)

Evidence Act), the magistrate found that the prosecution had not shown it was not lawful correction beyond reasonable doubt. Her Honour noted that there has been debate as to whether s 61AA is sufficiently clear regarding the allocation of the onus of proof. Whilst in the past the common law position may have suggested that the burden of proof was placed on the prosecution to rebut the defence, that was prior to the enactment of s 61AA. The proceedings were remitted to the Local Court to be re-determined.

Mental illness

Mental illness - drug induced psychosis not a disease of the mind – defence correctly withdrawn from jury

The appellant in ***Fang v R* [2018] NSWCCA 210** stabbed a friend to death following an argument while he was intoxicated by alcohol and methamphetamines but raised the defence of mental illness. The trial judge accepted that he was experiencing a drug induced psychosis at the time of the killing but declined to allow the jury to consider the defence of mental illness because the psychosis did not amount to a defect of reason arising from a disease of the mind. The appellant contended on appeal that the defence should have been left to the jury.

The Court dismissed the appeal. The Court considered *R v Falconer* (1990) 171 CLR 30, which applied the interpretation of the phrase "disease of the mind" adopted by King CJ in *Radford v R* (1985) 42 SASR 266. That is, for there to be a disease of the mind, there has to be an "underlying pathological infirmity of the mind". The Court cited with approval the passage of King CJ (and approved by Toohey J in *Falconer*) that there is a distinction between a reaction of an unsound mind to its own delusions or external stimuli and the reaction of a sound mind to external stimuli such as stress producing factors. Gaudron J in Falconer likewise held that a recurring state which involves some abnormality will indicate a diseased mind, but that the fundamental distinction is between mental states (albeit those resulting in abnormal behaviour from, for e.g., a blow to the head) and those mental states which are never experienced by normal persons.

In this case, the Court held that there was no evidence of recurrence of the mental state. While experts gave evidence that the appellant had an "underlying susceptibility, vulnerability to develop a psychosis" arising from prolonged methamphetamine use, there was no evidence that the disordered mental state was recurrent or that he was experiencing hallucinations either before or after the stabbing. The Court held that there was no objective evidence of a mental illness and that the evidence taken at its highest indicated behavioural changes and a propensity for the appellant to become enraged. The Court concluded that drug induced psychosis, on its own, is not a mental illness for the purpose of the defence.

Provocation/extreme provocation

Provocation – suddenness and temporariness of loss of control

In ***Pollock v R*** **[2010] HCA 35; (2010) 242 CLR 233**, the appellant was convicted of murder, having unsuccessfully raised the partial defence of provocation. The trial judge directed the jury that the prosecution would have succeeded in excluding provocation if it established any one of seven matters. The fifth was "the loss of self-control was not sudden" and the seventh was whether there had been time for the loss of self-control to abate by the time of the killing. The directions were consistent with authority in the Queensland Court of Appeal. The High Court held that the directions wrongly invited the jury to exclude provocation if they had found there had been any interval between the deceased's provocative conduct and the act causing death. It was held (at [54]) that the law requires the killing occur while the accused is in a state of loss of self-control that is caused by the provocative conduct, but this does not necessitate that the provocation is excluded in the event that there is any interval between the provocative conduct and the accused's response to it. The explanation provided by the trial judge of the word 'sudden' contained within the fifth direction, erroneously invited the jury to exclude provocation on the basis of there being some delay in the response by the accused. Similarly, the focus on time in the seventh direction had the potential effect of diverting the jury's attention away from the central determination.

Self-defence

Self-defence under s 418 – intoxication not relevant to an assessment of the reasonableness of the defendant's conduct

Two groups of men in separate but nearby homes were drinking heavily On New Year's Eve, 2017. One group (the adults) became concerned that the other group (the young men) had stolen some children's bicycles. The adults went to the home of the young men and violently assaulted some of them. The young men responded with violence. The adults were in retreat, and were pursued by the young men who committed further acts of violence against the adults and made grave threats against them. A magistrate acquitted the young men of some offences, but found them guilty of affray after rejecting the defence of self-defence. The young men appealed to the Common Law Division of the Supreme Court pursuant to s 52 of the Crimes (Appeal and Review) Act 2001 (NSW) on a question of law: ***Doran v Director of Public Prosecutions; Brunton v Director of Public Prosecutions*** **[2019] NSWSC 1191**. It was contended that the Magistrate erred in relation to self-defence when holding that intoxication could not be taken into account in assessing "the reasonableness of the plaintiff's conduct" (the suffix to s 418(2) of the *Crimes Act*). Rather, it was argued that the correct approach to the law was that intoxication was relevant to assessing the reasonableness of the conduct.

Simpson AJA dismissed the appeal. Her Honour held, consistently with well-known authority in *R v Katarzynski* [2002] NSWSC 613, that intoxication can be taken into account in the assessment of whether the defendant believed that his or her conduct was necessary for one of the purposes in s 418 (the first question), but that in assessing whether the defendant's conduct was reasonable in the circumstances as perceived by the defendant

(the second question), intoxication is only relevant to identification of the perceived circumstances. In other words, the assessment of the reasonableness of the conduct is an objective test and the defendant's intoxication cannot be taken into account. Simpson AJA rejected the notion that "some licence should be afforded to them to behave with impunity in a way in which they would not be permitted (without consequence) to behave if unintoxicated" – the consequence of the construction of s 418(2) contended for by the appellants.

Consistently with this construction of s 418(2), Simpson AJA found that the Magistrate was correct to not take into account intoxication in his assessment of the reasonableness of the violence and threats directed at the adults by the young men – these acts were not a reasonable response to an intruding party in retreat, because, as correctly found by the Magistrate, this was when "defence turned to attack".

Superior orders

Defence of superior orders at common law

The applicant in ***Gall v R*** **[2016] NSWCCA 82** was charged with dangerous driving causing death (x1) and grievous bodily harm (x6). All counts arose from a single incident where he, in the course of an Army training exercise, allegedly drove in a dangerous manner and lost control of the vehicle. He sought a pre-trial ruling that a defence of superior orders existed at common law and that it was available on the facts. The trial judge ruled that such a defence was known to law but that it was not available in the present circumstances. The applicant sought leave to appeal that ruling. Despite dismissing the appeal for want of jurisdiction, Simpson JA commented briefly upon its merits. Her Honour noted that it was unequivocally held in *A v Hayden* (No 2) [1984] HCA 67 that there is no place for a general defence of superior orders in Australian criminal law. The applicant, however, sought to distinguish that case on the basis that it concerned compliance with unlawful orders and therefore has no application to the "apparently lawful" order to drive the transport vehicle given in the present case. The applicant's case was that – because of his inadequate training and incompetence – he could only comply with the "apparently lawful" order by driving in a dangerous and thereby unlawful manner. In those circumstances, it is difficult to see how the order could be anything other than unlawful and squarely within Hayden.

H. Juries

Discharge of juror/juries

Appellate review of decision not to discharge jury

Mr Hamide stabbed a man in the hip. He then solicited a friend to murder the same man. Prejudicial evidence was spontaneously adduced throughout the trial – that Mr Hamide was evil, a backstabber, involved in an ambiguous drug dealing enterprise and arrested by the Middle Eastern Organised Crime Squad. The trial judge refused four applications to

discharge, but directed the jury not to have regard to anything beyond the specific charges in front of them.

On appeal, Bell P held that although the decision to discharge is discretionary, the appeal under s 5(1) *Criminal Appeal Act* lies not against the discretion but against the conviction: ***Hamide v R*** **[2019] NSWCCA 219**. Therefore, the test is not *House v The King*. His Honour considered each piece of irregular evidence in turn, concluding that any imbalance was cured by the directions given.

NOTE: An application for special leave to the High Court was refused, this case not being an appropriate vehicle: [2020] HCATrans 85.

Discharge of juror – considerations relevant to whether to discharge balance of jury or continue trial

On the second day of the trial in ***R v Khan (No 5)*** **[2019] NSWSC 56**, a juror provided the trial judge with a medical certificate indicating unfitness for jury duty due to anxiety and depression. This occurred despite the trial judge having given the usual direction to the jury panel to bring any matter to his attention which would affect their ability to act as a jury member. With some frustration, the trial judge discharged the juror, and then continued to consider the question of whether to continue with eleven jurors or discharge the balance of the jury. Bellew J noted that the *Jury Act 1977* (NSW) reflected the right of a person to a trial by a jury of twelve persons, referring to *R v Wu* (1998) 103 A Crim R 416 in support of this proposition. On this basis the judge said that the s 53C power to discharge the rest of the jury should be exercised.

OBSERVATION: his Honour's observations need to be treated carefully because *R v Wu* (and *Wu v The Queen* (1999) 199 CLR 99; [1999] HCA 52) were decided prior to the 2008 amendment to the *Jury Act*, which requires a trial judge to consider the question of whether continuing with a reduced jury would risk a "substantial miscarriage of justice".

Whether juror should have been removed from jury and whether erroneous removal of juror affected validity of verdicts delivered thereafter

The appellant in ***Hoang v R*** **[2018] NSWCCA 166** was tried in relation to a number of sexual assault offences.

During a trial concerning sexual assaults a Crown witness said that teachers were required to get a clearance under the Children and Young Persons Protection Act. After the jury had deliberated for some days they advised the judge they had reached verdicts on some counts. That night, one of the jurors, a former teacher, researched the requirements for a working with children check, she being curious as to why she had not been the subject of such a check. The next morning she told other jurors of her inquiry. This was disclosed to the judge in a note. The judge took the jury's verdicts on the counts upon which there was agreement and then determined that she should discharge the juror who made the inquiry. The balance of the jury continued and ultimately returned unanimous verdicts of guilty on

the remaining counts. It was contended on appeal that the judge should not have deferred the discharge of the juror until after some verdicts had been delivered.

N Adams J held there was no basis in s 53A of the Jury Act to discharge the juror. First, there was no "misconduct" in that the juror had made the inquiry out of personal curiosity and not for the purpose of obtaining information relevant to the trial (s 68C). Secondly, the conduct of the juror did not give rise to a risk of a substantial miscarriage of justice. The validity of the earlier verdicts was not affected by the subsequent decision (albeit erroneous) that there had been misconduct. As to the later verdicts which were given after the juror was discharged, there was no breach of any mandatory provision relating to the constitution and authority of the jury so there was no miscarriage of justice.

Principles relevant to the review of a decision on an application to discharge a jury

The appellant in ***Younan v R*** **[2016] NSWCCA 248** was convicted of one count of dealing with the proceeds of crime. During his trial a Crown witness referred to the appellant kidnapping his ex-partner. Counsel for the appellant made an application to discharge the jury on the basis that the statement was prejudicial. The trial judge refused the application, and another earlier in the trial based on similar circumstances. The appellant appealed in relation to the refusal of this second discharge application. Beazley P dismissed the appeal, finding that the trial judge did not err in refusing to discharge the jury. Her Honour reviewed the principles governing the exercise of a trial judge's discretion in determining a discharge application. Her Honour also set out principles guiding the review of such decisions by appellate courts. The test for the appellate court to apply is whether it can be satisfied that the irregularity has not affected the verdict, and that the jury would have returned the same verdicts if the irregularity had not occurred (*R v Marsland* (NSWCCA, 17 July 1991, unreported) and *Miller v R* [2015] NSWCCA 206, citing *Maric v R* (1978) 52 ALJR 631 at 635. The appellate court is not confined to examining reasons given for the order, but must decide for itself whether the result of the refusal occasioned the risk of a substantial miscarriage of justice (*Crofts v The Queen* (1996) 186 CLR 427 at 441). Beazley P noted three themes receiving emphasis in NSWCCA decisions: the discretionary nature of the decision, whether the irregularity affected the verdict, and the adequacy of any direction given to the jury.

Appeal against discharge of jury following unintended encounter between an accused and two jurors

The respondents in ***R v Lamb; R v Mason; R v Hill*** **[2016] NSWCCA 135** were being tried jointly when, during his Honour's summing up, the judge received a note from the jury. It detailed an unintended encounter between two of the jurors and one of the accused outside the court building. The note conveyed that the two jurors were uncomfortable because they interpreted the encounter as an attempt to intimidate the jury. The judge examined the foreperson in the absence of the jury and was satisfied the concerns were held by two jurors only. The judge discharged those two jurors pursuant to s 53B(b) and (d) of the *Jury Act 1977*, as well as the remainder of the jury pursuant to s 53C(1)(a). Relevantly, the former provision allows for the discretionary discharge of an individual juror and the latter provides for the discharge of a jury if continuing a trial following the

discretionary discharge of a juror(s) would give rise to the risk of a substantial miscarriage of justice. The Crown appealed pursuant to s 5G of the *Criminal Appeal Act 1912* against the decision to discharge the balance of the jury. The trial judge adjourned proceedings to facilitate that appeal.

The Court held that, despite the fact a different judge may have come to a contrary view in all of the circumstances, no *House v The King* error was established and the appeal should be dismissed. Factors arguing against the course adopted by his Honour included that the trial had proceeded for 11 days; it had been specially fixed in Sydney and witnesses had travelled lengthy distances; his Honour was part way through the summing up; and the balance of the jury were not unduly troubled by the encounter. Nonetheless, the decision was not unreasonable or plainly unjust and the trial judge was in an immeasurably better position to judge the atmosphere of the courtroom. Furthermore, the procedure adopted by the judge of adjourning proceedings following his Honour's decision was appropriate as it permitted the parties to exercise their appeal rights.

Erroneous to refuse to stay an order discharging the jury over objection of one of the parties

The applicants in ***Barber v R; Zraika v R*** **[2016] NSWCCA 125** were jointly indicted with two others, Haile and Spiteri-Ahern. The jury were unable to reach a verdict in relation to Spiteri-Ahern. They were never invited to return a verdict with respect to the applicants. The judge discharged the jury with respect to Spiteri-Ahern as well as the applicants, their liability being derivative from that of Spiteri-Ahern. His Honour considered it inappropriate in the circumstances of the case for them to deliberate with respect to the applicants where the only outcomes available were verdicts of acquittal or an absence of agreement. Counsel for the first applicant applied to the trial judge to stay that order to facilitate an appeal but the application was refused and the jury dispersed. The following morning, the CCA granted a stay and members of the jury were informed. Following a long weekend, the present appeal against the discharge pursuant to s 5G of the Criminal Appeal Act 1912 was heard.

The Court (Bathurst CJ, Basten JA and Button J) held that it was erroneous for the trial judge to discharge the jury over the objection of two of the accused. In all but exceptional cases, a judge who is minded to discharge a juror or the jury, over the opposition of one party, should stay his or her decision to allow an application to be made to the CCA, if so requested. However, the jury having in fact been discharged in this case, it is not appropriate to intervene under s 5G. The jury were discharged and entitled to consider themselves free of the obligations imposed on them and applicable during the trial for a period of 24 hours. It was a matter that had received considerable media coverage and there was a very real prospect that the jury had considered extraneous material, discussed the case with others, and reassessed the material they had heard at the trial. The capacity of the trial judge to assess whether that was in fact the case raises additional difficulties including, among others, that the power to examine a juror on oath pursuant to s 55DA of the *Jury Act 1977* would be unavailable.

No error in judge's refusal to discharge jury who mistakenly believed they were photographed during closing addresses

Mr Mikael was convicted of a number of charges relating to the supply of methylamphetamine. The jury sent a note expressing concern that two men entered the courtroom and appeared to photograph them using a phone during the defence closing address. The defence made an application to discharge the jury. The judge established that no photographs were taken after having the phone examined and hearing evidence from the two men before refusing the defence application. That decision was the subject of appeal in ***Mikael v R*** **[2015] NSWCCA 294**. Hall J dismissed the appeal finding that the exercise of the judge's discretion was not erroneous and that no miscarriage of justice occurred. The steps taken by the judge to deal with the jury note were appropriate and effective. There is nothing in the evidence to suggest the phone flashes occasioned anything more than a momentary distraction. Further, the jury were provided with transcript of the closing address of the Crown prosecutor and of the defence. They were also given a full explanation as to the circumstances surrounding the phone flashes, displacing the initial concern that they had been photographed. Despite being invited to do so, the jury did not make any further requests for information or expressions of concern.

Principles relating to the discharge of a jury exposed to prejudicial material

One of the grounds of appeal in ***Miller v R*** **[2015] NSWCCA 206** was that the trial judge erred by not discharging the jury when material asserted to be prejudicial was briefly placed before it and then withdrawn. A useful summary of principles relating to an application for the discharge of a jury, and appellate review thereof, may be found at [126] of the judgment of Beazley P, Fullerton and Hamill JJ.

Discharge of a juror due to illiteracy in a case where significant evidence was only comprehensible in written form

The appellants in ***Lee v R; Tang v R*** **[2015] NSWCCA 157** were two of four co-accused charged with drug offences. The jury initially returned verdicts of guilty with respect to the two appellants. The jury then continued their deliberations but were unable to reach a unanimous verdict for one of the other co-accused, and were discharged in relation to charges against him. They continued deliberations in respect of the final co-accused. At this point in the deliberations, the foreperson alerted the judge to two issues about one juror, "Juror X". First, he had a chronic illness and now wished to drop out due to ill health. Second, he was illiterate. After questioning it appeared that he had a limited ability to read English. The trial judge discharged Juror X under s 53B(a) of the *Jury Act 1977* (NSW).

The CCA focussed on the issue of illiteracy (as the details of when Juror X's health deteriorated, and to what degree, were not evident). The Court held that, in the circumstances, the illiteracy of one juror was a sufficient irregularity to call for a retrial without inquiring as to the effect of the irregularity on the jury's deliberations. Basten JA observed that there is a degree of flexibility inherent in the element of illiteracy, depending on the nature of the trial. In the appellants' trial, a key part of the Crown case was telephone intercepts in Mandarin or Cantonese. The jury were given English translations of the recorded calls, some of which were never read out in Court. The Crown accepted that Juror X's inability to consider all the evidence deprived the appellants of a fair trial. The appellants' convictions were quashed.

No error in failing to discharge jury where newspaper clippings of the trial found in jury room

Following a jury trial with two co-accused, Mr Carr was convicted on multiple counts of armed robbery and a related offence. Well into the trial, copies of four newspaper articles concerning the trial were found in the jury room. The judge made enquiries of the foreperson, who indicated he had brought the reports into the jury room. The judge raised the issue with the entire jury and asked them to send him a note if any of the jurors were aware of enquiries being made outside the jury room. No such note was received. Counsel for Mr Carr sought a discharge of the jury but this was refused. Mr Carr appealed. He argued in ***Carr v R* [2015] NSWCCA 186** that the judge erred in failing to discharge the jury because the "collation and apparent dissemination" of the newspaper articles amounted to "making an inquiry". It was argued in the alternative that bringing the articles into the jury room constituted "misconduct". The Court was not satisfied that misconduct was established. The reading of the newspaper and the bringing of the articles into the jury room is not the type of conduct intended to be prohibited by the *Jury Act 1977* (NSW). The focus of the prohibition on making enquiries is directed at preventing any extraneous information, information not the subject of evidence in the trial, being obtained by any member of the jury. There was no basis upon which it could be reasonably inferred that one or more jurors had done anything beyond reading the newspaper articles, such as conducting an internet search.

Importance of reasons when ordering trial to continue following the discharge of juror

Mr Le had been convicted at trial after a juror had been discharged and the judge had ordered the trial continue. Mr Le appealed, including on the basis of the adequacy of the trial judge's reasons for making those orders pursuant to ss 53B and 53C of the Jury Act 1977. In ***Le v R* [2012] NSWCCA 202**, R A Hulme J stated (at [67]) that although lengthy reasons will rarely be required when deciding such matters, it is important that sufficient reasons are disclosed. Parties need to understand the basis for the decision and an appeal court should not be left to "divine from the circumstances whether the decision was correct".

The determinative issue to be resolved in such cases is not whether there were insufficient reasons, but whether the continuation of the trial with a reduced number of jurors gave rise to a substantial risk of a miscarriage of justice: *Evans v The Queen* [2007] HCA 59, at [247] per Heydon J. However, R A Hulme J found that leaving an appeal court to redetermine the issue for itself was unsatisfactory. His Honour found that the reasons given by the trial judge in this case were "barely satisfactory" (at [71]). There were circumstances that limited the scope for extensive reasons and the judge would have been encouraged to take an economical approach by counsel for the appellant who did not oppose the order. But it was suggested the Court would benefit if brief reasons were given for making such orders in the future.

Accused absconding during trial

The case of ***Williams v R*** **[2012] NSWCCA 286** reaffirmed the discretionary power of a judicial officer, outlined in *Jamal v R* [2012] NSWCCA 198 from [35], to continue a trial after the accused has absconded. Ms Williams was on trial for dangerous driving offences, and during the course of giving evidence suffered a "complete meltdown". After the following adjournment, it was discovered that she had absconded. She did not return after the weekend. The trial judge refused to discharge the jury and continued the trial. R A Hulme J held this was an acceptable exercise of the discretion, noting the voluntary absence of the accused, the continued presence of counsel, and the late stage of the trial.

Decision to continue trial with jury of eleven

In ***BG v R*** **[2012] NSWCCA 139** it was contended that the discretion of a trial judge to discharge a juror and continue with a jury of eleven had miscarried. Early in their deliberations, the jury indicated that they could not reach a unanimous verdict. Shortly after, the judge discharged a juror after receiving a series of notes concerning the juror's business commitments. Later on, the jury indicated that it still could not reach a unanimous verdict. The judge told the jury that she would accept a verdict of 10 out of 11 and they subsequently returned a guilty verdict. Adamson J rejected (at [89]) the first ground of appeal that the trial judge had erred by not taking sworn evidence of the juror's business commitments before she was discharged. It was conceded that is was open to judge to discharge a juror even when deliberations have begun, and there is no requirement that reasons for a request by a juror to be discharged must be verified by sworn evidence (at [87]).

It was also argued that the discretion to continue with a jury of less than twelve had miscarried. Section 53C of the *Jury Act 1977* provides discretion to continue with a jury of less than twelve, depending on an assessment of whether there is a substantial risk of miscarriage. This is a distinct determination to be made separate from the decision to discharge a juror: *Wu v The Queen* [1999] HCA 52 at [6]. But in this case the judge failed to give specific consideration to the issue of whether the trial should continue after discharging the juror. Adamson J held (at [101]) that the lack of reasons was not determinative of whether a miscarriage had occurred. In *Evans v The Queen* [2007] HCA 59, Heydon J stated at [247] that while a failure to give reasons for a decision on a procedural matter may give rise to procedural unfairness, it will not necessarily lead to a miscarriage of justice has occurred. The issue for an appellate court to determine is not whether there were reasons for the decision of the court below, but whether the decision was the correct one.

Her Honour found there were three scenarios where an issue might arise about whether a trial should continue after a juror has been discharged (at [103]):

> "(1) Where there is no indication how the juror would have voted;
>
> (2) Where there is evidence from which it can be inferred prospectively that the discharged juror would, if not discharged, have voted for an acquittal; and
>
> (3) Where it can be inferred, but only with the benefit of hindsight, that the juror who was discharged would, if not discharged, have voted for an acquittal."

In the second and third scenarios, it would not be appropriate for the trial to continue. As opposed to the first scenario, there is information from which it can be inferred that there was miscarriage of justice. Although her Honour found that the present case fell into the first scenario and the decision to discharge was correct. However, it was also observed that it is preferable for a trial judge to give reasons for a decision of this nature (at [138]).

Jury disagreements and majority verdicts

Jury notes signifying disagreement – Black direction should have been given

A trial for armed robbery ran over its estimated timeframe. On the Thursday before a long weekend, a juror informed the judge via note that he or she had important work commitments commencing the following Wednesday. The jury were told that "accommodation" could be made for this. The jury retired to consider their verdict the following Tuesday at around 11am. Later, the jury requested a copy of the transcript. At around 3.30pm the jury sent a note indicating that they were unable to reach a unanimous decision. The note was discussed however neither the judge nor the parties raised the possibility of a Black direction, and soon after, the jury were provided with part of the transcript. At 4.30pm, a further note was received indicating that the jury were still in disagreement. At 4.44pm, the judge told the jury to continue deliberating although noted "I am mindful of difficulties that one juror raised previously." Guilty verdicts were returned at 5.47pm.

In ***Joyce (a pseudonym) v R* [2019] NSWCCA 187**, the appellant appealed against his conviction on the basis that "There was a failure to direct the jury, during deliberations, pursuant to the decision of [*Black v The Queen*] and as a result of this, the trial has miscarried." By majority, Simpson AJA and Walton J agreeing, Adamson J dissenting, allowed the appeal against the conviction. Simpson AJA was concerned by the inattention to the jury notes indicating deadlock, and considered that the jury should have been given a *Black* direction and told to listen to and engage with one another, and of the existence of the power to discharge. Her Honour considered that the failure to do so meant the jury was in a state of uncertainty and imposed undue pressure on the jury, and was an error productive of injustice sufficient to require that the appeal be allowed. After considering Adamson J's dissenting opinion, Simpson AJA went on to say that that after signifying disagreement, the jury is entitled to know about the prospective course of the trial and an accused is entitled to have their charges determined by a jury that is relieved of concern about its future. In relation to the jury note about the work commitment, Simpson AJA considered that the trial judge's response to them was "cryptic to the point of obscurity" and that there was no confidence that the guilty verdicts were not influenced by the state of uncertainty faced by that juror.

Majority verdict erroneously accepted where there was noncompliance with statutory requirements

The appellant in ***Tabalbag v R* [2016] NSWCCA 48** pleaded not guilty to murder but guilty to manslaughter. His plea was not accepted by the Crown and following a trial the jury

returned a majority verdict of ten to one of guilty to murder. The appellant appealed against his conviction challenging that verdict and the circumstances in which it was reached, specifically the manner in which the judge examined the foreperson about the likelihood of a unanimous verdict before directing the jury that he would accept a majority verdict. The Court (Hoeben CJ at CL, Harrison and Davies JJ) allowed the appeal, quashed the conviction and ordered a new trial. The trial judge at no stage indicated – as required by s 55F(2)(b) of the Jury Act 1977 (NSW) – that he was satisfied it was unlikely that the jurors would reach a unanimous verdict. In fact, the evidence arising from the examination of the foreperson could not have supported such a conclusion. The requirement for evidence to be taken from a juror(s) is not a mere procedural step and while other considerations may also be taken into account, it is the evidence of the juror(s) that must found the relevant level of satisfaction. Furthermore, the judge effectively delegated to the jury the requirement of being so satisfied, conferring on them a decision making process which should be carried out by the judge.

Guilty verdict reached through pressure of time restraints rather than proper deliberation

The appellant in ***Villis v R*** **[2014] NSWCCA 74** [a judgment only made public in June 2016] was convicted of a drug supply offence. The jury retired to consider their verdict after lunch on the eighth day of an estimated five or six day trial. A juror was excused that day. They returned the following day – a Friday – and were told they would not be required to sit beyond 1pm as some of them had commitments. Others were unavailable the following Monday. At 12.30pm after 4 hours and 40 minutes of deliberation they were given a Black direction and continued to deliberate. They agreed to sit until 2pm. Shortly before then, the foreman was examined by his Honour. He indicated that the jurors who could not agree were quite fixed in their position but, at the judge's request, he undertook to enquire whether further assistance was required. His Honour said something (it was not clearly expressed) to the effect that if the other jurors indicated no further assistance was required he would "discharge" or "release" them. He meant until the following Tuesday but this was far from clear. Without further response, a guilty verdict was returned moments later.

The appellant appealed against the verdict on the ground that it was reached through pressure of time restraints rather than proper deliberation. Fullerton J allowed the appeal, quashed the conviction and ordered a retrial. In this case there was the pressure of time with the jury in deliberation on a Friday afternoon on the ninth day of the trial when at least some of the jurors had competing commitments that afternoon and the following Monday. These matters alone had the potential to deflect the jury from their task. Further, the judge assumed the foreman both understood the role he was being asked to perform as a conduit for his Honour's further directions and that he was an able and reliable communicator of them. However, no further communication was conveyed from the foreman to the judge prior to the verdict being returned despite him being so directed. This case exemplifies the inherent danger of a trial judge examining the foreperson in the absence of the jury.

Calculation of jury deliberation time for majority verdict purposes

The issue in ***BR v R*** **[2014] NSWCCA 46** was whether the jury had been deliberating for 8 hours or more so as to enable the trial judge to consider acceptance of a majority verdict (s

55F *Jury Act 1977*). A period of 1 hour 5 minutes had elapsed between the jury sending a note saying they could not agree unanimously and being brought back into court. (The jury had previously been given a *Black* direction). Trial counsel accepted that 8 hours had elapsed (including the 1 hour 5 minutes) but appeal counsel did not. It was held, per Emmett JA, that the onus was on the appellant to show that the trial miscarried because the jury were not actually deliberating. In the absence of evidence to the contrary, it should be inferred that the jury continued to deliberate during the 1 hour 5 minutes so the 8 hour minimum period was satisfied. But his Honour also sounded a cautionary note about acting immediately after the 8 hour period had been reached if there is any ambiguity about any component of the period.

The Court also expressed views about what periods do or do not count towards deliberation time.

Time away from court (e.g. retirement overnight): the judges were unanimous this did not count.
Time in court listening to further directions: such time did not count according to Emmett JA and RS Hulme AJ. Hall J agreed with Emmett JA but not with RS Hulme AJ.
Lunchtime spent in the jury room: Emmett JA said judges should be slow to assume the jury were deliberating if having lunch (but in this case there was no evidence they were not deliberating). RS Hulme AJ said that lunchtime should count. Hall J agreed with both Emmett JA and RS Hulme AJ on this point.
Movement time between courtroom and jury room: this time should not count according to Emmett JA, Hall J agreeing, but should count according to RS Hulme AJ.
Cigarette breaks: Emmett JA was silent on this point; RS Hulme AJ said this time should not count (and that more attention needs to be directed to recording when the full complement of the jury not together); and Hall J agreed with both Emmett JA and RS Hulme AJ.

2011

In the Criminal Trials Bench Book, the suggested direction in relation to the need for a jury verdict to be unanimous includes mention of the law providing in certain circumstances, which may not arise, for the judge to accept a majority verdict. Where it becomes necessary for the judge to give a Black direction (*Black v R* (1993) 179 CLR 44 - to persevere when the jury indicate that it cannot reach a verdict) the suggested direction includes that "the circumstances in which I may take a verdict which is not unanimous have not yet arisen and may not arise at all" and an exhortation to reach a unanimous verdict.

There have been a number of cases dealing with this issue. But first, some background. In *RJS v R* [2007] NSWCCA 241; 173 A Crim R 100 and *Hanna v Regina* [2008] NSWCCA 173; (2008) 191 A Crim R 302, error was found in the trial judge giving an indication to the jury as to the time at which a majority verdict could be accepted. In *Ngati v R* [2008] NSWCCA 3, directions were given in accordance with the Bench Book, which did not give any indication that a majority verdict would be accepted within a certain time. The issue in each case was whether anything was said which undermined the effect of the Black direction.

In ***Doklu v R* [2010] NSWCCA 309**, the trial judge gave a direction in accordance with the Bench Book suggestion. After the jury had been deliberating for six hours a note was received to the effect that a unanimous verdict could not be reached. The judge reiterated to the jury that the circumstances in which a majority verdict could be taken had not yet arisen and that their verdicts must be unanimous. She then proceeded to give the jury a direction in accordance with *Black v R* (1993) 179 CLR 44. The preconditions in s 55F(2) of the Jury Act 1977 for receiving a majority verdict had not at that stage been met. Later, when those preconditions were met, and the jury were told they could return a majority verdict, they did so.

On appeal it was contended that the trial judge had erred by telling the jury of the possibility that a majority verdict was an option before the time at which such a verdict could be accepted. Macfarlan JA held that there was no undermining of the Black direction. There was no lessening of the encouragement given to the jury to reach a unanimous verdict. He did, however, indicate (at [79]) his view that "it is better not to mention the possibility unless there is a reason to do so".

In ***Ingham v R* [2011] NSWCCA 88**, the trial judge made reference in Bench Book terms to majority verdicts in the summing up and again in the course of giving a Black direction. The contention on appeal was confined to the reference in the latter. McClellan CJ at CL held (at [84] – [85]) that the trial judge's direction was in terms almost identical to those in Ngati. He noted that in contrast to *RJS v R* and *Hanna v Regina*, there had been no reference to the time or circumstances in which a majority verdict might become acceptable. For this reason there was no undermining of the effect of the direction to persevere in striving for a unanimous verdict.

In a joint judgment in ***Hunt v R* [2011] NSWCCA 152**, Tobias AJA, Johnson and Hall JJ held that the trial judge had undermined the effect of the Black direction. The jury had indicated that they were deadlocked well before the time at which acceptance of a majority verdict could be considered. In answer to a question from the judge, there was an indication that there was a possibility of a majority verdict. The judge told them that the circumstances in which he could accept such a verdict had not yet arisen. A short time later the jury sent a note indicating that they still could not reach a unanimous verdict but could return an 11/1 verdict. The jury returned to court and were told that such a verdict could not be accepted for another 1 hour 50 minutes. They were directed to return to the jury room and, in effect, wait for that period. 1 hour 55 minutes later, a majority verdict was returned.

For a thorough examination of the issues and the authorities on this topic, it is respectfully suggested that recourse should be had to the judgment of McClellan CJ at CL in *Ingham v R*.

Misconduct

Unlawful physical coercion by one juror upon another falls outside the exclusionary rule

A jury found Mr Smith guilty of two sexual offences. He appealed to the Western Australian Court of Appeal, arguing that the trial miscarried. A note had been found in the jury room

after they had been discharged, alleging that the author had been coerced by a fellow juror to return a verdict of guilty. The appeal was dismissed because of the exclusionary rule that says that a juror's evidence of what takes place in a jury room is inadmissible. The High Court in ***Smith v State of Western Australia*** **[2014] HCA 3; (2014) 250 CLR 473** found that the evidence fell outside of the exclusionary rule and therefore should have been admitted. The rationale for the rule "lies in the preservation of the secrecy of a jury's deliberations to ensure that those deliberations are free and frank so that its verdict is a true one and to ensure the finality of that verdict" (at [31]). Unlawful physical coercion by one juror upon another cannot be regarded as part of the course of "free and frank" deliberation and to apply the rule in such a case would defeat the purpose of the rule. Furthermore, "the need to protect and preserve the finality of trial by jury as a justification for the exclusionary rule loses its force where the evidence in question does not go to the substance of the jury's deliberations, but, rather, to demonstrate the disruption of the deliberative process" (at [43]).

Jury misconduct - failure of a judge to investigate

In ***Smith v R*** **[2010] NSWCCA 325**, the appellant was tried for offences of violence committed during the course of a relationship with the complainant. The complainant gave evidence that the appellant had a previous involvement with "some Falun Gong or Buddhism type of religion". During the trial, it became apparent that a juror may have accessed material from the internet concerning Falun Gong. The Crown Prosecutor indicated that there was material available on the internet that referred to Falun Gong as "an evil cult". Counsel for the appellant applied to have the juror discharged. Ultimately the trial judge refused the application and elected to proceed with the trial. In my judgment, I noted that the act of a juror making inquiries concerning any matters relevant to the trial is prohibited under the *Jury Act 1977*; amounts to "misconduct" as defined; and requires discharge of the juror. The information the trial judge had was second hand (the juror had mentioned it to a court officer who had mentioned it to the judge). The judge had the power to examine the juror in order to determine whether the juror had in fact made a prohibited inquiry, but failed to do so. An aspect of my decision was a consideration (at [34]-[39]) of a number of authorities that had discussed the subject of non-compliance with mandatory provisions governing the constitution and authority of a jury. I observed that such non-compliance will ordinarily result in the setting aside of a conviction.

Jurors play word games in court

In ***Li, Wing Cheong Li v R*** **[2010] NSWCCA 40; 265 ALR 445**, there was evidence on appeal that a juror at some unspecified occasion, or occasions, to some extent played the word game "Target" whilst in court. Howie and Hall JJ held that the evidence did not establish that any one or more of the jurors were so distracted that a miscarriage of justice occurred. It is notable that the trial was lengthy and the evidence, at times, tedious. It included a day of playing tapes of people speaking in a foreign language despite transcripts of an English translation being provided to the jury. Howie and Hall JJ noted that the game in question did not of its nature indicate that a juror playing it would necessarily be distracted from the evidence to an extent that a miscarriage resulted and that it was of no more concern than a

juror who doodles or does some other activity that keeps the mind active and alert. It was also significant that no-one in the courtroom noticed any jurors being distracted.

Procedural irregularities (juries)

Replaying video of complainant's evidence during deliberations – circumstances where a direction required.

The appellant in ***IW v R*** **[2019] NSWCCA 311** was a foster parent facing allegations of child sexual assault. During deliberations, the jury requested that video of the complainant's evidence be replayed. Bellew J held that this resulted in a miscarriage of justice, because it was not accompanied by any direction. The jury should have been directed not to overvalue the evidence simply because they were hearing it for a second time, and to view the video in light of both cross-examination and the other evidence adduced.

Had there been no defence evidence, no direction would have been needed because the replay could not cause any imbalance (as was the case in *R v NZ* [2005] NSWCCA 278; 63 NSWLR 628 resulting in r 4 of the Criminal Appeal Rules being applied).

No miscarriage of justice – irregular provision to jury of a prior recording of complainant's evidence

In a retrial following a successful conviction appeal, the Crown tendered a recording of the complainant's evidence in the first trial as an exhibit. The trial judge later acceded to the jury's request for access to the DVD during their deliberations. A ground of the further (unsuccessful) conviction appeal in ***AB (a pseudonym) v R*** **[2019] NSWCCA 82** was that the trial judge erred in providing the jury with the DVD in an unsupervised and unrestricted form.

Macfarlan JA noted that it was an error for the complainant's recorded evidence to be marked as an exhibit, and its default availability for the jury's deliberations. The judge took the wrong considerations into account. Rather, the correct approach should have been that it will "seldom, if ever" be appropriate to permit a jury unrestricted access to evidence in this form. His Honour referred to *CF v R* [2017] NSWCCA 318, handed down after the events of the second trial, in support of this proposition. Despite the irregularity, Macfarlan JA did not consider that it had caused a miscarriage of justice because the issue of disproportionate weight was negated by the fact that the applicant had not called evidence, the fact that the DVD contained the complainant's evidence-in-chief and cross-examination, and that the fact in issue in the trial was the complainant's credibility which had been adequately dealt with in address by the Crown Prosecutor and Defence, as well as in the trial judge's summing up. There was therefore no miscarriage of justice; and in particular, no issue in relation to the unbalanced consideration of evidence (with his Honour referring to *Gately v The Queen* (2007) 232 CLR 208; [2007] HCA 55).

Irregularity to accede to a jury's request to be provided with unsupervised access to a recording of the complainant's evidence

The appellant in ***CF v R*** **[2017] NSWCCA 318** was convicted of four counts of sexual assault committed against a 12 year old. Various interview recordings of the complainant, as well as recordings of CF's ERISP and intercepted phone calls, were tendered by the Crown. After the jury had retired, there was a request to view the complainant's first interview (i.e. unsupervised). Neither defence counsel nor the Crown objected to this occurring. CF contended on appeal that the unsupervised access to the video was an irregularity occasioning a miscarriage of justice.

The appeal was dismissed; there was an irregularity but it did not amount to a miscarriage of justice. Gleeson JA held that the unsupervised production of the videotape to the jury was not an error of law but of procedure, and that it did amount to an irregularity. However, his Honour went on to state that the question then becomes whether the irregularity was so fundamental that it occasioned a miscarriage of justice under s 6(1) of the *Criminal Appeal Act*. He concluded that it did not; the jury had had all the evidence before it and had been given a sufficient warning by the trial judge.

Questions from jury/jury notes

Inappropriate remarks to jury about prospect of disagreement

A jury sent a note to a judge asking "what happens if we cannot agree"? The judge replied in part that "trials are very costly to run and very time consuming and if I had to discharge you it would mean we would all have to go through the whole process again". It was held in ***Isika v R*** **[2015] NSWCCA 304** that the answer was apt to impose inappropriate pressure on individual jurors to join in a verdict with which they were not in genuine agreement.

Failure of trial judge to disclose jury's interim votes and voting patterns to counsel not a denial of procedural fairness

Mr Smith was tried in Queensland for an offence of sexual assault. The judge gave the jury a *Black* direction and then received a note from the jury indicating they had not reached unanimous verdicts and disclosing their voting figures on the two counts. The judge told counsel that the note contained the jury's voting patterns which he did not intend to disclose. The judge then gave a majority verdict direction and a short time later a verdict of guilty was returned. Mr Smith unsuccessfully appealed to the Queensland Court of Appeal but obtained special leave to appeal to the High Court. It was contended that procedural fairness required the judge to disclose the interim voting patterns of the jury and the failure to do so denied Mr Smith a fair trial. The appeal was dismissed: ***Smith v The Queen*** **[2015] HCA 27; (2015) 255 CLR 161**. There was no denial of procedural fairness. There is a general principle that interim votes and interim voting patterns of a jury should not be disclosed to counsel. The Court found that this principle was not displaced by the *Jury Act 1995* (Qld) (which imposes restrictions on the disclosure of jury information) or by principles of procedural fairness, encompassing an accused's right to a fair trial. Information regarding

the jury's voting patterns prior to their verdict is not a relevant consideration, especially in light of the fluidity of the jury process. The High Court held that under no circumstances should the interim voting patterns of a jury be disclosed to counsel.

Failure to answer outstanding question from jury before delivery of verdict

Mr Alameddine was on trial for two counts of aggravated armed robbery arising from a security van heist. The jury experienced difficulty in reaching a verdict. A note was sent to the judge expressing this, and the trial judge delivered encouragements generally along the lines suggested in *Black v The Queen* (1993) 179 CLR 44. Soon another note was received from the jury, this one asking what use could be made of a specific piece of DNA evidence. The note read:

> "How much weight can be given in reference to joint criminal enterprise in regard to using the DNA evidence from the interior door handle of the car to implicate the accused for robbery?"

The trial judge and counsel agreed that the note required clarification. This was sought from the jury, but was not immediately forthcoming. One hour later, the jury sent another note stating that it had "finished deliberating", by which it meant that it was unable to reach a verdict. The jury was informed of its ability to deliver a majority verdict, and soon found Mr Alameddine guilty of both counts. Mr Alameddine appealed.

On the appeal (***Alameddine v R* [2012] NSWCCA 63**), Grove AJ held that it was an error to accept a verdict from the jury while a question remained unanswered. He held, at [45]-[46]:

> "Where a question manifests confusion, it is important that this be removed and the jury be directed along the correct path. Even if, absent direction, a jury has resolved an issue to their own satisfaction, it has been held erroneous to omit so to do: *R v Salama* [1999] NSWCCA 105.
>
> It is perhaps understandable how the obtaining of the requested redraft of the question was overlooked, given the focus of the series of communications from the jury concerning its inability to agree but the omission amounted to error. Even where the directions in the initial charge are adequate, it has been held that they no longer remain so in the light of the existence of an unanswered question: *R v Hickey* (2002) 137 A Crim R 62."

I. Opening and closing addresses

Unfairness

Undesirable for prosecutor to frame address as questions to be answered by defence

The appellant in ***Lane v R* [2013] NSWCCA 317** appealed, inter alia, against certain aspects of the Crown Prosecutor's closing address in her trial for murder. The objectionable portion involved the Crown posing a series of questions to the jury, and asking that they be borne in

mind during the defence address. The appellant argued that this had the effect of reversing the onus of proof, and that as a result the trial had been unfair.

The Court (Bathurst CJ, Simpson and Adamson JJ), referring to *Wood v R* [2012] NSWCCA 21, agreed that asking questions with a view to inviting the jury to consider if satisfactory questions were provided was highly undesirable. But a miscarriage of justice did not automatically flow. In this case, the issues raised as "questions" were factually relevant to the Crown onus of excluding a defence case. Had the questions been framed as issues, they would have been unobjectionable. (And no objection was taken at trial.) The Court felt bound to accept that the jury applied the directions of the trial judge assiduously.

Inappropriate expression used in Crown closing address

At the conclusion of a trial for sexual assault, the Crown prosecutor's closing address included a characterisation of one part of the defence's case as a "scurrilous attack upon the complainant's credibility and character". Although no objection was taken at trial, the offender appealed on the basis that the comments were highly prejudicial: ***Geggo v R* [2013] NSWCCA 7**. Johnson J held that, in the context of the trial, the appellant had been perfectly entitled to test the evidence of the complainant and the particular expression "scurrilous attack" was inflammatory. However, noting in particular the absence of an objection at the time, the court dismissed the appeal on the proviso.

Revisiting evidence rulings where the successful objector takes unfair advantage

***WC v R* [2012] NSWCCA 231** concerned a trial for three counts of indecent assault. Counsel for the accused had objected to certain evidence by the child complainant that made reference to sexual approaches beyond the scope of the charged acts. The Crown had sought to lead that evidence to provide a reason as to why the complainant had not rebuffed the accused's advances. The trial judge, having regard to the limited probative value of the evidence at that stage of the proceeding and its prejudicial content, granted the application. But in his address to the jury, counsel for the accused emphasised the fact that the complainant had not rebuffed the accused. He called it "bizarre" and "unusual", and suggested that it was against "common sense". The trial judge decided that counsel had taken unfair advantage of the exclusion of evidence that might provide an explanation, and discharged the jury. The accused appealed under s 5G *Criminal Appeal Act*, which allows an appeal with leave from any decision to discharge a jury.

In the Court of Criminal Appeal, McClellan CJ at CL refused leave to appeal. He held that the trial judge was entitled to revisit the issues arising from his evidentiary ruling. It was not anticipated, at that time, that defence counsel would make the submissions he did. No direction could have remedied the unfairness as it manifested itself in closing addresses.

Reversal of onus – "why would complainant lie" as opposed to "why would the complainant tell such a complicated lie?"

The prosecutor in ***Cusack v R* [2009] NSWCCA 155** submitted to the jury (repeated by the judge in summing up) that, if the complainant were lying, she would not have added certain

complications, like her fear of pregnancy. The charge concerned multiple child sexual offences. The offender appealed on the basis that this was an impermissible submission that reversed the onus of proof. Beazley JA dismissed this contention. The accused was not being asked to provide a positive rebuttal to the rhetorical question. Rather, it was being to suggested to the jury that the complainant would

Similarly, in ***MAJW v R* [2009] NSWCCA 255**, a prosecutor had submitted to the jury in a child sexual assault trial that they should scrutinise the evidence of both the complainant and the accused and consider whether "there is any reason why either of these people would want to tell lies". It was held, per Macfarlan JA at [28] – [44]), that this submission did not give rise to a miscarriage of justice, although his Honour commented that it would have been better if the submission had not been made.

Impermissible comment in Crown closing – invitation to female jurors to use own life experience in appreciating strength of men compared to women

In ***GDD v R; NJC v R* [2010] NSWCCA 62**, the majority (Grove and Simpson JJ) concluded that it would be unsafe for convictions to stand in the light of the prosecutor's closing address. She had expressed her personal opinions as to some aspects of the evidence. She had also invited the female members of the jury to use their own life experience in appreciating how much stronger men are than women (the case concerned an allegation that the complainant had been physically overborne and sexually assaulted). In part, Simpson J said:

> "[121] Counsel inviting juries to examine evidence from a particular point of view will need to exercise caution in expression. That is, in my opinion, a dangerously wrong approach. The question the jury has to decide is whether the participants behaved as they, or other witnesses, said they did. It is wrong to invite juries to determine contested factual issues on the basis of their assessment of how they would feel, how they would react, or what they would do."

J. Summing up

Unbalanced or unfair summing up

Summing up not unfair if judge draws attention to evidence not mentioned in closing addresses

The offender in ***Balachandran v R* [2020] NSWCCA 12** was convicted of stabbing a man during a party. Much of the Crown case relied on identification evidence adduced from multiple witnesses. In the summing up, the trial judge referred to evidence of prior meetings and brief introductions between the offender and witnesses – evidence that the Crown did not refer to in closing.

White JA held that this was not a miscarriage of justice because the evidence was uncontroversial. Reminding the jury of evidence that was in the trial but not raised in the Crown's address could not amount to an unfair or unbalanced summing up. Any lack of balance was attributable to the strength of the Crown case. In addition, the trial judge gave

ample direction to the jury that they should disregard any opinions they perceived him to have. The appeal was dismissed.

Unfair and unbalanced summing up – impermissible comment and failure to put defence case

The appellant in **Decision Restricted [2019] NSWCCA 305** was found guilty of two offences following a jury trial. The offences arose from an alleged sexual assault upon a person known to the appellant. The Crown case relied upon various circumstantial matters. The defence case comprised alternative interpretations and inferences that the jury should draw. The trial judge directed the jury a number of times in his summing up that questions of fact were entirely for them and that, although he was entitled to express a view, he did not intend to do so. In referring to various aspects of the Crown case, he referred to the interpretation or inference for which the Crown contended but did not say anything about the defence response. He refused an application to discharge the jury midway through the summing up but then continued in the same fashion.

It was held by Gleeson JA that the failure to put the essential aspects of the defence case to the jury rendered the summing up unbalanced. After referring to *McKell v The Queen* (2019) 264 CLR 307; [2019] HCA 5, he also held that the line of permissible comment by the judge had been crossed. That followed from the judge having directed the jury that they "may infer" what the Crown contended about certain aspects of the evidence, prefacing directions with the otiose comment, "I have a view about it", and not reminding the jury of the defence case.

Adequacy of summary of the defence case

Two boys disclosed offences committed by the appellant to their grandmother after she had overheard them discussing the offending. The appellant was convicted following trial of nine counts of aggravated indecent assault on a person under the age of 16 years contrary to s 61M(2) on two boys aged under 10 years. The appellant's case at trial was that the offences did not occur and that the grandmother was motivated to lie because of animosity towards him. In Ground 2(e) on appeal in ***Roos v R*** **[2019] NSWCCA 67** it was contended that the trial judge erred by failing to adequately summarise the submissions made on behalf of the appellant; it was "so brief and general in its terms as to be almost purposeless". The contention was rejected.

The trial judge had observed early in his summing up that the trial had been relatively short, the evidence would be fresh in the jury's memory and they had heard detailed references to the evidence in the closing addresses. He told the jury that he did not propose to refer to the evidence in great detail but they were required to consider all of the evidence nonetheless. Later, after giving various legal directions, he summarised the respective cases over three paragraphs of transcript.

Gleeson JA observed that a trial judge does not have to summarise the evidence in every case, and found that this case was one that did not require such a summary for the reasons the judge gave. As to whether the appellant's case was not fairly put before the jury,

Gleeson JA noted that it was necessary to explain any basis upon which a verdict in favour of the accused could be returned. Here, the judge's brief and concise summary reflected the case put in counsel's closing address. The summing up was "sufficient and appropriate", a conclusion supported by the fact that counsel declined to ask for anything more.

Summing up unfair / unbalanced – trial judge should be reticent to express opinions on disputed questions of fact

In ***McKell v R*** **[2019] HCA 5; 264 CLR 307**, the High Court upheld an appeal on the ground that a judge's summing up was unfair; the appellant's conviction for drug-related offences was a miscarriage of justice. The Court made two main points. The first was that in this case, the trial judge's statements in his summing up "were so lacking in balance as to be seen as an exercise in persuading the jury of the appellant's guilt". The High Court expressly approved Beech-Jones J (dissenting in the earlier Court of Criminal Appeal decision) who found that the summing up was so unbalanced and thereby unfair that a miscarriage of justice occurred. The second point was that the risk of unfairness "is such that a trial judge should refrain from comments which convey his or her opinion as to the proper determination of a disputed issue of fact to be determined by the jury".

The High Court accepted that there is always scope for judicial comment, but went on to discuss the degree to which trial judges should express an opinion on the facts of a case. It was held that trial judges should be reticent to express an opinion as to the determination of disputed questions of fact because it does not advance the performance of the trial judge's duty to give fair and accurate jury instructions, especially in a context in where the jury is the constitutional tribunal of fact. Further, the Court said (at [50]) "there is no little tension between suggesting to the jury what they 'might think' about an aspect of the facts of a case and then directing them that they should feel free to ignore the suggestion if they think differently". It is "hollow and unconvincing" to say that a judge may not go so far as creating a risk the jury may be overawed, but it is permissible for a judge to use language that makes him/her appear a decided partisan.

Despite this, the Court was careful to note (at [53]) that there are cases where "judicial comment, but not an expression of opinion on the determination of a matter of disputed fact, may be necessary to maintain the balance of fairness between the parties". There was an example in this case where fairness required the judge to correct an impression mistakenly left by an untenable suggestion on a particular topic made during the closing address of the appellant's counsel.

Summing up unfair / unbalanced

In ***Mulholland v R*** **[2018] NSWCCA 299**, the jury found the applicant guilty of two sexual assault offences. One of the grounds of appeal was that the trial judge's summing up was unbalanced because he had offered a counterpoint to rebut all the defence case propositions, sometimes not based on the Crown case or evidence.

Payne JA commenced his analysis of the ground by reviewing the legal principles relevant to a miscarriage of justice due to an unfair and unbalanced summing up. In view of those

principles, Payne JA analysed the impugned passages of the summing up to conclude that it did not exhibit a "judicial balance" and was not rescued by the recognition that the jury is the arbiter of fact. The effect of the summing up and the possibilities suggested in the judge's counterpoint arguments was to deprive the jury of the opportunity to consider the applicant's defence, to urge a "particular mode of thought" on the jury including explanations of gaps, deficiencies and inconsistencies that while making sense to a legal mind are not required of a jury, and to direct the jury's collective mind to reason in a particular way. In addition, the summing up included matters not part of the Crown's address that did not need to be addressed in the context of the case.

As a result, the Court (Payne JA, Schmidt J agreeing, Fagan J dissenting) allowed the appeal, finding that the unbalanced summing up had caused a miscarriage of justice; the applicant had lost a chance fairly open to him of being acquitted, notwithstanding the strength of the Crown's case. This outcome was necessary because "[i]t is fundamental to our system of justice that the trial judge should not descend into the forensic arena".

Unbalanced summing up occasioning a miscarriage of justice

The four applicants in ***Popovic v R; Hristovski v R; Bubanja v R; and Koloamatangi v R*** **[2016] NSWCCA 202** were tried for their alleged involvement in a murder. In their appeals against conviction they raised a number of arguments challenging the fairness and balance of the judge's summing up to the jury. Adamson J allowed the appeal and quashed the convictions. Her Honour held that the cumulative effect of several errors was to produce a summing up that was so imbalanced so as to deprive the applicants of a fair trial. First, the judge erroneously gave a hearsay warning pursuant to s 165 of the *Evidence Act* in relation to a police officer's note containing an apparent prior inconsistent statement by a critical prosecution witness. This was in circumstances where the hearsay rule did not apply to the note. The warning was plainly adverse to the applicants' interests and had not been sought by the Crown. Second, the effect of the trial judge's asking, rhetorically, why [a witness] would lie was not only to deprive the earlier warning under s 165(1)(d) of the *Evidence Act* (that he was criminally concerned) of any substantial force, but also to give the jury the impression that if they could not identify another reason why he would lie, they should accept his evidence. This was an error which could give rise to a substantial miscarriage of justice. Third, the judge inadequately dealt with the Crown case against each accused separately and failed to summarise the defence cases individually at all. In this case, the role of each applicant was separate and distinct and his Honour was obliged to distinguish between their respective positions and the evidence relevant to each.

Unbalanced and unfair summing up

In ***Magoulias v R*** **[2012] NSWCCA 160** a jury had found the appellant guilty of two offences, including committing an act of indecency. He had been working as a painter on the exterior of a unit building at the time of the offences. The complainant lived in one of the units and gave evidence that when she was in her bathroom, the appellant had entered the premises and moved towards her with his penis out of his trousers. He told her that he simply needed to use the bathroom, but he did not give evidence at trial. It was held that the trial judge's summing up had been unbalanced. Allsop P found that the trial judge had erred in

directing the jury that the only evidence of intention came from the complaint. He had failed to direct the jury that a determination of intent was to be inferred from findings about the objective circumstances, including the appellant's location and the movement of his arm. Some of these objective circumstances were the subject of inconsistencies between the complainant's prior statements and her evidence at trial (at [11]). Allsop P found that the summing up must have left the jury with the impression that a finding about intention turned only on the complainant's truthfulness and the failure of the appellant to give a contrary version. Instead, the case depended on doubts about the complainant's accuracy based on past inconsistencies. This was not fairly put to the jury (at [13]).

Unbalanced summing up

In ***Abdel-Hady v R*** **[2011] NSWCCA 196**, the appellant was convicted of causing another to take a stupefying drug, with attempt to commit an indictable offence, and indecent assault. The appellant contended that in dealing with the defence case, the trial judge presented an unbalanced account of the respective cases in favour of the Crown. The Court agreed and allowed the appeal, Adams and Fullerton J finding (at [140] – [141]) that the trial judge had undermined the defence case by, inter alia, subjecting many of defence counsel's submissions to adverse comment and putting arguments to counter them. It was held that there had been an impermissible undermining of the defence case. The jury were likely to have formed a powerful impression concerning the weakness of the defence case and the opinion of the judge as to its insubstantial character.

K. Directions generally

Unhelpful "gloss" in directions to jury

Abbosh v R; Bene v R **[2011] NSWCCA 265** is another case where the Court of Criminal Appeal delivered an admonition in response to the use of poorly considered expressions in directions. The impugned directions related, in a trial for violent offences, to good character and self-defence. On the former, the trial judge had correctly outlined the use the jury could make of evidence of good character, but finished his direction with "an unhelpful anecdotal gloss" by referring to the notorious fall from grace of Allan Bond. Then, in relation to self-defence, the judge elaborated at the end of his standard directions:

> "It does not arise unless there is a reasonable possibility of it happening in the way that the said it happened. And a reasonable possibility means a reasonable possibility, not a far flung chance, or perhaps it could have happened somehow or another."

This was submitted, on appeal, to be a misdirection on the necessary standard of proof. In the Court of Criminal Appeal, Johnson J held that the comments at the end of the standard directions were regrettable because they had the potential to distract the jury, but was not convinced that they did in this case. (The appeal was dismissed on the proviso.)

Error in simplifying directions to jury on elements of offence

The appellant in ***RH v R*** **[2011] NSWCCA 98** was tried for offences of indecent assault and sexual intercourse without consent which were alleged to have occurred in the one incident. The Crown case was that the complainant was asleep when the appellant commenced the sexual activity, and when he awoke he immediately left the room. The defence case was that the appellant and complainant had engaged in consensual sexual activity over a number of hours, the complainant being at all times awake. Transcripts of police interviews given by the appellant recorded his version that the complainant had got up to use the bathroom on three occasions, and was making noises consistent with sexual activity. The trial judge directed the jury with respect to the charge of sexual intercourse without consent:

> "Consent must be voluntarily and consciously given. You cannot give consent to something if you are asleep, it is as simple as that and on the issue of whether or not the accused knew that he was not consenting, if you were satisfied beyond reasonable doubt that what [the complainant] said about him being asleep was both honest and accurate then you would be entitled to infer that the accused knew that he was not consenting, that he was not conscious and therefore not able to consent to what was happening and you are also on that issue entitled to take into account the way the case has been run."

About one hour after they retired, the jury sent a note to the trial judge asking for clarification of the elements of indecent assault, and specifically the consent element. The trial judge proposed to counsel that he would simply direct the jury that if they were satisfied that the version given by the complainant was honest and accurate, they would be satisfied that the appellant had committed an indecent assault. Despite defence counsel's protest that "it's not just an issue of whether they accept that the complainant was asleep but that that was known at the time to the accused", the trial judge gave his direction in the terms he originally outlined.

On appeal, the appellant argued that the trial judge ought to have given a direction that it was an element of indecent assault that the appellant knew that the complainant was not consenting. Davies J agreed. The simplification of the direction meant that the jury was precluded from acquitting the appellant if they found his evidence to also be accurate (presumably, in so far as it was consistent with the other party being asleep). The jury note indicated that they might well have been considering whether the appellant held a reasonable belief of consent, and should have been directed accordingly. A new trial was ordered.

Note: this case was decided before the High Court handed down *Huyhn v The Queen* [2013] HCA 6; (2013) 87 ALJR 434, where it was held at [31] that:

> "The contention that it is an error of law for a trial judge to omit to instruct a jury on all of the elements of liability for an offence cannot stand with the many decisions of this Court affirming the statement of the responsibility of the trial judge in *Alford v Magee* [(1952) 85 CLR 437]. The duty is to decide what the real issues in the case are and to direct the jury on only so much of the law as they need to know to guide them to a decision on those issues."

The Court of Criminal Appeal was taken to *Alford v Magee* in *RH*, leaving the inference that they were of the view that, perhaps because of the combined effect of counsel's objection and the jury note, the issue of belief in consent was a "real issue".

L. Directions on offences

Attempts

The two elements of an attempt

Mr Inegbedion and an associate attempted to intercept a parcel of heroin being delivered to a residential address. Unbeknown to them, the courier was an undercover officer of the Australia Federal Police. Mr Inegbedion was arrested and charged with an offence of attempting to possess a marketable quantity of heroin. He was convicted at trial. On his appeal, ***Inegbedion v R* [2013] NSWCCA 291**, he argued that the directions on attempt were erroneous.

Rothman J restated the two elements of an attempt: there must be an intention to commit the crime alleged; and the accused must have performed some act towards the commission of the offence that was more than merely preparatory and could not be regarded as being for any other purpose than the commission of the crime. In Mr Inegbedion's trial, the judge on no occasion expressly referred to these separate elements in adequate terms, instead using "intention" and "conduct". However, the trial judge directed the jury that intention was to be inferred from "conduct that was more than preparatory towards the commission of the offence". That is, while the directions were incorrect, they were favourable to the offender in restricting what could be considered in establishing intention. No miscarriage of justice was occasioned.

Conspiracy

No error in standard direction as to timing of co-conspirator joining a conspiracy

Mr Damoun was convicted of conspiring dishonestly to cause a loss to a Commonwealth entity. The Crown case was that the conspiracy commenced on 20 December following a meeting with Mr Damoun and others. In directing the jury, the judge said that it is not necessary for the Crown to prove that each co-conspirator joined the agreement at the same time. It is sufficient to prove that a person who enters an existing agreement enters it for the purpose of that agreement. In ***Damoun v R* [2015] NSWCCA 109** Mr Damoun appealed his conviction, arguing that the direction was given in error because the Crown did not contend that Mr Damoun joined the conspiracy at a later stage. The Court dismissed the appeal, holding that the direction given was a standard direction and did not result in any unfairness to Mr Damoun. It remained open to the jury to find that Mr Damoun's participation in the conspiracy was established by any one or more of the "overt" acts alleged against him.

Dangerous driving

Dangerous driving causing death - the irrelevance of negligence

King v The Queen **[2012] HCA 24; (2012) 245 CLR 588** was concerned with the Victorian equivalent of the offence in s 52A of the *Crimes Act 1900* of occasioning death by dangerous driving and a Victorian Court of Appeal decision concerning it (*R v De Montero* (2009) 25 VR 694). It was contended by King that the trial judge's directions to the jury at his trial, which occurred before *De Montero*, were deficient. It was held in the High Court (French CJ, Crennan and Kiefel JJ at [44] – [50]), that dangerous driving is not a species of the genus of criminal negligence and does not depend upon the degree to which the driving falls short of the standard of care owed to other road users. It was not necessary for the judge to direct the jury that it must be shown to be conduct that is deserving of criminal punishment.

Dishonesty

Failure to direct jury on matters relevant to a finding of dishonesty

In ***Krecichwost v R*** **[2012] NSWCCA 101**, the applicant was found guilty by a jury of dishonestly using his position as a director of a company to gain personal advantage. The trial judge directed the jury that dishonesty was to be judged according to "the standards of ordinary, decent people". In seeking leave to appeal it was contended that the judge had erred in failing to direct the jury to consider a number of factors relevant to the dishonesty of a company director. No such directions were sought at the trial. Macfarlan JA, refusing to grant leave, found that the applicant had been well represented at trial (at [64]-[65]). His Honour stated that it was too late argue that reference should have been made to further factors by the trial judge in her summing-up. Factors relevant to a finding of dishonesty vary according to the circumstances of the case and there are no prescribed matters that must be taken into account.

Grievous bodily harm

Section 35 of the Crimes Act – recklessness can be established by proof that the accused foresaw the possibility (not probability) of harm

The appellant in ***Aubrey v R*** **[2017] HCA 18; (2017) 260 CLR 305** knew he was HIV positive and had unprotected sexual intercourse with the complainant, who was then infected with HIV. The alternative count the appellant was charged with was maliciously inflicting grievous bodily harm contrary to s 35(1)(b) of the *Crimes Act 1900*. The second issue raised on appeal was whether recklessness requires foresight of the possibility or probability of grievous bodily harm. Kiefel CJ, Keane, Nettle and Edelman JJ held that in order to establish that an accused acted recklessly within the meaning of s 5 of the *Crimes Act*, and thus maliciously within the meaning of that section and s 35, it is sufficient for the Crown to establish that the accused foresaw the possibility (not probability) that the act of sexual

intercourse with the other person would result in the other person contracting the grievous bodily disease. Whilst the requirements in other states might vary according to the terms of their legislation, for ss 18 and 35 of the Crimes Act the reasoning in *R v Coleman* (1990) 19 NSWLR 467 was correct; the fact that recklessness for common law murder requires that the accused foresaw the probability (not possibility) of death or grievous bodily harm does not mean the same standard applies to s 35. The reason for requiring foresight of probability in the case of common law murder was the near moral equivalence of intention to kill or cause grievous bodily harm and the foresight of the probability of death: *R v Crabbe* (1985) 156 CLR 464 at 469. The same does not necessarily, if at all, apply to statutory offences other than murder.

The role of reasonableness in risk-taking was also discussed. The appellant pointed to recent English decisions which had held that recklessly causing grievous bodily harm required not only proof that the accused foresaw the possibility of harm and still proceeded, but also that it was unreasonable for the accused to take that risk in proceeding. The plurality rejected the appellant's submission that these decisions represented an advance in the law that the High Court should follow by replacing the requirement of foresight of possibility with probability. Reasonableness of an act and the degree of foresight of harm are logically connected. If the act in question lacks any social utility then a jury might more readily consider that foresight of mere possibility is enough to amount to recklessness. If, on the other hand, the act in question has a degree of social utility (such as driving a car, or playing a contact sport) then the jury might properly consider that foresight of something more than possibility is required. It was said that juries are ordinarily, as a matter of common sense and experience (and therefore without specific directions) able to take into account the social utility of an act in determining recklessness. There is no reason to replace the requirement of foresight of possibility with a test of probability.

Grievous bodily harm – recklessly inflicting - directions as to mental element

In ***Blackwell v Regina*** **[2011] NSWCCA 93**, the appellant was charged with the offence of maliciously inflicting grievous bodily harm with intent (s 33 Crimes Act 1900). It was open to the jury to convict of the alternative offence in s 35. Shortly prior to the offence having allegedly occurred, s 35 had been amended. The offence of malicious wounding or maliciously inflicting grievous bodily harm was replaced with reckless wounding or recklessly inflicting grievous bodily harm. Notwithstanding the amendment, the earlier form of the s 35 offence was presented to the jury as the alternative. The jury convicted the appellant of the primary count.

The issue on appeal was whether there was a miscarriage of justice because the jury had been directed on the wrong alternative count. The Court was required to examine whether the mental element for the new offence under s 35 was the same as for the repealed offence. Beazley JA held (at [82]) that the mental element for "reckless grievous bodily harm" does not involve foresight of the possibility of "some physical harm" but rather, foresight of the possibility of grievous bodily harm.

The Court allowed the appeal and order a new trial, endorsing the observation of Callinan J in *Gilbert v The Queen* [2000] HCA 15; (2000) 201 CLR 414 that "where there is a choice of

decisions to be made [in this case, for the jury], the choice actually made will be affected by the choices offered" and accepted that there had been a denial of procedural fairness "of a significant kind".

Hansard records that when the *Crimes Amendment Act 2007*, which brought about, inter alia, the removal of "maliciously" from the principal Act, was introduced in the Legislative Assembly, it was said that, "It is not intended that the elements of any offence, or the facts that the prosecution needs to establish to prove the offence, will change substantially". The decision in Blackwell demonstrates what appears to have been an unforeseen legislative consequence. The offence in s 35 previously only required proof of foresight of some harm.

Grievous bodily harm – intent to do - error in directing jury that offence could be proved on the basis of recklessness

The trial judge in ***Davies v R*** **[2011] NSWCCA 19** was held to have fallen into error when he misdirected a jury about the element of intent to do grievous bodily harm under the offence of malicious wounding with intent to do grievous bodily harm (s 33 of the Crimes Act 1900, as it was at the time of the offence). The judge directed the jury that they could find the accused guilty if satisfied either that the accused intended to do grievous bodily harm or that the accused was reckless, "reckless" meaning a realisation of the possibility of some physical harm (not necessarily grievous bodily harm) resulting from the action and following through with the action. James J said (at [76]), "the jury should have been directed that they could not convict the accused of the s 33 offence, unless they were satisfied that the accused had the intent to do grievous bodily harm. Recklessness, although it might be sufficient to satisfy the element of "maliciously" in the offence would not be sufficient to satisfy the element of "intent to do grievous bodily harm". Notwithstanding the misdirection, the Court applied the proviso and dismissed the appeal.

Intent to import

Importation offences – inferring intention to import from a finding that the accused saw there was a significant or real chance of a substance being inside an object they were bringing into the country

Smith v R; R v Afford **[2017] HCA 19; (2017) 259 CLR 291** concerned two appeals heard together because they raised the same question about the process of inferential reasoning in relation to importation of a border controlled drug contrary to s 307.1(1) of the Criminal Code (Cth) (the Code). Mr Smith admitted to having concerns about what was in the suitcase he was given and Mr Afford recalled hoping there was nothing illegal inside his baggage. At both trials it was argued that even if the accused had been suspicious, that did not establish intent to import illegal substances. Challenges to directions to the jury based upon *Kural v The Queen* [1987] HCA 16; 162 CLR 502 were unsuccessful in Smith's case in the NSW CCA but successful in Afford's case in the Victorian Court of Appeal.

Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ held that the reasoning in Kural v The Queen was applicable. There is was held that it was open to infer intention to import a

narcotic drug contrary to s 233B(1)(b) of the *Customs Act* where it was established that the accused knew or believed or was aware of the likelihood, in the sense of there being a significant or real chance, that what was being imported was a narcotic drug. Judges can direct juries that if they find beyond reasonable doubt that the accused saw there to be a real or significant chance of a substance inside an object they were bringing into the country, then they can infer that the accused intended to import a substance. If someone is aware of a real or significant chance that an extraneous substance in their luggage, and their state of mind is truly that they would not be prepared to take that substance into Australia, it is to expected that they would either inspect the luggage to ensure the presence of no such substance or at the very least declare their concerns to Customs upon arrival. Therefore, if such a person does not take any action to avoid the risk of the substance being present, there is a strong suggestion that the person's state of mind is that they were prepared to proceed with bringing the substance into the country. Rather than causing difficulties, it would likely be of considerable assistance to instruct the jury that it is open to them to infer intent to import provided certain requirements are met.

Their Honours found that whilst the directions in *Afford and Smith* were sufficient, it would be preferable if directions in the future aligned more closely with the language of the Code and particularly with the statutory definition of intent in s 5.2.

Suggested directions were listed at [69]. Regrettably, they included:

> "(7) In order to draw an inference of intent, it is necessary to be satisfied beyond reasonable doubt of the facts and circumstances from which the inference of intent is drawn and that the inference of intent is the only reasonable inference open to be drawn from those facts and circumstances."

Obviously it is necessary for a jury to be satisfied beyond reasonable doubt of an inference of intent. But the necessity to be satisfied beyond reasonable doubt of the facts and circumstances from which that inference is to be drawn is novel. No authority was cited in support of the proposition.

Manslaughter

Manslaughter by criminal negligence – relevance of cultural factors to the "reasonable person test"

The appellants in ***Thomas Sam v R; Manju Sam v R*** **[2011] NSWCCA 36** were convicted of manslaughter by criminal negligence. They were the parents of the victim, the case against them being that they neglected to properly care for their child and obtain appropriate medical attention concerning her eczema, which combined with malnutrition, were antecedent to septicaemia, the cause of death. On appeal it was contended that the trial judge erred in failing to give directions to the jury that in applying the "reasonable person test" they should take into account the cultural background of the accused.

The appeal was dismissed. McClellan CJ at CL held (at [54]) that it may be that, in some circumstances, the fact that a parent comes from a culture which approaches the nurture of infants in a different way to what is expected in Australia, may be relevant to the standard of care. Notwithstanding, his Honour found that the evidence did not support such a finding in this case. There was nothing in the evidence to suggest that the fact that the appellants were born and educated in India, or that the father was educated as a homeopath, could justify the expectation which the law imposed on their conduct as being different from that of the ordinary Australian. (An application for special leave to appeal to the High Court of Australia has been lodged).

Murder

Accessory before the fact to murder – directions as to elements of the offence

In ***Blundell v R*** **[2019] NSWCCA 3**, the appellant appealed against his conviction for the offence of being an accessory before the fact for providing encouragement and assistance through words alone and without being present at the scene, in circumstances where the deceased was murdered by the principal offender (PO) after being beaten with a tomahawk. The appellant's case was that while he had encouraged the PO to engage in anti-social behaviour towards the deceased, this did not extend to the infliction of grievous bodily harm. In addition, the appellant contended that he was not aware of the essential facts that would have made him privy to the PO's intention to cause grievous bodily harm to the deceased at the time of his encouragement, including the nature and timing of the attack. The appellant contended that he could not have foreseen the killing as it was the PO's own spontaneous folly.

N Adams J held that the trial judge's written and oral directions to the jury were deficient in four out of five of the issues raised by the appellant on appeal.

Ground 1(a) contended that the judge erred by directing the jury that it was not necessary to prove that the principal offender was actually encouraged. N Adams J rejected the appellant's submission that the Crown must prove actual encouragement by the accused accessory before the fact, finding that none of the cases supported this proposition – indeed, such a "subjective concept" would be difficult to prove beyond reasonable doubt.

Ground 1(b), however, was upheld, as Her Honour found that the trial judge's directions inadequately explained the fact that the Crown needed to prove that the appellant's words constituted intentional encouragement or assistance, a reference to which includes the doing of an act capable of encouraging the principal offender to inflict grievous bodily harm upon the deceased.

N Adams J also accepted the appellant's arguments in respect of Ground 1(c), which impugned the trial judge's directions to the jury that assisting and encouraging is a "continuous act" that persists until the substantive offence is committed. This was an incorrect direction which should not have been given, perhaps at all, because the statement of principle upon which it was based (*R v Robert Millar (Contractors) Pty Ltd* [1970] 2 QB 54

at 73; [1970] 1 All ER 577) was not of general application. Her Honour held the trial judge's direction caused unfairness as it was apt to undermine the defence case that the appellant could not have foreseen that the principal offender would have the opportunities to carry out the acts leading to the killing of the deceased. Her Honour also upheld

Ground 1(d), finding that the trial judge fell into error by directing that the jury must be satisfied beyond reasonable doubt that the appellant knew "all the essential facts and circumstances necessary" to show that the principal offender "intended to assault and inflict upon the victim grievous bodily harm". Rather, N Adams J held that the correct knowledge element is for the Crown to prove the appellant "knew" the principal offender was "going to" intentionally inflict grievous bodily harm on the victim.

Ground 2 was also allowed, with her Honour finding that the trial judge fell into error by including terms such as "enterprise", "design", "participation", "withdrawal" and assault "with a view" to inflicting grievous bodily harm in the directions. This was apt to confuse the jury because the terms form part of the standalone doctrine of (extended) joint criminal enterprise, separate from principles of accessorial liability.

Multiple acts capable of giving rise to murder or manslaughter – when unanimity required as to the act causing death

The appellant in ***Lane v R*** **[2017] NSWCCA 46** was in an altercation with the deceased outside a hotel. The deceased died nine days later and the appellant was charged with murder. The altercation was captured on CCTV, which showed the deceased falling to the ground twice. The Crown said that both falls were caused by voluntary acts of the appellant; first after the appellant made contact with the deceased (perhaps a "blow") which made him trip and fall, the second after the appellant punched the deceased in the head (one witness called it a "king-hit"). The injuries sustained from either fall were each sufficient to cause death. There were thus two discrete acts which were said to have been deliberate and caused death. The appellant's case was that the jury could not be satisfied either fall was caused by a voluntary act on his part. The jury found him not guilty of murder, but guilty of manslaughter. The trial judge gave a general direction on the need for unanimity. One ground of the appeal against conviction was that the trial judge erred in failing to direct the jury that they were to be unanimous as to the factual basis on which they might convict the applicant of manslaughter. The appellant contended that there were alternative factual bases of liability, being the two discrete acts relied on as capable of constituting the voluntary act causing death.

Meagher JA and Davies J held that the trial judge erred by not directing the jury that they could not convict of murder or manslaughter unless they were unanimous on the voluntary act upon which their verdict was based. If any of the discrete acts relied upon as proof of the offence would entitle the jury to convict, and the discrete acts go to the proof of an essential ingredient of the crime charged, then the jury cannot convict unless they are agreed upon that act which constitutes that essential ingredient: *R v Walsh* [2002] VSCA 98; 131 A Crim R 299 at [57]. In this case, it was left to the jury to decide whether each of the deceased's falls was caused by a voluntary act of the appellant. A specific direction was

therefore required. In the absence of any such direction, it was possible that some jurors would reason to a guilty verdict by satisfying themselves that the appellant's voluntary act caused the first fall, but others may come to the same conclusion about the second fall. Whilst there was therefore a risk of a substantial miscarriage of justice, their Honours held that no such miscarriage actually occurred: s 6(1) *Criminal Appeal Act 1912*. It was not open to the jury to have reasonable doubt as to the appellant's guilt of manslaughter by unlawful and dangerous act based upon the deliberate act causing the second fall. Fagan J agreed with Meagher JA and Davies J that the ground was made out, but disagreed on whether a substantial miscarriage of justice had occurred.

(The High Court took a different view as to the application of the proviso: *Lane v The Queen* [2018] HCA 28; 92 ALJR 689. See Chapter 5 – B. Conviction appeal – Proviso (s 6(1)).)

Sexual assault

When directions on "proper medical purpose" required in sexual assault trial

***Zhu v R* [2013] NSWCCA 163** was an appeal involving a contention that a trial judge should have directed the jury that sexual intercourse is not established where penetration is carried out for proper medical purposes. Mr Zhu was a practitioner of traditional Chinese medicine, and the complainant was a patient who presented with a skin rash on her arms and lips. During the course of the examination, Mr Zhu inserted his finger into his patient's vagina twice. Hoeben CJ at CL and Fullerton and McCallum JJ agreed in separate judgments that the question of "proper medical purpose" did not arise on the evidence and no direction was required. Hoeben CJ at CL observed at [79] and [84], that though the fact that the issue was disclaimed at trial was not determinative, the appellant's case at trial was that the act in question had not occurred. No evidence at all was adduced at trial to the effect that the conduct was part of the practice of traditional Chinese medicine. Or, as McCallum J put it at [103], "the notion of there being a proper medical purpose for inserting a finger in SB's vagina when she presented for treatment of skin irritation around the eye and mouth…is frankly ridiculous."

M. Directions on evidence

Browne v Dunn

Adverse Browne v Dunn direction to be given with caution

Mr Giourtalis was charged with fifty-seven tax offences. He gave evidence in his trial. Parts of his version of events, as it came out in cross-examination, had not been put to witnesses that preceded him. The trial judge gave a direction to the effect that the jury could assume that Mr Giourtalis had not told his lawyers of these matters, and that they could consider that a relevant factor in assessing his credibility. (Counsel at trial agreed to the judge giving a direction in general and did not object to the form it ultimately took.) Mr Giourtalis appealed, arguing, inter alia, that the direction should not have been given and the

witnesses should have been recalled: ***Giourtalis v R*** **[2013] NSWCCA 216**. Bathurst CJ agreed that the direction was incorrect. True it was that *Browne v Dunn* applies in criminal trials. But it should be applied with circumspection. It was not correct to invite the inference in the context of this trial. There were many reasons why Mr Giourtalis might not have informed counsel of discrete matters, not least the sheer volume of charges in which he had to give instructions on. However, the appeal was dismissed on the proviso.

Consider available inferences with caution before giving Browne v Dunn direction

The trial judge erred in ***RWB v R; R v RWB*** **[2010] NSWCA 147** by telling the jury that the failure of defence counsel to cross-examine the complainant about a particular topic, which the accused had raised in his evidence, would indicate that the accused had failed to tell counsel about it. Simpson J held this was erroneous but that no miscarriage resulted. The inference that the accused had failed to include the subject in his instructions was not the only inference available.

Evidence given by accused or co-accused

Directions as to the accused giving evidence

In ***BM v R*** **[2017] NSWCCA 133** a trial judge gave comprehensive directions as to the onus and standard of proof, both orally and in writing. He directed that if the jury accepted the accused's evidence they must acquit. He directed that even if the jury did not positively accept the accused's evidence, if it left the jury with a reasonable doubt they must acquit. (Such directions are in accordance with the suggested directions in the Criminal Trial Courts Bench Book.)

On appeal it was contended that by focussing on the accused's evidence the trial judge had placed "an evidentiary onus" on the accused. Basten JA said that the jury could not have been left in any doubt about the Crown bearing the onus of proof. It would have been remiss in the extreme for the judge not to refer to the accused's evidence and explain that even if they weren't affirmatively satisfied that it was reliable or truthful, it might still give rise to a reasonable doubt. It would also have been remiss for the judge not to have referred to trial counsel having made the same point in his address. If the directions had any tendency to deflect the jury from a correct appreciate of who bore the onus it would have been apparent to defence counsel; yet no complaint was raised. Leave under r 4 of the Criminal Appeal Rules was refused.

Warning about potential unreliability of accused's evidence in joint trial erroneously given and inadequately withdrawn

The appellant in ***Proud v R (No 2)*** **[2016] NSWCCA 44** was convicted of murder in a joint trial. During that trial in an exchange with counsel the judge indicated that he intended to give a s 165 warning concerning the potential unreliability of the appellant's evidence. It can be inferred from the transcript that nobody heard or noticed that expression. His Honour later gave that warning in his summing up. Trial counsel for the appellant objected

on the bases that nobody requested the warning thereby rendering s 165 inoperative and that the Crown did not rely upon any part of the appellant's evidence. In response to the objection the judge – with assistance from counsel for the appellant and that of her co-accused – drafted a "clarification" of the warning. His Honour directed the jury that he was not expressing a personal view about the appellant's evidence but simply stating that it was the Crown case that it was in fact unreliable. The jury later returned a guilty verdict.

On an appeal against conviction the appellant alleged that the warning was erroneously given for the reasons identified by trial counsel, and that it was thereafter inadequately withdrawn. R A Hulme J upheld the ground, quashed the conviction and ordered a new trial. Given that the warning was not called for, the question is whether it had the capacity to deflect the jury from its task. It had that effect and the attempted clarification did not remove the damaging aspects of the earlier warning from the jury's consideration. Further, rather than relying upon the appellant's evidence, the Crown vigorously disputed it as it represented the essence of her defence to the incriminating aspects of the Crown case against her.

Unreliability of evidence of a co-accused

In ***Oliveri v R*** **[2011] NSWCCA 38**, the appellant was convicted of a drug supply offence after a joint trial with three co-accused. Evidence given by one of the co-accused was damaging to the appellant's case. It was submitted on appeal that the trial judge erred in not cautioning the jury to take great care with the evidence of the co-accused as he had an interest in seeking to direct away from himself and towards the appellant. The appeal was dismissed. McClellan CJ at CL held (at [18]) that a warning was unnecessary since it would have been patently obvious to the jury that the appellant and the co-accused were trying to escape criminal liability and blame each other.

Complainants (sexual offences)

Murray direction unnecessary where jury already addressed and directed on need to consider weaknesses in complainant's evidence

Mr Neto was convicted of violently sexually assaulting a woman he had been messaging on Instagram. At trial, he argued that the encounter was consensual, the complainant regretted it, and her complaints of rape the following day were an attempt to control the narrative. He appealed on the grounds that the trial judge failed to give a direction with the force of a *Murray* direction and that the verdict was unreasonable: ***Neto v R*** **[2020] NSWCCA 128.**

Hidden JA, Fagan J agreeing, found that the trial judge sufficiently directed the jury to carefully consider the evidence of the complainant. No further direction was sought. The jury was perfectly capable of considering the weaknesses in the complainant's evidence following the adept address of defence counsel, and so no further direction was needed. Basten JA noted in obiter that a complaint that a close scrutiny direction lacked the force of

Murray was fraught with peril in light of s 294AA *Criminal Procedure Act*, which prohibits a judge warning the jury of convicting on uncorroborated evidence.

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

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

Failure to give R v Mitchell direction in a trial for child sex offences

The appellant in ***RSS v R* [2013] NSWCCA 94** argued that his trial for child sexual assault offences had miscarried because the trial judge had failed to give a direction in accordance with *R v Mitchell* (NSW Court of Criminal Appeal, 5 April 1995, unreported) and *R v Mayberry* [2000] NSWCCA 531. That is, the trial judge had failed to warn the jury in explicit terms against using the evidence of one complainant as proof of the guilt of the appellant of offences against another child.

Hall J rejected the appellant's argument. An *R v Mitchell* direction is necessary where the jury might assume, due to the way the evidence is led or the summing up is framed, that the evidence of one complainant was admissible towards the issue of the accused's guilt generally. But in the appellant's case, there was no such suggestion in either addresses or summing up. The summing up was carefully delivered and emphasised the caution to be exercised and the necessary standard of guilt in relation to each case. The issue of "cross-admissibility" was not raised at trial, and no *R v Mitchell* direction was sought. There was no error by the trial judge, in those circumstances, in failing to give a direction along those lines.

Directions concerning complainant not giving evidence at retrial

***PGM (No 2) v R* [2012] NSWCCA 261** was an appeal from a retrial for a sexual assault. The complainant's recorded evidence from the first trial was played at the retrial, but she did not give evidence herself. The trial judge explained to the jury that procedural legislation (s 306C *Criminal Procedure Act 1986*) meant the complainant was not compellable to give

evidence. The direction also contained a general, neutral description of the forensic disadvantage borne by each party as a result. The outline of the direction had been discussed and agreed with trial counsel. The direction became, in due course, a ground of appeal. McClellan CJ at CL held that there was no error in referring to the relevant legislation and the potential consequences for each party in a balanced and fair manner, as was done by the trial judge.

Complaint

Bench Book complaint direction – complaint not independent of complainant

SB was convicted of child sexual offences committed against his daughter. The victim complained to her mother following an after-school care program on sex education. The trial judge gave the jury the complaint direction from the Bench Book, including that they could use the complaint as "some evidence independent of the evidence given to you of that incident by [the complainant]". The use of "independent" was impugned on appeal: ***SB v R* [2020] NSWCCA 207**. Rothman J held that "independent" was erroneous because the complaint was not independent or corroborative of the complainant. However, his Honour found that this did not result in a miscarriage of justice. The appeal was allowed on another ground.

NOTE: The Bench Book complaint direction has been given for years and not been the subject of adverse comment. The content of the same direction was analysed in *DV v R* [2017] NSWCCA 276, where Hoeben CJ at CL noted that the direction was one that had "been given since the promulgation of the *Evidence Act* without challenge". The view taken of the direction here may involve a misconstruction – the Bench Book suggests that the complaint can be used independently of the evidence given in the trial by the complainant. This is confirmed by the subsequent reference to the jury using the complaint as evidence "in addition to the evidence that has been given about [the subject incident] in this courtroom".

Consciousness of guilt

"Edwards direction" – fundamental error not to give full jury direction to clarify the use of consciousness of guilt evidence

In ***Martinez v R; Tortell v R* [2019] NSWCCA 153**, the Crown-led evidence from a witness that one of the accused had threatened her, telling her that she should not tell anyone what she had seen. The trial judge referred to this evidence in her summing up, saying that it could be used as evidence that the accused "had a consciousness of his own guilt at that time in relation to the events". She declined the Crown's request to give a fuller *Edwards* direction. This ground was upheld as well.

Macfarlan JA concluded that "[w]hilst *Zoneff* makes it clear that there is no rigid rule as to when and in what terms directions of the type described in *Edwards* should be given, the

general position established by *Edwards* and subsequent cases is that, in the absence of reasons to do otherwise, those directions should be given". His Honour rejected the Crown's submissions that "the direction 'would simply have emphasised the suggested threat'", finding it to be an insufficient reason not to have given the direction. His Honour considered that there were a number of features justifying a full *Edwards* direction; particularly that without a direction, the jury may have impermissibly reasoned from the threat to a finding of guilt without regard for which offences the threats related to, or whether there were innocent explanations for the threat.

Consciousness of guilt direction required where the prosecutor refers to disposal of evidence by an accused and the jury could be left wondering how to use a lie by the accused

The appellant in ***DN v R* [2016] NSWCCA 252** denied taking topless photos of the complainant, which gave rise to one of the charges for which he was convicted. In cross-examination he was asked whether he disposed of his phone because it contained photos of the complainant consistent with the allegations. The appellant denied this, saying he wasn't sure what happened to the phone three years ago. He said it may have been sold, swapped or broken. The Crown's closing address included, "On the Crown case getting rid of the phone in which the Crown says these photographs were contained, the topless photographs". The appellant appealed against his conviction on the ground that a miscarriage of justice occurred as a result of the prosecutor's use of consciousness of guilt reasoning and/or the trial judge's failure to direct the jury regarding such reasoning.

The Court dismissed the appeal. Beazley P held that a consciousness of guilt direction was required, but in the circumstances there was no substantial miscarriage of justice. Beazley P reviewed the authorities, including the statement *in Zoneff v The Queen* (2000) 200 CLR 234; HCA 28 at [16] that there may be cases where a jury's misunderstanding as to how they should use a lie requires an Edwards-type direction, even if the prosecutor has not put that the lie was told out of a consciousness of guilt. In the present case, Beazley P found that if the jury rejected the appellant's version of what happened to the phone, there was a real question as to what they should do with that part of his evidence. Her Honour found that the way the matter was left to the jury invited the jury to treat the disposal of the phone as evidence of guilt. For this reason, a consciousness of guilty direction was required.

When a consciousness of guilt direction is not required

After Kevin Gall shot and killed the deceased, he disposed of the body; removed the hard-drive from a CCTV camera at the crime scene; destroyed the fired cartridge cases; destroyed a van he had used to transport the body of the deceased to a location where it was hidden; and altered the appearance of a car the deceased had driven to the scene of the crime. The trial judge did not give a consciousness of guilt direction. She was not asked to, but on appeal it was contended that she should have: ***Gall v R; Gall v R* [2015] NSWCCA 69**. Hoeben CJ at CL held that having regard to the issues in the trial, a consciousness of guilt direction was not required. Such a direction is necessary if there is a possible explanation for post-offence conduct that is inconsistent with guilt of the offence charged. But in this case, Kevin Gall's case was that he had acted in self-defence. The post-offence conduct was

only relevant to the Crown's attempt to rebut that claim; there was no other possible explanation for it.

Consciousness of guilt: silence in the face of an allegation of child sexual assault

The appellant in ***McKey v R*** **[2012] NSWCCA 1** was found guilty of a child sexual assault offence. The complainant was the younger sister of a woman (KN) who was about to marry the appellant's good friend (N). The complainant disclosed the offence to KN who repeated it to N. That night, KN tried to call the appellant but was unsuccessful. A few days later, the appellant rang N who said, "we've been given some information about a few days before our wedding that involved [the complainant]". The appellant said he was driving but would call N soon. He did not. In the ensuing days, KN sent the appellant text messages but he did not reply. N gave evidence that he had sent a text message to the appellant saying "I want to know both sides of the story". About a month later the appellant sent a text in which he said that they (N and KN) would not believe him and would only believe the complainant. There was no further contact.

The appellant gave evidence that he became aware of the allegation when he received the call from KN. He claimed that he had said, "I don't know what you're talking about" before the call dropped out. He agreed that he received some text messages but had been advised by his sister, who was a police officer, and a friend that he should not respond.

The Crown Prosecutor suggested in cross-examination that if the allegations were untrue, the appellant would have wanted to protest his innocence "long and loud". It was suggested that he did not do so because the allegations were in fact true. The prosecutor put to the jury in address that they might think that the appellant would be "protesting his innocence from the rooftops" if the allegations were untrue. Defence counsel put alternative arguments. The trial judge simply reminded the jury of the competing submissions and said that it was a matter for them to evaluate.

It was contended on appeal that the Crown had invited the jury to infer that the appellant's silence was because of consciousness of guilt and the trial judge had erred by failing to properly deal with this issue. The Crown submitted that the issue was only relevant to credibility and this is how the prosecutor had approached the issue at trial.

It was held by Latham J (at [31] – [44]) that the cross-examination had invited consciousness of guilt reasoning. At the very least, there should have been a direction as to the care with which the jury should approach such an issue before drawing an inference adverse to the appellant. There was the obvious alternative inference that his silence was not as a result of consciousness of guilt but was because he was acting on the advice of his sister that he should not respond to the allegations.

Forensic disadvantage

Whether judge was required to direct himself concerning forensic disadvantage suffered by accused on trial by judge alone

The appellant in ***Crickitt v R*** **[2018] NSWCCA 240** was a general medical practitioner convicted of murdering his wife by way of a lethal injection of insulin. The Crown case was circumstantial, and did not rely on direct evidence that the appellant had administered the insulin or that an insulin overdose caused death. At a judge alone trial the appellant argued that the central fact in issue was the cause of the death. Blood samples taken from the deceased had been destroyed by the time the matter came to trial. At trial the sentencing judge did not give himself a warning about what was said to be a loss of forensic opportunity due to the destruction of the blood samples. This was the basis of one of the appellant's grounds of appeal.

The Court of Criminal Appeal dismissed the appeal. The Court considered the provisions in s 133 of the *Criminal Procedure Act* that a judge is required to give his or herself a warning that would normally be given to a jury. The applicant contended that a finding that the applicant had killed his wife with insulin may be unreliable because he had lost a forensic opportunity because of the destruction of the samples. The Court considered the transcript of the proceedings at first instance, in which the Crown resisted the applicant's suggestion that a warning should be given. The Court concluded that this was not a case, as the appellant contended, in which there was an absence of evidence capable of proving the Crown's case. Moreover, it was not a case where a finding that insulin caused death was unreliable because it was not capable of proof by direct evidence. Rather, it was a circumstantial case in which the judge was required to determine whether the elements of the case were capable of proving the offence beyond reasonable doubt.

Whether direction concerning forensic disadvantage was required

Binns v R **[2017] NSWCCA 280** was concerned with a conviction for one count of sexual intercourse with a person under the age of 10. The offence was alleged to have occurred in 2008 or early 2009 but no complaint was made to police until 2013. It was contended on appeal that the trial judge should have directed the jury about forensic disadvantage caused by delay under s 165B of the *Evidence Act* because of the impossibility of DNA evidence being adduced. The appeal was dismissed.

Basten JA rejected the appellant's argument that any lapse of time which resulted in a possible source of relevant evidence engaged the obligation to warn the jury under s 165B. It was held that the obligation in s 165B(2) to warn was not engaged because the trial judge was not satisfied that the defendant suffered a significant disadvantage. He held that it is not correct to describe any potential disadvantage as resulting from the lack of DNA evidence in terms of delay of complaint or reporting. The concept of "delay" involves a departure from a time period which would be expected or might be considered reasonable in the circumstances. (What is reasonable or expected in relation to a 9-year old girl as to when an offence might be disclosed?) Moreover, Basten JA held that DNA evidence will not usually fall within s 165B(2) because it will rarely be possible for a judge to say that he or she is satisfied that the absence of such evidence involves a significant forensic disadvantage –

there would be no basis for knowing whether the DNA evidence was inculpatory or exculpatory.

A judge can give a "significant forensic disadvantage" direction under s 165B of the Evidence Act 1995 without a party making an application for such a direction

The appellant in ***TO v R* [2017] NSWCCA 12** was charged with child sexual assault offences alleged to have occurred in June 2012. The complainant told her mother in December 2013 and the police interviewed her in early 2014. The appellant was found guilty after a trial by jury in 2015. On appeal against his convictions, the appellant contended that a miscarriage of justice was occasioned by trial counsel's failure to seek a direction pursuant to s 165B of the *Evidence Act 1995* (NSW) regarding forensic disadvantage suffered as a result of delay. Price J rejected this ground of appeal. There were two questions; first, as neither party applied for a forensic disadvantage direction, was the trial judge permitted to give such a direction on her own volition? Second, if the judge was permitted to do so, was the judge obliged to in the circumstances?

On the first issue, Price J held that the judge was not prevented from giving a forensic disadvantage direction despite the lack of application. This was consistent with the Victorian Court of Appeal's conclusion in *Greensill v R* (2012) 37 VR 258; VSCA 306. Price J considered case law on s 165 *Evidence Act*; it is well established there is no obligation for a judge to give a warning under s 165 if not requested by a party, but the obligation may otherwise arise (e.g. whenever necessary to avoid a perceptible risk of miscarriage of justice or where the courts have special knowledge or experience about a kind of evidence). Price J found further support for the conclusion in ss 9(1) and 165B(5) of the *Evidence Act*. On the second issue, Price J held that a direction was not necessary in the present case. Defence counsel relied upon a witness' evidence to contradict the complainant's account that she was screaming; the forensic disadvantage by reason of delay was not significant, and; if an application had been made it would have been open to her Honour to find that the appellant's misconduct significantly contributed to the delay because the complainant said that she did not complain because the appellant threatened her and she was scared. The appeal was dismissed.

Content of a "Longman" warning

In ***TJ v R* [2009] NSWCCA 257**, a direction was sought pursuant to *Longman v R* [1989] HCA 60; 168 CLR 79. The issue on appeal was whether the trial judge's warning was sufficient – namely, whether the direction must use the word "warning", or whether it is enough to be a warning in substance. McCallum J concluded that the direction was sufficient to satisfy the requirement that it be cast in the form of an authoritative judicial warning of the dangers inherent in the trial. Use of the word "warning" was neither necessary nor always sufficient to satisfy the requirement.

Tendency

Departure from Bench Book direction not appellable error – no need for anti-tendency direction where tendency evidence admitted, lest jury be confused

The applicant in ***BRC v R*** **[2020] NSWCCA 176** appealed his conviction for historical child sex offences committed against multiple complainants. The charged acts were relied on as tendency evidence in support of each other. Uncharged acts were relied upon as context evidence to explain delay in complaint.

On appeal, the applicant argued that the tendency direction was deficient in its departure from the direction in the Bench Book – namely, that a paragraph was omitted warning the jury against reasoning that the applicant was of bad character and more likely to commit offending. Simpson AJA held, dismissing the appeal (Johnson and Hamill JJ agreeing in separate judgments) that the paragraph would only have confused the jury and undermined the admissible tendency evidence. Her Honour noted that departure from the Bench Book is not a ground of appeal.

Tendency direction not required where risk of tendency reasoning is remote, even where tendency application brought and rejected

Hamilton (a pseudonym) v R **[2020] NSWCCA 80** concerned an array of child sexual offences committed against the applicant's five children. A tendency application was refused at the close of the Crown case. *Murray* and separate evidence directions were given, but not an anti-tendency direction. One ground of the applicant's appeal was that this resulted in a miscarriage of justice.

Beech-Jones J held, Adamson J agreeing, that no direction was required. Multi-complainant cases do not always require tendency directions – the question is whether the lack of one caused a miscarriage, which turns on the likelihood the jury engaged in tendency reasoning. Here, the *Murray* and separate evidence directions assuaged that risk – the jury already had to satisfy themselves positively of a relevant child's reliability before convicting on their respective count. In addition, his Honour found that not seeking a tendency direction was a forensic decision – the defence case invited the jury to "join the dots" between the complainants to conclude that they had been poisoned by their mother against the applicant. Therefore, there was no miscarriage.

In addition, Adamson J held that a trial judge cannot delegate the drafting of the summing up – it is a judge's legal responsibility, and delegation would unfairly distract counsel from preparing their closing addresses. Macfarlan JA disagreed with their Honours on the tendency ground, holding that almost every multi-complainant sexual assault case will require an anti-tendency direction.

Witnesses

"Murray direction" – need for direction determined by reference to unreliable evidence warning

Counsel who appeared at trial for the appellant in ***Laughton v R*** **[2019] NSWCCA 74** sought a Murray direction (often given where the Crown case depended upon the acceptance of a single witness in accordance with R v Murray (1987) 11 NSWLR 12 at 19). Counsel did not press the request after the judge pointed out that this would require him to also inform the jury of evidence independent of the witness which supported his evidence. However, different counsel sought leave under r 4 of the Criminal Appeal Rules to contend on appeal that the judge erred by not giving the direction.

Meagher JA and Schmidt J engaged in an analysis of the quality of the witness' evidence and referred to cases, some of which were concerned with whether an unreliable evidence warning should be given in order to avoid a perceptible risk of a miscarriage of justice. Button J agreed with Meagher JA that leave under r 4 should be refused but declined to consider whether a "qualitative analysis" of the evidence was appropriate in the context of an application for a Murray direction.

Comment: the engagement of two members of the Court in a qualitative analysis of the potential unreliability of a witness' evidence in determining whether a Murray direction was required appears to conflate the question whether such a direction was required with whether it is necessary to give a warning in relation to evidence that may be unreliable for reasons that might not be fully appreciated by the jury. In this case, the only aspect of the witness' evidence that was identified where the jury may not have been aware of reasons why the evidence may be unreliable was his purported recognition of the accused as his assailant. The trial judge gave a specific warning to the jury about that evidence. Other bases for potential unreliability were recognised as being matters readily apparent to the jury such that an unreliable evidence direction would not normally be required: *R v Stewart* (2001) 52 NSWLR 301; [2001] NSWCCA 260 at [38], [98]-[101].

The fact that a *Murray* direction was not designed to warn about potential unreliability was made plain by Lee J in the oft-quoted passage of his judgment set out below. The direction was clearly intended to bring home to the jury the high standard of proof required of the Crown and the fact that its case depended upon the word of a single witness. Lee J said (at 19):

> "In all cases of serious crime it is customary for judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in; but a direction of that kind does not of itself imply that the witness' evidence is unreliable."

When a Murray direction and a s 165 Evidence Act 1995 direction are not required in child sexual assault trials

The applicant in ***AL v R*** **[2017] NSWCCA 34** was convicted by a jury of three counts of sexual intercourse with a child under 10. At the time of the offending the applicant was 12-13 years old. The complainant was a younger neighbour, 4-5 years old. At issue on appeal was whether the trial judge was required to give two jury directions which had been requested by the applicant's trial counsel and refused; a Murray direction cautioning the jury that where there is only one witness, their evidence must be "scrutinised with great care" (*R v*

Murray (1987) 11 NSWLR 12 at 19D-E) and an unreliable evidence direction pursuant to s 165 of the Evidence Act 1995. The applicant conceded that s 294AA of the *Criminal Procedure Act 1986* applied, preventing the trial judge from giving any warning or suggestion to the effect that complainants as a class are unreliable witnesses. On appeal, it was contended that the trial judge erred by refusing to give those warnings. The applicant contended that ten features (listed in full at [62]) of the evidence required a warning of the Murray/s 165 nature to guard against a miscarriage of justice.

The Court (Leeming JA, Schmidt and Wilson JJ) held that the trial judge was not obliged to give either the s 165 warning or a Murray direction. There was no risk of a miscarriage of justice. The first feature identified by the applicant (that the Crown case relied solely on the evidence of the complainant) was addressed by directions on burden and standard of proof. Some features were the subject of directions about delay and consequent disadvantage. Other features (eg the complainant's age and the effect of passage of time on the memory of a child of that age) were not permissibly subject of a warning due to s 165A of the *Evidence Act* and s 294AA of the *Criminal Procedure Act*.

The Court held that any direction cautioning the jury about the possible unreliability of a child complainant's evidence must focus on matters relevant to the particular child and the particular circumstances. On the remaining features (eg the complainant's evidence of memory and nightmares), the Court held that they were matters evident to the jury, who saw the complainant give evidence and answer questions in cross-examination that were directed to the possible unreliability of his evidence. Trial counsel for the applicant gave a comprehensive address noting all the features which could point to unreliability in the complainant's evidence. The distinction drawn by the trial judge between matters of which the jury could have little understanding or appreciation (which may require warnings about unreliable evidence) and matters a jury is well able to assess without particular assistance is supported by *The Queen v GW* [2016] HCA 6 at [5]; where the definition of a "perceptible risk" included the quality that it "may not be evident to a lay jury".

Murray direction not to be given in sexual assault trial

Mr Ewen was found guilty of two counts of sexual intercourse without consent in a judge alone trial. On appeal in ***Ewen v R* [2015] NSWCCA 117** it was argued that the trial judge erred in failing to give himself a Murray direction. A Murray direction is given in circumstances where the guilt of an accused is sought to be established based on the evidence of a single witness and accordingly directs that the evidence be scrutinised with great care. The Court found that s 294AA(2) *Criminal Procedure Act* prohibits a *Murray* direction being given in a sexual assault trial. Pursuant to s 294AA(2), a warning to the jury of the danger of convicting on the uncorroborated evidence of any complainant is prohibited. Thus, it was held that a *Murray* direction, based only on the absence of corroboration, is tantamount to a direction that it would be dangerous to convict on the uncorroborated evidence of the complainant.

Note: This decision does not obviate the need for a Murray direction in cases not involving prescribed sexual offences.

Whether witnesses have an interest in the subject matter of their evidence

In ***Hargraves and Stoten v The Queen*** **[2011] HCA 44; (2011) 245 CLR 257**, the appellants were charged with offences involving tax avoidance schemes and the only issue in dispute was whether they acted dishonestly. Both gave evidence at trial. The trial judge directed the jury as to how to assess the credibility of a witness, referring to whether they had an interest in the subject matter of the evidence, citing as examples "friendship, self protection, protection of the witness' own ego". On appeal to the Queensland Court of Appeal, it was held that the trial judge had misdirected the jury about how to assess the evidence of each accused, but dismissed the appeal on the basis that no substantial miscarriage of just transpired.

The High Court of Australia dismissed the appeal but held that the trial judge had not misdirected the jury, overturning the finding of the Queensland Court of Appeal. The Court considered its earlier decision in *Robinson v The Queen* (1991) 180 CLR 531, principally whether it created a new or a pre-existing principle. The plurality held that the principal in *Robinson* formed part of a broader over-arching principle relating to a trial judge's instructions, namely that "[t]he instructions which a trial judge gives to a jury must not, whether by way of legal direction or judicial comment on the facts, deflect the jury from its fundamental task of deciding whether the prosecution has proved the elements of the charged offence beyond reasonable doubt": at [45]. The plurality went on to find that the trial judge's directions, as a whole, did not do so.

Comment about leave to cross-examine being granted under s 38 Evidence Act 1995

In ***Lee v R*** **[2009] NSWCCA 259**, leave was granted for the Crown to cross-examine the wife of accused. The judge then informed the jury that he had granted leave. No complaint was raised at the trial but on appeal it was contended that this was tantamount to the judge telling the jury that he thought the witness was a liar who was in collusion with the accused and so should not be believed.

Grove J (at [36] – [37]) rejected this assertion. He characterised what the judge said as simply being things that would have been apparent, or would become apparent, to the jury in any event. He added (at [38]) that if a judge does elect to comment to a jury about a s 38 ruling (which is not obligatory), care should be taken to avoid the possibility of any implication that the mere making of the ruling is an adverse reflection on the creditworthiness of the witness.

N. Directions on defences

Intoxication

Intoxication – some evidence but no error in trial judge not leaving the issue to the jury

The offender in ***Sullivan v R*** **[2012] NSWCCA 41** was found guilty of murder. He said in his evidence that he had consumed illicit drugs on the day of the offence and that he was

"cruising, just out of it, whacked". The trial judge directed the jury to take this into account on the issue of self-defence but did not direct that it was relevant to whether the Crown had proved the necessary intent. Blanch J (at [22] – [32]) reviewed authorities concerning intoxication and its relevance to specific intent. He referred to the obligation of a trial judge to alert the jury to all relevant legal considerations, even if the defence does not rely upon them. However, he concluded that in this case there was such minimal and imprecise evidence on the issue that there was no error in the judge not having left it to the jury.

Obligation to leave "Carey defence" where it was possible for the jury to conclude the intention was to return drugs

The appellant in ***Alliston v R*** **[2011] NSWCCA 281** had been travelling in a motor vehicle with her partners when police found 129 g of methylamphetamine in her handbag and a further 973.5 g under the vehicle's back seat. At trial, A denied knowledge of the larger quantity and did not directly give evidence about to her intentions for the quantity in her bag. She was charged with supplying a large commercial quantity of the drug (i.e. both quantities), but convicted on the alternative of supplying a commercial quantity. It was argued by counsel at trial that the "Carey defence" should be left to the jury in relation to the smaller amount but the trial judge declined on the basis that there was an absence of evidence that she intended to return the drugs to her partner. On appeal, it was contended that the judge had erred in this respect because the relevant inference was available from her testimony.

McClellan CJ at CL held (Fullerton J agreeing, Simpson J disagreeing as to whether the defence should have been left) that the defence should have been left but that no miscarriage of justice had occurred. Pursuant to the decision in *R v Carey* (1990) 20 NSWLR 292, before the appellant could be guilty of supply the jury must have been satisfied that she both had possession of the drugs and had them for the purpose of supply. She had been asked at trial, "You knew you were going to be stopped at Glen Innes?" She replied, "Well, I didn't know. I didn't know what he was doing with them. I didn't know if he was taking them back to Peter or who, where." It was contended that it was implicit in this that the drugs belonged to the partner and the inference was available that she intended to return them to him. McClellan CJ at CL found that the inference was open to the jury to conclude that she had the intention to return the drugs to her partner and the "Carey defence" should have been left. However, the Court concluded that the jury must have found that the appellant was in possession of the larger quantity of the drug (for which no Carey defence was claimed) so no miscarriage of justice had occurred.

Self-defence

Defences of sudden and extraordinary emergency and self-defence not left to jury

The appellant in ***B v R*** **[2015] NSWCCA 103** was convicted of an offence against s 65Y *Family Law Act* when she removed her child from Australia at a time when she knew that a supervised contact order of the Family Court required the child to spend time with the child's father. At trial the appellant contended that her son was suffering ongoing harm as a result of the Family Court order. She believed that a further order permitting the father to

have unsupervised access was imminent and she felt it was necessary to flee the country in order to protect her son. In the Court of Criminal Appeal she submitted that the trial judge erred in refusing to leave the defences of sudden and extraordinary emergency and self defence to the jury. The central issue in the appeal was whether the evidence was capable of supporting as a reasonable possibility, that the belief by the appellant that her response was the only reasonable response, was objectively reasonable. The Court was satisfied that it was not. There were lawful channels available to the appellant to protect herself and her son from any harm. The Court cannot and should not condone unlawful action arising out of a distrust of the Family Court processes.

Self-defence should not be left where it does not arise on the evidence

The appellant in ***Flanagan v R*** **[2013] NSWCCA 320** was convicted of wounding with intent to cause grievous bodily harm. It was her case at trial she did not cause the relevant injury. No direction was sought on self-defence, but she appealed on the basis that it should have been left to the jury. The Court of Criminal Appeal held that even if a direction had been sought on self-defence, the trial judge would and should have refused to give it, given that the elements of self-defence could not be made out on the evidence. The appellant denied the conduct that was the subject of the charge and so there was no evidence to which the judge could have directed the jury.

O. Other directions

Acquittals

Directions to a jury concerning an accused's earlier acquittal

Jeffrey Gilham's parents and brother were stabbed to death in the family home: ***Gilham v R*** **[2012] NSWCCA 131**. He claimed that his brother killed their parents and he, under provocation, then killed his brother. He was charged with murder but the Crown accepted his plea of guilty to manslaughter, conceding that it could not disprove his explanation. Many years later he was charged with the murder of his parents, the Crown now contending that his explanation was false and that he was responsible for the three killings. One of the many issues at his trial, and on appeal, was whether he was given the full benefit of his earlier acquittal on the charge of murder in respect of his brother. The Court (McClellan CJ at CL, Fullerton and Garling JJ) found that the conduct of the Crown case had not involved impermissible controverting of the acquittal, it being a necessary step in the attempt to prove that Gilham murdered his parents to contend that he had also murdered his brother. However, it was held (at [150] – [155]) that in explaining the effect of the earlier acquittal to the jury the trial judge had erred by failing to tell them that it constituted a formal acknowledgement by the sentencing court that the Crown could not, as at the time of sentencing, negative the reasonable possibility that the brother had killed the parents and that, in doing so, he provoked Gilham to kill him. The trial judge had in fact told the jury that the reason the Crown accepted the plea to manslaughter was "neither here, nor there".

Admissions

Specificity in directions on conduct that is said to illustrate admission of guilt

Mr Christian was charged with seven child sex offences allegedly committed against a complainant at various times when the complainant was between the ages of five and thirteen. The Crown sought to use a recorded conversation between the victim and Mr Christian where the latter had failed to unequivocally deny certain allegations as evidence of incriminating conduct. Mr Christian was convicted, and appealed on the ground, amongst others, that the trial judge had provided inadequate directions on the use the jury could make of the telephone call: ***Christian v R* [2012] NSWCCA 34**. McClellan CJ at CL held that the trial judge should have given more specific directions. In particular, he pointed out the ambiguity of the conversation in the context of the historical spread of the offences and the fact that Mr Christian and the complainant had had consensual adult sexual relations. The trial judge was required to direct the jury to consider particular parts of the conversation, in the context of the whole, in relation to specific charges on the indictment and to remind the jury of the available alternative explanations. The jury ought also have been warned against engaging in tendency reasoning when the evidence was not led for that purpose.

Alternative hypotheses in circumstantial cases

In a circumstantial evidence case, should a judge alert a jury to a rational hypothesis inconsistent with guilt that is not relied upon by the defence?

In ***Nguyen v R* [2015] NSWCCA 78** the Crown case was that the appellant was involved in a drug transaction when her former husband received for the purpose of supply a quantity of heroin from another person. She had been present at a meeting between the two men but there was no evidence of her having participated in discussions. There were intercepted telephone calls but none involving her. She was present when the drug was handed over by the supplier and she was in a car with her former husband when he was arrested. The drugs were found in a bag at her feet on the passenger side of the car. She gave an account to police that involved lies and inconsistencies.

It was held that the verdict of guilty was unreasonable and not supported by the evidence. The Court made observations as to the obligation of a trial judge to draw a jury's attention to a potential further rational hypothesis inconsistent with guilt not relied upon by the defence. In this case the hypotheses presented to the jury by the parties were either she was knowingly involved or she was completely ignorant. An alternative hypothesis was that she was aware of, but not involved in, what her former partner was doing. The Court indicated that a judge should be alive to a situation as presented by this case but did not suggest that in every circumstantial evidence case there was a requirement of the judge to draw the jury's attention the existence of another rational hypothesis not relied upon by the defence; it very much depended upon the circumstances of the case at hand. Attention was invited to the discussion in *R v Sung Eun Park* [2003] NSWCCA 203 at [43] ff.

Defences – Liberato direction

When and in what terms is a Liberato direction required?

In a trial for two charges of rape (s 349, *Criminal Code (Qld)*), the complainant gave sworn evidence at the trial, but the accused did not. Instead, the defence relied on what were said to be exculpatory statements given by the accused in a police statement. An appeal from the decision of the Queensland Court of Criminal Appeal to dismiss the appeal – in which it was alleged that there was a miscarriage of justice because of the failure to give a *Liberato* direction – was dismissed by a majority of the High Court in ***De Silva v The Queen*** **[2019] HCA 48**.

Kiefel CJ, Bell, Gageler, and Gordon JJ (Nettle J dissenting) held that the circumstances in which *Liberato* direction is required will depend on the issues and conduct of the trial. In cases where it was not put that the jury's determination depends on which of the conflicting prosecution of defence evidence is believed, the direction may not be necessary. However, the *Liberato* direction should be given in cases where the trial judge perceives that there is a real risk that the jury might view their role as involving a choice between the prosecution or defence evidence – that is, if the jury is "left with the impression that the evidence on which the accused relies will only give rise to a reasonable doubt if they believe it to be truthful, or that a preference for the evidence of the complainant suffices to establish guilt". If this risk arises, it does not matter if the accused's version is given on oath or in the form of answers in a record of interview (as in *De Silva*).

In the context of the case in *De Silva*, the majority framed the *Liberato* direction in the following terms:

> "(i) if you believe the accused's evidence (if you believe the accused's account in his or her interview with the police) you must acquit;
> (ii) if you do not accept that evidence (account) but you consider that it might be true, you must acquit; and
> (iii) if you do not believe the accused's evidence (if you do not believe the accused's account in his or her interview with the police) you should put that evidence (account) to one side.
> The question will remain: has the prosecution, on the basis of evidence that you do accept, proved the guilt of the accused beyond reasonable doubt?"

The giving of a Liberato direction where relevant evidence is led to defend provocation case

The appellant in ***Iskander v R*** **[2013] NSWCCA 256** was charged with murder. He pleaded guilty to manslaughter, raising provocation. The Crown did not accept his plea and he was convicted of murder after a trial. On appeal he argued that the trial judge should have given a direction based on *Liberato v The Queen* (1985) 159 CLR 507. The conventional form of that direction reminds the jury that evidence given for the defence may cast sufficient doubt on the Crown case even if not positively accepted in its own right. In this case, the appellant argued that the direction should have been given in relation to evidence led for the defence

about what the deceased said that sought to resist the Crown's attempt to negative provocation.

Macfarlan JA considered the appellant's argument that the jury might have been led to erroneously believe that if they rejected the defence evidence in this regard provocation failed, rather than having to consider whether the Crown had in fact negatived it. His Honour noted that the trial judge had told the jury that the defence evidence need only be "possibly true". And the only evidence of provocation was from this defence evidence. So if the jury considered that the evidence was not "possibly true", the defence of provocation was bound to fail. A *Liberato* direction was not called for in the circumstances.

Logically consistent verdicts – Markuleski direction

Markuleski direction not crucial in every word against word case – ultimate question is whether it is required as a matter of fairness

The appellant in ***R v Keen*** **[2020] NSWCCA 59** was charged with a number of drug supply and manufacture offences. He pleaded guilty to the former and not guilty to the latter. Much of the Crown case relied on evidence from his accomplices. The jury found him not guilty of three counts but guilty of one count. The appellant challenged this conviction on the ground that, inter alia, there should have been a *Markuleski* direction.

McCallum J held, dismissing the appeal, that a *Markuleski* direction is not required simply because a case is word against word – the essential question is one of fairness. Her Honour held that, in any event, the case was not truly word against word. The acquittals could have been founded on the weakness of other Crown evidence (the drugs were not recovered). The conviction could have been founded on other direct and circumstantial evidence. The evidence of the accomplices was accompanied by judicial warnings and directions. Therefore, there was no unfairness.

Markuleski direction – no requirement for precise form of words

A taxi driver sexually assaulted a passenger. He was found guilty on a count of sexual intercourse without consent, and not guilty on a count of indecent assault. In ***Ganiji v R*** **[2019] NSWCCA 208**, Basten JA noted that in Markuleski itself, Spigelman CJ said of the direction: "The precise terminology must remain a matter for the trial judge in all the particular circumstances of the specific case". His Honour then extracted the direction given by the trial judge, finding that there was "no basis to quarrel with the terms" and noted that the defence did not complain about it. As to the assertion that the judge had made a "personal observation", he considered that it could not be characterised as such. His Honour concluded by saying, "An attempt to insist on precise and unqualified words for such a direction is not consistent with authority and is wrong in principle."

Pleas midway through trial

Co-accused's plea of guilty in front of the jury did not unfairly prejudice trial

The applicant in ***Humphries v R*** **[2015] NSWCCA 319** was jointly indicted with his brother. Following the close of the Crown's case, the brother was re-arraigned and pleaded guilty in front of the jury. The applicant applied to have the jury discharged submitting that the circumstances of his brother's plea were unfairly prejudicial towards his own trial. The judge refused the application and instead directed the jury not to take the guilty plea into account in the case against the applicant. He was later convicted and subsequently appealed against the judge's refusal. Bellew J noted that the application of s 157 of the *Criminal Procedure Act 1986* – providing for the discharge of the jury from giving a verdict following a change of plea – meant that there was no requirement to invite, as her Honour did, the jury to return a verdict of guilty against the brother. The preferable course was to take the plea in the jury's absence. Nonetheless, the comprehensive direction given by the judge meant no miscarriage of justice occurred. Although counsel for the appellant at trial did not ask for the direction to be repeated, it is prudent for the direction to be given both when the plea is entered and again in the summing up.

Prasad direction

Prasad direction contrary to law and should not be given

The Crown appealed to the High Court from a decision of the Victorian Court of Appeal in which a majority (Weinberg and Beach JJ, Maxwell P dissenting) answered a referred question of law by finding that a *Prasad* direction is not contrary to law. In ***Director of Public Prosecutions Reference No 1 of 2017*** **[2019] HCA 9**, the High Court allowed the appeal. A Prasad direction is taken to mean that at any time after the close of the prosecution case, the trial judge can direct the jury to acquit the accused if it considers the evidence insufficient to support a conviction. It is a direction commonly sourced in what was said by King CJ in *R v Prasad* (1979) 23 SASR 161 at 163 in obiter:

> "It is, of course, open to the jury at any time after the close of the case for the prosecution to inform the judge that the evidence which they have heard is insufficient to justify a conviction and to bring in a verdict of not guilty without hearing more. It is within the *discretion* of the judge to inform the jury of this *right* ..." (emphasis added)

The High Court framed the legal question for determination as: "whether the trial judge possesses the power to give a *Prasad* direction under the common law of Australia". The Court rejected the considerations adopted by the Court of Appeal in favour of retaining the *Prasad* direction, including efficiency and restoring the liberty of the accused at the earliest point, finding it is unsuitable for complex or multi-defendant trials, and that its value is limited even in uncomplicated single accused trials. The Court then approved what was said by Maxwell P, finding he was right to hold that the obiter dictum conferring to the trial judge a discretion to inform that jury of their right to return an acquittal without more "does not cohere" with the High Court's decision in *Doney*, in which the practice of directed acquittals based on the judge's assessment of the evidence was rejected because of the way it infringed on the jury's function.

Even though the jury ultimately makes the decision, the Court considered that it could not "exclude the possibility" that juries are unduly influenced by the imprimatur of the judge on the capacity of the evidence to support the conviction. In this way, the *Prasad* direction "is inconsistent with the division of functions between judge and jury and, when given over objection, with the essential features of an adversarial trial." Finally, the Court found that the direction prevents the jury from making a decision based on the evidence, final addresses of the prosecution and understanding of the law based on the judge's summing up – and "[a]nything less falls short of the trial according to law".

"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.

Shepherd Directions

When is a "Shepherd Direction" required?

In ***Rees v R* [2010] NSWCCA 84**, it was submitted that a jury should have been directed that one of the circumstances relied upon by the prosecution was an indispensable intermediate fact that they should be satisfied had been proved beyond reasonable doubt. Beazley JA held otherwise and in the course of doing so provided a detailed discussion (at [48] – [55]) of the circumstances in which a direction of the type referred to in *Shepherd v R* [1990] HCA 56; 170 CLR 573 should be given.

Standard, burden or onus of proof

Posing questions as to whether there is a "reasonable possibility" in relation to a matter the Crown must disprove

The appellant in ***Towney v R*** **[2018] NSWCCA 65** was tried for murder and argued that he was acting in self-defence. In summing up, the trial judge posed six questions to the jury in a "question-trail" style document. First, whether the jury were satisfied beyond reasonable doubt that the deceased died; second, whether it was a direct result of the stab wound; third, whether there was a reasonable possibility that the accused believed that his actions were necessary; fourth, whether there was a reasonable possibility that his response was a reasonable one; and finally whether the jury were satisfied beyond reasonable doubt that accused intended to kill or cause grievous bodily harm. (There was also a sixth question concerning provocation.) The appellant contended on appeal that the trial judge erred by failing to direct that the Crown bore the onus of negativing any reasonable possibility that the appellant was acting in self-defence and that there was an attempt to explain the standard of beyond reasonable doubt as the converse of the existence of a reasonable possibility.

Hoeben CJ at CL concluded that the trial judge had not misdirected the jury. His Honour rejected the fundamental premise of the appellant's argument that expressing questions three and four in terms of whether there was a "reasonable possibility" was a reversal of the onus of proof and that that premise was contrary to authority in *Moore v R* [2016] NSWCCA 185. His Honour noted that special leave to appeal to the High Court had been refused: *Moore v R* [2016] HCASL 323. He quoted at length the decisions of Basten JA and R A Hulme J where their Honours held that there are a number of High Court authorities in which the existence of a reasonable possibility of an exculpatory matter had been expressed as the corollary of the Crown not having proved guilt beyond reasonable doubt. In the present case, Hoeben CJ at CL held that the trial judge had repeatedly used the terminology of "beyond reasonable doubt", together with its corollary, and stressed that the Crown bore the burden of proof. His Honour held that in doing so, the trial judge was merely restating the standard of proof. The appeal was dismissed.

Hoeben CJ at CL rejected the appellant's submission that it is an error of law for a judge to attempt to explain the meaning of "beyond reasonable doubt" to a jury. While the High Court has cautioned against such a task, his Honour held that there are a number of authorities where such an explanation did not amount to error. His Honour concluded that even if it had been found that his Honour did seek to explain the meaning of "beyond reasonable doubt", that the explanation he gave was in accordance with Moore v R. His Honour held that the directions given were satisfactory and that no error was established.

Jury directions on "beyond reasonable doubt"

The trial judge in ***The Queen v Dookheea*** **[2017] HCA 36; (2017) 262 CLR 402** directed the jury that the Crown had to satisfy them "not beyond any doubt but beyond reasonable doubt". In the Victorian Court of Appeal it was held that the judge had erred. The High Court held that mentioning the distinction may be confusing, but a miscarriage of justice will only have occurred if the jury would have got a false perception of what the Crown has to prove. This is to be determined based upon the summing up as a whole, as the jury would have understood it, and (if applicable) how the defendant's competent counsel reacted to the relevant direction. The High Court also said that the practice of contrasting "beyond reasonable doubt" with the civil standard was to be encouraged: "It is an effective means of

conveying to a jury that being satisfied of guilt beyond reasonable doubt does not simply mean concluding that the accused may have committed the offence charged or even that it is more likely than not that the accused committed the offence charged."

Written jury directions asking if there was "a reasonable possibility" reversed the onus of proof

The appellant in ***Hadchiti v R*** **[2016] NSWCCA 63** raised self-defence and provocation at his trial but the jury found him guilty of murder. He appealed against conviction on the ground that written directions given to the jury erroneously reversed the onus of proof. They contained a question trail asking "is there a reasonable possibility…?" without making any reference to the requirement that the Crown must exclude such possibilities. The Court (Leeming JA, Hall and Bellew JJ) allowed the appeal and remitted the matter for retrial. It was held that the questions posed wrongly equated beyond reasonable doubt with the existence of a reasonable possibility. The accused in this case discharged the evidentiary onus as to a reasonable possibility of self-defence. The central point is that the reasonable possibility was one that the Crown had to eliminate as part of its onus of proof. It was important that the written directions made that clear. There is a critical difference between an instruction to the effect that the Crown must remove a reasonable possibility in order for a guilty verdict to be available and an instruction that turns on whether the jury has found there to be a reasonable possibility in order to avoid a guilty verdict. The oral summing up, correctly emphasising the Crown's obligation to prove beyond reasonable doubt, did not displace the force of the seven-page written direction. The latter will generally overpower the former because of (a) the power of the written word, (b) the fact that it is with the jury at the critical time, and (c) it is apt to be read repeatedly. While written directions can undoubtedly be useful, in the circumstances of this particular case, a series of questions such as those posed were not likely to assist the jury.

In ***Moore v R*** **[2016] NSWCCA 185**, it was held by Basten JA and R A Hulme J (Adamson J dissenting), that there was no error in a trial judge directing a jury in terms of their considering whether there was "a reasonable possibility" of an exculpatory matter (self-defence). An application for special leave to appeal to the High Court was dismissed: *Moore v The Queen* [2016] HCASC 323.

Avoid trying to explain 'beyond reasonable doubt'

The trial judge in ***RWB v R; R v RWB*** **[2010] NSWCCA 147** fell into error when he attempted to explain to a jury when a doubt is reasonable and when it is not, but there was no miscarriage. Simpson J identified two exceptions to the total prohibition on expanding upon the "formulaic direction": where counsel's address is such as to call for some remediation and where the jury seeks additional assistance. In relation to the latter she noted that the response in *R v Southammavong; R v Sihavong* [2003] NSWCCA 312 that, "the words 'beyond reasonable doubt' are ordinary everyday words and that is how you should understand them" was held not to have constituted a miscarriage of justice.

Unanimity

Unanimity – where discrete acts each capable of proving an essential element

A drug supply offence was based upon a person's alleged possession of bags of drugs in a variety of quantities in premises he controlled. On appeal it was contended that the trial judge had erred in giving a direction that the jury needed to be unanimous in finding that the accused possessed the drug, but not unanimous as to which bags he possessed. The contention was made good: ***Direction Restricted*** **[2019] NSWCCA 6**. Bathurst CJ held that the effect of the trial judge's direction was to leave open to the jury the power to convict even if they could not be unanimously satisfied that a specific bag of drugs was in the appellant's possession – it was sufficient if one juror was satisfied as to possession of one bag, and another juror was satisfied as to possession of a different bag. This was an erroneous direction.

Bathurst CJ referred to the correct approach to jury unanimity set out by Maxwell P in *The Queen v Klamo* (2008) 18 VR 644; [2008] VASCA 75 citing with approval *The Queen v Walsh* [2002] VSCA 98; (2002) 131 A Crim R 299 at [75]. There were two distinct types of cases. In one type of case, alternative legal bases of guilt are proposed by the Crown but depend substantially upon the same facts and unanimity about the basis of guilt is not required. The other type of case could involve an offence where "a number of discrete acts is relied upon as proof and any one of them would entitle the jury to convict"; if the discrete acts go to proof of an essential ingredient of the crime, the jury must agree upon the act which in their opinion does constitute the ingredient. The present case was in the latter category.

P. Verdicts

Alternative verdicts

Leaving alternate verdicts to the jury – error if judge fails to leave manslaughter where such a verdict is open on the evidence

A man was discovered lying in a driveway with fatal stab wounds. Two men were charged with murder. From the nature of the stabbing, it was evident that there was an intention to kill or inflict grievous bodily harm upon the deceased, but there was no decisive evidence as to which accused did the stabbing. Each contended that he was not directly present when it occurred. The way in which the evidence in the Crown case was put to the jury was that each accused was liable by way of a joint criminal enterprise to inflict GBH or kill the deceased. The trial judge left manslaughter to the jury only on the possibility that the stabbing was an unlawful and dangerous act, but that the person who was responsible "did not intend to kill or really seriously injure [the deceased], maybe because of intoxication". The jury returned verdicts of murder for both accused. Their appeals against conviction were upheld: ***Martinez v R; Tortell v R*** **[2019] NSWCCA 153**.

A ground of appeal was that the trial judge erred by "failing to leave to the jury the possibility of an alternative verdict of manslaughter on the basis of a joint criminal

enterprise involving an agreement falling short of intentional infliction of grievous bodily harm". After a thorough review of the authorities and principles relevant to the issue, Macfarlan JA held that a verdict of manslaughter should be left to the jury if it is "reasonably open on the evidence"; that the Crown on appeal cannot use the jury's verdict of murder as a basis to refute a ground of appeal of this type; the trial judge has a duty to leave the verdict of manslaughter even if the accused's counsel fails to make a request; and that an appeal of this type is not precluded by the fact that manslaughter was left on one particular basis if the contention is that it should have been left on another basis.

His Honour was not convinced that "it was not open to the jury to conclude that the Crown had not excluded as a reasonable possibility that any agreement between [the accused] was for the infliction of a lower level of violence on [the deceased] than grievous bodily harm". This meant that the verdict of manslaughter on this wider basis was open on the evidence and should have been left to the jury.

No miscarriage where alternative counts not left to the jury following acquiescence by counsel for the accused

The appellant in ***GM v R*** **[2017] NSWCCA 298** pleaded not guilty to multiple counts of sexual misconduct with a child under the age of 10. He denied the misconduct but there was also an issue whether the child was under the age of 10 at the relevant times. The trial judge raised the issue of whether alternative verdicts should be put to the jury. Counsel for the accused did not indicate that he wanted alternative verdicts to be put to the jury. Notwithstanding the silence of his counsel at trial, GM contended on appeal that the possibility of alternative verdicts ought to have been left to the jury.

The appeal was dismissed. Adamson J held that the silence of counsel for the accused as to whether alternative verdicts should have been left to the consideration of the jury reflected his forensic decision that it was more advantageous for the appellant to retain the chance of acquittal on the basis that the jury found the complainant to have been over the age of ten, than to face the possibility of being convicted of lesser charges.

(Special leave to appeal to the High Court was refused: [2018] HCASL 152.)

No error in failing to leave alternative verdicts to the jury contrary to submissions of both parties

The appellant in ***Finch v R*** **[2016] NSWCCA 133** was convicted by a jury of two drug offences including the supply of a large commercial quantity of LSD contrary to s 25(2) of the *Drug Misuse and Trafficking Act 1985* ("the Act"). The appellant appealed against his conviction for that offence on the basis that the judge erred by not leaving alternative verdicts to the jury. The judge declined to do so because neither party raised that possibility in final address, and his Honour was of the opinion that to leave alternatives would be contrary to the interests of the accused. Payne JA dismissed the ground of appeal holding that the judge's decision was in accordance with the test stated in *James v The Queen* [2014] HCA 6; 253 CLR 475. There was no evidentiary basis for the jury to find that the appellant possessed a commercial quantity rather than a large commercial quantity of LSD and

therefore there was no error in refusing to leave that alternative to the jury. With respect to the alternative charge of supply simpliciter, the judge was correct not to leave the alternative charge to the jury – contrary to submissions of defence counsel and of the Crown – for the reasons identified by his Honour. Leaving that alternative could distract the jury from their task of deciding the real issue in the case of whether the appellant's Carey defence was made out, that is, whether they were satisfied that his possession of the drugs was merely momentary and that he intended to return them to their owner.

Trial judges are not obliged to leave alternative verdicts in all cases

The appellant in ***James v The Queen*** **[2014] HCA 6** was charged with intentionally causing serious injury, alternatively recklessly causing serious injury. While the jury was deliberating, the prosecutor raised for the first time whether the jury should be instructed on the availability of another alternative, intentionally causing injury. The trial judge reasoned that to do so would be to deprive the accused the possibility of acquittal. Counsel for the accused remained silent on this point, which was taken as agreement. The Victorian Court of Appeal dismissed an appeal brought by Mr James, who argued that the trial judge occasioned a miscarriage of justice. Priest JA in dissent held that statements in *Gilbert v The Queen* [2000] HCA 15 and *Gillard v The Queen* [2003] HCA 64 with respect to the failure to leave manslaughter on an indictment of murder applied by parity of reasoning. The High Court (Gageler J dissenting) agreed with the majority of the Court of Appeal. *Gilbert* and *Gillard* are concerned with the wrongful neglect to leave manslaughter to the jury where it is open to do so, which is informed by history and the gravity of conviction for murder. They do not state any wider principle regarding the obligation to leave alternative verdicts. Whether a miscarriage of justice was occasioned involves an assessment of what justice to the accused required in the circumstances of the case, taking into account the issues in the trial and the forensic choices of counsel. Forensic choices of counsel are not determinative, however, and the ultimate assessment rests with the trial judge, which was correct in this case.

When manslaughter in the alternative should not be left to the jury

The notorious facts in ***Lane v R*** **[2013] NSWCCA 317** involved the disappearance of a newborn child while in the custody of her mother, Ms Lane. No body was ever found. After a substantial police investigation, Ms Lane was charged with, and ultimately convicted of, murder. On the conviction appeal, it was argued, despite the lack of any suggestion to the effect at trial, that the judge had been in error in not leaving a manslaughter verdict open to the jury.

The Court (Bathurst CJ, Simpson and Adamson JJ) considered that the success of this ground hinged on whether there was sufficient evidence to support a verdict of manslaughter on either of the two bases put forward on appeal: by unlawful and dangerous act, or by criminal negligence. In relation to the first, the Court observed that since no body was found, there was no evidence of a cause of death. The jury could not perform a reasonable person test in relation to a purely hypothesised unlawful or dangerous act. A similar defect affected the proposed criminal negligence basis. Without an identified breach of duty, to

leave the verdict open would invite the jury to engage in pure speculation. Manslaughter may only be left to the jury where it rests (on whatever basis) on an evidentiary foundation.

Comments made to jury indicating a different verdict on different counts would be "perverse" did not amount to a miscarriage of justice

Bilal Ahmed was charged with two offences: possessing a firearm and discharging the same firearm in a public place. The trial judge observed to the jury, "[y]ou can't fire a weapon unless you possess it", and other statements of that nature to indicate that it would be illogical to return different verdicts on both counts. Mr Ahmed appealed (***Ahmed v R* [2012] NSWCCA 260**) on the basis that those "directions" amounted to a substantial miscarriage of justice by purporting to prohibit the jury from coming to different verdicts on the different counts. Adamson J held that the relevant statements were observations, not directions. The statements were not only a legitimate observation on the facts before the jury, but also served to avoid a compromise verdict adverse to the appellant.

Alternative verdicts – raised for the first time by the judge in summing up

In ***Sheen v R* [2011] NSWCCA 259**, the appellant was charged with break, enter and steal in circumstances of aggravation (armed with a knife). The possibility of the jury returning a verdict for break, enter and steal was raised for the first time by the trial judge in his summing up. There was a possibility that the jury might not have accepted evidence relied upon by the Crown as to the appellant having been armed. The jury returned a guilty verdict on the alternative. Despite there having been no objection by the appellant's counsel at trial, it was contended on appeal that there had been unfairness. Johnson J surveyed authorities on the question of leaving alternative verdicts. Some of them referred to it being unwise for a trial judge to introduce the possibility of such a verdict on his/her own initiative. He concluded, however, that the test was whether there had been "practical unfairness" and held that there had not been in the circumstances of this case. His Honour specifically declined, however, to endorse what the approach taken by the trial judge.

[See also the following cases which raise alternative verdicts as an issue: *Prince v R* [2013] NSWCCA 274 (Chapter 3 – E. State offences (elements) – Grievous bodily harm), and *Blackwell v R* [2011] NSWCCA 93 (Chapter 3 – L. Directions on offences – Grievous bodily harm).]

Alternative verdict – when to leave manslaughter to the jury

The accused in ***Carney v R; Cambey v R* [2011] NSWCCA 223** were alleged to have murdered a drug dealer. The Crown case was based upon admissions that they had made to others. In essence, the case was that the accused had gone to the deceased's home with a view to assaulting him and robbing him of cannabis. He was struck with a metal bar and sustained head injuries that caused his death. The Crown was unable to say which accused did what, and the case went to the jury on the basis that each accused either caused the injuries or was an aider and abettor. The defence case for each accused was that he was not present at the scene at all. Manslaughter was not left the jury as an alternative and the trial judge was not asked to do so.

On appeal it was contended that manslaughter should have been left if it was "open" on the evidence, that is, whether a case of manslaughter was "viable". Here, striking the deceased over the head with a metal bar was clearly an unlawful and dangerous act. The Crown argued that there was "no viable case of manslaughter reasonably open" which could have been left to the jury. It was not "plainly open" on the evidence and this was reflected in the manner in which the trial was conducted. The difference between the Crown and the appellants was whether the test was "open on the evidence" or "reasonably open on the evidence".

In a joint judgment, Whealy JA, James and Hoeben JJ resolved this difference by drawing from what had been said by the High Court in *Gillard v R* [2003] HCA 64; 219 CLR 1:

> "[25] The expression "a viable case of manslaughter to be left to the jury" (as stated by Gleeson CJ and Callinan J) is a useful shorthand expression expressing the correct approach to be taken. Similarly, the question is often asked "was manslaughter open to be left". That too is a useful shorthand manner of approaching the issue. While we consider that the correct position is more akin to that urged by the Crown on the present appeal, namely whether a verdict of manslaughter was "reasonably open" on the evidence, we would prefer to state the proper approach (based on Hayne J's statement) in the following terms:-
>
> > A viable case of manslaughter means that it was open on the evidence led at trial for the jury to conclude that the appellant was not guilty of murder but was guilty of the alternative charge of manslaughter."

Their Honours were of the view that the approach advocated by the appellants was "perhaps too wide" in that it would mean that in virtually every case of murder, manslaughter should be left.

The judgment then proceeded to an examination of the evidence in the trial. Their Honours concluded (at [66]) that "it was reasonably open on the evidence led at trial for the jury to conclude that each man was not guilty of murder, but was guilty of the alternative charge of manslaughter". A retrial was ordered.

Larceny as alternative verdict to robbery

A man was attacked in his home and his wallet was stolen. The issue was whether the taking of the wallet was opportunistic. The trial judge was persuaded by the Crown and defence that larceny was not an available alternative. On appeal, in ***Mifsud v R* [2009] NSWCCA 313**, Simpson J held that larceny should have been left in the circumstances. It was not "fanciful"; a verdict for larceny would been a "viable outcome" and "rational"; and it was not a "comparatively trifling or remote" offence.

Directed verdict

A no case submission can be made before the close of the Crown case

The respondent in ***R v TS*** **[2017] NSWCCA 247** was charged with indecent assault and attempted sexual intercourse without consent. At the conclusion of the complainant's evidence in chief the respondent's counsel applied for a directed verdict of acquittal on one of the counts and the trial judge granted the application. One ground of the Crown's appeal concerned the fact that the directed verdict occurred before the end of the Crown case. This ground was rejected.

Latham J held that the evidence relied on by the Crown had reached its high point. As there was no further evidence to take the case higher there was no error in the judge determining the no case application at that point in time. The Crown contended that complaint evidence would have supplemented the complainant's evidence, but Latham J found that this evidence (had it been called) could not have improved the complainant's evidence of what occurred.

Directed verdict of acquittal in manslaughter by unlawful and dangerous act trial

CLD was involved in the manufacture of pseudoephedrine which took place in a small shed and involved the evaporation of a highly flammable substance, toluene. He was charged with manslaughter by unlawful and dangerous act after an explosion in the shed resulted in the death of one person. The trial judge directed a verdict of acquittal because the Crown could not identify the source of the ignition which caused the explosion and had not negated other sources of ignition consistent with innocence. A Crown appeal was upheld in ***R v CLD*** **[2015] NSWCCA 114**, the Court finding that it was not necessary that the precise cause of ignition be foreseeable. In assessing whether an appreciable risk of serious injury was objectively foreseeable, it was sufficient for the Crown to establish that ignition, whatever the precipitating cause, was foreseeable. Before directing a verdict of acquittal, the Court is required to assess the evidence of the Crown at is highest and determine whether it is open to the jury to be satisfied of the accused's guilt beyond reasonable doubt. In circumstances where there was evidence of several possible sources of ignition it was appropriate for the jury to determine whether a reasonable doubt existed as to the respondent's guilt.

Chapter 4
Sentencing

4. SENTENCING

A. Sentencing principles and procedure

Assessment of objective seriousness – generally

Intention to "prank" makes no difference to objective seriousness of firing a handgun

Mr Ah-Keni challenged the finding of objective seriousness in his sentence for discharging a pistol in a taxi (while on bail): ***Ah-Keni v R* [2020] NSWCCA 122**. He argued that, as he had taken the loaded pistol into the taxi as a "prank", and its discharge only resulted from the ensuing struggle, a finding of objective seriousness above the mid-range was excessive. Hoeben CJ at CL dismissed the appeal, holding that the finding was well within the ambit of the judge's discretion. The fact that it was intended to be a "prank" did not make any difference to the risk and the potential consequences.

Assessing objective seriousness where multiple indicative sentences

The applicant in ***FL v R* [2020] NSWCCA 114** pleaded guilty to multiple child sex offences committed against his stepdaughter. He argued that the sentencing judge erred in assessing objective seriousness "globally", rather than assessing each offence separately. Wilson J held that the judge did in fact step through the facts and circumstances relevant to the seriousness of each offence before concluding that the offending was well within the mid-range. Nothing further was required.

Difficulty in identifying error in objective seriousness where only slight difference between parties

Mr Pearce was sentenced to an 18-month ICO for providing a false alibi in his friend's sexual assault trial. The Crown appealed on manifest inadequacy, which the Court would have upheld but for Mr Pearce's exemplary subjective circumstances: **R v Pearce [2020] NSWCCA 61**. The Crown submitted that the sentencing judge erred in his assessment of objective seriousness – the Court noted the difficulty with this ground when where there was only slight difference between the parties' submissions below. The Crown alleged "in the mid-range", while defence submitted "not yet at the mid-range". The Court could not divine what sort of offending lay in the difference.

Distinction between assessment of objective seriousness and instinctive synthesis of objective and subjective matters

The offender in ***Simmons v R* [2020] NSWCCA 16** pleaded guilty to 7 offences with a further 6 taken into account on a Form 1. The offending was largely in the nature of knifepoint robberies and breaking and entering. The sentencing judge delivered an ex tempore judgment the day following the sentencing hearing. On appeal, it was alleged he elided subjective matters (criminal history; conditional liberty) with an assessment of objective seriousness.

On closer inspection, Adamson J held that, while the factors might have been referred to in the same sentence, they were treated as distinct concepts. Her Honour dismissed the appeal – while the sentencing judge was discursive, he appreciated the need to separate an assessment of objective seriousness from the process of intuitive synthesis (which takes into account subjective matters).

Assessment of objective seriousness – error to use Form 1 offence in assessment of gravity of primary offences and error to apply Veen principles where no relevant criminal history

In sentencing an offender for serious sexual assault offences committed against his partner's daughter, the sentencing judge took into account Form 1 matters in assessing the objective seriousness of some of the offences. In addition, the sentencing judge applied the *Veen* principles despite the applicant's lack of a criminal history. It was held in ***RO v R* [2019] NSWCCA 183** the judge had made errors in relation to Grounds 1 and 3.

In respect of Ground 1 (the Form 1 matter), Beech-Jones J held that to find that a Form 1 offence elevated the objective seriousness of the offending bespoke error in two ways. First, it constituted error because the objective seriousness of an offence is determined by reference to the nature of the offending and not other criminal conduct on a different occasion, and second, because its consideration in this way is inconsistent with the *Crimes (Sentencing Procedure) Act 1999* (NSW). Rather, Form 1 offences are merely relevant to demonstrate an "additional need for personal deterrence and retribution". In respect of Ground 3 (concerning the *Veen* principles), the issue was that the sentencing judge merged the circumstances of being sentenced for multiple offences with that of having a previous record of similar offences. The ground of appeal was upheld, with Beech-Jones J remarking that to apply the *Veen* reasoning which holds that an offender's antecedent criminal history may warrant a more severe penalty was an error because "the applicant might have received extra, or double, punishment for the same offending".

Assessment of objective seriousness – absence of aggravating factor does not diminish the objective seriousness of an offence

A man sexually assaulted a woman in a wheelchair. He was convicted following a jury trial and sentenced to a substantial term of imprisonment. On an appeal against the severity of the sentence it was submitted that the sentencing judge erred in the assessment of objective gravity because of the absence of certain aggravating factors: including the absence of threat, the fact that there was only one aggravating feature, where there was limited force used, and the absence of ejaculation. In ***Tindall v R* [2019] NSWCCA 136**, Simpson AJA (with whom Bellew J agreed) rejected the approach underpinning this submission, holding that it is well-established that "the absence of an aggravating factor does not diminish the gravity of an offence, which must be assessed on its own facts", referring to *Saddler v R* [2009] NSWCCA 83, *Bravo v R* [2015] NSWCCA 302, *Mills v R* [2017] NSWCCA 87, *R v CTG* [2017] NSWCCA 163 and *Faehringer v R* [2017] NSWCCA 248.

Objective seriousness assessment – need not be made by reference to a scale

In ***McDowall v R* [2019] NSWCCA 29**, the applicant sought leave to appeal the aggregate sentence imposed on him for a series of offences, one of which was taking a motor vehicle with assault in circumstances of aggravation (armed with offensive weapon). Adamson J rejected the applicant's submissions under Ground 1, in which it had been argued that the trial judge failed to make an assessment of the objective seriousness of the offence. Her Honour held that the statement of principle in *Muldrock v The Queen* (2011) 244 CLR 120; [2011] HCA 39 at [29] means that a sentencing judge does not need to "classify" the objective seriousness by reference to some sort of scale (eg low, mid-range, high), but must simply "identify fully the facts, matters and circumstances which the judge concludes bear upon the judgement that is reached about the appropriate sentence to be imposed". While there was no reference to scale in the sentencing remarks, Adamson J held that the trial judge had adequately fulfilled the statutory requirement to assess objective seriousness by identifying the "facts" (by way of a detailed description of events), the "matters and circumstances" (that is, the offence and its effect on the victims).

Objective seriousness assessment – mental state, duress, provocation, and mental illness (where causally related to commission of the offence) are relevant

The appellant in ***Yun v R* [2017] NSWCCA 317** was found guilty and sentenced for murder – an offence which carries a standard non-parole period. He was re-sentenced by the Court of Criminal Appeal in 2008 prior to *Muldrock v The Queen* (2011) 244 CLR 120. In 2017 his case came back to the CCA via Pt 7 of the *Crimes (Appeal and Review) Act 2006*. It was contended that the CCA in 2008 had, contrary to *Muldrock*, incorrectly taken into account matters personal to the appellant when assessing the objective seriousness of the offending. The appeal was dismissed.

Latham and Bellew JJ rejected a submission that *Muldrock* precludes consideration of the offender's mental state, duress, provocation and mental illness in assessing objective seriousness. Their Honours considered the High Court's distinction between "matters personal to a particular offender" (which the court is not permitted to take into account) on the one hand and matters affecting "the nature of the offending" (which the court is permitted to take into account). The latter was said to be sufficiently broad to include the mens rea and intention of the offender; it was held to be "an integral part of the offender's conduct that constitutes the offence". It was held to be incorrect to describe duress and provocation as personal characteristics of the offender which a court cannot take into account; the offender's mental condition is a critical factor affecting the objective seriousness of the offence.

There was a divergence of authority between *Badans v R* [2012] NSWCCA 97 (in which the Court held that the mental state of the offender cannot be taken into account), and later authorities (*Biddle v R* [2017] NSWCCA 128; *McLaren v Regina* [2012] NSWCCA 284). Their Honours concluded that in light of the authorities, it is now clear that an offender's mental condition at the time of the commission of the offence is a critical component of "moral culpability" which in turn affects the assessment of objective seriousness.

Objective seriousness assessment – an offence is not less serious because it is not more serious

In ***R v CTG*** **[2017] NSWCCA 163** it was again affirmed that an offence should not be regarded as being less objectively serious because there is an absence of features that would, if present, have rendered it more serious. In this case the Court rejected an argument that offences of having sexual intercourse with a 3 year old child were not less serious because there was no bodily harm and no force or coercion. Hoeben CJ at CL cited *Bravo v R* [2015] NSWCCA 302, in which *Saddler v R* [2009] NSWCCA 83; 194 A Crim R 452 was cited, and *Mills v R* [2017] NSWCCA 87.

Objective seriousness assessment – need to specify where an offence lay in the spectrum of offences

In ***Delaney v R; R v Delaney*** **[2013] NSWCCA 150; 230 A Crim R 581** a ground of the Crown appeal contending that there was a failure to determine the objective criminality of the offending was rejected. While a judge did not in terms assess the objective gravity of the offending (it was said that this would have been preferable), he had implicitly done so by referring to the factors which bore upon its objective seriousness. The case involved multiple instances of extortion and the judge had expressly taken into account "the amount involved, the role of the appellant, the nature of the conduct and the period over which it took place": Hoeben CJ at CL at []56].

However, in ***Sponberg v R*** **[2017] NSWCCA 120**, in respect of an offence of supplying drugs to an undercover police officer on six separate occasions, it was held by Macfarlan JA to be erroneous that the judge failed to state where in the spectrum of offences the instant case fell. The judge had said: "Charge 1 is a very serious, large amount of drugs involved. It was committed for profit; it is above the commercial quantity of cocaine; it had quite a high purity; he was able to supply at short notice; obviously had access to drugs; he was supplying to an undercover officer, which meant it did not find its way into the community, but he did not know that." It was said that the judge had merely referred to the amount of drugs involved and failed to assess the objective seriousness of the offence.

On re-sentence, in finding the offence was "mid-range compared to other offences of its type", the factors taken into account were: the substantial quantity of drugs involved; the number of occasions of supply; the applicant's ability to supply such quantities at short notice and to negotiate price; his motivation being to profit, albeit in part to support his own habit; his involvement of another person to effect one of the supplies; and that the supplies were made to an undercover officer and not disseminated into the community, albeit that his moral culpability was not reduced.

Objective seriousness assessment – a finding of "at a high range for the offence charged" can be interpreted to mean above mid-range but short of worst case category

The applicant in ***Mills v R*** **[2017] NSWCCA 87** was sentenced for one count of persistent sexual abuse of a child, contrary to s 66EA(1) of the *Crimes Act 1900*. The victim was his daughter and the abuse included intercourse culminating in ejaculation. The charge was

based on particularised offences of aggravated sexual assault (s 61J) which were representative of ongoing conduct over a period of three years. On appeal, the applicant contended that the sentencing judge erred in assessing objective seriousness as "at a high range for the offence charged". R A Hulme J observed the difficulty in understanding what sentencing judges mean when they use the terms such as "high range" and "mid-range", or above or below those ranges. His Honour interpreted the sentencing judge's finding as meaning that it was above mid-range but short of worst case category.

With regard to the circumstances of the case, he found this finding was open to the sentencing judge. His Honour stated that the absence of factors which, if present, would aggravate the offence, does not make the offence less serious. Attention was also paid to the seriousness of the "sexual offences" which can give rise to a s 66EA charge. It was submitted that s 66EA covered offences more serious than s 61J, such as offences with maximum penalties of 25 years' and life imprisonment (compared to 20 years for s 61J) but R A Hulme J noted that most of the offences listed have maximum penalties less than s 61J. This ground of appeal was rejected. The applicant was successful in establishing the sentence was manifestly excessive, and the appeal was allowed on that basis.

Objective seriousness assessment – whilst imprecise, a finding of a "serious offence of its type" can be sufficient

The applicant in ***Sharma v R*** **[2017] NSWCCA 85** was sentenced for several sexual offences, including sexual intercourse without consent contrary to s 61I Crimes Act 1900. A ground of appeal was that the sentencing judge failed to make a proper assessment of the objective seriousness of the s 61I offences. Her Honour had assessed the objective seriousness of those offences as "serious offences of their type". She reached this finding after mentioning a range of considerations (eg. the complainant saying "no", physical resistance, and the applicant's deliberate and to a limited extent predatory behaviour).

R A Hulme J rejected this ground of appeal, holding that there is no requirement for a sentencing judge to rank the objective seriousness of the offences on a scale. Sentencing judges are required to assess objective seriousness, and identify fully the facts, matters and circumstances which bear upon the judgment, both of which her Honour did. His Honour observed that the sentencing judge's assessment can be criticised for being vague or imprecise, but it was not erroneous. He noted that greater precision may be desirable, citing authority approving of sentencing judges assessing the gravity of offending according to a scale of seriousness. The sentencing judge did however err by mentioning the fact the offending occurred whilst the applicant was on conditional liberty in her assessment of objective seriousness. On that ground the appeal was allowed.

Objective seriousness assessment – criminal history irrelevant

The applicant in ***Kelly v R*** **[2017] NSWCCA 82** was sentenced for a number of robbery related offences. When assessing the objective seriousness of the offences, the sentencing judge listed a number of relevant factors, which included the applicant's criminal history. The applicant appealed against sentence. Price J held that the sentencing judge did err by taking into account the applicant's prior criminal history when assessing the objective

seriousness of the offence. It is well established that a person's prior criminal record has no part to play in determining the objective gravity of an offence. It was a reserved judgment. The applicant's criminal antecedents were grouped with factors that were relevant to objective seriousness, mentioned between factors that are quintessentially part of an assessment of objective gravity. Despite error being established, the appeal was dismissed.

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; (2015) 256 CLR 656** 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.

Criminal history erroneously considered in the assessment of objective seriousness

The applicant in ***McCabe v R*** **[2016] 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.

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.)

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.

Importance of assessment of objective seriousness on sentence

The offender in ***R v Campbell*** **[2014] NSWCCA 102** pleaded guilty to one offence of break and entering a dwelling house and committing a serious indictable offence in circumstances of special aggravation, and an offence of assault occasion actual bodily harm. Wholly concurrent sentences were imposed, with an effective sentence of 3 years and 11 months with a non-parole period of 1 year and 10 months. The Crown appealed. One of the issues was the importance of the assessment of the objective seriousness in formulating an appropriate sentence. Harrison J reached a different conclusion to Simpson J, with whom Hall J agreed. Harrison J wrote that he doubted the utility, for appellate purposes, of dissecting the extent to which a sentencing judge has referred to objective seriousness in passing sentence. "The nature of judicial discretion means that there is both a wide range of circumstances capable of supporting the same conclusion, and a narrow range of circumstances capable of supporting different conclusions" (at [86]). Therefore statements regarding objective seriousness must be approached with circumspection. Simpson J emphasised that the assessment of objective seriousness is a critical component of the sentencing process. Nothing in *Muldrock* derogates from that principle. The sentencing

judge did no more state that offences under s 112(3) are serious and then enumerate the features of aggravation in this case. An assessment of the objective seriousness of this particular offence was called for. Had that been done, it would have been clear that a harsher sentence was warranted.

Muldrock v The Queen – are matters personal to an offender relevant to the objective seriousness?

The Court of Criminal Appeal has grappled with this issue since the High Court delivered its judgment in *Muldrock v The Queen* [2011] HCA 39; (2011) 244 CLR 120; see, for example, ***Yang v R* [2012] NSWCCA 49, *MDZ v R* [2011] NSWCCA 243** and ***Ayshow v R* [2011] NSWCCA 240**. In ***Williams v R* [2012] NSWCCA 172**, Price J held, at [42]:

The objective seriousness of an offence is to be determined wholly by reference to the "nature of the offending". I do not think that the nature of the offending is to be confined to the ingredients of the crime, but may be taken to mean the fundamental qualities of the offence. In my view, where provocation is established such that it is a mitigating factor under s 21A(3)(c) Crimes (Sentencing Procedure) Act, it is a fundamental quality of the offending which may reduce its objective seriousness. It seems to me, that in those circumstances, there cannot be a realistic assessment of the objective seriousness of the offence unless the provocation is taken into account. The absence of provocation is not a factor of aggravation and does not increase the objective seriousness of the offence.

In ***McLaren v R* [2012] NSWCCA 284** there a ground of appeal was that "[t]he Sentencing Judge erroneously attributed weight to the appellant's apparent state of mind when making findings as to the objective seriousness of the offence." McCallum J found that the sentencing judge had indeed articulated his reasons for sentence in accordance with *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168. But her Honour went on to say, at [28]-[29]:

> "…there is no sense in attempting to place the offence at hand (with all its features, including matters personal to the offender where relevant to an assessment of the nature of the offending) at a point along a purely hypothetical range which, of its nature, is ignorant of those matters."

The decision in *Muldrock* does not, however, derogate from the requirement on a sentencing judge to form an assessment as to the moral culpability of the offending in question, which remains an important task in the sentencing process. That this assessment is also sometimes referred to as the "objective seriousness" of the offence perhaps contributes to the misconception. I do not understand the High Court to have suggested in *Muldrock* that a sentencing judge cannot have regard to an offender's mental state when undertaking that task (as an aspect of his or her instinctive synthesis of all of the factors relevant to sentencing).

A differently composed bench in ***Subramaniam v R* [2013] NSWCCA 159** approached the question afresh; that is, without reference to *McLaren*. Latham J (Simpson J agreeing, Emmett JA providing a separate judgment) held at [57] that "attributes personal to the

applicant (in particular her mental state at the time of offending) more appropriately belong to an assessment of moral culpability" as distinguished from the objective features of the offending.

Question: If *Muldrock* affirms *Markarian* in requiring all facts, matters and circumstances to be considered in the assessment of sentence, what is the a point of distinguishing between "objective seriousness of the offence" and "moral culpability" by assigning consideration of the offender's mental state to the latter and not the former?

Muldrock v The Queen – assessment of objective seriousness generally

The decision in *Muldrock v The Queen* [2011] HCA 39; (2011) 244 CLR 120 has also raised difficult questions as to how a judge should assess objective seriousness of an offence, or even whether such an assessment is desirable.

McCallum J provided a useful summation of the position in ***PK v Regina* [2012] NSWCCA 263**. There her Honour said at [25]-[26], of the assessment of objective seriousness generally:

> "…whilst an assessment of the objective seriousness of the offending remains an essential aspect of the sentencing task, the sentencing court need not, and arguably should not, attempt to quantify the distance between the actual offence before the court and a putative offence in the middle of the range: see *Muldrock* at [29]…"

What has been emphasised in decisions since *Muldrock* is that it remains important to assess the objective criminality of the offending, which has always been an essential aspect of the sentencing process. In that context, the view has been expressed that there is no vice in doing so according to a scale of seriousness: *Zreika v R* [2012] NSWCCA 44 at [45] per Johnson J (citing *R v Koloamatangi* [2011] NSWCCA 288 at [18]-[19] per Basten JA); McClellan CJ at CL agreeing at [1]; Rothman J not addressing that point (see [128] to [130]). However, as I read *Muldrock*, the usefulness of comparing the particular offence before the court with the hypothetical mid-point offence has been doubted."

In ***Yang v R* [2012] NSWCCA 49**, a question arose as to the relevance of Y's mental condition to the assessment of the objective serious of a drug supply offence. R A Hulme J stated (at [28]) that the High Court decision in *Muldrock v The Queen* [2011] HCA 29 appears to overturn the position in *R v Way* [2004] NSWCCA 131 that personal characteristics, such as mental illness, affect the objective seriousness of the offence. However, his Honour noted that this interpretation had not been universally accepted and cited a number of decisions that reach the opposite conclusion, including *MDZ v R* [2011] NSWCCA 243 and *Ayshow v R* [2011] NSWCCA 240. The present case did not call for determination of the issue.

Price J, however, bit the bullet in ***Williams v R* [2012] NSWCCA 172** in relation to an issue as to whether a claim to have acted under provocation was relevant to the assessment of the objective seriousness of a murder. He said ([42]):

> "The objective seriousness of an offence is to be determined wholly by reference to the "nature of the offending". I do not think that the nature of the offending is to be confined to

> the ingredients of the crime, but may be taken to mean the fundamental qualities of the offence. In my view, where provocation is established such that it is a mitigating factor under s 21A(3)(c) Crimes (Sentencing Procedure) Act, it is a fundamental quality of the offending which may reduce its objective seriousness. It seems to me, that in those circumstances, there cannot be a realistic assessment of the objective seriousness of the offence unless the provocation is taken into account. The absence of provocation is not a factor of aggravation and does not increase the objective seriousness of the offence."

Motive and its relevance to moral culpability

In ***Quealey v R*** **[2010] NSWCCA 116** the offender discharged a firearm at a house in which her former partner was an occupant on two occasions on the one night. It was contended on appeal that the judge should have found that her moral culpability was reduced for the reason that she was motivated by the recent disclosure of her daughter's alleged sexual abuse at the hands of the former partner. Latham J held that the motive explained the conduct but did not reduce the offender's moral culpability to any significant degree.

Where a standard non-parole period offence does not fall in the middle of the range of objective seriousness it is necessary for the sentencing judge to make a finding as to the extent to which it is above or below the mid-range. A finding that the offence is simply above or below is insufficient

In **McEvoy v R [2010] NSWCCA 110**, Simpson J said that, despite the use of the words "with precision" by McClellan CJ at CL in *R v Cheh* [2009] NSWCCA 134, "it would, in my view, be sufficient for a sentencing judge to indicate that a particular offence was significantly above or below mid-range, slightly above or below mid-range, or at the top or bottom of the range".

McClellan CJ at CL subsequently said in ***R v Sellars*** **[2010] NSWCCA 133** at [12] that when he had spoken in *Cheh* of "precision" he was endeavouring to emphasise that if an offence falls outside the mid-range a sentencing judge should identify where it falls rather than merely state that it falls above or below the range.

This error was commonly encountered. In addition to these two cases: *R v Nicholson* [2010] NSWCCA 80, *AWKO v R* [2010] NSWCCA 90, *Dunn v R* [2010] NSWCCA 128, *R v Farrawell-Smith* [2010] NSWCCA 144, *Mitchell v R* [2010] NSWCCA 145, *Corby v R* [2010] NSWCCA 146, *OH Hyunwook v R* [2010] NSWCCA 148 and *R v LP* [2010] NSWCCA 154.

Errors have also been found in matters taken into account by sentencing judges in the assessment of the objective seriousness of an offence, such as an offender's plea of guilty, that he was on conditional liberty at the time of the offence and "other subjective circumstances": see *R v Nicholson*, supra, and *R v McEvoy*, supra.

Parity does not inform a sentencing judge's findings as to the objective seriousness of an offence

The offender in ***Xue v R*** **[2009] NSWCCA 227** had been sentenced for a serious drug offence which involved the supply to a man called Gao on two occasions within a fortnight. Gao was

charged with separate offences in respect of the two occasions and also with further supply offences committed at a later time. The judge who sentenced Gao found his offences fell slightly below the mid-range of objective seriousness, a finding which the Court of Criminal Appeal held was open to be made. The judge who sentenced Xue found his offence was in the middle of the range. Hoeben J rejected a submission that the judge erred in this finding because of the lesser finding made in respect of Gao.

Availability of summary disposal

Availability of summary disposal – offences could have been dealt with in the Children's Court?

The applicant in ***DS v R* [2017] NSWCCA 37** was 16 at the time of the offending. He went to a party uninvited and became aggressive when asked to leave. He punched several guests. He jumped onto the roof of a shed and began throwing building materials (including steel bars) onto the guests. One bar hit a guest on the head causing catastrophic permanent injuries. He pleaded guilty to five offences and was convicted of grievous bodily harm with intent after a judge alone trial at the District Court. He received an aggregate sentence of 12 years 6 months with a non-parole period of 8 years. On appeal against sentence, it was argued that the sentencing judge overlooked his age and treated him as an adult. One ground was that the sentencing judge failed to consider the fact that all the offences except for one (grievous bodily harm with intent) could have been dealt with in the Children's Court, where the maximum penalty is a control order not exceeding 2 years.

Schmidt J rejected this ground. Her Honour held that none of the offences could have been dealt with in the Children's Court; s 18 of the *Children (Criminal Proceedings) Act 1987* could have had no application. The most serious offence was a "serious children's indictable offence". Whilst the Court did have a discretion under s 18 to deal with the other five offences through the Children's Court, given the applicant's extremely violent conduct, the considerations in s 18(1A) precluded those counts being dealt with under s 18. It would therefore have been an improper exercise of discretion to deal with those offences through the powers of the Children's Court. The risk of such severe injury caused by the applicant's conduct explains why s 18 was not referred to by the parties or sentencing judge. The appeal was dismissed.

Permissible to not have regard to the fact that a matter dealt with on indictment could have been disposed of summarily

The applicant in ***Baines v R* [2016] NSWCCA 132** pleaded guilty to 13 counts of indecent assault committed against 8 women in the course of his employment as a masseur. An aggregate sentence of 5 years imprisonment with a non-parole period of 3 years was imposed. Included in the applicant's appeal against sentence was a ground asserting that the judge failed to take into account the fact that the offences were capable of summary disposition. In separate judgments each member of the Court rejected that argument. Basten JA observed that it is unclear how that fact contributes to mitigation. The question is whether, and if so why, the offender should be entitled to a lower penalty than would

otherwise have been appropriate. The best that can be said is that the offender has been exposed to a form of punishment by way of facing a potentially higher sentence. Whether that factor can significantly affect the sentence is by no means clear and unless it could have, the failure to consider it should not warrant a grant of leave to appeal. Rothman J observed that if the application of sentencing principles to achieve the purposes of sentencing results in the imposition of a sentence beyond the jurisdiction of the Local Court, then the matter is plainly appropriate for the District Court. A court may choose, for good reason, not to have regard to the fact that a matter dealt with on indictment could have been dealt with by way of summary disposal. The jurisdictional limit for a sentence, if the matter were to have been processed in the Local Court, is not a constraining element. Fagan J found the issue to be of no significance to the determination of the appropriate sentence in this case. It was within the discretionary judgment of the DPP to elect that these issues be tried by jury.

Error in taking into account that offences could have been dealt with in Local Court

In sentencing for a large number of child sexual assault offences a judge took into account that offences of indecent assault (s 61M(1) and (2)) could have been dealt with in the Local Court. It was held in ***R v Van Ryn*** **[2016] NSWCCA 1** that such an approach was erroneous because in the circumstances of the particular case it was inconceivable that such offences could have been subject to summary disposal when the offender was liable to be sentenced for them in conjunction with such a serious array of other child sex offences.

Availability of summary disposal as an argument on appeal where no such submission was made to the sentencing judge

Z pleaded guilty to an offence of reckless wounding in the District Court and was sentenced to imprisonment for 1 year and 11 months. It was argued on appeal in ***Zreika v R*** **[2012] NSWCCA 44** that the sentencing judge had erred in failing to take into account that the offence could have been dealt with summarily, although this was not raised before the District Court. Johnson J, dismissing the appeal (with McClelland CJ at CL agreeing, Rothman J agreeing with separate reasons) held that it was difficult to see how the appeal might succeed where the sentence imposed did not reach the jurisdictional limit of the Local Court of 2 years imprisonment (at [123]).

Johnson J also made a number of remarks about the frequency with which this ground of appeal is relied upon without it being raised in the court below. His Honour noted (at [78]) that the failure of a sentencing judge to mention that a matter could have been dealt with at the Local Court could not itself amount to an error, citing *R v Jammeh* [2004] NSWCCA 327 and *R v Pickett* [2004] NSWCA 389. There is also an expectation that at an offender's counsel will make submissions at first instance as to the factors relevant to mitigation (at [80]). There may be rare cases where a failure to rely on a mitigating factor in determining sentence will result in a serious injustice to the offender. However, his Honour stated (at [83]) that it would only be in exceptional circumstances that a case prosecuted in the District Court clearly ought to have been dealt with summarily. In such a case, that fact would be so obvious that it would be expected a submission would be made to the judge about it.

Summary disposal – having regard to the possibility of

In ***Ruano v R*** **[2011] NSWCCA 149**, the appellant was sentenced in the District Court for three offences of stealing from the person. The offences have a maximum penalty of 14 years imprisonment but if finalised in the Local Court, depending upon the amount of money involved, were subject to jurisdictional ceilings of imprisonment for either 12 months or 2 years. Grove AJ rejected a contention that the sentencing judge erred by not having regard to the fact that the appellant could have been sentenced in the Local Court. Having regard to such a matter does not require a reduction in sentence. In this case, having regard to the penalties that could be imposed in the Local Court would have been erroneous. The offender, and his co-offenders, had been working as a part of a highly organised syndicate of thieves across Sydney.

Summary disposal not possible

The applicant in ***Dunn v R*** **[2010] NSWCCA 128** contended that the sentencing judge failed to have regard to the fact that the offence for which he was sentenced could have been dealt with in the Local Court. Grove J held that it could not. The applicant had been charged and committed for trial for causing grievous bodily harm with intent, an offence which is triable only on indictment. In the District Court he pleaded not guilty to that charge but guilty to recklessly causing grievous bodily harm. The Crown accepted that plea. In these circumstances, there never was any chance that the applicant could have been dealt with in the Local Court.

Commonwealth crimes

Section 16BA Crimes Act 1914 (Cth) - sufficient if instructed counsel agrees that offender admits offence - artificial to require offender to admit personally

Mr Kabir, a tax agent, pleaded guilty and was sentenced for proceeds of crime and fraud offences. A further dishonesty offence was taken into account under s 16BA of the *Crimes Act 1914* (Cth). On appeal, Mr Kabir alleged (inter alia) that the failure to formally ask him if he admitted to the 16BA offence amounted to a procedural error: ***Kabir v R*** **[2020] NSWCCA 139**. Harrison J rejected this argument. Mr Kabir signed the charge sheet and he was present in court when his counsel, presumably acting on instructions, agreed to the charge being taken into account. This satisfied the s 16BA requirements - to find otherwise would be to allow form to triumph over substance.

Discount for spontaneous cooperation where no evidence of value in Commonwealth matters

Mr Weber pleaded guilty at an early opportunity to an offence of importing a marketable quantity of methylamphetamine. In his police interview, he gave up the names of two other offenders. His appeal, alleging a failure to account for his plea, was successful: ***Weber v R*** **[2020] NSWCCA 103**. At re-sentence, the issue arose as to what discount could be given for his assistance where there was no evidence of its value. Bellew J gave a 5% discount, noting

that s 16(2)(h) of the *Crimes Act 1914* (Cth) made no specific reference to the usefulness of the assistance (cf s 23 *Crimes (Sentencing Procedure) Act 1999* (NSW)).

Commonwealth additional offences (s 16BA) – requirement to adhere to fundamental statutory procedures

When the applicant applied for leave to appeal his sentence for Commonwealth child abuse offences (8 primary offences and 3 additional offences under s 16BA), the CDPP as respondent identified a number of procedural errors attending the original sentence. Specifically, s 16BA *Crimes Act 1914* (Cth) required the sentencing court to expressly ask the offender if he or she admits guilt of the additional offences and whether he or she wishes to have them taken into account by the court in passing sentence. As this had not occurred, Simpson AJA found that there was error: ***Purves v R* [2019] NSWCCA 227**. Although the applicant asked that the CCA re-sentence him in accordance with procedure, her Honour considered that the terms of s 16BA(1) were clear: the procedure needed to be undertaken by the court before which the person is convicted. The appeal was allowed on the grounds raised by the DPP, and the sentence set aside, with the matter being remitted to the District Court for re-sentence according to law.

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.

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; (2015) 256 CLR 550** 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.

Non-parole periods for Commonwealth offences

Non-parole periods that are 60 to 66 per cent of the total term are usually regarded as appropriate in sentencing for Commonwealth offences although departure from this range is permissible in appropriate circumstances. However there would need to be special circumstances to warrant anything less than 60 per cent: ***R v Jones; R v Hill*** **[2010] NSWCCA 108** per Rothman J at [31] – [40].
Crimes Act (Cth) – s 4K(4)

Erroneous use was made of the provisions of s 4K(4) of the *Crimes Act 1914* (Cth) to impose a single sentence of imprisonment for 11 counts of fraud: ***Thorn v R*** **[2009] NSWCCA 294**. Section 4K makes provision for continuing and multiple offences, including that such charges, in specified circumstances, "may be joined in the same information, complaint or summons". Subsection (4) permits the imposition of a single penalty. Howie J referred to *Putland v R* [2004] HCA 8; 218 CLR 174 in determining that the section did not permit a single penalty to be imposed for multiple indictable offences.

Comparable cases and statistics

Unrefined statistics unhelpful

Statistics (and 2 comparable cases) were relied upon in ***Hooker v R*** **[2019] NSWCCA 283**, in part, to demonstrate that a sentence was manifestly excessive. However, Hoeben CJ at CL held that they were of no use without further subjective and objective considerations to refine them.

Possession of prohibited drug – imposition of custodial sentence not determined by statistical comparison

The applicant in ***Ahmad v R*** **[2019] NSWCCA 198** attempted to import cocaine via post from the United States. He was sentenced for drug importation offences and a related offence of drug possession. Overall, he was sentenced to 7 years, 5 years non-parole and appealed against the portion of the sentence in which a 6 month custodial sentence was imposed for the possession offence. The basis of the challenge was that there were Judicial Commission statistics showing that custodial sentences were not imposed for possession offences in 97% of cases. The ground was rejected.

Wilson J affirmed that the available range of sentence is not determined by statistical comparison but "by the facts of the offence, and the circumstances of the offender, and in compliance with sentencing law and principle", particularly as someone must be at the higher end of a given range in sentence. Further, comparison with statistics says nothing about the circumstances, and her Honour noted that this case was necessarily different from summary cases in the Local Court. Wilson J concluded that the assessment that a six month sentence reflected the criminality of the possession offence was open to the

sentencing judge. Further, her Honour considered that the quantity of the drug, the applicant's criminal history, lifestyle choice to use drugs, and need for specific deterrence met the s 5 *Crimes (Sentencing Procedure) Act* threshold, which was not disturbed by anything of significance in the applicant's subjective case.

Sentencing statistics must be used appropriately and practitioners should read "Explaining the Statistics" on the Judicial Commission's website

The applicant in ***Why v R*** **[2017] NSWCCA 101** received an aggregate sentence for two counts of supplying a prohibited drug, taking into account a further offence on Form 1. The applicant sought to appeal his sentence on the basis it was manifestly excessive. The appeal raised the issue of the proper use of sentencing statistics. One of the applicant's arguments relied upon a comparison between his aggregate sentence and the head sentence imposed on other offenders for the same offence (supply prohibited drug) where the offender had also pleaded guilty. Walton J criticised the invitation to compare an aggregate sentence and sentences for individual offences. The CCA has held on numerous occasions that statistics offer no guidance about the propriety of an aggregate sentence. His Honour noted that [in the past] the Judicial Commission only records the sentence imposed for one offence (the principle offence) in a multi-offence sentencing exercise and no statistics are maintained of the overall or aggregate sentence imposed in such cases: *Tweedie v R* [2015] NSWCCA 71 at [47].

In additional remarks, R A Hulme J said that sentencing statistics can be a very valuable tool if used appropriately and properly understood. If sentencing statistics are to be relied upon, counsel must ensure they understand the limits of their utility. His Honour implored practitioners to read the document called "Explaining the Statistics" on the Judicial Commission's website before relying upon sentencing statistics. He also discussed recent enhancements to statistics provided by the Judicial Commission, which include statistics for "Aggregate/Effective" terms of sentence and non-parole periods, and the provision of further information about individual cases which make up the database.

Sentences imposed in comparable cases impermissibly treated as defining the sentencing range

The respondent in ***The Queen v Kilic*** **[2016] HCA 48; (2016) 259 CLR 256** successfully appealed his sentence to the Victorian Court of Appeal ("VSCA"). The Crown appealed to the High Court on the ground that the VSCA erroneously dealt with cases identified as being comparable. The High Court held that the VSCA correctly observed the relevant sentencing principles, specifically that sentences imposed in comparable cases provided a relevant "yardstick" by which a sentencing court can attempt to achieve consistency in sentencing but that requirement to have regard to those cases does not mean that the range of sentences imposed fixes the boundaries within which future sentences must be passed. Despite correctly observing those principles, the VSCA fell into error in the significance it in fact attributed to sentences imposed in past cases when it concluded that they were so disparate to the sentence imposed in the present case that there was a breach by the sentencing judge of the underlying principle of equal justice. The VSCA thereby impermissibly treated the past sentences as defining the sentencing range.

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; 325 ALR 400** 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.

Erroneous regard to a "comparable case" in determining sentence

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

Comparable cases and statistics

Whilst caution has often been expressed about the use of comparable cases and statistics in assessing the appropriateness of a sentence, Blanch J explained (at [13] – [23]), with considerable reference to authority, in ***Smith v R*** **[2011] NSWCCA 290** that it is in the context of the principle of consistency of approach than an analysis of past decisions is useful. This concept was acknowledged in a judgment delivered 2 days later by Hoeben J in ***Papworth v R*** **[2011] NSWCCA 253**. However, while consistency in sentence is an important consideration and a desirable goal, his Honour reminded (at [54]) that the relevant question on appeal is whether the sentences are within a proper range. It is not a question of whether other sentences can be said to be more or less lenient.

However, in ***Ritter v Regina*** **[2012] NSWCCA 121** there was firm criticism of the submissions made on behalf of the appellant in an attempt to establish that a sentence was manifestly excessive. Counsel relied upon sentencing statistics and eight cases which were said to be comparable. R S Hulme J, with whom Hoeben J agreed, Fullerton J dissenting, was critical of reliance upon such material with no attempt to put the argument in the context of the

maximum penalty prescribed for the offence and the purposes of sentencing specified in s 3A *Crimes (Sentencing Procedure) Act 1999*. His Honour also noted that there was rarely an incentive for counsel making submissions in support of such a ground to identify a fair or representative sample of comparable cases and "rarely is such a sample produced". The sample produced in this particular case was described as "positively misleading".

Statistics

The decision of the court in ***McCarthy v R*** **[2011] NSWCCA 64** evinces the continuing utility of the Judicial Commission's sentencing statistics despite the High Court's observations in *Hili v R; Jones v R* [2010] HCA 45. Adams J interpreted the High Court's criticisms towards the use of sentencing statistics as being confined to the context of the case in which the decision was made, where it held that the number of offences each year were very small and the circumstances varied widely. This was distinguished from the available statistics for armed robberies, which his Honour observed to "demonstrate a marked similarity of characteristics, both in respect of facts and the subjective features of the offenders though, of course, there are also substantial variations". On this point, his Honour concluded ([42]):

> "It seems to me that in this area of crime the cases are of such a kind, the experience of the court in respect of them so extensive and the numbers of cases in the sample so substantial that the statistics are indeed useful."

Comparable cases – use of

In striving for consistency in sentencing, the court may examine comparable cases to determine whether patterns exist and to shed light on the proper sentence in any case under consideration: Director of Public Prosecutions (Commonwealth) v De La Rosa [2010] NSWCCA 194 per Basten JA at [123] – [124] and McClellan CJ at CL at [197]. The question in ***Wilcox v R*** **[2011] NSWCCA 42** was whether a sentence of 19 years (non-parole of 14 years) imposed in relation to multiple offences including robbery with a dangerous weapon (s(97(2) of the Crimes Act 1900) was manifestly excessive. Barr AJ endorsed the above remarks of the court in De La Rosa and annexed to his judgment a very useful schedule of cases concerning sentences for offences under s 97(2).

His Honour also examined the circumstances in which the Court of Criminal Appeal determines the limits of appropriate sentence ranges:

> "[108] When this court allows an offender's appeal against sentence and reduces the sentence it enters upon the sentencing process a second time, and it becomes manifest that the substituted sentence lies within the range the court considers appropriate. The substituted sentence does not indicate the limits of the range, however, unless the court says so. When the court dismisses an offender's appeal against what is claimed to be an excessive sentence it does not thereby imply where the sentence lies, or whether it lies, within the appropriate range. It simply declares that the sentence is not excessive.
>
> [109] There are cases, however, where the remarks of the court indicate the upper limits of the appropriate range. Two such cases are *Penfold & Ward* and *McKeon*.

[110] When the court allows a Crown appeal against the inadequacy of a sentence, the substituted sentence will often indicate the lower limit of the appropriate range."

Statistics and comparative cases

There is limited utility on appeal of comparing sentences imposed in other cases (apart from co-offenders) and Judicial Commission sentencing statistics: see, for example, ***Han v R* [2009] NSWCCA 300**, per Campbell JA at [2]–[3] and Rothman J at [32]–[42].

De Simoni error

De Simoni principle – not applicable to charge of robbery in company where offender armed with a knife

The applicant in ***R v Fangaloka* [2019] NSWCCA 173** was sentenced for three offences. One of the offences was robbery in company. The sentencing judge said that "there was a knife used but this is not an armed robbery charge and it is important that the sentence not breach the *De Simoni* principles". On appeal against sentence, the Court upheld a ground of appeal that alleged that the sentencing judge had erred by referring to the *De Simoni* principles. Basten JA held that the principle – which "prohibits a sentencing judge from taking into account circumstances of aggravation that would render the offender liable to a greater maximum punishment than that prescribed for the offence with which he or she is charged" – had no application where the offence of robbery in company carries the same maximum penalty as robbery with an offensive weapon.

Regime of damaging property and arson offences – De Simoni error?

In ***Issa v R* [2017] NSWCCA 188** it was contended that when sentencing for offences against s 195(1)(b) of the Crimes Act, namely intentional damage to homes by means of fire, a judge erroneously took into account as an aggravating feature contrary to *The Queen v De Simoni* (1981) 147 CLR 383 that the offender realised there was a likely risk of physical danger to the occupants. It was said that this involved a trespass into more serious arson offences in ss 196 and 198.

Adamson J referred to the legislative history of in ss 196 and 198 and noted that in their current form the elements comprised the intentional or reckless damage/destruction of property and a specific intent to cause bodily injury to another (s 196(1)) or a specific intent to endanger the life of another (s 198). Foreseeing the possibility of harm to others fell short of such intention and so there was no breach of the De Simoni principle.

Drug importation offences – De Simoni error by having regard to a net weight that would apply to a more serious offence

The offender in ***Lee v R* [2017] NSWCCA 156** was sentenced for an offence of importing a border controlled drug contrary to s 307.3 of the Criminal Code 1995. The gross weight of the substance was 3.2kg but investigating police failed to have it analysed for purity which is the weight that determines the appropriate charge under the Code. Accordingly, it was not

possible to charge an offence against s 307.1 (import/export commercial quantity – 0.75kg or more) or against s 307.2 (import/export marketable quantity – 2.0g or more). An offence against s 307.3 does not involve specification of any particular quantity. The sentencing judge had regard to the offender having imported "a substantial quantity". It was inferred that she had in mind something in excess of 2.0g, and probably well in excess of it. That was a finding that was well open on the facts, but without specific reference to the need to ensure she was not sentencing on the basis of facts that would render the offender liable for a more serious offence, it was concluded that error of the type described in *The Queen v De Simoni* (1981) 147 CLR 383 had occurred.

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.

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.

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.

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

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

Offending the De Simoni principle

Mr Nguyen was conducting a minor criminal enterprise from the garage of his unit complex. Two masked men attempted, unsuccessfully, to rob him. Mr Nguyen was able to scare them off unarmed, but later obtained a pistol to prevent further robberies. Two weeks later, eight police officers executed a search of Mr Nguyen's unit and garage. When they entered the basement, Mr Nguyen confronted them. A brief exchange of fire ensued, in the course of which Mr Nguyen shot Constable Crews in the arm, and another police officer, in returning fire moments later, accidentally shot Const. Crews dead. Mr Nguyen claimed that he had mistaken the police officers for disguised robbers. He pleaded guilty to manslaughter on the basis of excessive self-defence (and also pleaded to wounding with intent). The Crown accepted his plea.

The sentencing judge expanding on the consequences of the plea:

The plea of guilty to manslaughter also entails the Crown accepting the reasonable possibility that the offender genuinely believed that it was necessary to shoot at the person who proved to be Constable Crews in order to defend himself (based as it was on his mistaken belief that the officer was someone who was intent on robbing him and someone who might have posed a serious risk to his safety). It also entails acceptance by the offender

that a reasonable person in his position would not have considered that it was necessary to shoot that person in defence of himself or his property.

Her Honour made a finding that the offence was not in the worst category of manslaughter, reasoning by comparison to a hypothetical scenario where the offender knew the victim was a police officer. The Crown appealed the sentence, arguing, inter alia, that if Mr Nguyen had known that Constable Crews was a police officer, he would have been guilty of murder: ***R v Nguyen*** **[2013] NSWCCA 195**.

The Court of Criminal Appeal agreed. The sentencing judge had erred by having regard to the absence of a factor that, if present, would have rendered Mr Nguyen criminally liable to the more serious offence of murder (see *The Queen v De Simoni* (1981) 147 CLR 383 at 389). As a result, the sentencing discretion miscarried by taking into account an extraneous consideration.

The Court of Criminal Appeal decision was affirmed in *Nguyen v The Queen* [2016] HCA 17; (2016) 256 CLR 656.

Rule in R v De Simoni can be breached even when maximum penalties are the same

In ***Cassidy v R*** **[2012] NSWCCA 68** the appellant was sentenced on the basis that he had pleaded guilty to intentionally destroying property with intent to endanger life, contrary to s 198 of the Crimes Act 1900. In determining the seriousness of the offence, the sentencing judge relied on evidence that showed the offender had wanted the people in the destroyed property to die. On appeal it was argued that the rule in *R v De Simoni* [1981] HCA 31 had been breached. The Crown argued that the appeal should not succeed on the basis that maximum penalty for an offence against s 198 and for attempted murder under ss 27-30 are both 25 years imprisonment. Blanch J rejected the Crown's argument. His Honour stated (at [24]) that the Crown had failed to account for the impact of the standard non-parole period of 10 years for offences under ss 27-30, whereas there is no standard non-parole period for an offence contrary to s 198. Therefore, despite the offences all having the same maximum penalties, the offences of attempted murder under ss 27-30 are "more serious" pursuant to the rule in *De Simoni* and therefore the rule had been breached (at [26]).

Uncharged offences - De Simoni principle breached

The *De Simoni* principle (*R v De Simoni* [1981] HCA 31; (1981) 147 CLR 383 at 389.7 per Gibbs CJ) was considered in ***Tu v R*** **[2011] NSWCCA 31**, where the appellant was sentenced for the offences of possessing prohibited imports, and attempting to possess prohibited imports (substantial trafficable quantities of crystal methylamphetamine).

The appellant submitted that, in finding the offences to be in the worst category and imposing the maximum penalty for each offence, the sentencing judge had breached the *De Simoni* principle by taking into account the appellant's involvement in the importation of the prohibited imports, even though he was not charged with such an offence. The appellant relied on the remarks of the sentencing judge, who said, "but as far as importing of trafficable quantities of drugs is concerned it must be regarded in that way [as an offence of

the worst type]". McCallum J (McClellan CJ at CL agreeing, Hall J dissenting on this point but agreeing as to the result) allowed the appeal and reduced the appellant's sentences. Her Honour (at [140]) reasoned that there did not appear to be any conceivable basis for determining that the offences fell within the worst category without having regard to the appellant's involvement in the importation.

Impermissible regard to victim's injury

In ***McIntyre v R*** **[2009] NSWCCA 305**, the offender was sentenced for assaulting a police officer in the execution of his duty pursuant to s 58 *Crimes Act 1900*. The sentencing judge had regard to the injury sustained by the victim. On appeal, Johnson J held that this was a breach of the principle in *De Simoni*.

In comparison, there was no error in taking into account an injury which amounted to grievous bodily harm when sentencing for an offence of malicious wounding with intent to inflict grievous bodily harm: ***Bourke v R*** **[2010] NSWCCA 22** per McClellan CJ at CL. The offender had not been sentenced for a more serious offence than that for which he was charged or for an aggravated form of the offence charged.

Disclosure (sentencing)

Public interest immunity from disclosing identity of police informer

Prior to sentencing for two offences of supplying a commercial quantity of prohibited drugs, an offender sought documents by way of subpoena from the Commissioner of Police that recorded conversations between police and an informer. The purpose was to determine whether there were records of the informer encouraging the offender to supply greater quantities of drugs that could assist in mitigation of sentence. The Attorney General appealed against an order of the District Court that the Commissioner provide the documents on grounds that they were protected by public interest immunity (Evidence Act 1995, ss 130, 131A): ***Attorney General (NSW) v Lipton*** **[2012] NSWCCA 156**. The Attorney General argued that the only available exception to the public interest immunity against disclosure of an informant's identity was where the immunity would prevent an accused from properly defending himself, and the exception would not apply to sentencing proceeding. Basten JA, rejecting the proposition, said ([59]):

> "Whatever may be the principle applicable under the general law, the test to be applied under s 130 is clearly a balancing exercise which requires the court to be satisfied that, relevant to the present circumstance, the public interest in preserving secrecy or confidentiality in relation to a category of documents outweighs the public interest in their production… That exercise is not to be constrained by unexpressed rules derived from the common law."

But it was held that the judge in this case had erred in considering the factors relevant to the balancing exercise and allowed the appeal.

Fact finding (sentencing)

Sentencing hearing where facts disputed – can adverse inferences be drawn from silence of offender?

The offender in ***Strbak v The Queen*** **[2020] HCA 10; 94 ALJR 374** pleaded guilty to the manslaughter of her son. At sentence, it was disputed whether she killed her son through neglect or through the infliction of blunt force trauma. She did not give evidence. The sentencing judge, noting the lack of contradictory sworn evidence, found facts against her.

The Court (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ) held that *R v Miller* [2004] 1 Qd R 548 was wrongly decided, and that adverse inferences cannot be drawn from the refusal of an offender to give evidence in sentencing proceedings. *Miller* suggested that the presumption of innocence enlivens the rule, and this presumption is lost at sentence. However, it is actually the accusatorial nature of criminal trials that is critical. Sentencing, like a trial, is an accusatorial process and the facts found are still adverse and significant to the offender. The appeal was upheld and the proceedings were remitted to the Queensland Supreme Court.

Miscarriage of justice when a "preliminary hearing" is held to find facts in relation to an insufficiently particularised indictment for a later sentencing hearing

The applicant in ***Dean v R*** **[2019] NSWCCA 27** was charged with a number of offences including possessing an offensive weapon (a .22 rifle) with intent to commit an indictable offence. The "indictable offence" was not particularised. He pleaded guilty but the sentencing judge was persuaded to determine in a "preliminary hearing" a disputed issue as to what the "indictable offence" was – intimidation according to the applicant or murder according to the Crown. The judge found in the Crown's favour. It was held on appeal that the sentencing proceedings miscarried.

Fullerton J found that even though the charge in its term was technically correct as an offence known to law and a failure to particularise need not be fatal, in this case the indictable offence was an essential fact that should have been particularised. Her Honour found that this deprived the applicant of an opportunity to litigate the factual matters in the offence, and breached the Crown's obligation of fairness by failing to afford the applicant natural justice by knowing what case he needed to meet. Her Honour held this was compounded by the method of dealing with a disputed fact as a preliminary issue" as at the "preliminary hearing", in which the sentencing judge did not have access to material relevant to the applicant's intention that later emerged at the sentencing hearing.

Inferring injury, harm or loss as an aggravating factor without direct evidence

The appellant in ***WAP v R*** **[2017] NSWCCA 212** was sentenced for offences of sexual assault and armed robbery. He tricked a woman to let him into her house, before threatening her with a knife and violently raping her. The sentencing judge said that, although there was no victim impact statement, he was satisfied that the victim would have suffered substantial emotional and physical harm. The appellant contended that it was not open to the sentencing judge to make such a finding in terms of s 21A(2)(g) *Crimes (Sentencing Procedure) Act 1999*.

Johnson J rejected this argument. A finding of "substantial harm" (meaning harm greater than that which ordinarily attaches to an offence of the kind in question) can be made without reference to a victim impact statement or another form of evidence external to the material before the sentencing court. Whether the evidence does support such a finding depends on the evidence in the particular case. In this case it was open to the judge to be satisfied of the emotional injury based upon the "appalling [nature of the] offences committed with considerable violence" derived from the Agreed Statement of Facts. The appeal was dismissed.

Accepting hearsay assertions in reports

A sentencing judge was not prepared to accept expressions of remorse by an offender set out in a psychiatric report in circumstances where the offender did not give evidence. It was contended on the appeal in ***Imbornone v R*** **[2017] NSWCCA 144** that the judge wrongly concluded that there was insufficient evidence to satisfy the requirement in s 21A(3)(i) of the *Crimes (Sentencing Procedure) Act* for remorse to be taken into account as a mitigating factor.

Wilson J noted a distinction between a finding that there was insufficient evidence to establish on the balance of probabilities that there was remorse with a conclusion that the offender was obliged to give evidence before a finding of remorse could be made. The former was open to the sentencing judge and was well supported by authority. Her Honour restated the principles (at [57]).

Affidavit evidence – when deponent does not give evidence at sentence hearing

The applicant in ***Van Zwam v R*** **[2017] NSWCCA 127** pleaded guilty to one count of importing a commercial quantity of methamphetamine. At the sentence hearing, the applicant relied on an affidavit where he said he was remorseful. He deposed "I am ashamed of myself… I have remorse… I am very sorry for that." The applicant did not give oral evidence and was not cross-examined on the affidavit. The sentencing judge said "Those documents are of not particularly great weight." The judge found that remorse and contrition were not evident from the applicant's failure to enter a plea until the first day of the trial or his delayed assistance to authorities. His Honour considered claims in the affidavit but found "in the absence of evidence on oath subject to cross-examination, I am unable to find any genuine evidence of remorse or contrition." One ground of appeal against sentence was that insufficient weight had been given to his remorse and contrition. Macfarlan JA and Campbell J allowed the appeal, holding that the trial judge should not have disregarded the evidence of remorse in the affidavit given the Crown did not cross-examine the applicant or object to the affidavit.

Macfarlan JA stated that the applicant should not be prejudiced by the Crown's choice not to cross-examine the applicant on his affidavit. If the applicant declined to be cross-examined on the affidavit the Crown should have objected to it being read. The judge was entitled to treat the affidavit evidence as of less weight than evidence given orally, but he was not entitled to disregard it altogether. Campbell J added that the judge was not bound

to accept the affidavit evidence, but his failure to appreciate that the affidavit was evidence led him into error.

Adamson J, in dissent, found there to be no material difference on a sentence hearing between the weight to be given to an affidavit where the deponent is unwilling to subject himself to cross-examination and the weight to be given to an unsworn statement or a statement to the author of a pre-sentence report. Her Honour found no error; the sentencing judge took the statements in the affidavit into account but, having regard to all the evidence, was not satisfied that there was genuine remorse or contrition. The sentencing judge was not obliged to accept the applicant's affidavit evidence, even in circumstances where he was not cross-examined by the Crown.

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.

Seriousness or aggravation: a distinction without difference

The appellant in ***Richardson v R* [2013] NSWCCA 218** killed his partner and dismembered her body with a power saw. The cadaver was placed in garbage bags and buried in the bush. The appellant was tried and convicted of murder. At the sentence hearing, his counsel conceded that his treatment of the body could be taken into account "in assessing the seriousness of the offence" (by reference to cases such as *Knight v R* [2006] NSWCCA 292; (2006) 164 A Crim R 126). The sentencing judge made findings of fact that the dismemberment was not done only to facilitate disposal of the body, but also to remove evidence of injuries and express the appellant's anger and hatred of the victim. He considered that the sentence should be increased on account of this feature. On appeal, the appellant sought to make a distinction between his concession that the dismemberment went to the seriousness of the offence and the finding that it was a matter of aggravation. Hoeben CJ at CL remarked that this was a distinction without difference, and that it was not open for the appellant to resile from the concession below. The relevant findings of fact were open and uncontradicted.

Criticising psychiatric opinions without cross-examination

In ***Devaney v R*** **[2012] NSWCCA 285** the sentencing judge was sceptical of the concurring view of three psychiatrists that Mr Devaney was "floridly psychotic", and expressed the view that he had manipulated his diagnoses. Allsop P upheld the appeal, stating at [88]:

> "It is one thing to discount admissible statements made to a psychiatrist or psychologist if the offender is not prepared to give evidence to the same effect…it is quite another to lessen the effect of the opinion of a professional psychiatrists, without cross-examination, when that opinion is based on history."

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

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

Agreed facts – serious miscarriage where agreed facts inconsistent with offender's version

In ***Loury v R*** **[2010] NSWCCA 158** the appellant and his brother were involved in a violent incident outside a hotel. They each pleaded guilty to three charges of using an offensive weapon with intent, in company, to commit the indictable offence of assault occasioning actual bodily harm. The sentencing judge regarded their culpability as being equal participants in a joint criminal enterprise, primarily because he accepted a submission by the prosecutor that the appellant had handed a baseball bat to his brother that was then used by the brother in the course of the incident. The appellant had provided a version of events in a police interview, which he consistently maintained thereafter, which was to the effect that he was not a participant in a joint enterprise with his brother. He admitted culpability for assaults but less in number and of a significantly lesser degree of gravity than those committed by his brother. An agreed statement of facts was tendered by consent and was inconsistent with the appellant's version. Both brothers were sentenced to identical terms of imprisonment. The appellant's convictions were quashed on appeal. Whealy J held that a serious miscarriage of justice had occurred in that the pleas of guilty had been entered without the charges having been explained by the appellant's solicitor and he had no awareness of the details of negotiations between the solicitor and the Crown. The appellant's evidence as to what transpired with his solicitor was accepted, including that he had never seen the statement of agreed facts nor had its contents explained to him.

There are useful remarks in this case by Whealy J (at [107] – [109]) as to various shortcomings in the conduct of both solicitor and counsel who represented the appellant at first instance.

Error in rejecting untested evidence from offender

In ***O'Neil-Shaw v R*** **[2010] NSWCCA 42**, evidence as to the relationship between the offender and the victim of an offence of maliciously inflicting grievous bodily harm with intent was provided by a number of witnesses in the form of affidavits. The deponents were not required for cross-examination. The offender gave evidence but was not cross-examined on his claim that he had been mistreated by the victim who was his stepfather. The sentencing judge, however, rejected the offender's assertions on the subject. Basten JA held that, given the lack of cross-examination, the judge should have refrained from making an adverse finding against the offender.

Maximum penalty cases

Offences falling within the "worst category"

In ***The Queen v Kilic*** **[2016] HCA 48** the Victorian Court of Appeal ("VSCA") held the sentence imposed upon the respondent for an offence of intentionally causing serious injury was manifestly excessive. In its decision, the VSCA described the offence as being within "the worst category" of the offence. The High Court noted that, properly described, such an offence is an instance of the offence which is so grave that it warrants the imposition of the maximum prescribed penalty for that offence, taking into account both the nature of the crime and the circumstances of the criminal. An offence may fall within this category notwithstanding that it is possible to imagine an even worse instance of the offence. The High Court warned that it is potentially confusing and likely to lead to error to describe an offence which does not warrant the maximum prescribed penalty as being "within the worst category"; it is a practice which should be avoided. Further, the common practice of describing an offence as "not within the worst category" may be misleading to laypersons. Instead, sentencing judges should state in full whether the offence is or is not so grave as to warrant the maximum prescribed penalty.

Worst case category

A sentencing judge was found to have erred in characterising aggravated sexual assault offences as being the worst case category in ***Stephens v R*** **[2010] NSWCCA 93**. There is a useful discussion of authorities on the issue in the judgment of Fullerton J at [43]–[65].

Mistakes/misstatements

Failure to give effect to finding of special circumstances

The applicant in ***AM v R*** **[2020] NSWCCA 101** was 19 when he committed sexual offences against his 10-year-old half-sister. The sentencing judge made a finding of subjective circumstances and purported to calculate this by reducing the non-parole period by 9 weeks

to 6 years (with a balance of 2 years, 3 months). On appeal, Hidden AJ held that while fixing a non-parole period was a matter for the discretion of the judge, such a small reduction required explanation to not be in error.

Error in referring to a wrong standard non-parole period

The appellant in ***Portelli v R*** **[2018] NSWCCA 28** was found guilty by a jury for a number of break enter and steal offences in circumstances of aggravation. That offence carries a SNPP of 5 years. The sentencing judge, in his opening remarks, stated that the offence carried a SNPP of 7 years. The appellant contended that this was erroneous and affected the sentencing discretion; the Crown argued that the misstatement was a mere slip of the tongue.

The appeal was allowed. The issue was whether the misstatement should be treated as an error that affected the exercise of the sentencing discretion. Simpson JA had regard to the SNPP scheme in s 54B in light of *Muldrock* and held that the SNPP is a guidepost to be considered among various other factors. Her Honour found that although the sentencing judge had referred later in the judgment to a SNPP, the judge did not nominate what that period was. Simpson JA therefore accepted the Crown's contention that it was possible that the judge had in mind the correct SNPP, but concluded that it was doubtful whether that was so. Her Honour held that the offender should be resentenced according to *Kentwell*.

When misstatement of maximum penalty will result in intervention by Court of Criminal Appeal

The appellant in ***Campbell v R*** **[2018] NSWCCA 17** was sentenced to a number of offences but the judge said in respect of one of them that the maximum penalty was 15 years imprisonment whereas it was 5 years. He assessed an indicative sentence of 2 years. Campbell J referred to *Andreata v R* [2015] NSWCCA 239 where Beech-Jones J likened the error of acting upon an erroneous maximum to the House v The King error of acting upon a wrong principle. Campbell J distinguished the present case from *Baxter v R* [2007] NSWCCA 237; 173 A Crim R 284 where the misstatement of a maximum was in respect of one offence where there were many other offences carrying significantly higher maximums. In this case the offence in question was the one that carried the highest maximum. The appeal was allowed.

Misidentification of maximum penalty does not necessarily mean the sentence will be excessive

The appellant in ***RLS v R*** **[2012] NSWCCA 236** pleaded guilty to a child pornography offence and was sentenced for that charge to an effective term of 15 months. The sentencing judge had misidentified the maximum penalty for that offence as ten years, the actual penalty at the time of the offence being five years. The sentencing judge did not err as the standard non-parole period, correctly stating that none was specified for the offence. On the appeal, Bellew J observed that while the mistake was an error justifying a grant of leave to appeal, no lesser sentence was warranted in law. The appeal was dismissed.

Muldrock issues

Applying the 2013 statutory amendments in relation to standard non-parole periods following Muldrock v The Queen

When sentencing the appellant in ***Tepania v R*** **[2018] NSWCCA 247** for recklessly causing grievous bodily harm to a 10 month old baby, the sentencing judge took into account that the appellant had a dysfunctional background and an intellectual impairment. The judge found that the offences were within the "broad midrange of objective seriousness". On appeal the appellant contended that the judge failed to take into account his reduced moral culpability and thereby erred in his assessment of objective seriousness.

Johnson J held that the finding as to objective seriousness was open to be made. His Honour's judgment includes a detailed analysis of the effect of the 2013 amendments on sentencing for standard non-parole offences. He first considered the text of ss 54A and 54B of the *Crimes (Sentencing Procedure) Act*, in that the amendments removed the concept of "an offence in the middle of the range of objective seriousness" and in its place inserted a definition that the standard non-parole period represents an offence "that, taking into account only the objective factors affecting the relative seriousness of the offence, is in the middle of the range of objective seriousness". In doing so, his Honour held that the amendments give effect to the High Court's characterisation in *Muldrock*. Johnson J stated a number of propositions relevant to standard non-parole period offences, including that the judge is not required to list the features of the offence which were or were not taken into account in considering the role of the standard non-parole period.

His Honour held that in sentencing for an offence, a court should make an assessment of the objective gravity of the offence including motive, provocation, and personal factors that are causally connected with or materially contributed to the commission of the offence. He held that taking into account an offender's moral culpability may be seen as a consideration of one of the many factors which bear on sentence as part of the process of instinctive synthesis. His Honour considered the sentencing judgment and concluded that it had not been demonstrated that the judge had not taken into account the appellant's profound deprivation and impairment.

A finding of midrange seriousness does not trigger the automatic imposition of the standard non-parole period

The applicant in ***Purtill v R*** **[2016] NSWCCA 80** was convicted of murder following a drug deal gone awry. He was sentenced to imprisonment for 28 years with a non-parole period of 21 years. In addition to the maximum penalty of life there was a standard non-parole period of 20 years. The applicant appealed against his sentence on the ground that it was excessive in light of the sentencing judge's finding of midrange seriousness, particularly when having regard to the prescribed standard non-parole period. Hoeben CJ at CL refused leave to appeal, holding that the approach contended for by the applicant would inevitably involve a two-stage process of sentencing that would be contrary to the approach in *Markarian v The Queen* [2005] HCA 25; 288 CLR 357 and *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120. His Honour took into account the standard non-parole period as a

legislative guidepost and did not give it determinative significance. The standard non-parole period does not represent the upper limit for a non-parole period for offences that are found to be in the middle range of seriousness. The middle range is, as the term implies, a range. A finding of midrange seriousness does not attract the automatic imposition of the standard non-parole period.

Muldrock does not prohibit consideration of objective criminality of offence

Mr Ramea appealed a sentence out of time which he claimed had been calculated on a two-stage basis contrary to *Muldrock* and *Markarian*. He claimed that the sentencing judge had given determinative weight to the standard non-parole period, in particular by referring to *R v Knight; R v Biuvanua* [2007] NSWCCA 283. In ***Ramea v R* [2013] NSWCCA 310** Latham J held (at [17]) that there is "nothing inherently objectionable, even post *Muldrock*, in the statement that there must be an appropriate relationship between the standard non-parole period and the objective criminality of the offence. In my view, that is saying no more than that the standard non-parole period operates as a benchmark." The appellant's claim that the sentencing judge had offended the approved approach to sentencing set out in *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 was also rejected. *Markarian* was not a standard non-parole period case, and indeed the plularity recognised that careful attention ought be paid to legislative yardsticks. Instead, the prohibited approach involves "determining a sentence referable to an offence, and then engaging in 'arithmetical deduction' from that sentence for mitigating and/or subjective factors" (Latham J at [21]).

Standard non-parole period and maximum penalty both relevant even where significant disparity is prescribed

The appellant in ***Duncombe v R* [2013] NSWCCA 271** was sentenced, pre-Muldrock, to an offence of inflicting grievous bodily harm. That offence carries a non-parole period of seven years, and a significantly higher maximum penalty of 25 years. The appellant argued that the sentencing judge had applied a two-stage process, and had also assigned determinative significance to the standard non-parole period.

In his remarks, the sentencing judge said:

> "Taking all of these matters into consideration I would fix the objective criminality of this offence as being slightly below the mid range for offences of this nature. The prisoner's counsel Mr Priestley submitted that as against the standard non-parole period of seven years such an analysis as that which I have disclosed might be quantified at six years. I agree that represents a fair appraisal of the culpability of this offender. I stress however that this is to be viewed not simply against the standard non-parole period but against the overall maximum penalty of twenty five years. I have not been distracted from consideration of that penalty by over concentration on the standard non-parole period."

Johnson J agreed that the remarks revealed a two-stage approach. But he did not see that the sentencing judge assigned determinative significance to the standard non-parole period. Rather, the remarks showed appropriate regard to the statutory guideposts of both the standard non-parole period and the maximum penalty. His Honour remarked, at [53], that

both standards are relevant even where there is such a significant gap in their prescribed lengths.

Finding that standard non-parole period "highly relevant" not erroneous in light of judgment as a whole

***Black v R* [2013] NSWCCA 265** concerned a finding by a sentencing judge that, for offences in the mid-range with no guilty pleas, the prescribed standard non-parole periods were "highly relevant". The offender argued that this demonstrated *Muldrock* error. Bellew J held that this ground did not succeed in the light of the judgment as a whole. The sentencing judge only made that remark after considering objective seriousness and the subjective case. It was also not possible to conclude that anything expressed as "relevant", to whatever degree, could be equated with a finding of determinative significance. The application for an extension of time in which to appeal was refused.

Reference to the mid-range of objective seriousness does not establish "Muldrock" error

Mr Kerrtai was sentenced for an offence of having sexual intercourse with a child under 10. He appealed his sentence, arguing that the sentencing judge had fallen into Muldrock error in expressing a finding that the objective seriousness of the offence was "slightly below mid-range": ***Kerrtai v R* [2013] NSWCCA 252**. Mr Kerrtai submitted that the degree of specificity in that finding was contrary to an instinctive synthesis approach. Hoeben CJ at CL disagreed. It is no error to express a finding of objective seriousness on a scale. And the judge did not engage in a two-step process. He had identified all factors relevant to sentence, evaluated their significance, and determined the appropriate sentence according. The application for an extension of time in which to appeal was refused.

Standard non-parole periods – the approach to sentencing post-Muldrock

Some observations were made about *Muldrock v The Queen* [2011] HCA 39 by Basten JA in ***R v Koloamatangi* [2011] NSWCCA 288**. They included that it "weakens the link between the standard non-parole period and the sentence imposed in a particular case" as well a limited the range of factors to be considered in determining the "objective seriousness" of the offence ([18]). It remained in doubt as to "whether the sentencing court is required or permitted to classify, or [is] prohibited from classifying, the particular offence by reference to a low, middle or high range of objective seriousness" ([19]). A number of matters in this respect were noted, including that the High Court did not "suggest that a conventional assessment of the objective offending, according to a scale of seriousness, was to be eschewed" ([19]). "One consequence of *Muldrock* is that a sentencing judge will need to bear the standard non-parole period in mind as a marker, whether or not there are reasons why it should not be applied". "(T)he standard non-parole period cannot have "determinative significance – see *Muldrock* at [32] – nor even, as the Court also noted, much weight at all in circumstances such as those which arose in *Muldrock* itself" ([21]). Further, in *Beveridge v R* [2011] NSWCCA 249, James J held that *Muldrock* had wholly undermined as grounds of appeal the failure of the trial judge to precisely identify the degree to which an offence has departed the notional mid-range of objective seriousness.

The case of ***Bolt v R*** **[2012] NSWCCA 50** involved an appeal against sentence handed down seven months prior to the High Court's decision in Muldrock v R [2011] HCA 39. McCallum J held that the sentencing judge had engaged in a two stage reasoning process that, although correct at the time, was now erroneous given the High Court's decision.

However, Davies J in ***Butler v R*** **[2012] NSWCCA 23** held that merely because an offender was sentenced prior to *Muldrock* did not establish an error in sentencing. The sentencing judge had held the standard non-parole period was simply a "guideline or yardstick" in determining the sentence. Further, his Honour had not engaged in the two-step reasoning process as set down by Way. It was the appellant's case that as the sentence had been imposed prior to *Muldrock*, and so had miscarried. However, Davies J found that there had been no error in the sentencing judge's approach.

His Honour stated at [26]:

> "Merely showing that a sentencing judge sentenced pre-*Muldrock* following the dictates of Way will not be sufficient to demonstrate error. What should be ascertained in each case is whether a reliance on Way has sufficiently infected a sentence with such error that this court must intervene. Ordinarily this might occur in cases where an applicant is found guilty by a jury, with the result that the sentencing judge will have considered that a two-stage process must be applied and that the standard non-parole period is mandatory unless factors can be found to justify a variation from it. It is far less likely that intervention will be required from this court where a sentence has been imposed following a plea of guilty and the sentencing judge has referred to the standard non-parole period as simply a guideline or yardstick."

The appellant in ***Zreika v R*** **[2012] NSWCCA 44** had pleaded guilty to reckless wounding. It was contended that the sentencing judge and followed the approach set out in *Way* in relation to the standard non-parole period. Johnson J (at [36]-[42]) set out the unusual fashion in which the High Court overturned the approach in *Way*, without arguments against the approach ever being put before the Court of Criminal Appeal for determination. His Honour then returned to consider two alleged errors in the sentencing judge's approach in *Zreika*. First (at [43]), it was found that the judge's reference to the standard non-parole period as a "reference point" and "useful guide" was entirely consistent with *Muldrock*. Secondly, the sentencing judge had asked whether "there are reasons for not imposing the standard non-parole period". Johnson J (at [44]) held that this statement does not conform to the *Muldrock* approach. However, an assessment of the objective seriousness of the offence still forms part of the process of instinctive synthesis undertaken by a sentencing court (at [46]-[47]). Rejecting this ground of appeal, Johnson J held that, looking at the whole decision, the sentencing judge had not misused the standard non-parole period in determining sentence.

In ***Mendes v R*** **[2012] NSWCCA 103**, error was identified in the latter of the two categories of case described by Davies J in *Butler v R* (above) (sentencing after a plea of guilty). The judge had posed for herself the question whether it was appropriate to impose the standard non-parole period, characterised the offence as being of mid-range objective seriousness, and then gave reasons, including the plea of guilty, for not imposing the standard. Using the standard non-parole period as a starting point was held by Davies J (at [57] – [63]) to be

erroneous. The judge had engaged in the two-stage sentencing process proscribed by *Muldrock*.

Standard non-parole periods – R v Way overruled

The offender in ***Muldrock v The Queen*** **[2011] HCA 39** pleaded guilty to a child sexual assault offence that had carried a maximum penalty of 25 years and a standard non-parole period of 15 years. A non-parole period of 96 days was imposed so as to allow for immediate release. The total term was 9 years. A Crown appeal was allowed and a new non-parole period of 6 years 8 months was substituted. The High Court of Australia held that the CCA had erred in its approach concerning the standard non-parole period. It was also held that the total term was manifestly excessive. The approach to the assessment of sentence for an offence with a standard non-parole period that had been set out by the CCA in *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168 was held to be wrong. (Special leave to appeal was refused in *Way v The Queen* [2005] HCATrans 147).

The appellant submitted that *Way* was wrongly decided and that the standard non-parole period had no role in sentencing for an offence that was not in the middle of the range of objective seriousness. That assumed that s 54B(2) prima facie mandated imposition of the standard non-parole period for a midrange offence. The Crown submitted that there was nothing in the legislation to suggest that the standard non-parole period only applied to a particular category of offence by reference to where in the range of seriousness it fell. It also submitted that decisions subsequent to *Way* had adopted a categorical two-stage approach. There was also the submission that s 54B(2) was not mandatory in terms ("the court is to set the standard non-parole period…"). Rather, there remained the full range of judicial discretion to impose a longer or shorter period.

The Court accepted that submission. It followed that *Way* was wrongly decided. When sentencing for a standard non-parole period offence it was wrong to commence by asking whether there are reasons for not imposing that period. It was also wrong to "proceed to an assessment of whether the offence is within the midrange of objective seriousness" (at [25]). Earlier (at [17]) it was said that "fixing the appropriate non-parole period is not to be treated as if it were the necessary starting point or the only important end-point in framing a sentence."

As to the correct approach, reference was made to what was said by McHugh J in *Markarian v R* [2005] HCA 25 [51]: "The judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case". In taking into account the full range of factors the court is mindful of the two legislative guideposts, the maximum sentence and the standard non-parole period.

One matter that is somewhat difficult is that at [27] the court said that having regard to the standard non-parole period as one of the guideposts required "that content be given to its specification as 'the non-parole period for an offence in the middle of the range of objective seriousness'". Then, at [29] there was reference to the requirement of s 54B(4) for the court to make a record of its reasons for increasing or reducing the standard non-parole

period. It was said that this did not suggest, inter alia, a need "to classify the objective seriousness of the offence". Regrettably there was no explanation as to how a court is to give "content" to the standard non-parole period being for a middle range offence without "classify[ing] the objective seriousness of the offence". In the next paragraph ([30]) there is reference to a "full statement of reasons for the specification of non-parole periods either higher or lower than the standard" assisting appellate review, promoting consistency in sentencing, and increasing public awareness of the sentencing process. One might think that specifying where within the range of objective seriousness the offence at hand falls would promote each of those objectives.

The important point, however, is that the Court held (at [28]) that Div 1A does not require, or permit, a court to engage in a two-stage approach to sentencing, commencing with an assessment of whether the offence falls within the middle of the range and, if it does, inquiring whether there were matters justifying a longer or shorter period.

The Court also acknowledged (at [31]), as did the CCA in *Way*, that the specification of standard non-parole periods may lead to a move upwards in the length of the non-parole period as a result of adding the court's awareness of the standard to the various other considerations bearing on the determination of the appropriate sentence. It was not because the standard non-parole period is the starting point in sentencing for a midrange offence after conviction at trial.

Parity

Parity a relevant factor even where co-offenders dealt with summarily

The applicant in ***Greaves v R*** **[2020] NSWCCA 140** appealed his sentence for a number of assaults and thefts. His two co-offenders were dealt with in the Local Court, while he was sentenced in the District Court. On appeal, the applicant argued a lack of parity between him and his co-offenders – the trial judge had disregarded parity because the co-offenders were dealt with summarily.

Cavanagh J held that this was in error. The sentencing exercise is the same in both the Local and District Courts, and takes as its point of maximum reference the maximum sentence, not the jurisdictional limit. The limit should only have entered the equation if the final sentence exceeded it. Parity should therefore not be disregarded because of the limit.

Parity appeal rejected where incongruous with case below

Mr Raine and his wife were sentenced for defrauding their employer, Tabcorp, by falsifying betting tickets. At sentencing, they were represented by the same senior counsel who argued that Mr Raine was the "ringleader" and his wife a "follower". This argument was accepted by the sentencing judge, and Mr Raine received a higher sentence as a result. On appeal, Mr Raine argued that this disparity gave rise to a legitimate sense of grievance. In ***Raine v R*** **[2020] NSWCCA 32**, Lonergan J rejected that argument as being incompatible with the submissions made below.

Parity requires parties to be co-accused or engaged together in a criminal enterprise – wrong large commercial quantity used in comparison to assess objective seriousness

Mr Malouf appealed his sentence on four grounds, including that his sentence was disparate from that of Mr Azzopardi. Malouf had bought drugs from Azzopardi to on-sell to his own customers. In **Malouf v R [2019] NSWCCA 307**, R A Hulme J dismissed this ground, holding that Azzopardi lacked enough involvement in Malouf's criminal business to be considered comparable. They were neither co-accused nor engaged in the same enterprise.

The appeal was upheld on different grounds, namely that the sentencing judge misconstrued the objective seriousness of the offending when she made a comparison with the wrong prescribed large commercial quantity. At the time of offending, the large commercial quantity for methylamphetamine was 1kg. At the time of sentence, this had been reduced to 500g – the quantity referred to by her Honour. Malouf was being sentenced for the supply of 366.54g. The sentencing judge fell into error when she compared Malouf's quantity to the new large commercial quantity, rather than the old, to determine the objective seriousness of the offending.

Parity principle does not apply where relevant offence appears on Form 1 for co-offender

The appellant in ***Dunn v R*** **[2018] NSWCCA 108** pleaded guilty to seven counts relating to drug supply. The seventh count was for knowingly taking part in the supply of a prohibited drug. For the appellant's co-offenders, the only offence in common was that in Count 7 but for them it was an offence taken into account on a Form 1. The sole ground of appeal was that there was "a legitimate sense of grievance when comparing the sentence imposed upon him to the sentences imposed upon his co-offenders".

Leave to appeal was refused. Adamson J held that the parity principle had no application because of the inclusion of the corresponding charges on a Form 1; there could be no relevant comparison between a sentence for an offence and an unspecified increase in a principal sentence incorporating a Form 1 offence.

Parity – disparity need not be "gross, marked or glaring"

In ***Miles v R*** **[2017] NSWCCA 266**, one of the grounds of appeal was that the appellant had a justifiable sense of grievance in relation to the disparity between his sentence and that of a co-accused. The Crown referred to *Tan v R* [2014] NSWCCA 96 to argue that the test of whether disparity will give rise to a ground of appeal is whether the difference is "gross, marked or glaring".

Rothman J, with whom Leeming JA and Hamill J agreed, adopted the analysis of Hamill J in *Cameron v R* [2017] NSWCCA 229, in which his Honour had regard to the fundamental principles that underpin the parity principle. These principles, outlined by Dawson and Gaudron JJ in *Postiglione v R* (1997) 189 CLR 295 and Hoeben CJ at CL in *Tuivaga v R* [2015] NSWCCA 145, are based on equal justice; that like should be treated alike but that due allowance should be had to relevant differences between co-accused.

Rothman J held that the epithets “gross", "marked" and "glaring” do not reflect the test; the test is whether the principles of equal justice have been misapplied. Leeming JA also rejected the proposition that it is necessary to demonstrate a “marked, gross, or glaring” disparity between sentences, and said that the descriptors are apt to mislead. Rather, his Honour held that the question is whether the sentence imposed on a co-accused is reasonably justified in light of the objective and subjective differences between the co-offenders.

In ***Adams v R*** **[2018] NSWCCA 139** Johnson J (Simpson AJA and Adamson J agreeing) endorsed the notion that the parity principle involves a consideration of discretionary assessments by sentencing judges. Thus in *Lloyd v R* [2017] NSWCCA 303 it was said that the question was whether "the differentiation made by the judge was one that was open to her in the exercise of her discretion". This was seen to echo the approach taken in the Victorian Court of Appeal where "it has been said that the concept of (an objectively) justifiable sense of grievance is a way of expressing the conclusion that a sentencing differential (or lack of differential) was not reasonably open to the sentencing judge given the relevant similarities and differences between the offending and the offenders". His Honour quoted Ashley JA saying in *Tran v R* [2017] VSCA 346 that sentences are not weighed "with a pretence of arithmetical certainty" and that "an attempt to demonstrate that a sentence imposed upon one of the offenders was not reasonably open, by resort to a minute examination of the individual circumstances of the offending and the offenders, runs counter to the concept of instinctive synthesis".

In ***Fenech v R*** **[2018] NSWCCA 160** the applicant took the Court to what was said in *Miles v R*. In response, it was said (at [30]-[32]) that the better course is to confine discussion of the parity principle to the terms used in judgments of the High Court. These included "marked disparity", "marked and unjustified disparity" and that for interference to be justified the difference between the sentences must be "manifestly excessive", an expression well known to mean "unreasonable or plainly unjust".

Parity principles have little or no application where co-offender sentenced in Drug Court

The applicant in ***Tobia v R*** **[2016] NSWCCA 99** pleaded guilty to aggravated (in company) break, enter and steal contrary to s 112(2) of the *Crimes Act 1900* and was sentenced to 3 years imprisonment with a non-parole period of 1 year and 3 months. The applicant was referred to the Drug Court on two occasions but was not selected in the ballot. The co-offender was sentenced for this and other offences to an aggregate sentence, which was suspended upon him entering the Drug Court program; the indicative sentence for the subject offence was 2 years and 3 months. The applicant appealed against his sentence, including on the ground that there was disparity between the sentences imposed upon him and his co-offender. Wilson J rejected the ground and dismissed the appeal. It must be accepted that sentences imposed by the Drug Court may incorporate what may be perceived to be a significant measure of leniency. That is a consequence of the importance of achieving an offender’s rehabilitation. Due to the specific statutory objectives under which sentences are determined by the Drug Court, it is generally unproductive to attempt to make a direct comparison between a sentence imposed in that jurisdiction and a

sentence imposed in another court. The parity principle in those circumstances could have little or no application. The comparison for the purposes of determining a parity ground is to be made with the initial indicated sentence. The applicant's sentence being nine months longer than that of the co-offender is explained by his greater criminal history and the fact that he was subject to a bond at the time of the offence.

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

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

Parity and errors in sentencing co-offenders

***Truong v R; R v Le; Nguyen v R; R v Nguyen* [2013] NSWCCA 36** concerned, in part, an appeal by a Mr Truong against the severity of his sentence for a firearm offence. His co-offenders had been sentenced on the erroneous factual basis that the weapon in question was not capable of firing live rounds. Mr Truong submitted that he had a justifiable sense of grievance because he did not, in his sentence proceedings, have the advantage of that error. Button J dismissed the appeal, holding that the Court could not knowingly replicate the error below. Nor in the absence of a Crown appeal, the error being on the basis of a mistaken concession, could not correct it by reference to the sentence for the other offenders.

Information on sentences passed upon co-offenders

In ***Shortland v R* [2013] NSWCCA 4**, the Court yet again stressed the importance of sentencing judges being provided with the details of sentences passes upon co-offenders. If this is not done, there is a likelihood of delivering inconsistent sentences across a group of offenders without allowing for practical comparison of culpability. This is an objective basis for a sense of grievance on the part of an individual co-offender, and re-sentence on parity grounds may be necessary. (The most desirable arrangement is, of course, for one judge to sentence all offenders.)

Reminder against sentencing co-offenders in separate proceedings

In ***Arenila-Cepeda v R* [2012] NSWCCA 267**, the Court considered a sentencing appeal by an offender who had been sentenced in separate proceedings from his co-offender. The evidence before each sentencing judge was different; each judge made different findings in relation to that evidence; and the remarks on sentence produced in the prior proceeding were not provided to the latter judge. Johnson J upheld the appeal on the grounds of parity and proportionality, noting that the case was a reminder that separate sentence proceedings for co-offenders were undesirable, but if they were to be pursued the Crown

would bear the main burden for ensuring that each subsequent judge had the relevant remarks on sentence.

Desirability of co-offenders being sentenced by the same judge at the same time

In ***Dwayhi v R; Bechara v R*** **[2011] NSWCCA 67**, three co-offenders were sentenced by different judges. Two who were sentenced in 2008 and 2009 raised a parity ground in relation to the sentencing of the third offender who was sentenced in 2010. Johnson J provided a useful discussion of the difficulties that emerge when co-offenders are sentenced by different judges, and held that it is necessary for sentencing courts and prosecutorial bodies to take steps to ensure as far as is reasonably possible that related offenders are sentenced by the same judge at the same time in a single sentencing hearing. His Honour proffered the following opinion ([45]):

> "It ought to be appropriate… for sentencing and appellate courts to enquire of counsel for an offender, who seeks to rely upon the parity principle, as to the steps taken by that offender or his legal representatives to ensure that he or she was sentenced by the same Judge, and at the same time, as any related offender, if the case is one where there were different sentencing judges."

Parity - offenders not engaged in a common enterprise

The appellant in ***Henderson v R*** **[2012] NSWCCA 65** had been sentenced for possessing an unauthorised firearm and supplying ecstasy. Other firearm offences had also been taken into account. He contended that the sentencing judge erred in not applying the parity principle in relation to the sentence imposed on a man who had been convicted of possessing an unauthorised firearm based on his having secreted it for a few days for the appellant. R A Hulme J referred to the principle in cases such as *Jimmy v R* [2010] NSWCCA 60 that the parity principle will be applied to offenders engaged in the "same criminal enterprise" or a "common criminal enterprise". It was contended on behalf of the appellant that the effect of the decision in *Green v R; Quinn v* R [2011] HCA 49 was that strictures of the parity principle had been relaxed, and the approach was one of substance over form. However, R A Hulme J found (at [60]) that as a matter of "substance" it was doubtful whether a "criminal enterprise" existed at all in the circumstances of the case, let alone one common to both the appellant and the other man.

Disparity unlikely where co-offenders are adult and child

In ***Ruttley v R*** **[2010] NSWCCA 118**, the adult offender and his juvenile cousin broke into a man's home and assaulted him. Simpson J found that, although the parity principle would normally arise where one offender was received a more lenient sentence for a more serious offence, the statutory need to "reintegrate" juvenile offenders meant that disparity could only arise in exceptional cases. The difference in sentence was found to be relevant to proportionality, but not to parity.

R v Wing Cheong Li; Wing Cheong Li v R **[2010] NSWCCA 125** was another case where no disparity was found despite markedly different sentences. Here, the co-offenders had been

dealt with for different sentences carrying different maximums, so there was no legitimate grievance.

Special circumstances idiosyncratic, unlikely to give rise to disparity

In ***Lau v R*** **[2010] NSWCCA 43**, McClellan CJ at CL noted that any special circumstances usually differed between co-offenders, and so could not be said to give rise to a justifiable grievance. However, in some cases, the facts and circumstances might be similar enough to justify a finding of disparity. Here, the special circumstances of the offenders (mostly being away from their overseas families) were sufficiently indistinguishable that disparity arose when one but not the other was granted a shorter non-parole period.

Disparity must be marked before intervention called for

England v R; Phanith v R **[2009] NSWCCA 274** concerned a number of robberies in company carried out by co-offenders. The applicants complained of disparity. Howie J took the opportunity in this case to make the point that appellate intervention is only justified when there is a disparity of sentence if it is such that can be described as "marked", "gross", "glaring", "manifest" or the like.

The parity principle does not apply where offenders are not co-offenders

Meager was sentenced for drug supply. Her offence comprised 14 separate supplies within a period of a month, the total amount involving just less than three grams. She sourced her drugs from Collier who was sentenced for a supply offence that involved a greater quantity of heroin over a longer period of time. Meager complained on appeal about her sentence being greater than Collier's. In ***Meager v R*** **[2009] NSWCCA 215,** Latham J accepted the Crown submission that Meager and Collier were not co-offenders and so the parity principle had no application.

Procedural fairness

Sentencing judge not bound by submissions of parties on objective seriousness, unless agreement expressly indicated

Mr Brown was sentenced for two assault offences, including puncturing a man's lungs with scissors. At sentencing, the Crown agreed with defence counsel that the objective seriousness of the offending fell below mid-range. In his remarks, the judge disagreed with these submissions. Brown appealed, alleging a lack of procedural fairness because he was not given notice or an opportunity to dissuade the judge from that course: ***Brown v R*** **[2020] NSWCCA 132**.

Harrison J dismissed the appeal, finding that the judge was not bound by the submission or concession of the Crown on objective seriousness without some express or implied indication that he intended to adopt it. Here, it was clear that the assessment remained a matter for the judge, and so Brown was not denied an opportunity to be heard on it.

Procedural fairness – discount for guilty plea at lower amount than Crown concession

The applicant pleaded guilty to manslaughter 4 days before his trial was due to start. He was sentenced to 8 years after a 12% discount for the plea. One of the grounds of appeal against sentence in ***ES v R*** **[2019] NSWCCA 262** asserted a denial of procedural fairness in relation to the sentencing discount. During the sentence hearing the applicant's counsel sought a discount of 25-25% and the Crown accepted it should be higher than 15%. The judge observed, "you are not terribly far apart, but the top of your suggested range is the bottom of his". It was held that the judge had not indicated that she would find a figure in the range suggested, but made a neutral observation of the extent of the issue between the parties that reflected their submissions. Appeal dismissed.

Procedural unfairness not established because judge did not depart from proposed finding but is established because judge made adverse finding regarding prospects of rehabilitation without notice

A man supplied a pistol to another man in exchange for $20,000, which was used to pay down a $100,000 gambling debt. He pleaded guilty to charges of supplying a pistol to a person not authorised to possess it. In the proceedings on sentence, the judge said that "my impression is that the risk of reoffending is minimal if at all". Later in his judgment he said the man's prospects of rehabilitation were "poor to moderate". One of the grounds of appeal in ***Neil Harris (a pseudonym) v R*** **[2019] NSWCCA 236** was that there was a denial of procedural fairness, because the finding of the risk of reoffending was different at hearing than what transpired in the remarks – in other words: "a sentence was imposed on the basis of a different course, adverse to the applicant, without the applicant being afforded an opportunity to be heard in the matter".

N Adams J found that there was procedural unfairness, although not on the basis of the sentencing judge having resiled from the preliminary finding on risk of reoffending. Rather, it was procedurally unfair for the sentencing judge to make a finding that the applicant's prospects of rehabilitation were "poor to moderate". This was so because the finding was not the subject of submissions by the Crown, and was not based on anything in the psychological report before the sentencing judge. Therefore, if the sentencing judge was contemplating an adverse finding, it was incumbent on him to raise this with representatives for the applicant.

Defence submissions – requirement that sentencing judges explicitly deal with them

A man got into a taxi and threatened the driver with assault unless the driver drove him at high speed down the Pacific Highway to Bulahdelah. The taxi driver complied out of fear, until he managed to swerve into a service station and barricade himself inside the building. The man then unsuccessfully attempted to set the service station across the road on fire. Police arrived and pepper-sprayed the man, and eventually were able to arrest him. He was sentenced in the District Court after pleading guilty to a series of offences to 5 years, with a non-parole period of 2 years, 6 months reflecting a finding of special circumstances. The appeal to the Court of Criminal Appeal asserted that the sentencing judge had failed to deal

with two explicit submissions made on behalf of the applicant: that is, the failure to address whether the applicant's mental condition at the time of offending reduced his culpability, and the applicant's good prospects of rehabilitation and low likelihood of reoffending. In ***Masters v R* [2019] NSWCCA 233**, Hamill J upheld the grounds of appeal and re-sentenced the applicant to a shorter term.

In respect of ground 1, there was an express submission that the applicant's change of medication affected his mental condition, and that by virtue of the causal link with the offending, this reduced his moral culpability. The judge's sentencing remarks made no reference the mental condition reducing the applicant's moral culpability, apart from the brief remark that it mitigated the offending. This was insufficient and the judge needed to expressly deal with the submission. The ground was upheld by Hamill J on this basis.

In respect of ground 2, submissions that the judge should find good prospects of rehabilitation and unlikelihood of reoffending were not resolved in the remarks in sentence in terms of either making a finding or considering how it would impact on the sentence. While the remarks made by the sentencing judge during the course of proceedings were favourable, there was an obligation on the judge to record a clear finding given that there were some differences in opinion between the pre-sentence report and the evidence called by the applicant. Hamill J upheld this ground for that reason.

Procedural fairness – if judge accepts submission at hearing, it is unfair to reverse that finding without allowing an offender opportunity for further submissions

Mr Kha faced sentence for supplying drugs. As the only adult fluent in English, he was the breadwinner and primary caregiver to his wife, four children, and his mother and mother-in-law. Counsel submitted that the judge should find special circumstances. The Crown conceded this and the sentence judge said, "prima facie I think that must be so". Ultimately the sentence reflected the statutory ration and there was no mention of special circumstances in the judgment.

In ***Kha v R* [2019] NSWCCA 215**, Ierace J agreed with applicant's submissions on this ground. While it is not clear from the remarks on sentence whether the sentencing judge ended up concluding that special circumstances were not made out, or omitted the issue by mere oversight, but the end result was the same. The sentencing judge's rejection of special circumstances was unexplained. His Honour held that the applicant was denied procedural fairness because he lost the opportunity to make submissions in favour of a finding of special circumstances, having been led to believe it was not necessary in view of the Crown's concession and the judge's express preliminary view. Error having been made out, the applicant was re-sentenced to a shorter term of 9 years, with a 6 year NPP.

Procedural fairness – disclosure of preliminary views on appropriateness of custodial sentence

A winemaker knew that some people were cultivating commercial quantities of cannabis at a nearby property. He did not inform the police. He pleaded guilty to a charge of concealing a serious indictable offence and was sentenced to imprisonment for 8 months,

with a non-parole period of 6 months. It was argued in ***Casella v R*** **[2019] NSWCCA 201** that the sentencing judge did not "fairly raise" that he was considering a custodial sentence at the hearing, and that this was a denial of procedural fairness. This argument was dismissed, although the appeal was allowed on the basis of manifest excess.

Bathurst CJ said that to start with, there is a difference between disappointed expectations and denial of procedural fairness. The latter arises if the judicial officer deals with a matter in a different fashion without notice, or tells the parties that it is unnecessary to deal with an issue, and then proceeds to make an adverse finding on that very issue. Subject to these circumstances, Bathurst CJ considered, "in the context of the present case, that did not mean that the sentencing judge had a duty to advise counsel for the applicant as to how he should conduct his case, or … express any preliminary views that he or she may have formed on the appropriate sentence". Given that submissions by counsel below adverted to the possibility of a full-time sentence, and that a custodial sentence was being treated as an issue in the sentencing proceedings, his Honour concluded that there was no procedural unfairness.

No denial of procedural fairness in rejecting second hand claim of remorse

The appellant in ***Newman v R*** **[2018] NSWCCA 208** pleaded guilty to seven charges of possessing child abuse material. At sentencing, the appellant did not give evidence but tendered a report by a forensic psychologist which referred to the appellant seeking treatment following his arrest. The sentencing judge rejected his claim that he was remorseful, finding that if he was genuinely remorseful he would have sought treatment much earlier. On appeal, the appellant argued that the sentencing judge denied him procedural fairness because the prosecutor did not make submissions opposing a finding of remorse and the judge gave no indication that he would not accept the claim.

Payne JA held that the sentencing judge was entitled to exercise considerable caution in relying on untested assertions in the psychologist's report in the absence of sworn evidence. His Honour held that the sentencing judge had not led the offender to believe that a finding of remorse would be made, but rather was a case where the offender had not given direct evidence of remorse. His Honour held that it is for the accused to prove on the balance of probabilities any mitigating circumstances relied upon, and that it was not incumbent upon the judge to forewarn the applicant that he may not accept untested and indirect evidence of remorse.

A judge considering imposing a non-parole period greater than three quarters of the head sentence should alert an offender to that possibility

After failing the Drug Court program, the appellant in ***Brennan v R*** **[2018] NSWCCA 22** was sentenced for a number of offences. The sentencing judge said he had been asked to find special circumstances but concluded that he would not. He imposed an aggregate sentence of 3 years 6 months with a non-parole period of 3 years (86%). The appellant argued, first, that the judge was required to find special circumstances for imposing a non-parole period that exceeded three quarters of the sentence, and secondly, that he was denied procedural

fairness by there being no warning of the possibility there might be a non-parole period greater than three quarters of the sentence.

Button J considered *Connelly v R* [2012] NSWCCA 114 to conclude that the working of s 44 of the *Crimes (Sentencing Procedure) Act* did not require the sentencing judge to find special circumstances in order to impose a non-parole period that is more than 75% of the head sentence. As for ground two, Button J held the sentencing judge was, in the circumstances, obliged to forewarn that he might impose a non-parole period greater than three quarters so as to provide the appellant with the chance to make submissions.

Procedural fairness – no warning that an aggravating factor would be taken into account

The applicant in ***Aloniu v R* [2017] NSWCCA 74** was sentenced for three counts of aggravated sexual assault. The victim was his niece by marriage, who was 15 at the time and staying at the applicant's home. On appeal, the applicant contended that he was denied procedural fairness prior to the sentencing judge finding that the offences were aggravated by the fact that the applicant knew the victim was under 16 years old. The applicant had denied knowing the victim was under 16. The only aggravating factor on the indictment was that the victim was under the applicant's authority. Walton J (with whom Hoeben CJ at CL agreed, Price J dissenting on this ground) accepted this ground of appeal. His Honour found that the sentencing judge had treated knowledge that the complainant was underage as an aggravating factor. The Crown had not submitted that such a finding be made at the sentence hearing and the sentencing judge did not raise the issue. The applicant was entitled to be given an opportunity to be heard on the issue before the sentencing judge took it into account as an aggravating factor: *R v Tadrosse* (2005) 65 NSWLR 740; NSWCCA 145. The failure to give the applicant that opportunity was a denial of procedural fairness.

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.

Judge'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.

Judge should have disqualified himself after stating that offender was guilty in respect of another offence for which he had been acquitted

The sentencing judge in ***Murray v R*** **[2015] NSWCCA 75** had presided over an earlier trial at which the appellant was acquitted. However during the course of the sentencing proceedings, in considering issues of whether appellant had been on conditional liberty at the time of the offence in question and whether there was an issue of future dangerousness, the judge made statements to the effect that despite the jury's verdict he was satisfied beyond reasonable doubt of the appellant's guilt in the other matter. He also made statements to the effect that it was appropriate that he put such a matter out of his mind. Mr Murray however made an application for the judge to disqualify himself which the judge refused. On appeal it was held that he should have stepped aside on the basis that there was a reasonable apprehension of bias.

No requirement for a judge to foreshadow that he will reject unchallenged evidence of remorse

In ***Tweedie v R*** **[2015] NSWCCA 71** a sentencing judge received oral evidence from an offender that he was ashamed of himself and other expressions of purported remorse. There was also tendered a letter from the offender's partner in which she conveyed that he had expressed remorse. The Crown did not in direct terms challenge such evidence. In his reserved sentencing judgment the judge rejected that the offender was remorseful. It was complained on appeal that there was a denial of procedural fairness. It was held by R A Hulme J that it was unreal to expect a judge to consider and reflect upon all that was placed before him or her during a sentence hearing and indicate before delivering or reserving judgment any possibility of disagreement or non-acceptance of such matters even where they were not challenged by the opposing party. The judge did not do anything to foreclose or discourage any evidence or submission on the subject of remorse.

Failure to warn of a disagreement with Crown concession is not a denial of procedural fairness

The offenders pleaded guilty to offences of drug supply and dealing with the proceeds of crime. The Crown conceded, in written submissions, that concurrent sentences could be imposed. The offenders' counsel indicated agreement with the Crown submissions. The sentencing judge, however, imposed partially accumulated sentences. In ***Toole, Kurt v R; Toole, Joshua v R*** **[2014] NSWCCA 318** Joshua Toole argued that the trial judge's failure to warn his counsel that she intended to accumulate the sentences was procedurally unfair. In dismissing the appeal, R S Hulme AJ held that in light of the demands on District Court judges, it would be "an intolerable burden" to require judges, when reserving, to be well acquainted with every detail of a matter so as to identify any concessions and raise any disagreement with defence counsel. An obligation would only arise in circumstances where the judge has given a positive indication that a particular approach or argument will be adopted and then has a change of view.

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.

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

Mr Wootton was sentenced in the District Court for an offence of specially aggravated breaking and entering a dwelling and committing a serious indictable offence. In her remarks on sentence the judge said, among other things, that "gun crimes are on the increase". On appeal Mr Wootton argued there was no evidence for this and that he was denied procedural fairness. Campbell J in ***Wootton v R*** **[2014] NSWCCA 86** dismissed the appeal. The judge referred to the increase in gun crimes in the context of general

deterrence and was not singling it out as a determinative factor in fixing the sentence. However, it was wrong to refer to "police expectations". Just as prosecutorial opinions are irrelevant as to the available range of sentences, so to are those of the police.

Denial of procedural fairness at a sentence hearing

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

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

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

Failing to warn that uncontested evidence will not be accepted amounts to procedural unfairness

The appellant in ***Cherdchoochatri v R*** **[2013] NSWCCA 118** was being sentenced for importing a marketable quantity of heroin. He gave evidence, which was not challenged by the Crown, that he had been subject to duress in respect of the offending. That evidence was the subject of a submission on the appellant's behalf, and neither the Crown nor the sentencing judge made any comment on the use that was made of it. But on sentence, the judge rejected the argument that the appellant was motivated by duress. In the Court of Criminal Appeal, Emmett JA and Simpson J (with whom Latham J agreed) held that to give no warning that the submission might be rejected amounted to a denial of procedural fairness. In terms of the practical aspects of this, Simpson J pointed out at [58] that:

It may even have been possible to call additional evidence in support, for example, from the applicant's wife, or from Mr Howard. In this respect it is pertinent to note (although it is often overlooked) that the Evidence Act 1995 applies in sentencing proceedings only if a direction is given to that effect. There is a degree of flexibility in sentencing proceedings in the manner in which evidence may be given.

Procedural fairness

The offender in ***Ng v R*** **[2011] NSWCCA 227** was convicted of offences of murder and aggravated armed robbery. The offences were committed in the company of a co-offender who had pleaded guilty and assisted the prosecution. When sentencing the co-offender, the sentencing judge calculated a starting point of 30 years for the offences. During the offender's sentencing proceedings, the judge proposed to use the same 30 year starting point. The Crown agreed with that approach and the offender's counsel was invited to make submissions as to why a lesser sentence should be imposed. Ultimately, a sentence of 35 years was imposed, based partly on a finding that the offender was a "markedly more dangerous man" than the co-offender.

The appeal was allowed. In a joint judgment, Bathurst CJ, James and Johnson JJ held (at [48] – [50]) that practical injustice had occurred for two reasons: first, by the sentencing judge having imposed a sentence longer than that which had been indicated during the course of submissions, without providing an opportunity for submissions; and secondly, the judge's finding as to the dangerousness of the offender had not emanated from the parties' submissions or from the judge's provisional thought process conveyed throughout the proceedings.

Procedural fairness

In ***Trujillo-Mesa v R*** **[2010] NSWCCA 201**, the parties had agreed on a discount of 25% for an early plea of guilty. The trial judge noted that concession, but his Honour said nothing of the prospect that he might not act upon it. In light of this, the defendant made no submissions on the topic. His Honour later determined a discount of 20% was more appropriate. The defendant appealed. Fullerton J, allowing the appeal, held that the defendant had been denied procedural fairness.

Remarks/reasons on sentence

"Sentencing remarks" is not anachronistic

In ***Maxwell v R*** **[2020] NSWCCA 94**, Johnson J responded to criticism of the term "remarks on sentence" as being inaccurate and depreciatory. His Honour held that the remarks on sentence play an important role in explaining the sentencing process to offenders, victims, the community and appellate courts. His Honour pointed to usage of the term in recent English decisions and in parliamentary and legislative materials. The term is also used in recent decisions of the High Court.

Phrase "in this country, that is sexual intercourse" not impermissible consideration but part of duty to give reasons to offender and laypeople

The applicant in ***Rahman v R*** **[2020] NSWCCA 13** was sentenced for a penile-vaginal sexual assault offence with a cunnilingus sexual assault offence taken into account on a Form 1. The sentencing judge, in his remarks, said "in this country, that [cunnilingus] is sexual intercourse". On appeal, the applicant inferred from this that the sentencing judge took into account an irrelevant consideration – namely, that the applicant wasn't Australian.

Beech-Jones J held, dismissing the appeal, that the sentencing judge was merely fulfilling the duty to give reasons. The offender had expressed confusion as to what cunnilingus was. Additionally, it was not readily clear to the layperson that cunnilingus amounted to sexual intercourse in Australian law. Therefore, the sentencing judge was explaining the law in this jurisdiction for the benefit of both the offender and the observer.

Sentencing – the requirement to give reasons

An offender committed offences of aggravated sexual assault in January 2002. The offences were reported but he was not identified as the offender until 2015. He was sentenced in 2018. He had been sentenced in 2002 and 2003 for similar serious sexual assaults committed a year before and a month after the incident in question. One of the grounds of appeal in ***Porter v R*** **[2019] NSWCCA 117** was that the judge erred in his approach to the principle of totality. Other grounds alleged failures to make determinations on the applicant's prospect of rehabilitation and likelihood of reoffending.

The grounds of appeal were upheld but the appeal was dismissed on the basis that no lesser sentence was warranted. Error in relation to each ground was based upon the primary judge's lack of reasoning; each issue having been raised during submissions on sentence. At [67], R A Hulme J said that the appeal could have been avoided if "the primary judge had not just simply adverted to the issues to some relevant case law and legislative requirements. The judge should have provided some insight into his determination. The accused and the community are "entitled to know why a judge had determined to imprison the person and how a particular period of imprisonment has been assessed".

Magistrate's duty to give reasons and consider s 10 procedure continues even if defendant is absent

The applicant in ***Hayes v Office of the Director of Public Prosecutions*** **[2019] NSWSC 378** was caught with a small amount of cocaine in Barangaroo. He elected to lodge a written plea of guilty under s 182 *Criminal Procedure Act* and sought leniency. He did not appear in court when the matter was mentioned. The Magistrate adjourned the matter saying that if the applicant wanted leniency then he would have to appear in court. A Registrar failed to mention to the applicant that he had the opportunity of being afforded leniency if he appeared in court. When the matter was heard, a different Magistrate noted the applicant's absence, then convicted and fined him $250 without providing reasons. This decision was appealed to the Supreme Court.

Campbell J allowed the appeal and remitted the matter to the Local Court. Referring to Bellew J's judgment in *Roylance v Director of Public Prosecutions* [2018] NSWSC 933, his Honour reiterated that it is the duty of a magistrate to give reasons; "succinct reasons" can be given, but they need to meet a certain "legal standard". Here, the Magistrate's decision to convict and fine without more did not "engage with the issues put forward for determination by the parties and explain, shortly, why a decision is made one way rather than the other". Furthermore, Campbell J noted that reading the provisions of the *Criminal Procedure Act 1986* (NSW) together in its context requires the Court to consider the issue of whether a conviction should be recorded, even if that person has lodged a written plea through the s 182 procedure. For that reason, his Honour noted that the Local Court "practice" of not considering s 10 in the physical absence of a defendant – despite the fact that they are "taken" to have attended by way of s 182(3) – should no longer be followed.

Magistrate's obligation to give reasons for sentencing in written pleadings

A school teacher was arrested and issued with a Court Attendance Notice for possessing a prohibited drug. She completed a written notice of pleading, attached some character references, and submitted them to a Local Court for her case to be dealt with in her absence. The magistrate convicted her and imposed fines but did not provide reasons.

In ***Roylance v Director of Public Prosecutions (NSW)*** **[2018] NSWCCA 933**, Bellew J held that a magistrate is under an obligation to provide reasons for his or her decision and that a failure to provide adequate reasons is an error of law. Even making allowance for the busy work load of magistrates and the fact that this case was determined ex parte, it was necessary for there to be some indication of how the magistrate took into account what had been submitted by the offender and why the case was being dealt with by way of fines.

Requirements of remarks on sentence

The appellant in ***Taylor v R*** **[2018] NSWCCA 255** appealed against the severity of his sentence on two grounds, one contending that the sentencing judge did not take into account that he did not have any significant record of previous convictions.

Wilson J held that the judge was not specifically asked to take that into account but that a consideration of his sentencing remarks showed that he did give it favourable regard. In so doing, her Honour explained a number of principles relevant to the requirement to give remarks on sentence. Her Honour held that the requirement does not dictate a need for the recitation of all applicable law by first instance judges. Rather, it is enough if the appellate court is able to determine what the sentencing court did and why so that it can determine whether law and principle have been applied correctly. Her Honour concluded that in this case it is difficult for the appellant to rely on a contention not put at sentencing, but that nonetheless it was clear from the judge's remarks that the appellant's lack of significant prior convictions was viewed favourably.

Ex tempore reasons for judgment need not be "exceptionally eloquent"

Mr Newton pleaded guilty to an offence of break, enter and steal. His sentence was accumulated upon previous sentences that had been imposed for other offences. The remarks on sentence were delivered ex tempore, during which the appellant claimed the judge misapprehended a submission made on his behalf about the application of the totality principle. Adamson J in ***Newtown v R*** **[2014] NSWCCA 41** held that, with one minor exception, the criticisms were not soundly based. The timely administration of justice requires that judges often deliver oral judgments soon after hearings. Where this is necessary, it is not easy to "select the most apposite words or to construct sentences which not only reveal one's reasoning in a lucid way but which also withstand rigorous syntactic analysis" (at [41]). Parties are entitled to reasons but not to an "exceptionally eloquent" standard. The principle of interpretation that documents should be read as a whole applies to judgments, just as it does to contracts and legislation.

No requirement that remarks on sentence be bland

Piscitelli v R **[2013] NSWCCA 8** was a sentence appeal by the offender in a home invasion and sexual assault committed on an 83 year old woman. One ground related to remarks by the sentencing judge that a person reading the facts would be "horrified" and "disgusted". Button J, dismissing the appeal, held that there is no requirement that remarks on sentence be anodyne or mealy-mouthed, especially where the offence deserves condemnation.

Both the offender and members of the public in court should be able to understand the basis for the sentences from what is said at the time of sentencing

In ***R v Hersi and Hersi*** **[2010] NSWCCA 57** the sentencing judge said that he requested his "comments to be added to the comments I made on the earlier occasion this matter was in court", something Howie J described as a "somewhat unusual course". He was also critical of the need for the Court of Criminal Appeal to have to read the transcript of addresses and dialogue between the Bench and counsel in order to understand the reasons for sentence.

Sentencing for historical offences

NOTE: s 25AA was inserted in the *Crimes (Sentencing Procedure) Act 1999*, effective from 31 August 2018. It applies only to child sexual offences and requires that a court must sentence in accordance with the sentencing patterns and practices at the time of sentencing, not at the time of the offence. It also requires that in such cases a court must have regard to the trauma of sexual abuse on children as understood at the time of sentencing. The new provision does not affect s 19 ("Effect of alterations in penalties").

Use of "judicial memory" in sentencing for historical child sexual offences

The appellant in ***MC v R*** **[2017] NSWCCA 316** was charged with historical child sex offences committed against his daughters between 1972 and 1981. He appealed on the basis that the sentencing judge had used "judicial memory" of sentencing practices of the time of the commission of the offences. The appeal was dismissed. Hamill J (Simpson JA and Rothman J agreeing) adding his voice to the criticisms of the use of judicial memory: see, for example,

Garling J in *MPB v R* (2013) 234 A Crim R 576; [2013] NSWCCA 213 and Basten JA in *R v MJR* (2002) 54 NSWLR 368; [2002] NSWCCA 129.

Sentencing for historical offences and whether to take into account the former availability of remissions

In ***Versi v R* [2013] NSWCCA 206**, the applicant had been found guilty of offences committed in 1985-1986 and a question arose whether there was a need to replicate sentencing practices that would have prevailed at that time, that is, prior to the "truth-in-sentencing" reforms. Basten JA (Latham J agreeing, Adams J contra) held that, since the offender would not have been sentenced until after the commencement of the Sentencing Act 1989 (NSW), there was no need to take account of principles that may have operated prior to this. Accordingly, the Court should have regard to statutory guidelines, the range of conduct covered by the offence in each count and other sentencing principles that were applicable at the time.

Summary offences

Interaction between discounts and jurisdictional limits

Mr Park was sentenced for a number of sexual assaults. There were two further offences on a certificate pursuant to s 166 *Criminal Procedure Act 1986* (NSW). They were indictable offences to be dealt with summarily and thereby subject to the Local Court's jurisdictional limit of two years imprisonment. The issue in ***Park v R* [2020] NSWCCA 90** was how the jurisdictional limit interacted with s 22 *Crimes (Sentencing Procedure) Act 1999* (NSW) which allows for sentences to be reduced on account of pleas of guilty. The focus was upon the words: "may accordingly impose a lesser penalty than it would otherwise have imposed". The question was whether s 22 or the jurisdictional limit fell to be considered first – whether the sentence that would otherwise have been imposed was two years (at most) because of the limit, or whether the sentence that would otherwise have been imposed was the sentence appropriate in all the circumstances.

Bathurst CJ and R A Hulme J held that s 22 referred to the sentence appropriate in all the circumstances. The jurisdictional limit is not the maximum penalty – that is, it is not reserved for a worst-case offence. An appropriate sentence might, for example, be 2 years, 3 months, in which case it would be reduced by the limit. The plea of guilty is one of numerous factors that is synthesised when determining the appropriate sentence. Otherwise, courts would be constrained to passing disproportionate sentences by virtue of incoherence in the legislation. Fullerton J dissented, favouring the alternative construction.

Related offences can be dealt with under s 166 Criminal Procedure Act when person under the age of 18 is being sentenced

It was contended in ***DJ v R* [2017] NSWCCA 319** that a sentencing judge had no jurisdiction to impose sentence upon a juvenile for related summary offences on a s 166 certificate but the appeal was dismissed. The primary offence against s 33A(1)(a) of the *Crimes Act*

(discharge of a firearm with intent) is a "serious children's indictable offence" so that the Children's Court did not have jurisdiction. One of the certificate offences, contrary to s 93I(2) of the Crimes Act is an indictable offence capable of being dealt with summarily. The other, against s 39(1)(a) of the *Firearms Act* is a purely summary offence. Johnson J held that the offences could be dealt with by the higher court under s 167(2)(b). In light of the policy underpinning s 167, his Honour noted that the parties had wished for the offences to be dealt with under the s 166 certificate in the interests of efficiency, and that the case of *R v Farrell* (1976) 2 NSWLR 498 supports the view that the provisions for taking other offences into account (ie s 167) apply to juvenile offenders.

Uncharged offences

Accounting for course of conduct in lead-up to offence distinct from sentencing for uncharged offence

The offender in ***LN v R* [2020] NSWCCA 131** was convicted alongside her partner for the murder of their three year old son. In the two months prior to his death, the son was repeatedly physically and psychologically abused. On appeal, the offender submitted that the trial judge erred by taking these uncharged assaults into account in assessing the objective seriousness of the murder charge.

Basten JA held, dismissing this ground, that sentencing for an uncharged offence was distinct from taking into account conduct that could constitute an offence when sentencing for another, more serious offence. His Honour noted that the administration of justice would only be frustrated by requiring the Crown to charge every assault potentially arising on the course of conduct. The events were relied upon to prove the seriousness of the murder, not to prove the elements of uncharged offences. Moreover, the earlier violence was relevant because it contributed to the child's death - the child was weakened and vulnerable as a result of weeks of abuse.

Hamill J dissented on this ground, finding that the offender was indeed punished for uncharged offences. The appeal was otherwise allowed as the judge made insufficient reference to evidence of the offender's mental illness.

Uncharged sexual conduct erroneously used to elevate the objective seriousness of index offences

The applicant in ***AK v R* [2016] NSWCCA 238** pleaded guilty to sexual offences committed between 2010 and 2011 against two girls aged 10 to 11 years old. One of the complainants was the daughter of the applicant's partner. A statement in the agreed facts indicated there had been inappropriate sexual touching of her since 2009 when she was aged 8. The applicant's appeal against sentence included a ground that the judge erred in the manner in which he took into account that uncharged conduct. Johnson J, after expressing reservations as to the correctness of the law, observed that the principles to be applied when imposing a sentence in respect of representative counts are those from *R v JCW* (2000) 112 A Crim R 466: (a) that the overall history of the conduct from which the

representative charges have been selected may be looked at for the purpose of understanding the relationship between the parties; (b) to exclude any suggestion that the offences charged were of an isolated nature; and (c) as bearing upon the degree of any leniency the court might be considering in regard to sentencing.

In light of those principles, it was open to the sentencing judge in this case to have regard to the applicant's uncharged sexual conduct on sentence. It was not erroneous to describe the conduct concerning the relevant complainant as part of a "course of conduct" in the circumstances of this case – however, such a description may not be apt in a particular case if, for example, the uncharged conduct is said to constitute a small number of incidents. The error in the judge's approach was to elevate the objective seriousness of the offences by way of aggravation as a result of that finding. Despite the error, no lesser sentence was warranted in law.

Uncharged offences - error in taking into account injuries inflicted in a separate, uncharged, assault

In ***Adams v R*** **[2011] NSWCCA 47**, the appellant was convicted of an offence of malicious wounding with intent to cause grievous bodily harm for his part in the joint attack on the victim with two other offenders in which he was found to have struck the victim on the top of the head using a baseball bat. The appellant, however, was also responsible for fracturing the victim's left forearm with a blow using a curtain rod. That incident took place soon after, when the other two offenders had exited the dwelling in which the attacks had taken place.

On appeal, it was contended that the sentencing judge had erred in taking into account the injuries from this later incident in imposing a higher sentence on the appellant. The appeal was allowed. Latham J noted that the injuries to the victim in the later incident were independent of the joint assault and needed to be the subject of a separate charge for which the appellant was convicted to be taken into account. Her Honour at [31] drew distinctions between this case and that of *Bourke v R* [2010] NSWCCA 22 on the basis that in *Bourke* the "relevant grievous bodily harm was inflicted at the same time as, and as a consequence of, the blows causing the wounding".

Representative charges

Different views were expressed in ***Giles v Director of Public Prosecutions (NSW)*** **[2009] NSWCCA 308** as to whether a sentencing judge was entitled to increase a sentence for an offence where it was representative of other uncharged offences. Basten JA was of the view that the fact that the offences for which the offender was to be sentenced constituted part of an ongoing course of conduct placed them in the higher range of cases. R S Hulme J was of the view that conduct which is not the subject of a charge may not be taken into account so as to result in the imposition of a sentence higher than would be merited by the conduct charged. Johnson J found the reasoning of Basten JA persuasive but concluded that the issue should await determination by the Court of Criminal Appeal in a case where the court has the assistance of submissions from the parties.

B. Subjective factors

Addiction

Gambling addiction, generally, is not a mitigating factor

The applicant in ***Johnston v R*** **[2017] NSWCCA 53** was sentenced for one count of obtaining a financial advantage by deception contrary to s 192E(1)(b) of the *Crimes Act 1900*. The applicant had a gambling problem and all the money gained was lost through gambling. The sentencing judge said that there were differences between a gambling addiction and a drug addiction; gambling does not physically alter the mind or body, so a gambler knows what they are doing. On appeal against sentence, the applicant asserted errors in the sentencing judge's approach to his gambling addiction. Dismissing the appeal, Bathurst CJ found no error in the sentencing judge's observations; he was not postulating a hierarchy of addiction. He was simply stating that unlike some cases of drug addiction, the applicant could still exercise judgment and the crime was a willed act. The Chief Justice reviewed the principles on what relevance a gambling addiction has to sentencing. The fact that an offence was committed to feed a gambling addiction is generally not a mitigating factor. Whilst such an addiction may explain the crime and provide a motive, it will be rare for it to sustain an appreciable reduction in the sentence. This is particularly so where the offending involved planning or took place over a long period of time.

Illicit drug dependence and moral culpability

Nair v R **[2013] NSWCCA 79** involved a sentence appeal by Dr Nair, a neurosurgeon who was convicted of manslaughter for failing to intervene in the fatal cocaine overdose of an escort he had hired. One ground of appeal was that the sentencing judge had not reduced Dr Nair's moral culpability to take into account his "intense craving to use the drug in sexual situations". Blanch J rejected any suggestion that drug addiction, without underlying or supervening mental illness, is a reason to reduce moral culpability. His Honour referred in particular to the free (initial) choice to experiment with illicit drugs known generally to have addictive qualities.

Age

Youth – relevance when immaturity and impulsivity did not contribute to the offending

In ***Abdul v R*** **[2019] NSWCCA 18**, it was contended that a sentencing judge erred in not taking the applicant's youth into account when determining the sentence and in not having regard to the importance of rehabilitation when determining the proportions between non-parole and parole periods. The applicant was aged 20-21 at the time of the offences and 22 when sentenced. Bathurst CJ said that it was well-established that youth and comparative immaturity were less relevant in a case where immaturity and impulsivity were not contributing factors to the offending. In this case the sentencing judge correctly assessed the applicant as the "entrepreneurial force" and played a "senior controlling role" in the organisation of distributing commercial quantities of a number of prohibited drugs. His

Honour noted that the judge had taken into account that there was a "reasonable prospect of rehabilitation" and there was no error in the discretionary assessment of non-parole/parole period proportions.

Bail conditions

Relevance of bail conditions to sentence ultimately imposed

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

Civil liability claims/compensation

Compensation order made – not a mitigating factor

The offender in ***Upadhyaya v R*** **[2017] NSWCCA 162** diverted money from a company of which he was a financial director and board member to the tune of about $10 million. During the sentence proceedings the company applied for a compensation direction under the *Victims Rights and Support Act 2013*. After sentence had been imposed, the sentencing judge made a compensation direction in the maximum sum permissible, $750,000. It was contended on appeal that the judge should have taken this into account as a matter of mitigation of sentence.

Leave to rely upon this ground of appeal was refused. Leeming JA held that on the facts of the case there was no error in failing to have regard to the compensation direction which had not been made at the time of sentencing and which, at the time of the appeal some 19 months later, had not been enforced and might never be. The judge had not been asked to take it into account on sentence. Very commonly an offender's criminal conduct will also give rise to a civil liability and in this case the victim company had available a civil claim entitling it to judgment for many millions of dollars. The making of the compensation direction made no appreciable difference to the offender's civil liability.

Criminal history of child

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.

Criminal history (adult)

Criminal history – Veen (No 2) principles still apply if current offence is less serious than previous offences

The applicant in ***Gilshenan v R*** **[2019] NSWCCA 313** had been sentenced for ("unsophisticated" and "not… well planned") child pornography offences. The applicant's criminal history disclosed similar offences of a more serious nature. The principles in *Veen v R (No 2)* (1988) 164 CLR 465 allow a sentencing judge to take the offender's criminal history into account to determine if an offence is an "uncharacteristic aberration" or part of a pattern of "continuing disobedience of the law". The latter may justify a more severe sentence, while the former might justify leniency.

The applicant submitted that it was not open to the sentencing judge to rely on Veen (No 2) in this way, because the recent offences were less serious than the previous offences. Johnson J dismissed this, holding that it was the repetition of the offending of the same type, no matter its severity, which empowered the sentencing judge to impose a harsher sentence.

References to unproven matters on custodial disciplinary record did not affect sentencing discretion

The applicant in ***Williams v R*** **[2016] NSWCCA 68** was convicted of larceny and two counts of supplying a commercial quantity of methylamphetamine. An aggregate sentence of 8 years and 6 months with a non-parole period of 5 years was imposed. On appeal he alleged that the sentencing judge erred by placing significant weight on unproven offences alleged to have been committed by the applicant whilst in custody. He relied on the following remarks of the sentencing judge after his Honour cited the allegations: "This impacts upon the assessment of his prospects for rehabilitation. I would note though that I know little more of those matters than appears in the custodial record and the weight that they deserve is limited." Harrison J dismissed the appeal, holding that while it was reasonable for the applicant to raise a concern that he may have been sentenced upon the basis of matters that had not been proven, the Court would be slow to conclude that a judge with the considerable experience of his Honour would have given them any weight at all. It seems his Honour was at pains to record the Crown submission regarding the disciplinary record whilst simultaneously discounting its significance. It is not possible to assess how, if at all, it affected the sentencing discretion. Those matters appear in any event to be de minimus, so that if error were demonstrated, no lesser sentence would be warranted.

Delay

Relevance of temporal gap between offence and sentence due to inability to identify offender

The respondent in ***R v Hall*** **[2017] NSWCCA 313** was sentenced after having been found guilty of four serious sexual assaults on a prostitute at knife point. After the attack, the victim reported it to the police and swabs were taken. The offender was only identified by DNA many years later. The sentencing judge referred to "delay" between the offence and sentencing and found that the offender had since demonstrated rehabilitation. The Crown appealed against the sentence of 5 years with a non-parole period of 1 year.

The Court allowed the appeal and found the sentence to be manifestly inadequate. It was held that the trial judge was wrong to apply the decision of *R v Moon* [2000] NSWCCA 534 as "authoritative" in any case involving delay and rehabilitation. In that case Howie J had regard to the offender's rehabilitation during the period of delay but it was a case in which there had been "very gross delay in raising complaint". In this case, the delay was caused by the respondent having decamped, remained silent, and evaded prosecution. However, it was proper for the judge to have regard to the fact that the respondent had pursued a productive lifestyle, was of otherwise good character, was useful to society in the intervening 27 years, and had physical and mental health issues.

Historical child sexual assault offences – relevance of delay

An offender was sentenced at the age of 85 for indecent assaults and an act of indecency against his three daughters between 1965 and 1978. On appeal it was contended that the offender was under no obligation to disclose his offending and after such a long passage of time he was entitled to believe that he would never be charged and to order his affairs accordingly. He submitted that the delay was occasioned by the absence of a complaint to authorities, not by any conduct on his part.

Hoeben CJ at CL held that "this is a somewhat bold submission": ***Hornhardt v R*** **[2017] NSWCCA 186**. Where close family relationships are involved it is a significant distortion of reality to argue that the offender has been disadvantaged because his criminality has been undetected for almost 50 years when the lack of detection is directly related to the nature of his offending. Reference was made to *Wilson v R* [2017] NSWCCA 41 where Beech-Jones J said (at [48]) that the commission of an offence on someone so young even 30 years ago should not necessarily be regarded as a "stale crime" and to *Magnuson v R* [2013] NSWCCA 50 at [62] where Button J said that, whilst it is true that the offender had not offended for a long time, it was also true that he had escaped justice for decades and enjoyed a life free from opprobrium or punishment for his crimes.

Delay – when a sentencing judge is entitled to give limited weight

The applicant in ***Hudson v R*** **[2016] NSWCCA 278** committed the relevant offences in 2008 and was not sentenced until 2016. Whilst the applicant made admissions to the offences in documents filed in court in 2009, charges were not laid until 2014. The Crown gave no explanation for the almost five year delay after the admissions were made, other than that the applicant moved interstate in 2009. The applicant appealed against her sentence. One ground of appeal was that the sentencing judge erred in concluding that the delay was not significant. The applicant contended that delay should have been taken into account as a significant mitigating factor.

The appeal was dismissed. Hoeben CJ at CL found it to be clear from the sentencing judge's remarks that delay was taken into account as a mitigating factor. The sentencing judge considered the two important aspects of delay; the opportunity to pursue rehabilitation and anxiety created by the prospect of future punishment. Therefore, the applicant's complaint must be that the sentencing judge only took it into account "to some limited extent". A sentencing judge has a wide discretion as to the weight to give to the issue of delay: *Luong v R* [2014] NSWCCA 129. Hoeben CJ at CL found it was clear why the sentencing judge only took delay into account to a limited extent; there was no evidence at all that applicant was in fact anxious about the prospect of future punishment. The sentencing judge was thus entitled to limit the extent to which he took that aspect of delay into account.

No error in refusal to allow leniency for delay caused by the offender absconding

The applicant in ***Walker v R*** **[2016] NSWCCA 213** pleaded guilty in 2004 to an offence of maliciously inflicting grievous bodily harm contrary to s 35(b) of *the Crimes Act 1900*. He failed to appear for sentence and a bench warrant was issued. He was arrested by chance over 11 years later in Victoria in 2015. He maintained his guilty plea and was sentenced in 2016 to 2 years with a non-parole period of 1 year. His sentence appeal included a ground that the judge erred by finding that it would not be appropriate to make any finding of leniency because of the delay in sentencing. Gleeson JA dismissed the appeal and held that the sentencing judge properly distinguished between cases where delay occurs because of circumstances outside of the offender's control, and those where it is the offender's actions that cause the delay. To allow leniency on account of delay alone with respect to the latter could hardly be said to further the public interest. Consistent with authority, her Honour took into account the evidence of the applicant's rehabilitation up to the date sentence was imposed.

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.

Deprived background

Bugmy principles – not inconsistent to make finding of disadvantaged background and also give weight to specific and general deterrence

An offender pleaded guilty and was sentenced for various sexual assault offences against a 4 year old girl. On appeal he contended that the sentencing judge erred by not applying the Bugmy principles: ***BT v R* [2019] NSWCCA 147**.

It was submitted that the judge's finding that he had a "dysfunctional upbringing and, with it, a reduced moral culpability for his offending" was later negated by the finding that "considerations of both specific and general deterrence are fully engaged". Hidden AJ rejected this, holding "there is no inconsistency between his Honour's finding that the applicant's background raised a *Bugmy* issue, on the one hand, and that weight should be given to specific and general deterrence, on the other". Rather, his Honour held that background is "one of a number of competing sentencing considerations". It was therefore "open" for specific and general deterrence to be reflected in the sentence.

Bugmy principles – no discretion not to apply principles where a finding of a background of social deprivation is established

In ***R v Irwin* [2019] NSWCCA 133**, the Court of Criminal Appeal (Walton J, Simpson AJA and Adamson J agreeing) allowed a Crown appeal and increased the sentence in question. However, in doing so the Court noted that the primary judge had made an error which favoured the offender in the reassessment of sentence. The error was to decline to "apply the *Bugmy* principles and reduce [the] offender's moral culpabilities". Simpson AJA, held that the primary judge was in error because "[a]pplication of the *Bugmy* principles is not discretionary". Walton J held that the primary judge's findings in relation to the absence of a link between the respondent's upbringing and the nature of his offending, or the fact that "the circumstances are not so compelling as to be a relevant factor" were not adequately explained. His Honour considered that they were clearly erroneous findings to be made in light of the expert evidence which established the respondent's background of social deprivation. His Honour also considered that it was open on the evidence to establish a causal connection (or at least a contribution) to the offending.

Bugmy v The Queen – no error for judge to reject submission that Bugmy factors apply

The appellant in ***Egan v R* [2018] NSWCCA 235** was sentenced for supplying a prohibited drug and dealing with property suspected to be the proceeds of crime. At sentencing, the appellant relied on evidence of his upbringing and background to argue that the principles in *Bugmy v The Queen* (2013) 249 CLR 571 applied. The sentencing judge rejected the submission.

The appeal was dismissed. Campbell J reviewed the sentencing judge's remarks that the alleged social deprivation of the appellant (as explained by a psychologist) was not a mitigating factor on sentence. His Honour held that this case was very different from *Bugmy* or *Fernando* in that the circumstances which led the appellant into drug dealing arose in his adulthood and had nothing whatsoever to do with childhood deprivation.

Bugmy v The Queen - judge's failure to refer to Aboriginality of offender does not mean that Bugmy considerations were ignored

The appellant in ***Judge v R* [2018] NSWCCA 203** pleaded guilty to robbery in company. He relied on his deprived upbringing but did not give evidence as to his aboriginality, nor did the sentencing judge refer to it when sentencing him. On appeal the appellant contended that the judge erred by failing to advert to or apply the *Bugmy* principles, in particular by not referring to the appellant's aboriginality.

White JA held that the *Bugmy* principles, applying *Fernando*, are not about sentencing Aboriginals but are about the recognition of social disadvantage, which the sentencing judge had taken into account. His Honour held that the sentencing judge did consider the appellant's dysfunctional upbringing, including violence and sexual abuse as a child and so was not in error.

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.

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.

Application of Munda – limited weight given to the deprived background of the offender

In ***R v Robinson*** **[2014] NSWCCA 12** the Crown appealed against the inadequacy of a sentence imposed for an offence contrary to s 112(3) of the Crimes Act 1900. Although it was acknowledged that the offender had a seriously disadvantaged background, Basten JA found that the sentence imposed was manifestly inadequate. He referred to *Munda v Western Australia* [2013] HCA 38 where the High Court emphasised that the importance of personal deterrence may in fact be elevated where an offender's deprived background has had a bearing upon his or her criminal tendencies. Furthermore, courts must be wary of treating offenders as victims since this can lead to a belief that they are not wholly responsible for their actions, thereby reducing community protection.

The relevance of entrenched disadvantage

Bugmy v The Queen **[2013] HCA 37; (2013) 249 CLR 571** was an appeal against a decision of the Court of Criminal Appeal affirming a sentence below. The offender had assaulted a corrective services officer, blinding him in one eye. He came from a profoundly disadvantaged background in a variety of respects. The Court of Criminal Appeal found that the importance of these features must diminish over time where a person goes on to accumulate a significant criminal record. The High Court remitted the appeal on a technical matter, but also gave its considered view on this point. It held, at [43]-[44]:

> "...The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.
>
> Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision. However, this is not to suggest, as the

> appellant's submissions were apt to do, that an offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment. Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult. An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender."

The reasoning was based on the principle outlined by Brennan J in *Neal v The Queen* [1982] HCA 55; (1982) 149 CLR 305 at 326, reflected in particular in NSW in *Fernando* (1992) 76 A Crim R 58 at 63.

The appellant in ***Munda v Western Australia*** **[2013] HCA 38; (2013) 249 CLR 600** argued a similar point, that "systemic deprivation and disadvantage, including an environment in which the abuse of alcohol is endemic in indigenous communities" should have been taken into account. The appellant had killed his spouse in an intoxicated assault. The High Court reached a similar conclusion as it had in *Bugmy*, but also mounted a strong argument in support of features of the criminal law that look beyond the offender, including the "obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence" (at [54]).

Dysfunctional upbringing a mitigating factor

In sentencing for aggravated dangerous driving causing death and grievous bodily harm, a judge referred at length to the offender's severely dysfunctional upbringing. The Crown appealed against the sentence: ***R v Millwood*** **[2012] NSWCCA 2**. It argued that the sentencing judge had given excessive weight to the respondent's personal circumstances where they provided little ground for mitigation for this offence. Simpson J rejected the argument and dismissed the appeal. Her Honour stated at [69]:

> "I am not prepared to accept that an offender who has the start of life that the respondent had bears equal moral responsibility with one who has had a "normal" or "advantaged" upbringing. […] I consider that the DPP's submission significantly underestimates the impact of a dysfunctional childhood."

Her Honour held that this was consistent with the approach of Wood J in *R v Fernando* (1992)76 A Crim R 58.

Extracurial punishment

Extra-curial punishment - loss of contact with children due to length of sentence does not qualify

An offender was sentenced to 16 years imprisonment, with a non-parole period of 11 years for participating in a joint criminal enterprise with her partner to sexually abuse her

daughter. The offender had 7 children and conceded at sentencing that she would not have contact with those children until they turned 18 at least. On appeal against the severity of her sentence to the Court of Criminal Appeal, it was contended that the sentencing judge erred by not accounting for the way the loss of the offender's children imposed an extra-curial punishment, which should have mitigated her sentence.

In ***RH v R*** **[2019] NSWCCA 64**, Schmidt J dismissed this ground and the appeal overall. Her Honour defined extra-curial punishment as "loss or detriment" imposed for the purpose of punishing, or by reason of the commission of the offence, by some person other than the sentencing judge. Her Honour went on to dismiss the applicant's submissions finding there are no authorities to support the contention that removing children from a dangerous offender involved punishment to that offender – indeed, "to conclude that it did…would be perverse". The removal was not extra-curial punishment but the "natural consequence" of the offending.

Impact of a conviction upon an offender's employment and ability to travel overseas

In ***R v Mauger*** **[2012] NSWCCA 51** the respondent to a Crown appeal was a senior analyst at an Australian investment company who travelled to the United States for work. He was found guilty of drug supply and possession, and the judge made an order pursuant to s 10 of the *Crimes (Sentencing Procedure) Act 1999* that no conviction be recorded on the condition of him entering into 2 year good behaviour bond. Harrison J stated (at [18]) that the power available under s 10 to not record a conviction demonstrated a willingness on the part of the legislature to allow an offender to maintain their reputation and "avoid the otherwise rigid application of inexorable laws" in appropriate circumstances.

In this case, the sentencing judge appeared to be influenced in her decision to make a s 10 order by the consequences that the respondent might otherwise have lost his job and been prevented from travelling oversees (at [26]). There was no evidence led at sentence about restrictions that are placed on those with drug-related convictions travelling to the US, nor is it a matter appropriate for judicial notice: *United States Surgical v Hospital Products International* [1982] 2 NSWLR 766 at 801. Harrison J found (at [32]) that the judge had erred in relying on these unsupported considerations, although he noted that it may be different where actual evidence was led about loss of livelihood or inability to visit family due to travel restrictions in foreign countries. Regardless, the sentence was not regarded as manifestly inadequate and the Crown appeal was dismissed.

No error in judge refusing to take public humiliation into account

A local councillor with the prospect of a political career suffered significant public denigration when charged with child sexual assault offences. The judge noted this fact but declined to find that he had suffered extra curial punishment. In ***Kenny v R*** **[2010] NSWCCA 6**, Basten JA and Howie J held that while public humiliation could have been taken into account, there was no error in the sentencing judge deciding not to – and even if it were, it could only have had a slight impact.

Injuries arising out of victim's retaliation do not constitute extra curial punishment

The offender in ***Clinton v R*** **[2009] NSWCCA 276** committed an offence of aggravated entering a dwelling house with intent to steal. He was armed with a knife. The victim struck him on the head with a stool, causing a laceration that bled heavily and required some 20 stitches. It was submitted on appeal that he was entitled to have regard paid to extra curial punishment. Howie J held that there was no such entitlement. He noted that the injuries were relatively minor and the actions of the victim were not disproportionate to the threat faced and indicated that he would have come to the same conclusion as the sentencing judge.

Failure to use the term "extra curial punishment" does not mean that it has not been taken into account

In ***Brooks v R*** **[2009] NSWCCA 265**, the offender had sustained significant injuries in the collision which gave rise to charges of aggravated driving causing grievous bodily harm. The sentencing judge did not use the term 'extra curial punishment" which led to a submission on appeal that he had failed to take the offender's injuries into account. It was noted, however, that the judge had made specific reference to the injuries, saying that the offender was deserving of some leniency and made a finding of special circumstances with that consideration in mind. Hall J held that this was sufficient.

Entrapment

Drug supply to an undercover operative – culpability not reduced when offender ready and willing to supply

The applicant in ***Cam Huynh Giang v R*** **[2017] NSWCCA 25** was sentenced for two drug supply offences. Undercover operatives had been involved, requesting supply of methylamphetamine and meeting with the applicant on several occasions over a five-month period. He supplied the operatives with five ounces of methylamphetamine and then one kilogram of the same drug. On appeal against sentence, it was contended that the sentencing judge failed to consider the role of police provocateurs in aggravating the seriousness of the offending and the applicant's overall criminality.

Latham J rejected this submission. As the applicant acknowledged, the question is whether there is a real possibility that he would not have committed the offences but for the undercover operatives' involvement. It was clear from the agreed facts that the applicant was ready and willing to supply high-grade methylamphetamine to any prospective purchaser. For example, he had a practice of supplying samples so the purchaser knew they were buying a high quality product, he referred to having a usual supplier, and he contacted the operatives on his own volition. Contrary to the applicant's suggestion, any fair reading of the facts indicated that once the undercover operatives were referred to the applicant, they merely presented him with the opportunity to supply methylamphetamine and tested his capacity to supply commercial quantities. Thus, the fact that undercover operatives were involved could not be said to be a mitigating factor.

Hardship

Re-sentencing and the coronavirus

The offender in ***Scott v R* [2020] NSWCCA 81** was convicted of numerous child sex offences. His appeal against sentence was upheld on the ground of manifest excess, and Hamill J proceeded to re-sentence. A number of late submissions were filed without leave annexing various internet articles and pages from WebMD concerning the offender's ill-health and the coronavirus. His Honour disregarded much of this material, but held that the offender's ill-health, advanced age, vulnerability to Covid-19 and the increased hardship of custody were factors relevant on re-sentence.

Relevance of likely deportation of offender when determining appropriate sentence

During a severity appeal in a matter concerning the offence of using a carriage service to send indecent material to a child it was contended that the applicant's concern that he may be deported when released from prison was relevant to his state of mind as he served his sentence of imprisonment.

The appeal in ***Kristensen v R* [2018] NSWCCA 189** was allowed but not on this ground. Payne JA considered the decisions of *Mirzaee*, *Pham*, and *AC*, in which the court held that the risk or likelihood of deportation was irrelevant when determining sentence, and held that he saw no reason to adopt a different approach. His Honour held that although the amendments to the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) mandated deportation in cases such as this (subject to exceptions and review), the applicant's likely deportation did not rise above mere speculation.

Hardship to third parties

New and a co-offender were sentenced for drug supply offences. At sentencing the judge took into account that New was living with and caring for her invalid partner as well as her two dependent children aged 16 and 18. On appeal in ***Matthews v R; New v R* [2018] NSWCCA 186** an issue arose on the hearing of an appeal against the severity of the sentence that there was fresh evidence to establish exceptional hardship to the children.

Fagan J noted that the sentencing judge had taken into account New's living situation with her children prior to sentence, but that no specific submission was made as to the position the children would find themselves in if New was imprisoned. His Honour cited *R v Wirth* in which Wells J (endorsed by Gleeson CJ in *R v Edwards* (1996) 90 A Crim R 510) held that hardship likely to be caused by third parties ought to be taken into account only "where it would be, in effect, inhuman to refuse to do so". Fagan J held that this high standard has been endorsed in subsequent cases. His Honour held that the effects of imprisonment on third parties, while not exceptional enough to warrant a discrete component of leniency, can be taken into account as part of the offender's subjective case. In this case, his Honour

held that the children's hardship was not so exceptional as to warrant a reduction in New's non-parole period.

Further on whether exceptional circumstances are required before hardship to third parties can be considered a mitigating factor when sentencing for Commonwealth offences

The applicant in ***Kaveh v R*** **[2017] NSWCCA 52** was sentenced for importing a marketable quantity of opium contrary to s 307.2(1) of the Criminal Code Act 1995 (Cth). A ground of appeal was that the sentencing judge erred by failing to give any weight to the issue of probable hardship experienced by the applicant's family. Both Basten JA and Latham J (Campbell J agreeing with both) found that the ground was unsupportable as a matter of fact. The sentencing judge expressly found imprisonment would have an adverse effect on the applicant's family but that hardship should not result in any substantial reduction of the sentence. There was no error found in this approach. Whilst it was not contended that the sentencing judge misunderstood the correct sentencing principles, Basten JA observed that the ground raised the same issue addressed *in Director of Public Prosecutions (Cth) v Pratten (No 2)* [2017] NSWCCA 42. His Honour confirmed that there is still a live issue whether the standard of "exceptional" applies to third party hardship for s 16A of the Crimes Act 1914 (Cth). He noted the division of opinion between the majority in *Elshani v R* [2015] NSWCCA 254 and Beech-Jones J's dissent in that case (repeating his view in *R v Zerafa* [2013] NSWCCA 222; 235 A Crim R 265) which found support from the CCA in obiter in Pratten. Leave to appeal with respect to this ground was refused.

Hardship to third parties – conflicting case law in respect to Commonwealth offences – evidence required that the offender's imprisonment would significantly and deleteriously affect those persons' lives.

The respondent in ***Director of Public Prosecutions (Cth) v Pratten (No 2)*** **[2017] NSWCCA 42** was convicted of seven counts of obtaining a financial advantage by deception contrary to s 134.2(1) of the *Criminal Code Act 1995* (Cth). The Crown appealed against sentence, contending that the sentencing judge erred in finding that hardship caused to the respondent's daughters warranted mitigation of sentence. The sentencing judge had taken into account the effect on the daughters, mentioning their ill health. The appeal was allowed.

Basten JA found that the sentencing judge erred in relying on hardship to the offender's daughters in circumstances where the evidence did not establish that imprisonment of the offender would significantly and deleteriously affect their lives. His Honour discussed the tension between s 16A(2)(p), which requires the Court to take into account "the probable effect that any sentence or order under consideration would have on any of the person's family or dependents", and the general law principle that hardship to a family member can only be relied on to reduce the sentence in "exceptional" circumstances. It was thought that s 16A(2)(p) was intended to reflect the general law principle: *R v Togias* [2001] NSWCCA 522; 127 A Crim R 23. However, there have been expressions of disquiet that such an approach requires a reading down of the Commonwealth statute in a manner which finds no basis in statutory language: *R v Zerafa* [2013] NSWCCA 222 per Beech-Jones J, who was of the view that *Togias* was wrongly decided. Ultimately it was not necessary for the CCA to

decide whether Beech-Jones J's view in *Zerafa* should be followed. The respondent on appeal conceded that exceptional circumstances were required and had not been established. However, Campbell and N Adams JJ both observed there was force in Beech-Jones J's position in *Zerafa*.

A subsidiary issue was whether the trial judge was entitled to take the effect on the offender's family into account in setting "an unusually short non-parole period", as the respondent contended. Basten JA rejected this submission, holding that the fixing of a non-parole period is as much part of a sentence as the nomination of a full term. Whilst there are State cases supporting the argument, there is no federal equivalent to s 44 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). The Crown appeal was allowed.

Necessary to have regard to effect of separation of mother from young baby

The applicant in ***HJ v R*** **[2014] NSWCCA 21** pleaded guilty to two offences of breaking and entering and committing a serious indictable offence. She was sentenced to a term of imprisonment of 2 years and 1 month, with a non-parole period of 12 months. She was a juvenile at the time of the offence, and at the time of sentence was mother to a four-week-old baby. Garling J found that the sentencing judge gave no attention to the effect of separation from the baby. There are facilities for mothers and babies to live together in the adult correctional environment but not in any juvenile detention facility. It was necessary for the judge to consider the effect the separation would have had on the applicant and the degree to which it would have impacted upon the hardship of her time in custody. No attention was given to these matters and accordingly the appeal was allowed, with HJ being released on parole forthwith.

Hardship to third parties when sentencing for Commonwealth offences

R v Zerafa **[2013] NSWCCA 222** concerned an offender who was convicted of a number of tax offences. The proceedings had been attended by significant delay. Section 16A(2)(p) of the *Crimes Act 1914* (Cth) requires a sentencing court to have regard to "the probable effect that any sentence or order under consideration would have on any of the person's family or dependants". Despite the obvious and uncontested hardships on Mr Zerafa's young family, the sentencing judge felt constrained by authority not to take this into account because it was not "exceptional". In response to a Crown appeal against leniency, Mr Zerafa raised a contention that the cases relied upon, primarily *R v Togias* [2001] NSWCCA 522 and *R v Hinton* [2002] NSWCCA 405; 143 A Crim R 286, were wrongly decided. Hoeben CJ at CL (Latham J agreeing, Beech-Jones J dissenting on this point) ruled that whatever the argument against the present interpretation of the legislation, the remarks of Spigelman CJ in *Togias* at [17] held true, "If there is to be any change in this position…only the High Court can effect it".

More onerous imprisonment as consequence of assisting authorities

C v R **[2013] NSWCCA 81** concerned the extent to which a sentencing judge should take into account the onerous prison conditions that invariably come with an offender providing a high degree of assistance to authorities. The appellant was engaged by a Mexican cartel to

come to Sydney to receive and distribute an enormous shipment of cocaine. The shipment was detected and the appellant was arrested. He pleaded guilty and provided considerable assistance in relation to the criminal enterprise he was involved in. On sentence, he was allowed a combined discount of 35 per cent. The sentence judge noted he would be kept in the Special Purpose Centre at Long Bay, but said that she had received no evidence to establish that conditions there would be more onerous than in the general population.

In the Court of Criminal Appeal, Hoeben JA found that the sentencing judge had been in error to not make at least some allowance for the fact that the appellant was to be detained in the Special Purpose Centre. He found, at [41], that

> "an offender in the position of the applicant during a sentence hearing, if he or she wishes to gain some benefit in the sentencing process because of the conditions under which the sentence is likely to be served, should adduce evidence as to those conditions. If the Crown disputes that evidence, it can call its own evidence, otherwise the evidence of the offender should be given appropriate weight."

But notwithstanding the lack of evidence, an appropriate discount in this case was 45 per cent.

Hardship for a foreign national on a criminal justice visa

In ***Van Eeden v R*** **[2012] NSWCCA 18** it was argued that the sentencing judge had failed to give due weight to the appellant's circumstances as a foreign national who had been placed on a criminal justice visa. The result was that while he was on bail he had been unable to obtain employment or receive social security, and his family had been unable to visit him. Schmidt J, dismissing the appeal, referred (at [37]-[38]) to the decisions in *R v Hinton* [2002] NSWCCA 405 and *R v Togias* [2001] NSWCCA 522, where it was held that the effect of a sentence on an offender's family could only be considered where the hardship was "exceptional". Similarly, her Honour held (at [40]-[42]) that there was no error in the sentencing judge giving little weight to consequences flowing from being a foreign national convicted of a crime in Australia.

Hardship to third parties

It is settled that hardship to members of an offender's family is generally irrelevant and can only be taken into account in "highly exceptional circumstances" per *R v Edwards* (1996) 90 A Crim R 510: ***Mokhaiber v R*** **[2011] NSWCCA 10** per Price J at [30]. Following the sentencing of the appellant, the appellant's daughter was diagnosed with metachromatic leukodystrophy, a deteriorative and terminal condition requiring increasing care. The court held that fresh evidence that the appellant's wife, as full-time carer for the daughter in addition to caring for their other two children, would suffer overwhelming hardship as a result of the appellant's incarceration, could be regarded as exceptional circumstances. The court also gave modest weight to the appellant's distress at being unable to assist his wife. Together these justified a reduction in the appellant's sentence.

In contrast, the court in ***Winter v R*** **[2011] NSWCCA 59** rejected an appeal seeking a reduction in sentence based on "fresh evidence" of hardship to one of the appellant's sons.

The fresh evidence led was that since the appellant's sentencing proceedings, the appellant's son had undergone an operation to correct his spinal problems and that his prospects of walking again were very slim. The evidence also indicated that the appellant's son was cared for by his grandmother and younger brother, both of whom had their own health problems. These circumstances gave rise to the submission that the appellant needed to care for her son. The Court took into account the authorities on hardship to third parties and emphasised the proposition that hardship to third parties must be "highly exceptional", before concluding that the evidence did not meet the threshold. Blanch J (at [17]) noted that the son was being cared for; he was eligible for rehabilitation treatment; and he was living in a house modified to assist with his needs. Further, the applicant had her own health problems which did not make her an ideal carer.

The circumstances in ***R v NJK*** **[2011] NSWCCA 151** were somewhat different to the two aforementioned cases. The offender was convicted for the indecent assault and the use for pornographic purposes of his 5 year old step-daughter. The sentencing judge imposed a suspended sentence. One of the matters referred to in the sentencing remarks was that the offender was continuing to make payments on the mortgage of the marital home occupied by the victim and her mother, as well as on a loan relating to renovations of the home. Since his arrest he had separated from the victim's mother and had moved elsewhere. The Crown appealed, submitting that the sentencing judge had placed excessive weight on this matter in deciding to suspend execution of the sentence and that the alleged hardship did not amount to the "exceptional" kind necessary as per R v Edwards.

The appeal was dismissed. Hoeben J was of the view that there were a number of other factors in addition to this which the sentencing judge had taken into account. As to the question of hardship, Hoeben J concluded that the circumstances were unique in that victim was one of the beneficiaries should the offender be able to continue working and paying off the mortgage in that she could continue to live in the home.

Double-counting to take harsher conditions into account both when determining special circumstances and when determining total length of imprisonment

The offender in ***R v Jarrold*** **[2010] NSWCCA 69** was convicted of numerous child pornography and child sexual offences. In sentencing, the judge made allowances for the onerous conditions of protective custody (on an assumption both that the offender would be in protective custody and that custody would be more onerous). It was a factor both in finding special circumstances and reducing the term of imprisonment. On the Crown's appeal, Howie J held that courts should stop assuming protective custody is harder to bear than normal prison. Harsher conditions must be proved. Once proved, they may be taken into account in determining the head sentence – but to take them into account again in further varying the non-parole period is erroneous double-counting.

There is no mathematical formula that is to be applied in taking into account that an offender has or will be held in protective custody

In **Clinton v R [2009] NSWCCA 276**, the offender had been held in protective custody whilst on remand for a period of about 15 months. A submission that the sentencing judge should

have given to that period "the equivalence of at least 20 months or more ordinary prison time" was rejected by Howie J.

Mental condition

Moral culpability assessment – where offender sustained traumatic brain injury a few months prior to offending

Armed with a meat cleaver, the applicant was arrested during the course of a robbery of a home. He was convicted for the offences of aggravated break and enter with intent to commit a serious indictable offence, namely larceny, contrary to s 113(2) of the *Crimes Act 1900*, and sentenced to 6 years' imprisonment with a non-parole period of 4 years, 6 months. A few months prior to the robbery, the applicant had sustained a traumatic brain injury and leg and spine fractures, after crashing a motorbike into a tree at 180km/h. One of the grounds of appeal in ***Isbitzki v R*** **[2019] NSWCCA 247** was that the sentencing judge fell into error by not having proper regard to the applicant's traumatic brain injury.

Fullerton J was not satisfied that the sentencing judge dealt in a principled way with the issue of the applicant's traumatic brain injury and its causal relationship to the offending reducing his moral culpability. She derived from a number of authorities that the sentencing judge needed to assess the impact of the applicant's traumatic brain injury – either on the assessment of the offence's objective seriousness or his moral culpability. The sentencing judge failed to make that assessment and asked himself the entirely wrong question – whether the offender was aware the offending was wrongful.

A reference to Bugmy factors does not demonstrate that the sentencing judge was taking into account an offender's intellectual disability

A man pleaded guilty to a home invasion offence and an issue was raised in the sentence proceedings as to him having a mild intellectual disability. When sentencing, the judge said that he had "taken into account what I'd describe as *Bugmy* matters" and "I also accept that he has a mild intellectual disability". It was contended on appeal in ***Kerwin v R*** **[2018] NSWCCA 23** that the sentencing judge failed to assess the effect of the offender's mental disability on his moral culpability and whether the mental condition operated to reduce the weight required to be given to general deterrence.

The appeal was allowed. Garling J said that he could not see in the judge's reference to "*Bugmy* matters" that there was a proper consideration of the impact of the appellant's intellectual disability on his moral culpability and on the weight to be given to general deterrence. There was clear evidence of a causal connection with the commission of the offence which lessened the degree of moral culpability and impacted upon the weight to be given to general deterrence.

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.

Relevance of offender's brain injury on sentence

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

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

Mr Elturk pleaded guilty to stealing a knife and wounding with intent to cause grievous bodily harm. The Crown applied to have his pleas set aside on the basis that a special verdict of not guilty by reason of mental illness would be more appropriate. That application was rejected. At sentence the sentencing judge did not take into account the appellant's mental condition when assessing the objective seriousness of the offence, because the appellant had not availed himself of the defence of mental illness. Beazley P in ***Elturk v R* [2014] NSWCCA 61** held that this was an erroneous determination. Beazley P quoted from the decision in *McLaren v R* [2012] NSWCCA 284 where McCallum J held that "the decision in *Muldrock* does not … derogate from the requirement on a sentencing judge

to form an assessment as to the moral culpability of the offending in question … I do not understand the High Court to have suggested in *Muldrock* that a sentence judge cannot have regard to an offender's mental state when undertaking that task" (at [29]). Accordingly the sentencing judge erred in determining that the applicant had waived his right to have his mental illness considered as a causal factor in the commission of the crime: [35].

Future dangerousness

In 2009, Kirby J sentenced Malcolm Potts to a non-parole period of 21 years for murder. His appeal was heard in ***Potts v R* [2012] NSWCCA 229**. One ground of appeal was that the sentence passed was manifestly excessive. The murder had been committed in 2008. In 2001, the appellant had killed his own father, had successfully argued substantial impairment, and had since then been undertaking psychiatric treatment. Given these circumstances, and medical evidence that the appellant was not responding well to treatment, Kirby J took into account the appellant's future danger to the community in setting an appropriate sentence. Johnson J in the Court of Criminal Appeal, citing *Veen v The Queen* (1988) 164 CLR 465, held that Kirby J had demonstrated no error in this respect.

(Special leave to appeal refused 7 June 2013: *Potts v The Queen* [2013] HCATrans 141.)

Mental illness does not necessarily mean that general deterrence is inappropriate

Mr Bugmy was sentenced for two counts of assaulting a corrective services officer and one count of grievous bodily harm with intent after he attacked three prison guards whilst in custody. The Crown appealed the sentence and submitted in part that too much weight had been paced on Bugmy's mental illness. Hoeben JA upheld the appeal in ***R v Bugmy* [2012] NSWCCA 223** and found (at [43]) that the trial judge had assumed a diagnosis of mental illness automatically meant Bugmy was an inappropriate vehicle for general deterrence. Mental illness will only reduce the weight to be given general and specific deterrence where the illness is directly involved in the commission of the offence. But in this case Bugmy's mental illness had nothing to do with the offending and the judge's approach was held to be erroneous.

Protection of the community as a factor in sentencing a mentally ill offender

In ***R v Windle* [2012] NSWCCA 222** the Crown appealed against the sentence imposed on Mr Windle for attempting to murder a fellow inmate while in prison. There was evidence that Windle had a severe mental illness and would pose a significant risk to the community when released. Although the Court allowed the appeal, Basten JA (Price J agreeing, SG Campbell J agreeing with different reasons) held that little weight can be given to the protection of society when imposing a sentence on a person with mental illness.

At [43]-[46], his Honour reviewed the judgments in *Veen v The Queen [No 2]* [1988] HCA 14 where the majority noted the countervailing effect of a dangerous mental illness on a sentence: it makes the offender a greater danger to society but reduces moral culpability for the crime. These may balance out, but mental illness cannot lead to a more severe penalty

than the offender would have otherwise received. In the case of Windle, Basten JA held (at [57]), little weight could be given to protection of society. The danger arose from his mental illness and protection for society should be addressed through preventative mental health legislation. The criminal law is an inappropriate vehicle for that purpose.

Mental condition of offender

In ***Watts v R*** **[2010] NSWCCA 315**, the appellant was convicted of, and sentenced for, an offence of maliciously damaging a house owned by the Department of Housing by means of fire. There was evidence that the appellant suffered from at least one mental disorder, albeit there was no consensus between the psychiatric experts on the severity of his mental condition. The sentencing judge gave consideration to the evidence only in respect of the question of mitigation. The appellant appealed on the grounds that the sentencing judge erred in her treatment of this evidence.

McClellan CJ at CL and Howie AJ (Schmidt J agreeing) allowed the appeal, finding that the sentencing judge had incorrectly applied the evidence. Their Honours held that a person's mental disorders, which need not amount to a serious psychiatric illness to be relevant to the sentencing process, transcend a matter of mitigation in sentencing. Their Honours endorsed the position of the Court in *DPP (Cth) v De La Rosa* [2010] NSWCCA 194 (at [177]) as to the significance of an offender's mental disorder in sentencing.

Finding a causal connection between an offender's mental condition and the commission of an offence is a finding of fact

In ***Mercael v R*** **[2010] NSWCCA 36**, a psychiatrist expressed an opinion in the first of a number of reports that the court might take into account in mitigation the offender's likely severely depressed mood at the time of the incident. He did not reiterate this opinion in the subsequent reports. James J held that it was open to the sentencing judge to have rejected a causal connection with the commission of the offence. Such a finding would be a finding of fact, meaning the Court of Criminal Appeal would be bound by it unless error was established.

Restitution

Restitution – a promise to repay is entitled to some mitigating weight

The appellant in ***Job v R*** **[2011] NSWCCA 267** pleaded guilty to fraud type offences which caused a substantial loss to his employer. He gave evidence that he would repay the proceeds that he had received. This would necessitate the sale of the family home as well as an investment property. The sentencing judge declined to accept that this was a matter of mitigation. He did not consider the sale of the investment property has a hardship but he did note that selling the family home meant that his wife and children would have to live in rented accommodation; this the judge described as a hardship that was not "in any way unusual". Hidden J referred (at [36]ff) to a number of authorities concerning the relevance

of an offender having made reparation, or having undertaken to do so. He concluded (at [48] - [49]) that the judge in this case had been wrong to dismiss the matter out of hand. It was entitled to "some weight" in the appellant's favour.

C. Section 21A factors

Section 21A matters generally

Mere lip service paid to statutory mitigating and aggravating factors

The respondent in ***R v RMW*** **[2016] NSWCCA 211** pleaded guilty to offences of administering a poison so as to endanger life, administering poison with intent to injure and two counts of assault. The victim of each offence was her seven year old daughter who suffered complications at birth resulting in brain damage, epilepsy and cerebral palsy. The offences were committed while the victim was in hospital recovering from a lengthy and life-threatening coma. The poison administered was chloral hydrate, a sedative previously prescribed to the victim but in respect of which the respondent had been strictly and repeatedly instructed to no longer administer to the victim, as it was suspected to have been causative of some of her medical problems. The respondent was sentenced to an overall sentence of 1 year 10 months to be served by way of an intensive correction order. Bellew J, dismissing a Crown appeal against the sentence in an exercise of the residual discretion, found that the sentence was manifestly inadequate and suffered from several specific errors. One such error related to the sentencing judge's failure to make any reference to, much less specifically identify, arguably the two most significant aggravating factors in the sentencing process, namely the extreme vulnerability of the victim and the significant breach of trust by the respondent. His Honour merely paid lip service to the statutory requirements by stating "I have considered s 21A [of the *Crimes (Sentencing Procedure) Act 1999*] both in terms of mitigating and aggravating factors."

Aggravating: s 21A(2)

"In company" not always aggravating despite inclusion in s 21A Crimes (Sentencing Procedure) Act

Mr Pehar and two associates robbed an industrial complex under cover of night, committing 10 offences. On appeal, he contended that the sentencing judge was wrong to find that the offences were aggravated by the fact he was in company: ***Pehar v R*** **[2020] NSWCCA 118**. Fullerton J found that circumstances aggravate to different degrees, despite their inclusion in s 21A. Being in company is more aggravating where, as is usual, victims are intimidated by superior numbers of offenders. Here, there were no bystanders and no confrontations. The trial judge should have considered whether, on the evidence, the offences were actually aggravated by the presence of two other men.

Breach of conditional liberty a subjective aggravating factor that does need to relate to the offending

Mr Field stabbed a man. He was on two good behaviour bonds at the time. He argued on appeal (inter alia) that it was wrong to regard breach of the bonds as aggravating because they did not contribute to the seriousness of the offending in a material sense: ***Field v R* [2020] NSWCCA 105**. In particular, he was not abusing his freedom or abandoning his rehabilitation because he believed the stabbing was necessary in self-defence. Hoeben CJ at CL rejected this argument, holding that while breach does not elevate the objective seriousness of an offence, it will always aggravate because of its effect on factors like deterrence and community protection.

"Conditional liberty" – s 21A(2)(j) – encompasses being "at large" after parole is revoked

All of the domestic violence offences for which an offender was sentenced occurred at a time when he was "at large" in the community after his parole was revoked, with some offences committed prior to the date at which his sentence was due to expire and the balance committed afterwards. The operation of s 171(4) of the *Crimes (Administration of Sentences) Act 1999* means that a person's sentence is extended by the number of days at large if they are not taken back into custody on the day their parole is revoked. In sentencing the applicant, the sentencing judge took into account the fact that the applicant was at "conditional liberty", namely parole (which was a mistake because he was in fact "at large"), when assessing the objective seriousness of one of the offences, and also when he was explaining the individual sentences and principle of totality. The applicant in ***Turnbull v R* [2019] NSWCCA 97** relied on two grounds of appeal in relation to this issue.

The Crown conceded Ground 1. Simpson AJA (with whom Ierace J agreed, Wilson J dissenting on this point) accepted this concession, explaining that the trial judge erred in taking account of the applicant's conditional liberty status as a factor aggravating the objective seriousness of one of the offences, because personal circumstances are not relevant at this stage. Ground 2 was a broader ground directed at the sentencing judge's error in saying that the applicant was on parole. Simpson AJA accepted this mistake, but noted that it doesn't necessarily follow that the applicant was not "on conditional liberty" for the purposes of s 21A(2)(j; the phrase is not defined in the section and has a broad meaning. Simpson AJA held that it was open to the sentencing judge to take account of the applicant's conditional liberty status (even if its nature was mistaken). Her Honour found that the error was not established because it did not make a material difference to the outcome; in fact, it may be against the applicant's interests because the commission of offences at large as opposed to on parole is arguably more serious.

Error in finding that drug supply offence was committed "in company": s 21A(2)(e)

The appellant in ***Elliott v R* [2018] NSWCCA 69** pleaded guilty to two offences of supplying drugs. The appellant gave evidence that the drugs were to be supplied by him to a man named Dunn at the direction of a man named Kennedy. At sentencing the judge found that the appellant had acted "in company". Under a ground of appeal contending a denial of

procedural fairness, the appellant argued that the finding was not open to the judge in any event.

Fullerton J upheld the ground, at least on the basis that the finding of "in company" was not open on the facts. Her Honour cited *White v R* [2016] NSWCCA 190 where Simpson JA held that each case will depend upon its own facts but that it is appropriate to focus on at least three questions: first, whether the presence of other persons had a potential effect on the victim by way of coercion or intimidation; second, whether the presence of others had an effect of emboldening the offender; and third, whether the evidence establishes that the other person present shared a common purpose with the offender. Fullerton J concluded that in this case, there was no evidence to suggest that the other men involved in the drug supply chain supported or assisted the appellant in his offending for the purposes of s 21A(2)(e) and therefore that the aggravating factor was not made out.

Mere presence of children in a house outside which an offence occurs is not sufficient to establish the aggravating feature in s 21A(2)(ea) of the Crimes (Sentencing Procedure) Act

Two children were said to be inside a house outside of which there was a violent melee in which two men were being attacked by ten men. A judge found the offence of affray was aggravated (per s 21A(2)(ea)) by the fact that the offence was committed in the presence of children. This was held to be erroneous: ***Alesbhi v R; Esbhi v R* [2018] NSWCCA 30**. Howie AJ said in *Gore v R; Hunter v R* [2010] NSWCCA 330 that the provision was aimed at preventing the deleterious effects of crime on the emotional wellbeing of children. In *R v Seymour* [2012] NSWSC 1010, Price J rejected a Crown submission that the factor was made out notwithstanding that the child was asleep at the time of the offence. In this case, there was no basis for the sentencing judge to conclude beyond reasonable doubt that the affray was committed “in the presence of a child under 18 years of age” because there was no evidence to suggest that any children saw, heard or were aware of the affray.

Aggravating factor of an offence being committed in the presence of a child: s 21A(2)(ea)

The appellant in ***Lloyd v R* [2017] NSWCCA 303** was involved in a violent melee in which he and his two older brothers seriously injured two victims. Lloyd was 15 at the time, and the incident included the 15 year old son of one of the victims. The sentencing judge took into account that the offences were committed in the presence of the victim’s child as an aggravating factor under s 21A(2)(ea) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). The appellant alleged that the judge was in error because the offender was also a child of the same age.

The appeal was dismissed. It was held that the aggravating factor was capable of applying to an offence committed by a child. R A Hulme J cited *Gore v R; Hunter v R* [2010] NSWCCA 330 and held that whether the factor is aggravating in a particular case will depend on the nature of the offence and the likelihood that the child will be affected by it. In this case, the child was a victim of the affray offence and a witness to his brother and father being wounded in the melee. There was no reason to limit the aggravating factor to offences committed by adults but not children.

Lack of remorse is not an aggravating factor

The appellant in ***Roff v R*** **[2017] NSWCCA 208** was convicted of murder. He killed the partner of the woman he was having an affair with. He continued to disclaim responsibility and the sentencing judge found that there was no remorse. The judge held that "the absence of remorse or of acknowledgement of his crime" was a reason for fixing a longer non-parole period than the standard non-parole period. A ground of appeal that the sentencing judge erred in treating the absence of remorse as an aggravating factor was upheld by Leeming JA, Button and Hamill JJ. The Court considered the distinction mandated by the structure of s 21A of the *Crimes (Sentencing Procedure) Act 1999*, noting it was a fine one: "the absence of remorse may explain why a heavier sentence was imposed upon the co-offender … However… regard may not be had to the absence of remorse in imposing a heavier sentence". On balance, the Court found that a fair reading of the reasons indicates that the judge did consider the absence of remorse as a reason to impose a heavier sentence. The appeal was allowed.

A security guard at licensed premises is a "vulnerable person" for the purposes of the aggravating factor in s 21A(2)(l) of the Crimes (Sentencing Procedure) Act 1999

The applicant in ***Longworth v R*** **[2017] NSWCCA 119** was sentenced for recklessly causing grievous bodily harm. The victim of the offence was working as a security guard at the time. After the victim denied the applicant entry to a bar on the basis that he was too intoxicated, the applicant "launched a heavy blow to [the victim's] head" which caused him to fall and suffer a serious brain injury. The sentencing judge found that because the victim was engaged in work as a security guard at the time of the attack, he was a vulnerable victim for the purposes of s 21A(2)(l) of the *Crimes (Sentencing Procedure) Act 1999*. On appeal, the applicant contended that the sentencing judge erred by finding this aggravating factor was made out. Macfarlan JA held that there was no such error. Security guards for licenced premises are "vulnerable" in the relevant sense. The examples given in subsection (2)(l) are not exhaustive; they are occupations where the worker is often isolated from other people and sometimes in possession of significant amounts of money. The victim's work as a security guard is also one where the worker is isolated from others who may be able to come to their assistance. Additionally, security guards for licenced venues are often liable to encounter, and have to control the conduct of, individuals who are intoxicated and/or disorderly. This is important given security guards' duties to prevent the admission of such persons and eject them from the venue. His Honour also noted that security guards assist in the licensees' performance of their duties under the *Liquor Act 2007*, and added that it was irrelevant that many security guards are physically strong or perhaps trained in self-defence. The appeal was dismissed.

Vulnerability of the victim – Aboriginal victim of DV – vulnerability not inherent but finding was legitimate in the circumstances of her emotional attachment to the offender: s 21A(2)(l)

The applicant in ***Drew v R*** **[2016] NSWCCA 310** pleaded guilty to wounding with intent to cause grievous bodily harm. The victim was his partner, and there was an Apprehended Domestic Violence Order in place for her protection at the time of the offence. The sentencing judge found the victim's vulnerability to be an aggravating factor: s 21A(2)(l)

Crimes (Sentencing Procedure) Act 1999. Her Honour found that the victim was less likely to seek help or complain, and stated "[t]here is a well-known culture of silence and ostracism of those who do complain in relation to acts of violence within the Aboriginal community". The applicant's first ground of appeal against sentence was that the sentencing judge erred in finding that the victim was vulnerable.

Fagan J (Gleeson JA agreeing and N Adams J reaching the same conclusion) held that the sentencing judge did not have evidence upon which to make findings that there is a culture of silence about domestic violence within the Aboriginal community; that victims who do complain are ostracised, or; that such a culture of silence was applicable to the relevant community. Irrespective of whether these propositions are valid, they were not open to the sentencing judge without evidence. It was therefore not open to her Honour to conclude that those cultural phenomena made the victim "less likely" to seek help or complain to the authorities. Whilst the sentencing judge erred, there was other evidence upon which to find vulnerability. Fagan J found that the inescapable conclusion from the victim's emotional and intimate attachment to the applicant was one of individualised vulnerability. There was evidence of the victim returning to their home after numerous threats and recanting previous complaints. She was therefore less likely than other potential victims of his violence to try to avoid him or put herself out of harm's way. Therefore, despite the sentencing judge's error on this issue, the sentence was not excessive. The appeal was dismissed.

Abuse of trust and abuse of a position of authority (s 21A(2)(k)) – distinct concepts

The offender in ***MRW v R*** **[2011] NSWCCA 260** was convicted of having sexual intercourse with a child (his daughter) aged over 10 and under 16 who was under his authority. The sentencing judge took into account as an aggravating feature that the offender had abused a position of trust. It was contended that this was to double count a matter that was an element of the offence ("under authority"). Bathurst CJ held (at [77] – [78]) that abuse of trust and abuse of authority are distinct concepts but his Honour indicated that caution is necessary where they arise from the same facts.

Without regard for public safety (s 21A(2)(k)) and planned or organised criminal activity (s 21A(2)(n))

In ***Mansour v R*** **[2011] NSWCCA 28**, the appellant was sentenced for a number of drug supply offences which included ongoing supply for financial or material reward, contrary to s 25A Drug Misuse and Trafficking Act 1985. The offences involved sales of relatively small quantities of drugs to undercover police officers, either directly or via members of his family. The issue on appeal was whether the sentencing judge erred in taking into account as aggravating factors that the offences were committed without regard for public safety and were part of a planned or organised criminal activity (s 21A(2)(i) and (n)).

Price J held (at [46] – [56]) that the offence of ongoing supply of cocaine is of a kind for which the failure to have regard for public safety, and the element of planning and organisation, are both inherent features which are not to be taken into account as aggravating factors unless their nature or extent in a particular case is unusual. His Honour

found (at [51] and [56] respectively) that in neither respect did the nature or extent of the act exceed the norm to warrant a finding that they were aggravating factors.

In company (s 21A(2)(e))

In ***Gore v R; Hunter v R*** **[2010] NSWCCA 330**, the sentencing judge was held to have erred in taking into account as an aggravating factor the fact that the offences were carried out in company. Merely because the offences were carried out together, and the factor is listed in s 21A(2), does not mean it should have an effect on the sentence; regard must be had to ordinary sentencing principles. In this case, the presence of one appellant during the commission of the offence was found not to have added significant culpability to the other appellant, and vice versa (per Adams J at [29]).

Substantial injury, emotional harm, loss or damage caused by the offence (s 21A(2)(g))

It was contended in ***Josefski v R*** **[2010] NSWCCA 41** that the sentencing judge erred taking into account that the harm suffered by a female occupant was substantial because the harm was no more than would be expected of a person in her situation. The occupant had a young child and was a victim of an aggravated break, enter and steal. Howie J emphasised that harm to a victim should not be discounted merely because it is not greater than would be expected. He termed the approach "absurd" because a court has no knowledge of how a victim might react to offending.

Howie J held that while it is still the law that consequences must be foreseeable to be aggravating on sentence, that principle was not applicable here because the emotional harm was definitely a foreseeable consequence of an aggravated break and enter of a residential home at night.

Planned or organised criminal activity (s 21A(2)(n)) – must be more extensive criminal undertaking

In ***Williams v R*** **[2010] NSWCCA 15**, the offender was sentenced for a single offence of break, enter and steal but it involved a substantial amount of property from a house in a very remote rural location including artwork of indeterminable value. The sentencing judge rejected a prosecution submission that the offence was the result of professional planning, organisation and execution but found that the aggravating factor provided in s 21A(2)(n) was applicable. He was found to have erred in doing so but the error did not influence the sentence to any significant extent because the offence was professionally planned in the sense referred to by Grove J in *R v Ponfield* [1999] NSWCCA 435; 48 NSWLR 327 at [48].

Similarly, in ***Knight v R*** **[2010] NSWCCA 51**, James J held that a judge had erred in finding that it was an aggravating feature of two drug supply offences that they were "planned, albeit without much sophistication, as street level dealing in drugs is planned without much sophistication, and were part of an organised criminal activity". The two offences were constituted by the finding of two types of drugs in the offender's possession at the same time. James J determined that there was no evidence that either offence was part of a planned or organised criminal activity.

Victim vulnerability (s 21A(2)(l)) and breach of trust (s 21A(2)(k))

In ***Ali v R*** **[2010] NSWCCA 35** the offender was a taxi driver who sexually assaulted an intoxicated young female passenger. It was contended that the sentencing judge had erred in having regard to her vulnerability as an aggravating feature under s 21A(2)(l). Johnson J held that it was appropriate for the judge to take into account both the victim's vulnerability and that the offender breached the position of trust he was in in relation to a passenger in his taxi who was both intoxicated and in ill-health, although he did not specifically refer to provisions of s 21A(2) in saying so.

Breach of child protection or AVO order is an aggravating feature, either under s 21A(2)(j) or at common law

Sivell was sentenced for an offence of possessing child pornography. In ***Sivell v R*** **[2009] NSWCCA 286,** it was submitted, unsuccessfully, that the sentencing judge had erred in regarding the fact that the offence was committed whilst he was subject to an interim prohibition order imposed under s 7 of the C*hild Protection (Offenders Prohibition Orders) Act 2004* as a circumstance of aggravation. There was no condition of the order that the offender refrain from possessing child pornography. Nevertheless, the commission of such an offence was described as a "breach" of the order.

Financial gain not necessarily inherent to break, enter and steal (s 21A(2)(o))

The sentencing judge in ***Hejazi v R*** **[2009] NSWCCA 282** referred to circumstances of aggravation and in that context said that it "was clear the offences were committed for a financial gain noting that the items taken were of some significant value". It was submitted, unsuccessfully, that financial gain could not be a circumstance of aggravation because it was an inherent characteristic of the particular class of offence.

Financial gain – selling drugs to feed addiction is not selling them for financial gain

In ***Cicciarello v R*** **[2009] NSWCCA 272**, a sentencing judge was found to have erred in finding that a drug supply offence was within the mid-range of objective seriousness taking into account that it was committed for "financial gain" when he also accepted the offender's evidence that he was selling drugs in order to fund his own addiction.

Previous convictions (s 21A(2)(d)) – even if mostly driving offences and no previous imprisonment, still capable of demonstrating Veen v R (No 2) attitude of continuing disobedience

In ***Tsakonas v R*** **[2009] NSWCCA 258** the offender was sentenced for dishonesty offences and dealing with the proceeds of crime. He had previous convictions that included four offences of driving whilst disqualified and one of driving whilst suspended. He had received suspended sentences of imprisonment for two of the disqualified driving offences. There were other minor traffic and criminal convictions.

Conditional liberty (s 21A(2)(j)) – outstanding warrant for breach of parole is not conditional liberty

The offender in ***Morrison v R*** **[2009] NSWCCA 211** had breached parole which had then been revoked and a warrant of apprehension issued. The period of parole had been due to expire in the month before he committed an offence of break, enter and steal. The Crown conceded the error but argued that the offender was "at large". Grove J clarified that "at large" in the context of a break, enter and steal offence refers to an offender at large after escaping from lawful custody.

Section 21A(2)(eb) – offence committed in home of the victim

Aggravated break and enter – whether double-counting aggravating factor to take account of fact that additional common assault occurred in a home

A man broke into a home where he assaulted a woman and then assaulted her brother when he came to her aid. He destroyed items of property, and then assaulted a neighbour who came to investigate. He pleaded guilty to offences of aggravated break and enter and commit serious indictable offence, namely an assault occasioning actual bodily harm (s 112(2) of the *Crimes Act 1900*) (to which offences of intentionally damaging property and assaulting a neighbour were taken into account) and to an offence of assault (s 61 of the Crimes Act). The length of the sentence imposed was 6 years, 1 month and 9 months respectively, with an accumulation of 3 months. The appeal to the Court of Criminal Appeal was on the ground of manifest excess: ***Pham v R*** **[2019] NSWCCA 211**.

Leave to appeal was granted and the applicant was re-sentenced. One of the issues was the contended double-counting of aggravating factors in respect of the common assault committed against the brother. Fagan J held that "The Court cannot treat this offence as aggravated by the circumstance that it occurred in the course of a home invasion as that would result in double punishment, the break and enter being already dealt with as part of the criminality of the first offence." This was because, in the circumstances of the offending, the applicant pushed the brother then immediately left the building – therefore "The circumstance that this took place within [the brother's] home is punished as an aspect of the aggravated break and enter".

OBSERVATION: It was uncontroversial that P could not be doubly punished for the breaking and entering of the premises in the assessment of the sentence for the common assault offence against the male occupant. It remained the case, however, that s 21A(2)(eb) of the *Crimes (Sentencing Procedure) Act 1999* had application to that offence. It was held in Jonson v R [2016] NSWCCA 286; (2016) 263 A Crim R 268 at [41] that the correct construction of s 21A(2)(eb) promotes the purpose of the section, "namely, that a home is a place which should be safe and secure for persons who reside, or are otherwise present, at such a place".

Taking that aggravating factor into account in relation to the common assault in the present case would not be to punish the offender twice for having broken and entered the premises.

It is respectfully suggested that caution is required in construing this aspect of the present judgment as meaning that an aggravating factor that applies to one offence cannot be taken into account in assessing the seriousness of another offence committed at the same place and time: e.g. two offences committed at the same time by an offender who is on conditional liberty (s 21A(2)(j)). The response may be more in the application of the totality principle, having regard to what was said in *Pearce v The Queen* (1998) 194 CLR 610, in considering the degree of concurrence of individual sentences.

Where offence committed in victim's home – not always an aggravating circumstance

The applicant in ***Patel v R*** **[2019] NSWCCA 170** was convicted of manslaughter on the basis of excessive self-defence following a trial for murder. The offence itself occurred when the victim used a knife against the applicant, such that the applicant felt threatened and needed to defend herself by taking physical action – and after disarming the victim, continued to believe she needed to defend herself and she smothered and strangled the victim. The death occurred in the victim's home. The sentencing judge held that the fact that the victim died at home was an aggravating factor. On appeal to the Court of Criminal Appeal against the sentence, Harrison J (with whom Simpson AJA and N Adams J agreed) found that in this case, where the victim created the risk to her safety in her own home by her own actions, the fact that the death occurred in the home did not aggravate the offence.

Offences committed in a home – aggravating factor not confined to intruders

The applicant in ***Jonson v R*** **[2016] NSWCCA 286** was the victim's partner and their relationship involved domestic violence. The applicant physically and sexually assaulted the victim in the home where they lived together. The applicant was convicted of recklessly inflicting grievous bodily harm and sexual intercourse without consent. The sentencing judge took into account as an aggravating factor for all the offences the fact that they were committed in the home of the victim or any other person under s 21A(2)(eb) of the *Crimes (Sentencing Procedure) Act 1999*. The applicant appealed and one issue was whether the sentencing judge erred in determining that the offences were aggravated under s 21A(2)(eb). The applicant relied on a series of cases to support the claim that it was a rule of law or sentencing principle that it was not an aggravating factor for an offence when the offender was lawfully present, relying on *R v Comert* [2004] NSWCCA 125 and a series of cases said to consistently apply that principle.

A five-judge bench of the CCA dismissed the appeal and held that the offender does not need to be an intruder in the home for s 21A(2)(eb) to apply. First, the Court construed the text of the section. Bathurst CJ observed that there is no explicit pre-condition in the section that the offender be an intruder for the section to operate. Further, the section is not limited to the victim's home, but extends to the home of any person, which literally construed includes the offender. The Chief Justice held that the legislature did not appear to intend the section to only apply where the offender was an intruder. His Honour found this construction to be consistent with the purpose of the section, that a home should be safe and secure. It is also consistent with the purpose of "preserv[ing] the notion of sanctity of the home, whereby individuals are entitled to feel safe from harm of any kind" in the Second Reading Speech.

Secondly, the Court considered the interaction of s 21A(2)(eb) with s 21A(4), which provides that the Court should not have regard to an aggravating/mitigating factor if it would be contrary to any Act or rule of law. Bathurst CJ held that s 21A(4) does not limit the operation of s 21A(2)(eb) just because sentencing principles up to the present time have only recognised the aggravating factor where the offender is an intruder. Inconsistency with sentencing principles must be shown for s 21A(4) to have an effect. There is no relevant rule of law limiting the content of s 21A(2)(eb) in the way contended for by the applicant. The decisions which said *Comert* stood for the contrary proposition were plainly wrong.

Doubt over the principle that it is not an aggravating factor for a victim to be assaulted in his/her home if the offender was lawfully present

The applicant in ***Erazo v R*** **[2016] NSWCCA 139** pleaded guilty to six counts of aggravated sexual intercourse without consent with a further six sex offences being taken into account on a Form 1. The offences were committed against the applicant's step-daughter over a number of years. He was sentenced to an aggregate sentence of 14 years imprisonment with a non-parole period of 10 years. Included in the appeal against sentence was a ground alleging that the judge erred in finding it to be an aggravating factor that the offences were committed in the family home. Davies J upheld the ground of appeal but concluded that no lesser sentence was warranted. The principle in *Ingham v R* [2011] NSWCCA 88 states that it will be an aggravating circumstance when a victim is assaulted in her or her own home by an unauthorised intruder but it is otherwise when the offender is lawfully on the premises. That principle is the present state of the law and accordingly, the judge erred in the way alleged. However, some doubt has been cast on the principle in Ingham by recent decisions. Despite being a member of the bench in Ingham, Davies J now accepts the principle expressed therein may have been an unduly restrictive approach to s 21A(2)(eb) of the *Crimes (Sentencing Procedure) Act 1999* and the issue should be revisited. However, this was not an appropriate case in which to do so. Ward JA agreed with these conclusions but R S Hulme AJ deferred expressing an opinion on the matter.

That offence committed in home of victim still an aggravating circumstance even if offender initially a guest of victim

Mr Aktar was sentenced for sexual assault offences against a woman who was regarded as his cousin. The offences were committed in the victim's home in circumstances where Mr Aktar had gone to visit the victim and after they had chatted for a while he began to make sexual advances upon her. She clearly indicated she was not interested but Mr Aktar continued, committing a number of sexual assaults upon her. The sentencing judge regarded the fact that the offences occurred in the victim's home as an aggravating circumstance pursuant to s 21A(2)(eb). Mr Aktar challenged this finding in ***Aktar v R*** **[2015] NSWCCA 123** on the basis that he had the right to be in the victim's home. In dismissing the appeal, Wilson J reviewed the authorities regarding the proper construction of s 21A(2)(eb). Her Honour rejected an interpretation in which s 21A(2)(eb) was enlivened only in circumstances where the offender was an intruder in the victim's home. Such a narrow construction was not intended by the Legislature. In any event, the Court was satisfied that

while Mr Aktar was initially a guest of the victim, his status changed once she asked him to leave. He then committed the offences in what should have been the safety of her home. Accordingly, there was no error by the sentencing judge in treating Mr Aktar's presence in the victim's home as an aggravating factor.

NB: Hoeben CJ at CL and R A Hulme J reserved their position regarding the proper construction of s 21A(2)(eb) as the point was not fully argued.

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

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

Whether an aggravating feature that offence was committed in premises offender entitled to be present in

The facts in ***Melbom v R*** **[2013] NSWCCA 210** involved an offender stabbing one of his housemates and threatening another. The sentencing judge referred to as an aggravating feature that the offence "was committed in the home of the offender". Section 21A(2)(eb) of the *Crimes (Sentencing Procedure) Act 1999* provides that it is an aggravating feature if, "the offence was committed in the home of the victim or any other person". It has been held to not apply where offences are committed in a home where the offender has a lawful right to reside, in accordance with pre- s 21A common law. Mr Melbom appealed his sentence, arguing, inter alia, that this interpretation had been transgressed.

On appeal, R A Hulme J found that the sentencing judge was not in error because she relied on other circumstances (domestic violence and the special vulnerability of housemates) in making her findings in relation to the offence occurring in the home. But he was, in passing, sceptical of the current state of the law on the scope of s 21A(2)(eb). Simpson J took the point further, and remarked (Price J agreeing with her additional comments) at [1]-[2]:

> "I have read in draft the judgment of R A Hulme J. I agree with his Honour's analysis and the orders he proposes. In relation to Ground 1, I note that the Crown initially sought to challenge the correctness of previous decisions of this Court that hold that the aggravating feature specified in s 21A(2)(eb) of the *Crimes (Sentencing Procedure) Act 1999* (that the offence was committed in the home of the victim or any other person) does not extend to offences committed in the home of the victim if the offender lives in the same home. The Crown expressly abandoned that challenge. Why that course was taken is not apparent.

> I understand R A Hulme J to have expressed some reservations about the principle stated. I share those reservations. It is, perhaps, time for re-examination by this Court of those previous decisions."

A similar conclusion was reached in ***Montero v R* [2013] NSWCCA 214**, handed down days after *Melbom*. *Montero* involved a sexual assault in premises the offender was entitled to be in after a New Year's Party. Mr Montero climbed into a bed occupied by a guest after he had a fight with his girlfriend, and, in the morning, raped her. The sentencing judge referred to s 21A(2)(eb) as an aggravating factor. Mr Montero appealed, arguing that this finding was erroneous. Judgment on the appeal was again given by R A Hulme J, who found the ground was not made out. It was clear that the sentencing judge was occupied with the entitlement of the young victim to safety and security while a guest at a friend's home. (In the event that it was an erroneous finding, R A Hulme J found it was not material.)

Offence committed in the home of the victim or any other person (s 21A(2)(eb))

There was no error in taking into account as an aggravating feature that an offence of breaking and entering and committing a serious indictable offence, namely intimidation, in circumstances of aggravation, namely that corporal violence was used, was committed in the home of the victim: ***Palijan v R* [2010] NSWCCA 142**. The element of breaking and entering in s 112(2) of the *Crimes Act* does not require that the premises be the home of the victim. Law-abiding members of the community are entitled to feel safe in their homes.

Double counting of aggravating factor

Breach of trust should not be double-counted as both an aggravating factor and undermining good character

Merhi was a former Australian Border Force employee who was convicted of bribery, fraud and corruption offences. Her breach of trust was taken to be a significant aggravating factor. However, the sentencing judge refused to consider her good character and lack of prior record, on the basis that the good character enabled her to obtain the position of trust. In ***Merhi v R* [2019] NSWCCA 322**, Cavanagh J upheld this ground, finding that where the position is not obtained for the purpose of committing the offence, the refusal to consider good character is a form of double-counting the breach of trust. In addition, the fact that she was a former employee at the time of the offence did not absolve Merhi of the breach of trust, as she was still exploiting the knowledge she had been entrusted with as an employee.

Double counting re "under authority" and "breach of trust"

The appellant in ***Beavis v R* [2018] NSWCCA 248** was convicted of child sexual assault offences, three counts of which included an element where the victim was "under the authority" of the offender. On sentencing, the primary judge said that the offences were aggravated by "a significant breach of trust" because the offences occurred when the complainant was staying at the appellant's home, and was entitled to feel safe and secure.

One of the grounds of appeal was to the effect that the finding of breach of trust was "double dipping" because an element of the offences was that the complainant was "under the authority" of the appellant. As the sentencing judge had not adverted to any distinction between a breach of authority or breach of trust, the Court of Criminal Appeal upheld the ground of appeal finding that "the sentencing judge treated a breach of trust as aggravating an offence, when as a matter of substance that breach was an element of the offence" [255].

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

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

Double punishment

In ***Portolesi v R*** **[2012] NSWCCA 157** the appellant had pleaded guilty to offences concerning a cannabis cultivation operation at his vineyard in regional NSW. He was sentenced to 5 years imprisonment for an offence of cultivating a commercial quantity of cannabis, 12 months for diverting electricity and 3 months for possession of a mobile phone jamming device. The terms were to be served concurrently. When considering the seriousness of the cultivation offence, the sentencing judge had regard to the sophistication of P's operation, including his possession of the jamming device and diversion of electricity.

It was contended that it was double punishment to treat this conduct as an aggravating factor in the first offence, and as the basis for two separate offences. In *Pearce v R* [1998] HCA 57 a majority of the High Court stated (at [40]) that where an offender is convicted of two offences with common elements, it would be wrong to impose punishment twice for the elements that are in common. The majority also stated that ordering the sentences be served concurrently would not rectify such an error. The correct approach is for an appropriate sentence to be fixed for each offence before turning to the question of concurrence.

Beech-Jones J found that the appellant had been punished twice for possession of the jamming device and diverting electricity (at [47]). But he held that they were relevant aggravating features to be considered in the cultivation offence; error in double punishment only arose later in sentencing for the possession and diversion offences (at 51]). By the time the appeal was decided sentences for these offences had already been served in their entirety and the appeal was dismissed.

Mitigating: s 21A(3)

Drug supply – supply to undercover police – mitigating factor of "harm not substantial" (s 21A(3)(a)) does not apply

It was contended in ***Taysavang v R; Lee v R*** **[2017] NSWCCA 146** that a judge was in error when sentencing for drug supply to an undercover police officer that the mitigating factor in s 21A(3)(a) of the *Crimes (Sentencing Procedure) Act 1999* applied because the drugs did not cause harm to the community. The Court (Simpson JA, McCallum and Fagan JJ) held that there was no error. Indirect and generalised harm flows from the supply of drugs; for example, funding drug manufacturers and importers, thereby increasing the availability of drugs. Further, a great deal of law enforcement time and resources are taken up with investigation of criminal drug activity. Also, it would be absurd to allow for this mitigating factor in other circumstances where the drugs did not find their way into the drug using community; for example, the seizure of large quantities upon importation, or when supplied from one drug supplier to a lower level supplier, or where the supplier is arrested in possession and before actual supply.

Good prospects of rehabilitation and unlikelihood of reoffending are separate issues

A relatively young offender was sentenced for drug supply offences. He had some psychological issues and had fallen into drug use at the age of 18 and into supplying drugs at the age of 21. Following his arrest he had managed to abstain from drugs in the 3 years until he was sentenced, had managed to build a business, restore family relationships and was remorseful. A psychologist opined that it would be highly surprising if he offended again. It was contended on appeal that while the sentencing judge made a favourable finding of good prospects of rehabilitation he was in error in not determining his likelihood of reoffending.

Price J held in ***Zuffo v R*** **[2017] NSWCCA 187** at [46]-[57] that as the two concepts are commonly linked but they are not the same (citing *R v Pogson* (2012) 82 NSWLR 60 at [118]-[121] – e.g. "rehabilitation is a concept which is broader than merely avoiding reoffending"). The issue was squarely raised in submissions and, in a reserved judgment, it should have been addressed by the sentencing judge. Adamson J agreed with the result but provided her own reasons in relation to this ground. She regarded it as significant that the judge had said there was a need for the sentence to reflect specific deterrence. Why would specific deterrence be required if there was an unlikelihood of reoffending? The judge should have addressed the issue and made a finding. Hoeben CJ at CL agreed with both judgments.

Prior good character – s 21A(3)(f) – cannot be disregarded in sentencing for an ongoing course of offending conduct

The applicant in ***Erazo v R*** **[2016] NSWCCA 139** pleaded guilty to six counts of aggravated sexual intercourse without consent with a further six sex offences being taken into account on a Form 1. The offences were committed against the applicant's step-daughter over a number of years. He was sentenced to an aggregate sentence of 14 years imprisonment with a non-parole period of 10 years. Included in the appeal against sentence was a ground alleging that the judge failed to take into account the applicant's otherwise good character

by finding that it was "totally dissipated by his continued offending over many years". Davies J upheld the ground of appeal but concluded that no lesser sentence was warranted. The proper approach to good character was discussed by the High Court in *Ryan v The Queen* [2001] HCA 21; 206 CLR 267. There it was stated that a court must first consider whether the prisoner is of otherwise good character, disregarding the offences for which he/she is being sentenced. Second, if established, the judge must take that fact into account. However, the weight given to it will vary according to the circumstances of the case. In the present case, the Crown submission that the judge acted in accordance with Ryan should be rejected. The applicant's otherwise good character prior to the initial offending should have been a mitigating factor at least to a small extent.

This issue considered above arose in the context of supplying prohibited drugs in the matter of *Bidgood v R* [2016] NSWCCA 138. The applicant pleaded guilty to three drug supply charges, including supply on an ongoing basis, with a further six offences taken into account on a Form 1. He received an aggregate sentence of imprisonment for 4 years with a non-parole period of 2 years. In sentencing him, the judge found that despite being of prior good character, the applicant disentitled himself to any leniency through his involvement in a course of ongoing serious criminal conduct. The applicant's appeal against sentence included a ground challenging that approach as contrary to the decision of *Ryan v The Queen* [2001] HCA 21; 206 CLR 267. Davies J upheld the ground but dismissed the appeal finding that no lesser sentence was warranted. The sentencing judge found that the applicant was otherwise of good character, but fell into error by holding that he was disentitled to the benefit of that by reference to the offending for which her Honour was sentencing him. The continuous nature of the offending is not a correct basis for disentitling the applicant to the benefit of good character; it is correct only as supporting the view that limited weight should be given to it. If the offending over 20 years in Ryan did not have the effect of negativing good character as a mitigating factor, offending in the present case of no more than three months, a fortiori, did not have that effect.

Meaning of "duress" in offending behaviour – s 21A(3)(d)

Marcelo Hernandez, a South American national, was sentenced for a number of offences relating to safe heists against fast-food stores. He gave evidence that through a gambling addiction he had fallen into debt with insalubrious characters in Panama and was forced to flee to Australia, leaving his wife behind. He said that his creditors had threatened his wife and this was why he committed his offences. In due course, Mr Hernandez appealed his sentence, arguing that his evidence suggested that the offences were committed in circumstances of duress and that the sentencing judge had not made a clear finding as to whether this was accepted and, if so, to what extent it sounded in mitigation. In ***Marcelo v R* [2013] NSWCCA 51**, Rothman J found that the sentencing judge had taken into account the facts said to constitute "duress" in dealing with the matter. As to actual duress, the offender bore the onus of proving it and the sentencing judge was not in error in holding that he had not. Mr Hernandez was not left, by his circumstances, with no option but to commit the crimes he did.

Remorse – s 21A(3)(i) – assessment in a case of "gross moral culpability"

A woman drove a vehicle which was involved in a collision where two of the passengers were killed and three others suffered serious injury. She pleaded guilty to two counts of manslaughter and three counts of dangerous driving occasioning grievous bodily harm in circumstances of aggravation. In ***Duncan v R*** **[2012] NSWCCA 78** it was argued that the sentencing judge erred in the manner in which he dealt with evidence of the applicant's remorse. Basten JA dismissed the appeal and held (at [22) that trial judge's decision to place little weight on remorse in a case of "gross moral culpability" was in line the approach set down in *R v Dhanhoa* [2000] NSWCCA 256; *R v Koosmen* [2004] NSWCCA 359. His Honour did not find (at [23]) that the approach was inconsistent with the statement of Murphy J in *Neal v R* [1982] HCA 55 at [12], nor that Murphy J's general statement was applicable in the circumstances of the case.

Duress as a mitigating factor in sentencing – s 21A(3)(d)

In ***Tiknius v R*** **[2011] NSWCCA 215**, the offender was a foreign national who came to Australia to facilitate the recovery and distribution of imported drugs. The sentencing judge found that the offender was motivated by a need to settle a substantial debt owed by him to his cocaine dealer, and that the cocaine dealer had threatened him and his girlfriend with serious harm unless he performed the "job". On appeal, it was contended that the sentencing judge, whilst finding that the offences were committed under duress, had not taken it into account in assessing the objective seriousness of the offences and had given it inadequate weight in allowing an appropriate reduction in the sentences imposed. The Court allowed the appeal. Johnson J held that the findings of the sentencing judge as to duress should have resulted in a significant reduction in the moral culpability of the offender and a corresponding reduction in the objective seriousness of the offences. His Honour provided a succinct distillation of the principles concerning offences committed under duress at [31] – [54] of his Honour's judgment.

Section 21A - remorse (s 21A(3)(i))

The offender in ***Pham v R*** **[2010] NSWCCA 208** pleaded guilty to an offence of knowingly taking part in the supply of not less than the large commercial quantity of pseudoephedrine. There was an issue on appeal as to whether the sentencing judge was in error in finding that the offender was "not truly remorseful for his conduct". Simpson J observed (at [29]) that remorse and contrition are taken into account in sentencing because they are thought to be indicative of prospects of rehabilitation. She added (at [32]) that, "Despite the often ritual incantation of remorse and contrition as relevant to sentencing, it is seldom that they have any real bearing upon the sentencing outcome except … where they can be taken to indicate good prospects of rehabilitation".

Restitution is a powerful way to demonstrate an offender's remorse. In **OH Hyunwook v R [2010] NSWCCA 148** the sentencing judge had implicitly found that the offender was remorseful but was critical of legal advice he had received that prevented him making any offer to pay the victim's medical expenses. The judge had said, in part, "I always have a limited acceptance of expressions of remorse unless they are backed up by something concrete".

There are varying degrees of remorse. In ***Morrison v R*** **[2009] NSWCCA 211**, a sentencing judge found that the offender was remorseful and had acknowledged the loss caused by his break, enter and steal offence. However he also remarked that the remorse was limited to the extent that the offender did not inform authorities as to where he had disposed of the stolen goods and also had not provided the name of another person who was seen in the getaway vehicle. It was contended on appeal that the judge erred in finding that the remorse was limited but R A Hulme J held the judge was simply acknowledging that whilst the offender was remorseful, it was not as complete as it possibly could be.

Good prospects of rehabilitation (s 21A(3)(h)) – not precluded simply because offender maintains innocence

The offender in ***Alseedi v R*** **[2009] NSWCCA 185** had been convicted after trial of a number of sexual assaults. Giles JA dismissed the conviction appeal but upheld the sentencing appeal, on the grounds that the sentencing judge erred in giving undue weight to the accused maintaining his innocence. His Honour noted that offenders convicted at trial are not automatically deprived of a finding of good prospects of rehabilitation.

Good character (s 21A(3)(f)) – erroneous to use offence for which offender is being sentenced to refuse good character

In ***Pfeiffer v R*** **[2009] NSWCCA 145** the sentencing judge found the offences were not "out of character" because they occurred over a lengthy period of time and involved the repeated obtaining of moneys from the victims and also that a further offence was committed about two years later. McClellan CJ at CL held that the offence before the court should've been irrelevant in assessing good character.

D. Guilty plea and facilitating justice (s 22A)

Commonwealth offences

Guilty plea discounts in Commonwealth offences are purely for utilitarian value – lack of remorse does not affect numerical discount

The offenders in ***Betka v R; Ghazaoui v R; Hawchar v R*** **[2020] NSWCCA 191** pleaded guilty at an early stage to money laundering offences. The trial judge gave them a discount of 20% for these pleas, reasoning that they were made in the face of a strong prosecution case and so were born more of fatalism than a desire to facilitate the administration of justice. On appeal, Fullerton J held this was in error. Her Honour found that the discount for a guilty plea is purely for its utilitarian value, and therefore its timing. The reason for the plea may be relevant to remorse, but that is a separate and subjective factor.

The discount for pleading guilty cannot be expressed as a range

The appellant in ***Jinde Huang aka Wei Liu v R*** **[2018] NSWCCA 70** pleaded guilty to the importation of a commercial quantity of methamphetamine and dealing with the proceeds of crime. The plea for the first offence was entered earlier than the plea for the second. Upon sentencing the judge resolved to reflect the extent to which the pleas facilitated the course of justice by discounting the sentence for the first offence by "between 10% and 15%" and "between 5% and 10%" for the second offence. On appeal it was contended, inter alia, the sentencing judge erred by specifying a range for the discounts.

The appeal was heard by a five judge bench at the same time as *Xiao v R* [2018] NSWCCA 4 (see above) although judgment was delivered some months later. The members of the Court were generally of the view that a "range" of discount for a plea of guilty should not be utilized, although the strength of such views varied. Usefully, Bathurst CJ stated (at [9]):

> "Because somewhat divergent views have been expressed on the issues raised in this appeal, it may be of assistance to specify the approach which should be taken by sentencing judges in dealing with the utilitarian value of a plea of guilty in respect of Commonwealth offences having regard to the decision in *Xiao v R* and the judgment handed down in the present case:
>
> 1. Sentencing judges should take into account the utilitarian value of a plea in Commonwealth sentencing offences. Failure to do so constitutes error.
> 2. It is desirable that any discount given for the utilitarian value be specified. However, a failure to do so would not of itself constitute error.
> 3. It is an error to specify a range of percentage discounts as distinct from a specific percentage."

Plea of guilty for Commonwealth offences - s 16A(2)(g) requires a court to take into account the utilitarian value

The appellant in ***Xiao v R*** **[2018] NSWCCA 4** pleaded guilty to insider trading offences under the Corporations Act 2001 (Cth). Whilst the investigation was ongoing, ASIC obtained orders preventing Xiao from leaving the country. He was subsequently granted overseas travel for a particular purpose but breached the orders and remained overseas for some years. Xiao was later extradited and entered a plea of guilty. The sentencing judge stated that the utilitarian discount identified in *R v Thomson; R v Houlton* (2000) 49 NSWLR 383 did not apply to federal sentencing and that there was no obligation to give any specific quantification of a discount for a guilty plea. Moreover, the sentencing judge held that the pleas had to be evaluated in the overall context including the appellant's failure to return from overseas in breach of court orders. The appellant appealed against the severity of the sentence on several grounds, two grounds contending that the judge failed to take into account the utilitarian value of an early guilty plea and that the reduction by reason of the guilty pleas was inadequate.

The Court was constituted by a bench of five judges in order to resolve conflicting views expressed in earlier cases, primarily in *Tyler v The Queen* [2007] NSWCCA 247; 173 A Crim R 458 and *Director of Public Prosecutions (Cth) v Thomas* (2016) 347 ALR 275; [2016] VSCA 237. It was held s 16A(2)(g) of the *Crimes Act 1912* (Cth) requires a court to take into account the utilitarian value of a guilty plea and that it is desirable but not obligatory to specify the discount specified by the Court.

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.

Plea of guilty – no discount in a Commonwealth case

The applicant in ***Lee v R*** **[2012] NSWCCA 123** complained that the sentencing judge had erred by failing to indicate that a discount had been allowed on account of his pleas of guilty. Hoeben JA held (at [56] – [60]) that there was no such error. It is *Cameron v R* [2002] HCA 6; 209 CLR 339 that applies to Commonwealth offences, not *R v Thomson, R v Houlton* [2000] NSWCCA 309; 49 NSWLR 383. The plea is taken into account as reflecting the offender's willingness to facilitate the course of justice, not on the basis that it had saved the cost of a contested hearing. In this case, the plea was not indicative of a willingness to facilitate the course of justice because it was simply recognition of the strength of the

Crown case and the inevitability of conviction. The plea was not indicative of remorse either; it was entered late and the applicant still tried to downplay his role.

Ellis discount

Assistance to authorities – disclosure of otherwise unknown guilt (Ellis) – necessary to apply the requirements in s 23 of the Crimes (Sentencing Procedure) Act

The respondent in ***R v AA*** **[2017] NSWCCA 84** pleaded guilty to sexual assault offences committed against his two nieces. The respondent first denied the allegations, but within a few days made full admissions. The sentencing judge said that the respondent would receive an unspecified "further *Ellis* type discount", referring to an additional measure of leniency afforded in circumstances where the offender voluntarily discloses guilt which would otherwise unlikely have been discovered and established: *R v Ellis* (1986) 6 NSWLR 603 at 604. The Crown appealed against the sentences imposed. One ground of appeal was that the sentencing judge erred in applying an *Ellis* discount.

Beech-Jones J upheld this ground. The sentencing judge allowed a discount for the respondent's assistance to authorities but failed to address the factors in s 23(2) of the *Crimes (Sentencing Procedure) Act 1999*, which are mandatory considerations in deciding whether to impose a lesser penalty. Beech-Jones J found that, contrary to the respondent's submissions, the sentencing judge had indeed given an Ellis style further discount, and not just considered his assistance as a demonstration of remorse. His Honour reviewed the authorities which hold that the disclosure of otherwise unknown guilt is subject to the stricture of s 23(3): *CMB v Attorney General for the State of NSW* [2015] HCA 9; 256 CLR 346 at [72]. If sentencing judges are considering imposing a lesser sentence due to a voluntary disclosure of unknown offending, the factors in s 23(2) must be considered in determining whether the discount should be given: *Williamson v R* [2015] NSWCCA 250 at [68]. They also must ensure that the penalty imposed is not disproportionate: s 23(3). Whilst error was made out, the sentences imposed were not manifestly inadequate and the appeal was dismissed.

Proper approach to "Ellis discount" for voluntary disclosure of guilt

The appellant in ***Panetta v R*** **[2016] NSWCCA 85** pleaded guilty to murder. The victim's death and the appellant's involvement in it only came to light when he voluntarily attended a police station and disclosed the crime approximately two years after it occurred. He was sentenced to 17 years imprisonment with a non-parole period of 12 years. While that sentence expressly included an "*Ellis* discount" for assistance to authorities, the appellant challenged the sentence on the ground that the reduction was not quantified. Adams J (Ward JA and Bellew J agreeing with his Honour's reasons but not as to the appropriate sentence) allowed the appeal. Relevant to the appeal was s 23(4) of the *Crimes (Sentencing Procedure) Act 1999* ("the Act") which imposes on the Court a requirement to make explicit the nature and extent of any reduction in sentence from that which otherwise would have been imposed absent the provision of assistance to authorities.

Section 23(4) was generally understood to apply to the situation where a discount was given to one offender for future assistance in respect of offences committed by another, to facilitate a reconsideration of the reduced sentence should the Crown appeal in the event the respondent failed to fulfil the undertaking. It was not understood to apply to the *Ellis* discount. Accordingly, in this case, the judge followed what was the preponderant view. However, this matter requires reconsideration in light of the decision in *CMB v Attorney General for New South Wales* [2015] HCA 9; 89 ALJR 407, where members of the High Court indicated that the Ellis discount fell within s 23(1) of the Act. Once it is accepted that the Ellis discount falls within s 23(1), it necessarily falls within the other sub-sections, including s 23(4). The ground of appeal must be upheld. A failure to comply with s 23(4) is an error of law requiring the Court to consider the issue of resentencing. On resentence each member of the bench quantified the Ellis discount.

A differently constituted bench reached a contrary conclusion to that of *Panetta v R* in the matter of ***AG v R* [2016] NSWCCA 102**. Judgment in the latter was delivered soon after the former but made no reference to it. The applicant in *AG v R* committed sexual offences against his daughter. The offending came to light when the victim made complaints to her mother, who then confronted the applicant and urged him to report himself to authorities. He voluntarily attended a police station and disclosed the offending as a result. His disclosures founded more serious charges than the conduct described by the complainant. His appeal against sentence included a ground that the judge erred by failing to have proper regard to the voluntary disclosure. Davies J, citing CCA and High Court authority to this effect, held that a quantified discount is not to be given for an Ellis discount and dismissed the appeal. In this case, the remarks on sentence reveal that the sentencing judge clearly took into account the applicant's voluntary disclosures. In circumstances where a quantified discount is not to be given, the ground of appeal necessarily becomes one suggesting that insufficient weight was given to the disclosures. However the extent of weight to be given to matters is a matter for the sentencing judge; no error of the *House v The King type* was established.

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.

Error in judge's 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.

Facilitating justice (s 22A)

Facilitating the course of justice (s 22A) – limiting the issues at trial does not necessarily justify a reduction on sentence

The applicant in ***Biddle v R* [2017] NSWCCA 128** was charged with murder. He pleaded not guilty to murder but guilty to manslaughter. The jury found him guilty of murder. One ground of appeal against sentence was that the sentencing judge erred in finding there was no reason to regard the applicant's conduct prior to and during the trial as meriting any lesser sentence because he facilitated the administration of justice. The applicant pointed to many concessions made by the defence which assisted the Crown. It was submitted that a lesser penalty should have been imposed: s 22A of the *Crimes (Sentencing Procedure) Act 1999*. Hoeben CJ at CL found that most of the concessions made were beyond argument and would have been very easy to prove. The applicant's submissions went no higher than the proposition that it was open to the sentencing judge to allow a small discount for the forensic decisions made on behalf of the applicant but he was not obliged to do so. It is significant that the issue was not raised at the sentence hearing. If reliance is placed on s 22A at first instance, the sentencing judge is able to assess whether the concessions made truly did facilitate the administration of justice and they are best placed to do so as the trial judge: *Mulvihill v R* [2016] NSWCCA 259. See also *RP v R* (2015) 90 NSWLR 234; NSWCCA 215**.**

State offences

Discount for offer to plead guilty to lesser offence where offer rejected but offender then found guilty of lesser offence

Mr Magro was charged with murder after fatally shooting a man in the neck. This followed a confrontation the previous night. Magro offered to plead guilty to manslaughter, arguing that the Crown could not rule out excessive self-defence. The offer was refused, the matter proceeded to trial, self-defence was raised and Magro was found guilty of manslaughter. The sentencing judge allowed a discount of 10% for the offer, finding "no great utilitarian value" given the significant factual and culpability disputes.

Gleeson JA ruled that this was in error. In ***Magro v R*** **[2020] NSWCCA 25**, his Honour held that the importance of the offer was its potential utilitarian value, not its actual value. In addition, his Honour held that the offer resolved all the criminal elements – it did not need to resolve every fact. Disputes about culpability could be resolved in the normal course of a sentencing hearing.

Not double-counting to consider guilty plea both for utilitarian value and as evidence of remorse – Bugmy principles where offender now pro-social

Mr Hoskins hit and killed a woman with his car, panicked, and drove off. There was no evidence that his driving was negligent or dangerous. He turned himself in the next day, was charged with failure to stop and assist and pleaded guilty at the earliest opportunity. The sentencing judge refused to double-count the guilty plea as evidence of remorse, having already granted the 25% utilitarian discount. His Honour also rejected a causal link between Mr Hoskins' disadvantaged background and the offending, given that Mr Hoskins was at the time of the offence living a pro-social life.

In ***Hoskins v R*** **[2020] NSWCCA 18**, Basten JA allowed the appeal. His Honour held that the guilty plea should have been taken into account as evidence of contrition, given how clearly remorse was raised on the facts (conceded by the Crown). R A Hulme J held that the actual criminal act of Hoskins – fleeing the scene – was clearly a poor decision consistent with his troubled background, such that *Bugmy* principles could not be discarded.

Late plea of guilty – assessment of utilitarian value

The applicant in ***Udovic v R*** **[2019] NSWCCA 196** pleaded guilty two days after his trial was due to commence, was unrepresented in a first disputed facts hearing which had to be adjourned, and instructed his counsel to accept the proposed statement of facts on the day of the second disputed facts hearing. On appeal, the applicant argued that the sentencing judge erred by only applying a 5% discount to his sentence to reflect his late plea of guilty. Hidden AJ rejected the ground of appeal. The common law applied to this matter, and Hidden AJ referred to *R v Borkowski* [2009] NSWCCA 102; (2009) 195 A Crim R 1 and *R v AB* [2011] NSWCCA 229. His Honour held that while sentencing judges often apply a 10% reduction on sentence for pleas entered on the day of the trial, here, the utilitarian value of the plea was eroded by disputation over the facts over 10 months. Hidden AJ accepted that the 5% discount was within the legitimate discretion of the sentencing judge.

Two aspects regarding discounts on sentence for pleading guilty

The appellant in ***Gordon v R*** **[2018] NSWCCA 54** was sentenced for two serious offences, and had other offences taken into account on Forms 1. He pleaded guilty to the substantive offences; one after the complainant had given evidence. He did not plead guilty to all the Form 1 offences, one of those offences had been fixed for trial after a committal hearing in which the complainant had been cross-examined. On appeal it was contended that the sentencing judge had erred in her approach to the discount for pleading guilty.

The appeal was allowed. Simpson JA explained the history of affording offenders a sentence discount for an early plea of guilty; s 22 of the *Crimes (Sentencing Procedure) Act 1999*; and the guideline judgment of *R v Thomson; R v Houlton* (2000) 49 NSWLR 383. She found, contrary to RA Hulme J and Hidden AJ, that because the appellant did not plead guilty to all the Form 1 offences at the earliest time, this reduced the utilitarian value of the plea. Further, her Honour held that the value of the guilty plea for one of the substantive offences was also reduced because of the late guilty plea for one of the Form 1 offences that was attached to that substantive offence.

On this point, RA Hulme J (with the agreement of Hidden AJ) held that section 22 requires a court to take into account a guilty plea "in sentencing for an offence". There is no statutory requirement to take into account whether an offender pleaded guilty to an offence taken into account on a Form 1. His Honour therefore held that a court need not, when sentencing for one offence, consider the procedural history of any additional offences that are taken into account in assessing by how much the sentence for the primary offence should be reduced on account of the utilitarian value of the plea of guilty. Comments were made about a myriad of potential complications to the sentencing process if judges were required to analyse the utilitarian value of an offender's acknowledgement of guilt in respect of offences on a Form 1. In this case, his Honour held that an appropriate discount for an offence to which there was an early plea of guilty was 25%, notwithstanding a late acceptance of guilt in respect of a Form 1 matter.

Plea of guilty – failure of sentencing judge to acknowledge can indicate no regard was had to it

The appellant in ***Edwards v R*** **[2017] NSWCCA 160** pleaded guilty to robbery and two other offences were placed on a Form 1. She was sentenced to 3 years imprisonment with 18 months non parole. The sentencing judge considered the appellant's subjective case, including a disadvantaged upbringing and mental health issues. He noted that she had expressed remorse and had accepted responsibility for her behaviour. However, the remarks on sentence made no reference to the fact that the applicant had entered a plea of guilty or that she had done so at an early stage. On appeal it was contended that the sentencing judge failed to apply a discount of 25%, or any discount, in recognition of the guilty plea. Garling J held that clear error had been demonstrated. The sentencing judge failed to take into account a material consideration when determining the relevant sentence. When there is no mention of an early guilty plea it can only be inferred that the sentencing judge did not have regard to it. The appeal was allowed and in re-exercising the

sentencing discretion afresh, a sentence of 2 years 3 months with a non-parole of 1 year 2 months was imposed.

The discretion to reduce the utilitarian discount for a guilty plea under s 22(1A) of the Crimes (Sentencing Procedure) Act 1999 is wide, but should not be applied inconsistently

The applicant in ***Silvestri v R*** **[2016] NSWCCA 245** pleaded guilty to three charges of dangerous driving occasioning grievous bodily harm. Each charge related to one victim; two men and a pregnant woman who lost her baby as a result. For each of the two counts relating to the male passengers, the applicant was given a 25% discount for his guilty pleas. On the count relating to the female passenger however, the sentencing judge (who was also the sentencing judge in *Lehn v R* [2016] NSWCCA 255) only allowed a 20% discount on the basis that any greater discount would not reflect the object gravity of the offence. The applicant appealed on the ground that the trial judge erred in allowing a discount of only 20% for the utilitarian benefit of the guilty plea to that last charge.

Hidden AJ observed that the discretion to reduce a sentence for the utilitarian value of a guilty plea remains a wide one. However, his Honour held that there was incongruity in reducing the sentence for two counts by 25% but the other by 20%. Given the severity of the sentence for the last count (5 years, 3 non-parole), it was said to be hard to see how a 25% discount would have produced a sentence less than was required to mark the gravity of the offence. Hidden AJ held that if this was the only ground in the application the Court would not intervene because the difference is only a matter of a few months. However, his Honour found that there was merit in the ground on accumulation, so the combination of errors rendered the sentencing process erroneous. The appeal was allowed and the applicant was re-sentenced.

Guilty plea entered shortly before trial date should receive full discount in the circumstances

The applicant in ***Haines v R*** **[2016] NSWCCA 90** was unfit to be tried but was found to have committed murder in a special hearing in 2004. A limiting term of 17 years was nominated. The Mental Health Review Tribunal formed the opinion that she was fit to be tried in 2013. An expert report expressed the opinion that a defence of mental illness was available. The applicant was found fit to be tried; she was arraigned and entered a plea of not guilty on the basis of a defence of mental illness. That defence was to be the sole issue at the judge alone trial. Shortly before the date fixed for trial, the expert provided a further report expressing the opinion that the defence was likely not available. The applicant was re-arraigned and pleaded guilty. She was sentenced to 17 years with a non-parole period of 12 years 9 months. She appealed against that sentence on the basis that the judge erred in assessing the discount arising from the guilty plea at 15%. The Court (Ward JA, Price and Adamson JJ) allowed the appeal and re-sentenced the applicant applying a 25% discount. The principles pertaining to the assessment of the utilitarian value of the plea have to be applied by reference to the particular circumstances of a case. In this case it is not apparent how the reasons for delay in the guilty plea were taken into account, if at all, in his Honour's assessment of the discount. In all of the circumstances, including the applicant's long history of mental illness (during which time she could not have pleaded guilty) and the

reliance she reasonably placed on the assessment of the expert, it must be concluded that his Honour erred in finding that she did not plead guilty at the first reasonable opportunity.

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.

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.

Error in awarding greater discount for guilty plea 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%.

COMMENT: This is yet another example of a sentencing judge applying a discount for a guilty plea to an aggregate sentence.

Error in applying discount for guilty plea to aggregate sentence

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).

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

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

Withholding a discount for the utilitarian value of a plea of guilty justified in exceptional circumstances

Mr Milat pleaded guilty to murder, described as being of "very great heinousness". He did not receive a life sentence by virtue of his age at the time of the offence, being a few weeks short of his 18th birthday. The sentencing judge acknowledged that his plea of guilty would have ordinarily warranted a discount because of its utilitarian value, but she declined to allow a discount because of the "extreme gravity of the crime" and the "serious danger which he represents to the public". One of the grounds of Milat's sentence appeal was that he should have been awarded the full 25 per cent discount, given that the maximum penalty was not imposed. R A Hulme J in ***Milat v R; Klein v R* [2014] NSWCCA 29** dismissed the appeal. The decision whether or not to impose a lesser penalty after a plea of guilty has been entered is discretionary, and this holds where the maximum penalty is not imposed. There are "rare cases in which the policy of transparency in allowing quantified discounts on sentences so as to encourage early pleas of guilty need not be applied because of their exceptional circumstances" (at [84]), but there is not a closed category of cases to which this applies.

Utilitarian value of guilty plea depends on length of delay in entering it

The applicant in ***Morton v R*** **[2014] NSWCCA 8** pleaded guilty to an offence of knowingly taking part in the supply of cocaine, and asked that further Form 1 offences be taken into account on sentence. He was arrested in August 2010 and did not plead guilty until 4 June 2012. The trial judge allowed a discount of 15 per cent for the plea. Hoeben CJ at CL rejected the submission that this was an inadequate discount. The plea of guilty was entered after lengthy charge negotiations. The applicant argued that the offer that was eventually accepted was in the same terms as an earlier offer (made on 22 June 2011) and so he should have been awarded a 25 per cent discount. The Court referred to *R v Stambolis* [2006] NSWCCA 56 and *R v Borkowski* [2009] NSWCCA 102, both of which are authority for the proposition that delayed negotiated pleas reduce their utilitarian value. Furthermore, even if the earlier offer had been accepted, there was still a disputed factual matter to be resolved, thereby reducing the utilitarian value of the plea.

Utilitarian value of a proposed, but not entered, plea of guilty to the alternative offence

In ***Blackwell v R*** **[2012] NSWCCA 227**, the respondent had, while in a highly intoxicated state, struck another man with a glass in the early hours at Scruffy Murphy's Hotel. He was charged with maliciously inflicting grievous bodily harm. At trial, he denied being involved in the altercation. He was convicted, but the Court of Criminal Appeal returned the matter for retrial on account of a misdirection. At the commencement of the second trial, the respondent maintained his plea of not guilty, but did offer to plead guilty for the statutory alternative of recklessly inflicting grievous bodily harm. The Crown indicated that it would not accept that plea, and no plea was formally entered. The respondent was found guilty of the alternative offence, and the sentencing judge allowed him a discount of 13 per cent for the utilitarian value of the plea. Garling J held that there was no error in granting the discount, notwithstanding that the plea had not been entered, and that the circumstances of the retrial were not relevant to calculating the utilitarian value of the plea.

Plea of guilty – allowance for delay because of question of fitness to stand trial

The appellant in ***Hatfield v Regina*** **[2011] NSWCCA 286** pleaded guilty 2 years after his arrest and 5 months after he had been found fit to stand trial. It was held (per Hall J at [43] – [54]) that the sentencing judge erred in only allowing a reduction of 15% because it would not have been reasonable for the pleas to have been entered until after the appellant had been found fit. The maximum reduction of 25% was not available because of the 5 month delay after that time but on re-sentence an allowance of 20% was made.

Plea of guilty – erosion of discount after disputed facts hearing

The Court in ***R v AB*** **[2011] NSWCCA 229**, determined that "as a matter of general principle … the utilitarian value flowing from a plea of guilty is not a fixed element, and is capable of erosion as a result of the manner in which the sentencing hearing is conducted": at [33] per Johnson J. The circumstances were that the offender had pleaded guilty, but then put the Crown to proof on certain facts, which resulted in the matter being heard in the District Court on multiple occasions and led to the calling of evidence under rather trying circumstances. His Honour drew a comparison with the situation faced by a person on trial, who may not be penalised for the manner in which the defence is conducted but who is not

entitled to mitigation for a plea of guilty. His Honour concluded (at [32]) that a person who pleads guilty but puts the Crown to proof on certain factual issues and loses is not entitled to the same discount for a plea, on utilitarian grounds, as a person who does not require a contested hearing.

Plea of guilty - discount when entered after capture following escape

The appellant in ***Visser v R*** **[2011] NSWCCA 146** pleaded guilty in 6 March 2009 to drug supply offences for which he was charged on 3 April 2007. Between 5 April 2007 and 14 May 2008, he was at large following an escape. He complained on appeal that he was entitled to a reduction of 25 per cent, rather than 12.5 per cent, because of his waiver of committal proceedings and his early plea. The submission was rejected. Grove AJ held (at [19]) that "utilitarian benefits are collateral to the efficiency and effectiveness of the criminal justice system as a whole", and that because of the delay caused by the appellant's escape, there was an absence of any benefit to the efficiency and effectiveness of the system.

Open to allow 20% discount where plea took 16 months due to factual dispute

In ***Donaczy v Regina*** **[2010] NSWCCA 143**, the applicant had contended that the judge had wrongly reduced the discount because of the dispute as to the facts. The factual dispute required evidence to be called at sentence. Allsop P did not think the judge had taken the factual dispute into account but said that even if he did, this was not illegitimate.

Transparency not promoted when starting point is unspecified and curious

In ***R v Huang*** **[2010] NSWCCA 68**, the sentencing judge said he would allow a discount of 10 per cent and then imposed a suspended sentence of 2 years (the maximum for a suspsended sentence). Grove and R A Hulme JJ found that the starting point, which was not specified, must have been one of 2 years and about 3 months which seemed rather unlikely.

Expressly quantify reduction for guilty plea

In ***Devine v R*** **[2009] NSWCCA 261**, the sentencing judge noted that the offender had pleaded guilty at the first available opportunity but did not quantify any reduction of the sentence on account of the utilitarian value of the plea. The Crown submitted that it could be inferred that the judge did reduce the sentence despite the omission to state that he had. Fullerton J considered whether such an inference could be drawn and concluded that it could not. In doing so she noted that the total sentence imposed was one of 2 years which would mean a starting point of 32 months prior to a 25 per cent reduction. She considered such a starting point, although theoretically open to the judge, unlikely. The appeal was allowed and the sentence reduced to one of 18 months.

E. Assistance to authorities – s 23

Evidence of assistance to authorities – procedural fairness issues

In ***HT v The Queen*** **[2019] HCA 40**, the High Court held that the appellant had been denied procedural fairness in the Court of Criminal Appeal. She and her lawyers had been denied access to material relevant to her assistance to authorities because the CCA had upheld a police claim of public interest immunity. She had therefore been denied a reasonable opportunity of testing and responding to evidence relevant to whether her sentence was manifestly inadequate. Observations were made about the steps a court may take when an unusual level of confidentiality is said to attend the material upon which a claim of assistance to authorities is based (see at [43]-[50]).

Section 23 Crimes (Sentencing Procedure) Act – admissions to police of known offending is not "assistance"

In ***Le v R*** **[2019] NSWCCA 181**, the applicant was sentenced for offences related to the cultivation of a large commercial quantity of cannabis. He appealed to the Court of Criminal Appeal against his sentence, alleging that the sentencing judge failed to take into account his admissions at the time of his arrest for the purposes of s 23 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) – that is, the applicant had engaged with police with an electronically recorded walk-through interview, and admitted to being the caretaker of the crops. N Adams J (with whom Bathurst CJ and Price J agreed) held that the admissions did not amount to assistance. Specifically, her Honour noted that while assistance is not defined, "there is no doubt that it extends to disclosure by an offender of otherwise unknown guilt" – which did not arise here because the applicant was found at the crime scene and there was evidence he was living there. Even if the admissions constituted assistance within the meaning of s 23, a lower sentence would not automatically follow. On the basis that the admissions were correctly treated as not amounting to assistance, there was no miscarriage of the sentencing proceedings.

Section 23 Crimes (Sentencing Procedure) Act 1999 – assistance to law enforcement authorities includes admissions to police

The applicant in ***Howard v R*** **[2019] NSWCCA 109** was part of a confrontation between two gangs at a railway station. He was charged with throwing a Molotov Cocktail with intent to burn a unidentified person, contrary to s 47 Crimes Act 1900. Upon arrest, he made admissions to police. At sentencing, submissions were made that account should be taken of the "full and frank admissions in the interview to police about his role". The judge said that that "he still gets the benefit of those admissions" despite earlier saying that police had strong evidence implicating the applicant in the form of CCTV footage. Following a 25% discount for his guilty plea, the applicant was sentenced to 9 years, 6 months with a non-parole period of 6 years.

A ground of appeal asserted that the judge erred by not having regard to the applicant's admissions. In the course of rejecting this ground, Bellew J (with whom Fullerton J and Macfarlan JA agreed on this point) said that admissions to police constituted assistance of the kind contemplated by s 23 of the *Crimes (Sentencing Procedure) Act 1999*. However, His Honour noted that a difficulty was that submissions on his point were never made before

the sentencing judge. In addition, Bellew J disagreed that the admissions were pivotal to the prosecution's case because of the existence of, in his Honour's view, compelling and unequivocal CCTV footage. The appeal was ultimately allowed by majority (Fullerton J and Macfarlan JA agreeing, Bellew J dissenting) on the basis of that the sentence imposed was manifestly excessive.

OBSERVATION: The proposition that an offender's admissions to police fall within the concept of assistance to law enforcement for the purposes of s 23 was not supported by any citation of authorities, and there is no known precedent for this approach (apart from admissions of unknown guilt, as considered in *CMB v Attorney General (NSW)* (2015) 256 CLR 346). The potential effect of this decision is to open up a new area of dispute in sentencing at first instance and on appeal – where assistance to authorities may permit a quantified reduction on sentence by way of s 23. In a subsequent judgment of a differently constituted bench, the Court held that an offender's admissions to police upon arrest did not constitute assistance to authorities within s 23: *Le v Regina* [2019] NSWCCA 181 at [54] (N Adams J, Bathurst CJ and Price J agreeing).

Assistance to authorities – extent of reasons required to explain discount

The appellant in ***Greentree v R* [2018] NSWCCA 227** was sentenced for two drug manufacture offences and a firearms offence. At sentencing, the appellant relied on some assistance which he had provided authorities and he received a discount to reflect that. The sentencing judge said in his remarks that he had considered two exhibits relevant to that point, but made general conclusions about the usefulness and veracity of those exhibits and applied a 30% discount. The appellant contended on appeal that the judge had failed to properly apply s 23(2) *Crimes (Sentencing Procedure) Act*.

The appeal was allowed on the basis of another error. In the course of his judgment, Beech-Jones J noted that there is an obvious tension between the objectives of s 23(2) and a sentencing judge's obligation to provide reasons in open court. In some cases, revealing the details of the assistance provided can risk the offender's safety and undermine the purpose of the assistance and defeat the purpose of the provision. His Honour held that in this case the sentencing judge was clearly conscious of the tension and did not err in his reasons.

Crown appeal to revoke an assistance to authorities discount

The appellant in ***R v OE* [2018] NSWCCA 83** was convicted of serious drug offences. At sentencing the trial judge allowed a discount of 65% to reflect the fact that the appellant had undertaken to give evidence against a co-offender; 15% of the 65% discount was for future assistance. The appellant failed to give that assistance and the Crown appealed pursuant to s 5DA of the *Criminal Appeal Act 1912*. An issue that arose – and one which may arise in the future – was whether the appeal was confined to adjusting the sentence to remove the 15% or whether the Court could take a broader assessment of the issues that may have influenced the discount as a whole.

The appeal was allowed. Rothman J found that this was a case where the offender had failed to do that for which he was given a 15% discount. His Honour stated (at [44]) that a

Court may go beyond the limited issue of removing the future discount but declined to decide that point in this case. Button J agreed, and added that his judgment in *R v GD* [2013] NSWCCA 212 should be understood in the context of the problem in that case – a failure by a judge to separately discount for past and future assistance. It provided no support to the proposition sought to be advanced in the present case.

Assistance to authorities – discount should not be given when the assistance was given many years earlier for unrelated offences

The respondent in ***R v XX*** **[2017] NSWCCA 90** was sentenced for three offences relating to sexual abuse of his daughter. The offending occurred in 2013-14, when the daughter was four years old. The respondent received a discount of 15% for the assistance he gave to police and prosecuting authorities in 2006-7 in relation to a charge of conspiracy to murder. This was entirely unrelated to the child sexual abuse he was sentenced for. At the time he received $17,000 for his assistance. The Crown appealed, contending that the sentencing judge erred by allowing this discount. Beech-Jones J rejected the Crown's first submission that the discount was not open as a matter of law because the respondent did not fit into any category of witness established by the case law. The Crown's effort to ascertain the scope and limits of s 23 of the *Crimes (Sentencing Procedure) Act 1999* from case law was misconceived. On his Honour's construction, the respondent's assistance was capable of falling within s 23(1).

However, in the exercise of the discretion to reduce the sentence, Beech-Jones J accepted the Crown's alternative submission that the discount was not open to the sentencing judge in the circumstances. A proper exercise of the discretion under s 23(1), with regard to the factors in s 23(2), could only have led to a refusal to impose a lesser sentence. Beech-Jones J found that the sentencing judge acted on a wrong principle and the exercise of power under s 23(1) was unreasonable. The offence the subject of assistance was unrelated to the subject offence in any sense and there was no temporal association. The sentencing judge acted on wrong principle by assuming that once assistance fell within s 23(1) a discount is available.

His Honour also observed that the sentencing judge's determination was unreasonable when regard is had to the purpose of s 23(1). That purpose, being the public interest in encouraging offenders to supply information to the authorities which will assist them to bring other offenders to justice and to provide evidence, is not advanced when the assistance was provided well prior to the commission of the subject offences. The sentencing judge failed to consider whether the unrelated nature of the offending the subject of the assistance affected the assessment of whether a lesser penalty should be imposed (s 23(2)(i)). The failure to give this factor great importance led to an unreasonable determination. The Crown appeal was allowed.

Assistance to authorities – importance of CCA taking a strong view of breaches of undertakings

When the respondent in ***R v X*** **[2016] NSWCCA 265** was sentenced in 2014 he was given a combined discount of 50% (25% for his guilty plea and 25% for his past and future assistance

to authorities). The future assistance consisted of the respondent undertaking to assist authorities with three matters, including the prosecution of Mohamad Hamzy for murder. The respondent undertook to give evidence against Hamzy in accordance with his statement, which said he was in the car with the deceased, unarmed, when Hamzy shot at them. At trial, the respondent gave evidence that he was not unarmed as previously stated; instead, he said he brought a gun with him, intending to shoot Hamzy, which gave Hamzy an evidentiary basis upon which to claim self-defence.

The Crown successfully appealed pursuant to s 5DA of the *Criminal Appeal Act 1912* (NSW), contending that the respondent failed to fulfil his undertaking. Bellew J found that the respondent did breach the undertaking, and then addressed the question of whether the Court should exercise its discretion and decline to intervene. Bellew J held that, due to the importance of requiring offenders to adhere to undertakings to assist authorities, the Court should intervene and impose a sentence of 6 weeks imprisonment. His Honour accepted the Crown's submission that persons in the respondent's position should be under no misapprehension that if they breach an undertaking to assist, they will ordinarily be re-sentenced: *R v KS* [2005] NSWCCA 87 at [19]. Intervention from the Court was not prevented by the fact that the respondent had already served his sentence, the short period for which he would be returned to custody (6 weeks), or that there was unexplained delay in the Crown pursuing the appeal.

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.

Failure to plead guilty does not limit amount of discount for assistance to authorities

The applicant was sentenced for three offences relating to the manufacture and supply of drugs. He pleaded guilty to one offence (supply cannabis) and, following a trial, was convicted of two charges of manufacturing. The applicant provided assistance to the police of "the highest quality and usefulness". He received a total discount of 37.5% for the supply charge (25% for assistance and 12.5% for a late guilty plea) and 25% for each manufacturing charge, that discount being solely referable to assistance. The applicant appealed, arguing that the sentencing judge failed to adequately discount his sentence in light of the level of assistance provided. In ***Z v R*** **[2014] NSWCCA 323** McCallum J allowed the appeal, finding

that the sentencing judge was wrongly constrained by the view that a discount for assistance can never exceed 25%. "To construe the [Crimes (Sentencing Procedure)] Act with that level of mathematical rigidity would come close to punishing some offenders who offer assistance for not pleading guilty" (at [34]). Her Honour observed that the only constraint in the Act is the s 23(3) imperative that the resulting sentence be not unreasonably disproportionate to the nature and circumstances of the offence.

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

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

Removing the entire discount for assistance to authorities where the offender fails to provide promised assistance

Mr Shahrouk was sentenced in the District Court and was awarded a discount of 10% for providing assistance to authorities, 7% of which was for future assistance. Mr Shahrouk subsequently refused to give evidence against the person he had implicated and claimed that the portions of his statement that related to the other person were false. The Crown appealed pursuant to s 5DA Criminal Appeal Act 1912. A question arose as to whether the discount should be removed entirely or only in respect of the promise of future assistance. Davies J in ***R v Shahrouk* [2014] NSWCCA 87** held that since the assistance was of no value at all, the entire discount should be removed. The case against the person implicated by Mr Shahrouk was supported entirely by the evidence he had promised to give. The basis upon which the discount on sentence was awarded was therefore completely annulled and the respondent was re-sentencing accordingly.

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

On 20 November 2013 Mr Peiris was found guilty by a jury of two counts of indecent assault upon a child. On 10 April 2012 he made a witness statement to the effect that the victim's older brother had been sexually assaulted by the father of one of the victim's friends. The trial judge altered the ratio of parole to non-parole to 50% in recognition of the statement and the appellant's preparedness to give evidence in those proceedings. His Honour did not award a discount in sentence, however, and the appellant appealed this decision. In ***Peiris v R* [2014] NSWCCA 58** Leeming JA held that there was no error disclosed in the approach

adopted by the sentencing judge. It is doubtful that s 23(1) *Crimes (Sentencing Procedure) Act* should be read literally, as this could lead to a scenario whereby, for example, a discount is awarded to a victim of a home burglary for reporting the crime to police years before offending him or herself (see *RJT v R* [2012] NSWCCA 280). There was no evidence as to the value of the statement, as this largely depended upon the testimonial and forensic evidence otherwise available to the Crown.

Discount for assistance incorrectly applied to single sentence

In ***CM v R* [2013] NSWCCA 341**, the applicant was allowed a discount on sentencing as a result of providing assistance to authorities. His appeal centred on the fact that the sentencing judge only applied the discount to one of five sentences. R A Hulme J held that, since the assistance did not relate to any of the offences for which the appellant was charged, there was no reason not to apply the discount to each of the sentences. Further, such discounts should not be eroded by a process of accumulation of sentences.

Correct calculation of discount for assistance to authorities

LB was involved in the large-scale manufacture of methamphetamine and ecstasy in Western Sydney. He was arrested and charged with two serious drug manufacture offences, to which he pleaded guilty. He provided the Crown with significant information in relation to the criminal enterprise that he was involved in. At his sentencing, Garling DCJ allowed LB a discount of 25% for his plea of guilty, and 25% for his assistance to the authorities. But his Honour applied a combined discount of only 30% to the final sentence, giving no particular reasons for doing so. LB appealed on the basis he had not been afforded a sufficient discount for assistance.

In ***LB v R* [2013] NSWCCA 70**, Button J rejected the suggestion that there had been mathematical miscalculation. Rather, he found that Garling DCJ had attempted to balance the competing imperatives of s 23(4) Crimes (Sentencing Procedure) Act 1999, which requires particularisation of the discount, with s 23(3), which requires that the total penalty not be unreasonably disproportionate to the offence. The approach taken led to error. If LB withdrew his assistance in the future, it would not be possible to calculate the relevant discount for the purpose of a Crown appeal under s 5DA Criminal Appeal Act 1912. The correct approach was to formulate the discounts; explicitly reduce them, if necessary, by reference to s 24(3); and then apply them to the undiscounted sentence.

Basis for plea and assistance discounts in Commonwealth matters

The decision of ***R v Karan* [2013] NSWCCA 53** serves as a reminder that the legislation allowing discounts for pleas of guilty and assistance to authorities in Commonwealth cases differs from the NSW scheme. Regard is not to be had to the utilitarian value of the plea, rather to the offender's contrition and willingness to facilitate the course of justice by cooperation. The case concerned a Crown appeal against a discount of 25 per cent given to an offender who offered a late plea and "assisted the authorities" by presenting himself at the police station for arrest. The Court of Criminal Appeal found that the late plea had been spurred by the addition of further evidence to an already-strong Crown case: it was

recognition of the inevitable. This substantially reduced the extent to which the offender could be said to be willingly facilitating the course of justice. An appropriate discount was 15 per cent.

The scope of the discount for providing assistance to authorities

In ***RJT v R*** **[2012] NSWCCA 280**, the appellant argued for a discount to his sentence under s 23 of the *Crimes (Sentencing Procedure) Act 1999* because he had, independently of the offence for which he was convicted, reported another crime of which he was the victim. The appellant had committed two serious sex offences against his 7-year old daughter. After she had reported the offences, but before he was interviewed in relation to them, he reported to police that his grandfather had, for a long period when he was younger, committed sexual offences against him. The appellant assisted police in recording incriminating conversations with his grandfather.

Basten JA (with whom Adams J agreed, R A Hulme J dissenting) identified the purpose of the discount in s 23 as, in a general sense, countering the disincentive of reporting criminal activities. While some disincentives are more established, such as fear of retribution by one's criminal associates, the discount could be applied where there was a public interest in overcoming any disincentive to reporting. Basten JA observed that it was well known that sexual abuse was underreported for a variety of reasons, and there was a public interest in applying the discount in this case. The appropriate discount was set at 10 per cent. His Honour declined to decide whether this interpretation would apply to independent witnesses, rather than victims, of crimes, or to assistance provided to authorities before the discovery of a crime for which the informant received a sentence. The full scope of the discount remains at large.

Discount for assisting authorities applies to all counts

Mr Isaac was sentenced for three offences of aiding and abetting the importation of heroin. For assistance provided to authorities, the sentencing judge granted a discount of 15 percent for counts 2 and 3. But her Honour did not provide a discount for count 1 on the basis that a co-offender had pleaded guilty before Mr Isaac had been arrested or charged. Mr Isaac's information had been of no use to the authorities in relation to two of the three counts.

In ***Isaac v R*** **[2012] NSWCCA 195** it was held by Garling J that the judge had erred by applying the discount differently to the three sentences. His Honour held at [43]-[45] that the proper approach is to assess all the assistance given and apply an appropriate discount to each sentence after they are initially assessed, otherwise the discount may be eroded. It is then necessary to consider totality.

Assistance to authorities can be reflected in both reduction of sentence and the type of sentence imposed

R v Farrawell-Smith **[2010] NSWCCA 144** concerned a Crown appeal in which it was asserted that the sentencing judge had double counted by allowing combined discounts for

the respondent's pleas of guilty and assistance of 40 per cent on one count and 50 per cent on another count and then suspended the sentences, in part, because of the assistance. Barr AJ held that whilst the discounts were excessive, the judge was entitled to also take the assistance into account in deciding to suspend the sentences.

Assistance to authorities in other jurisdictions may be taken into account but not double-counted

In ***Shaw v R*** **[2010] NSWCCA 23**, McClellan CJ at CL held assistance the provided to authorities in other states could be taken into account in principle. However, the assistance provided in this case by the offender to Queensland authorities had already been considered when he was sentenced for offences in Queensland, prior to his extradition to New South Wales.

No "standard deduction" for guilty plea and assistance of authorities

The sentencing judge in ***FS v R*** **[2009] NSWCCA 301** had allowed a combined discount of 40 per cent, saying, "the standard deduction is 40 per cent unless there are exceptional circumstances". It was held by Rothman J that the judge had either misunderstood or misapplied the principles set out by Howie J in *R v Sukkar* [2006] NSWCCA 92; 172 A Crim R 151.

F. Victim impact and attitude to sentencing

Child sexual assault - any suggestion that the child consented is misguided and irrelevant

The applicant in ***CT v R*** **[2017] NSWCCA 15** was convicted of numerous child sexual offences, which were committed against his step-daughter when she was aged between 6 and 10 years old. One ground of appeal against sentence was that the sentencing judge failed to consider the evidence given by the complainant that she remembered enjoying the intercourse. Hoeben CJ at CL held that the submission was 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. His Honour observed that there is no authority for such a submission for good reason; it is inappropriate to equate a child's appreciation of sexual experience with that of a mature adult. Whilst the use of threats or force to overcome resistance would be an aggravating factor, to treat a lack of opposition as a mitigating factor is to misunderstand the nature of the offence. Persons of a young age are unable to give consent and even when sexual activity is not opposed by the victim, it will be damaging; *R v Nelson* [2016] NSWCCA 130 at [23]. The appeal was dismissed.

Document authored by child-victim attempting to minimise the seriousness of the offending is not a "victim impact statement"

The applicant in ***AC v R*** **[2016] NSWCCA 107** pleaded guilty to persistent sexual abuse of a child contrary to s 66EA of the *Crimes Act 1900*. The acts constituting the offence occurred in the weeks following a ceremony that the applicant understood to result in his marriage

under Sharia Law to the 12 year old victim. The Crown tendered a document on sentence titled "victim impact statement" in which the victim expressed distress over the applicant's arrest and incarceration while maintaining that his crime "didn't hurt anybody in any way". The applicant appealed against his sentence, inter alia, on the ground that the sentencing judge failed to give weight to that document. Schmidt J dismissed the appeal holding that the document was not one that the judge was entitled to take into account under s 28 of the *Crimes (Sentencing Procedure) Act 1999* ("the Act"). By its terms it is apparent that it is not a victim impact statement as defined by the Act because it does not contain particulars of harm suffered by the victim. The applicant's further contention that the judge was obliged under s 21A(3)(a) of the Act to take into account the document as evidence of the harm being "not substantial" must also be rejected. Consistent with the victim's youth and immaturity, the document reveals a lack of real understanding of the seriousness of the assaults committed against her and the potential ongoing physical and psychological consequences of that abuse. Such risks have in fact already materialised. Compassion for her situation cannot result in a lesser sentence for the applicant.

Error in giving too much weight to victim impact statement

In ***EG v R*** **[2015] NSWCCA 21** it was held that a child sexual assault offence was at the bottom of the range of seriousness for offences of its kind but the consequences described in a victim impact statement, in relation to their effect on the complainant and the family, went beyond that which would normally be expected. For full weight to be given to the matters described there needed to be more than just uncritical acceptance of the victim impact statement. Some additional support of the kind discussed in *RP v R* [2013] NSWCCA 192 and *R v Tuala* [2015] NSWCCA 8 was required.

Approach to consideration of Victim Impact Statements

Mr Tuala was sentenced for a number of shooting and firearm possession offences. The shooting offences occurred in circumstances where the victim was indebted to Mr Tuala and repeated demands for payment had not been fulfilled. The victim was shot several times and sustained significant injury. At the sentence hearing, a victim impact statement was tendered which complained of substantial physical and emotional harm. ***R v Tuala*** **[2015] NSWCCA 8** was a Crown appeal against the asserted inadequacy of the sentence. It was contended that the shooting offence was aggravated by the level of physical and emotional harm suffered by the victim. Simpson J, in dismissing the appeal, considered the extent to which victim impact statements may be used to prove an aggravating factor in s 21A(2) of the *Crimes (Sentencing Procedure) Act*. Her Honour considered that in circumstances where the victim impact statement is not objected to; there is no question about the weight to be attributed to it; no attempt is made to limit its use; it is confirmatory of other evidence; or it attests to the kind of harm to be expected, the statement may be more readily accepted as evidence of substantial harm. However, she noted that "considerable caution" should be exercised in using the victim impact statement to establish an aggravating factor if: the statement attests to facts that are in question; the victim's credibility is in question; the harm asserted in the statement exceeds what might be expected in the circumstances; or the statement itself provides the only evidence of harm. Her Honour was not satisfied that

injury, loss or damage beyond what is encompassed in offences of this kind was proven beyond reasonable doubt by the contents of the victim impact statement.

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

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

(NOTE: *R v Slack* was disapproved of in *R v Aguirre* [2010] NSWCCA 115.)

The relevance of a victim's benevolent view towards offender

Efthimiadias v R **[2013] NSWCCA 276** illustrates a victim's potential influence on sentencing that was firmly rejected. In this case, the offender had attempted to solicit (from an undercover officer) the murder of his young partner. After the offender's arrest and imprisonment, the victim expressed a desire to at least maintain contact with him. This was said, on the sentence appeal, to be a relevant mitigating circumstance. Johnson J strongly disagreed. He stated, at [67]:

> "The attitude of a victim cannot be allowed to interfere with a proper exercise of sentencing discretion. A serious crime such as this is a wrong committed against the community at large and the community itself is entitled to retribution. Matters of general public importance are at the heart of the policies and principles that direct the proper assessment of punishment, the purpose of which is to protect the public, not to mollify the victim: *R v Palu* [2002] NSWCCA 381; 134 A Crim R 174 at 183-184 [37]; *R v Burton* [2008] NSWCCA 128 at [102]ff. To adopt the words used in another solicit to murder case (*R v Qutami* [2001] NSWCCA 353; 127 A Crim R 369 at 374 [37]-[38]), the fact that the victim adopted a generous attitude to the Applicant was not something on which the Applicant can trade."

Caution in use of untested victim impact statements

Great care is required in making use of the content of victim impact statements in making findings adverse to an offender. In ***McCartney v R*** **[2009] NSWCCA 244**, Grove J noted that such statements are usually unsworn and the assertions within them untested.

In comparison, a sentencing judge made reference to victim impacts statements in making a finding that the aggravating circumstance under s 21A(2)(g) (substantial injury, emotional harm, loss or damage) was proved in ***Aguirre v R*** **[2010] NSWCCA 115**. James J held that in the circumstances it was permissible for the judge to have done so. The circumstances were

that the statements were tendered without objection and there was no argument by experienced counsel as to whether there should be any limit on the use made of them by the judge.

G. Form 1 offences taken into account

Form 1 procedural issues

The applicant in ***LS v R*** **[2020] NSWCCA 27** was sentenced for three aggravated sexual assaults against his daughter. Further counts were taken into account on a Form 1. The Form 1 only listed one principal offence, but the sentencing judge considered the Form 1 offences across all three offences. Harrison J held that this was in error – Form 1 offences can only be contemplated when considering a stipulated principal offence. The appeal was dismissed as no lesser sentence was warranted.

Form 1 matters – correct approach is to take Form 1 matters into account prior to discounting the sentence term for a plea of guilty

A judge took account offences listed on a Form 1 in the following way: "in respect of the supply prohibited drug, I impose a head sentence of 14 years from which I take 25% for the plea of guilty and to that I add one year which is to represent the matters on the Form 1 document". An appeal was upheld in ***Huang v R*** **[2019] NSWCCA 144**. Bell P said that Form 1 matters are not to be taken account of as a "separate sentencing exercise". The 25% discount for the early guilty pleas should have been applied following the taking to account of the Form 1 matters, rather than before it.

Form 1 offences - taking account of maximum penalty and SNPP for such offences when sentencing for a main offence

An applicant was sentenced for serious sexual offences committed against his 4- 5 year old daughter to an aggregate sentence of 20 years imprisonment with a non-parole period of 13 years. One of the grounds of appeal alleged that there was a failure to have proper regard to the maximum penalties for a set of Form 1 offences because the Crown had provided the sentencing judge with a table of Form 1 offences identifying the penalties for ss 61M(2) and 61O(2A) offences as 10 years, when they should have been 2. This was submitted to be incorrect because, following ss 165, 166 and 167 of the *Criminal Procedure Act 1986*, those indictable offences were being summarily dealt with by the District Court.

In ***CH v R*** **[2019] NSWCCA 68**, Schmidt J dismissed this ground of appeal. Her Honour noted that at sentence, admissions of guilt to other offences listed on a Form 1 were taken account. They had previously been listed on a s 166 certificate as related offences. If they had have been dealt with by that procedure, the jurisdictional limit of the Local Court would have applied. But when the judge was asked by the offender to take the offences into account by the Form 1 procedure, this limitation was no longer applicable.

Form 1 offences taken into account – inappropriate to include offences that are more serious than the principal offence, involve a different victim, or carry a standard non-parole period.

The applicant in ***PB v R*** **[2016] NSWCCA 258** was sentenced for five offences of child sexual assault against one stepdaughter. He was sentenced to an aggregate sentence of 14 years with a non-parole period of 8 years. The sentencing judge took into account multiple Form 1 offences, some of which were against a different victim, the principal victim's younger sister. Some of the counts had attached up to four or six offences. The applicant contended that the sentencing judge failed to indicate how he took into account the Form 1 offences in arriving at the indicative sentences for certain counts.

The CCA dismissed the appeal, finding no lesser sentence was warranted, but discussed the appropriate use of Form 1 lists of further offences and the inappropriate use in this case. Davies J noted that the CCA has criticised the inclusion of offences on a Form 1 where a separate victim was involved, or where the offences carry standard non-parole periods. It is illogical to include crimes relating to one victim on a Form 1 where the offence charged related to another victim: *SGJ v R; KU v R* [2008] NSWCCA 258 at [26]. His Honour held that it was inappropriate for four offences of aggravated indecent assault against a different victim to have been placed on a Form 1 attached to one count of aggravated indecent assault against the principal victim, as was done for Count 1. The second victim's younger age (10/11 years, cf the principal victim's age of 15) made the Form 1 offences objectively more serious than the principal offence charged. Counts 3 and 5 both had included on the Form 1 aggravated indecent assault which carries a standard non-parole period. His Honour held that, as the Court made clear in *Karel Eedens v R* [2009] NSWCCA 254 at [19], the standard non-parole periods lose their impact when the offence is placed on a Form 1.

Form 1 offences not relevant to accumulation

Mr Sparos was sentenced for import and supply offences relating to a large quantity of cocaine. The sentencing judge was asked to take into account a Form 1 offence relating to Mr Sparos' dealings with the profits of his criminal enterprise. In his remarks, the sentencing judge said "the Form 1 matter requires an increase in the sentence for the principle offence and militates against complete concurrence for that offence with that to be imposed for the Commonwealth matter" (emphasis supplied). Mr Sparos appealed his sentence, arguing that the sentencing judge was not entitled to, in effect, take into account a Form 1 offence twice: ***Sparos v R*** **[2013] NSWCCA 223**.

Fullerton J (Beazley P agreeing, Beech-Jones J in disagreement on this point) considered whether such an approach was contrary to the principles laid down in ***Abbas, Bodiotis, Taleb and Amoun v R*** **[2013] NSWCCA 115**. In Abbas, Bathurst CJ held that s 33 *Crimes (Sentencing Procedure) Act 1999* was framed so as to allow a sentencing judge to take Form 1 offending into account when "dealing with the primary offence" ([22]-[23]). Applying this, Fullerton J held that having determined the appropriate sentence for the primary offence, it was not open to the judge in sentencing Mr Sparos to take the Form 1 offence into account for the subsequent consideration of the extent to which sentences should be accumulated. Authorities emphasising the role of totality in the sentencing process must be read as being applicable only to offending the subject of a criminal conviction.

Form 1 offences and the primary sentence

Mr Abbas was sentenced for two offences of knowingly taking part in the supply of a commercial quantity of a prohibited drug. The sentencing judge was asked to take into account four offences on a Form 1. The judge stated that, in some cases, taking additional matters into account would increase the weight given to personal deterrence and retribution, and so have the consequential effect of increasing the penalty for the primary offence. Mr Abbas appealed his sentence and contended that this approach as erroneous. On the appeal (***Abbas, Bodiotis, Taleb and Amoun v R* [2013] NSWCCA 115**) Bathurst CJ (Garling and Campbell JJ agreeing, Basten JA and Hoeben CJ at CL also rejecting the ground) held that the approach was correct. While it was not open to the sentencing judge to punish the offender for the criminality reflected by the Form 1 offences, it was open to find personal deterrence and retribution be given additional weight in respect of the primary offence.

Taking into account non-custodial offences on a Form 1

Mr Marshall was convicted and sentenced for two indictable offences. The sentencing judge took into account another offence, that of entering a vehicle without consent, which is punishable by a fine. Mr Marshall appealed his sentence on the basis that the sentencing judge had impermissibly considered a non-custodial offence when assessing the penalty for an offence that carried a sentence of imprisonment. The appeal was dismissed: ***Marshall v R* [2013] NSWCCA 16**. Grove AJ said that it was entirely permissible, in sentencing for a particular offence, to take into account other matters for which guilt has been admitted with a view to increasing the sentence. This gives weight to two normal sentencing considerations: personal deterrence and the community's expectation for condign punishment.

Courts should ensure appropriate use of Form 1 – Inappropriate to place serious offences on Form 1 such that sentence can't reflect totality, criminality, denunciation

In ***Eedens v R* [2009] NSWCCA 254**, the offender committed three sexual assaults against three children in the one afternoon. As a result of negotiations, two of the offences were placed on a Form 1 in prosecution for the third. Howie J observed that this was inappropriate, especially given that one of the offences on the Form 1 was objectively more serious than the others. As a result, in his Honour's view, there was no chance that the sentence could reflect the totality and criminality of the offender's conduct, or sufficiently denounce the abuse. His Honour was of the opinion that it would generally be inappropriate to place any matter with a standard non-parole period on a Form 1.

McClellan CJ at CL noted in ***C-P v R* [2009] NSWCCA 291** that courts have both a supervisory function and power over Form 1 use: s 33(2)(b) *Crimes (Sentencing Procedure) Act 1999*. His Honour regarded placing eight armed robbery, ammunition possession, car theft and proceeds of crime offences on a Form 1 as inappropriate.

Howie J reiterated the remarks in the above cases in ***El-Youssef v R*** **[2010] NSWCCA 4**, stating (at [15]), "this is another case where a serious matter was inappropriately placed onto a Form 1 with the result that the judge could not impose a sentence to reflect the seriousness of that offence".

H. Correction or amendment of sentences

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

A judge imposed aggregate sentences upon two offenders but it was later realised when an appeal in the Court of Criminal Appeal was pending that there was no power to do so. The Crown went back to the District Court with an application pursuant to s 43 of the *Crimes (Sentencing Procedure) Act 1999* to re-open the proceedings and impose sentences according to law. The offenders sought to present additional material relevant to sentence but the judge rejected it. The appeal was continued with an additional complaint about the judge's refusal. It was held in ***Bungie, Scott v R; Bungie, Robert v R*** **[2015] NSWCCA 9** that s 43 does not afford an opportunity to re-litigate what has already been litigated, or to seek a different outcome on different evidence. Section 43 was held by the High Court in *Achurch v The Queen* [2014] HCA 10; 306 ALR 566 to have very narrow scope.

Correcting sentencing errors pursuant to s 43 of the Crimes (Sentencing Procedure) Act 1999

The High Court of Australia in ***Achurch v The Queen*** **[2014] HCA 10** held that a strict construction of s 43 should be adopted; with emphasis on the words "contrary to law". A penalty is not "contrary to law" only because it is reached by a process of erroneous reasoning or factual error (at [36]). Correction of legal or factual errors is available by way of appeal, it being said (at [35]) that obvious matters could be dealt with by way of consent orders. But there is also available inherent powers or the slip rule or statutory extensions thereof (e.g. r 50C Criminal Appeal Rules).

Re-opening sentence proceedings to correct errors

In ***Davis v DPP*** **[2011] NSWSC 153**, the appellant was convicted of a drink-driving offence that carried an automatic disqualification period of 12 months, although there was discretion to order a longer or shorter period, but not less than 6 months. The appellant's licence had been suspended upon his arrest on 14 June 2008. On 19 November 2008 a magistrate imposed no penalty pursuant to s 10A of the Crimes (Sentencing Procedure) Act 1999, and ordered that the appellant's licence be returned to him. He stated his intention, for the benefit of the RTA, that there should be no disqualification. Subsequently, however, because of the absence of any order as to disqualification, the RTA recorded the automatic 12 month period against the appellant's licence.

On three subsequent occasions the magistrate purported to re-open the sentencing proceedings, first to make an order specifying a period of disqualification, then to reduce

the period ordered, then to revoke such orders. Both the defendant and the prosecutor appealed.

Hoeben J dismissed the defendant's appeal (and allowed the cross-appeal), finding that there was no jurisdiction to re-open the original sentence proceedings as the decision had not been contrary to law. His Honour concluded as well that there was no inherent or general jurisdiction for a Local Court to review, rehear, vary or set aside a judgment or order once formally made.

I. Sentencing of children

General principles relating to the sentencing of children

The appellant in ***Paul Campbell v R*** **[2018] NSWCCA 87** was a 13 year old child who pleaded guilty to very serious sexual offences against younger relatives. At sentencing he did not rely on the defence of doli incapax. He was sentenced to 16 months' imprisonment with a non-parole period of 8 months. He appealed on four specific grounds and a general manifest excess ground.

The Court allowed the appeal and remitted the matter to the District Court for resentencing. Hamill J held that the sentencing judge erred by rejecting a concession by the Crown that a sentence other than full-time custody was in range; by failing to consider an alternative to full-time custody; in his assessment of the seriousness of the offences; by finding that the appellant abused his position of trust; and by taking into account an offence listed on a Form 1 that carried a maximum penalty of imprisonment for life.

This case is notable for Hamill J providing a useful collection of principles that apply to the sentencing of children (at [20]-[32]).

J. Purposes of sentencing

General deterrence for vigilante offences

Four offenders assaulted, drugged and robbed Michael Venn at his home. The attack was carried out because the group believed Mr Venn, who was 42, was maintaining a sexual relationship with one of their number who was then aged 16: a fact they viewed as abhorrent and illegal. The group was arrested and charged shortly after the crime. ***Bonnet v R*** **[2013] NSWCCA 234** concerned an appeal brought by one of the group, Ms Bonnet, against her sentence for an offence of robbery with deprivation of liberty. She argued, inter alia, that the sentencing judge had erred by not giving ameliorating weight to her motivation for committing the offence. Ms Bonnet relied on the case of *R v Swan* [2006] NSWCCA 47, which concerned an assault by an intellectually disabled victim of a sexual offence against his attacker.

Adamson J dismissed the appeal. Unlike *R v Swan*, the offender in this case was not affected by any mental disorder or delusion. Vigilante offences are to be discouraged by general deterrence, and even more so where, as in this case, the perceived crime may be unsavoury to the attackers, but is no crime in law at all.

Parents report child's offending – relevant to purposes of sentencing

A rather unusual factor fell for consideration in ***R v Barlow*** **[2010] NSWCCA 215**. The offender's guilt of an offence of supplying a commercial quantity of ecstasy only came to the attention of police when his parents alerted them to their suspicions. Police attended the home and asked the offender if he had anything that he should not have. He disclosed the presence of $120,000 in cash in the boot of his car and subsequently made admissions of involvement in drug supply. The Crown appealed against a sentence of 2½ years to be served by way of periodic detention. One contention raised was that the sentencing judge had erred by taking into account that parents should not be deterred from bringing attention to illicit behaviour of their children. McCallum J was of the view that the disclosure by parents of criminal conduct on the part of their children ultimately promotes the purposes of sentencing (s 3A *Crimes (Sentencing Procedure) Act 1999*), it being conducive to the protection of the community from the offender; promoting his/her rehabilitation; and potentially making the offender accountable for his/her actions. In concurring judgments, Allsop P and Price J expressed their agreement with this reasoning.

Personal and general deterrence less of a factor where offence has been repealed

A sentencing judge was found to have erred in ***Orkopoulos v R*** **[2009] NSWCCA 213** in sentencing for offences against s 78K (sexual intercourse with a male aged between 10 and 18 years) by not taking into account that s 78K was subsequently repealed. There were multiple offences committed up until February 2000. Section 78K was repealed in 2003. A modest reduction was made to the sentences imposed. In the circumstances, McClellan CJ at CL found that considerations of punishment, retribution and deterrence of other persons from committing criminal offences of a similar character had the same significance as they would have had if the offence had remained but personal and general deterrence with respect to the particular offence was of no continuing significance.

K. Penalties

Bonds

Good behaviour bonds – Local Court power to deal with breach of bond imposed on appeal in the District Court

The offender in ***Director of Public Prosecutions (NSW) v Jones, Dillon Michael*** **[2017] NSWCCA 164** was sentenced to imprisonment in the Local Court. He appealed to the District Court where good behaviour bonds were imposed in lieu. The judge made a direction that any breach of the bonds be reported to him for further action. The offender committed further offences and when they were dealt with the magistrate also purported to re-sentence in respect of the breach of the District Court bonds. The offender again

appealed, this time against the aggregate sentence imposed in the Local Court which included the offences the subject of the breached bonds. The District Court judge before whom the appeal came (not the same as the first judge) expressed concern about the failure to adhere to the direction of the other judge and about the power of the Local Court to call-up the offender and re-sentence. This resulted in a stated case coming to the Court of Criminal Appeal.

In relation to the first judge's direction, Basten JA held that it was not a condition of the bond; it was legally ineffective; it was unclear to whom it was directed; it was not based upon any statutory power vested in the judge; and it could not diminish the statutory authority of any other court or judicial officer to deal with a breach of the bond.

Basten JA also closely analysed the provisions of ss 95, 97-99 of the *Crimes (Sentencing Procedure) Act 1999* and concluded that the Local Court had jurisdiction (as did the District Court) to deal with the breach.

His Honour also noted (at [18]) a practical matter favour a conclusion that the Local Court had power to deal with the breach: "Where the offender is before the Local Court for further offences which constitute breaches of a bond imposed for earlier offences, it would be unfortunate if the one court could not deal with both the breach of the bond and the further offences. For that purpose, it should not matter whether the bond was imposed by the District Court or a Local Court."

His Honour also referred to *Yates v Commissioner of Corrective Services of NSW* [2014] NSWSC 653 which held that the Local Court had (sole) jurisdiction in respect of breach of a bond imposed in that Court but purportedly "confirmed" upon dismissal of an appeal to the Local Court.

Fines

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

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

Community Service

Community service orders – sentencing after revocation

The sentencing judge in ***Bonsu v R*** **[2009] NSWCCA 316** proceeded upon a notion that his sole function upon revocation of a community service order was to sentence the offender to prison for a period of one month per 50 hours of unperformed work. Howie J emphasised that s 115 of the *Crimes (Administration of Sentences) Act 1999* required that the sentencing discretion be re-exercised in respect of the offence committed, taking into account the work that had been performed. His Honour held that there is no presumption that a failure to perform work pursuant to a community service order results in a prison term and there is no mathematical formula to be applied to convert unserved hours of work into a period of imprisonment.

Confiscation orders

Obligation to make confiscation order where defendant has benefited from drug trafficking

R v Hall **[2013] NSWCCA 47** concerned the making of a Drug Proceeds Order against Mr Hall, who had pleaded guilty to supplying cannabis and knowingly dealing with proceeds of crime. Conlon DCJ ordered the forfeiture of cash found in the possession of Mr Hall, but declined to grant the Drug Proceeds Order on the basis that the information before him was too scant to form a proper assessment. The Court of Criminal Appeal held that the judge must have been satisfied that the dealer had received a benefit from drug trafficking, because he had ordered the forfeiture of cash. The Court held that he should have gone on to make a Drug Proceeds Order. The *Confiscation of Proceeds of Crimes Act 1989* requires, once that conclusion is reached, an assessment of appropriate order having regard to the available information, notwithstanding that it may be vague or unsatisfactory.

Imprisonment

"Tailoring" a sentence to facilitate the imposition of a suspended sentence

Each of the four respondents in ***R v Dong, Matur; R v Marial; R v Dong, Ayuok; R v Mathiang*** **[2016] NSWCCA 195** pleaded guilty to one count of causing grievous bodily harm with intent to do so contrary to s 33(1)(b) of the *Crimes Act 1900*. A two year suspended sentence was imposed on each respondent. The Crown appeal included a ground alleging that the judge's decision to impose uniform two year sentences indicated that they were "tailored" to facilitate the imposition of a suspended sentence. It was submitted that, taking into account the 10 per cent discount, a sentence of 2 years suggests a starting point of 2 years 2 months and 20 days, which is highly improbable especially given that the standard non-parole period is 7 years. Payne JA rejected this argument and dismissed the appeal. The sentencing judge followed the "staged procedure" set out in *Zamagias v R* [2002] NSWCCA 17. His Honour first determined that a custodial sentence was required and then determined that a term of sentence of 2 years was appropriate. Only then did his

Honour suspend the sentences. Furthermore, the Crown's submission about the judge's "improbable starting point" assumes an application of the discount with mathematical precision which is unwarranted.

No requirement for a judge to mechanically consider alternatives to full time imprisonment in every case

In ***R v Zamagias*** **[2002] NSWCCA 17** at [24]-[28], Howie J set out the process to be followed when determine a sentence to be imposed pursuant to the Crimes (Sentencing Procedure) Act 1999. His Honour stated at [25]:

> "The preliminary question to be asked and answered is whether there are any alternatives to the imposition of a sentence imprisonment. Section 5 of the Act prohibits the court from imposing a sentence of imprisonment unless the court is satisfied, having considered all the alternatives, that no other penalty other than imprisonment is appropriate."

In ***Hardie v R; Phillipsen v R*** **[2012] NSWCCA 6** the appellants argued that the sentencing judge had failed to consider this preliminary question. Basten JA, dismissing the appeal, held (at [6]) that while Howie J had accurately expressed process as set out by the Act, it was not incumbent on a sentencing judge to expressly state each step in the judge's reasoning. A failure to advert to one of the steps referred to by Howie J may increase the risk of error, but there were cases where a sentence of imprisonment was so obviously demanded that a consideration of the alternatives was not required.

Intensive correction orders

Three-step process in considering an ICO sufficiently followed

The applicant in ***Kember v R*** **[2020] NSWCCA 152** pleaded guilty to his part in supplying a pistol and possessing a silencer, with eight other firearms offences taken into account. He sought, unsuccessfully, an ICO. On appeal, he argued that the sentencing judge failed to follow the three-step process in refusing an ICO and gave insufficient reasons as to why an ICO was unsuitable while overvaluing community safety.

Bellew J dismissed this ground, finding that the judge gave extensive reasons for why the seriousness of the offending militated against an ICO. His Honour also dismissed submissions on parity – while the co-accused were sentenced by different judges, specific regard was had to parity and material differences between the offenders justified a higher sentence.

The anomalous advantage of aggregate over concurrent individual sentences regarding availability of ICOs

The applicant in ***Abel v R*** **[2020] NSWCCA 82** appealed his sentence for cocaine supply and proceeds of crime offences. Originally, the proceeds offence was on a Form 1. When the sentencing judge proposed, after his remarks, a sentence of 2 years, 6 months for the

principal offence, the applicant sought an adjournment to disentangle the offences and have them dealt with on separate indictments. This would allow the court to impose an aggregate sentence and therefore an ICO (by virtue of s 68(2) *Crimes (Sentencing Procedure) Act 1999* (NSW)).

When the applicant then complained, inter alia, of a lack of assessment of objective seriousness of the proceeds offence, Button J refused leave. A number of criticisms were also made about procedural aspects of the case.

Intensive correction orders - s 66 of the Crimes (Sentencing Procedure) Act should be expressly considered when cogently raised in sentencing submissions

***Blanch v R* [2019] NSWCCA 304** concerned an appeal from a full-time custodial sentence. At sentencing, the applicant's counsel sought an intensive correction order (ICO). Section 66 of the *Crimes (Sentencing Procedure Act) 1999* (NSW) requires a sentencing judge to have regard to several mandatory factors, especially community safety, when considering whether or not to grant an ICO. However, the sentencing judge here opted for full-time custody and did not contemplate an ICO in his reasons.

On appeal, Campbell J held that this constituted a sentencing error. While it was open to the judge to find that full-time custody was the only appropriate sentence, he was required to, expressly or by necessary implication, deal with the question of an ICO. This was because the material before him enlivened, by virtue of s 66, a requirement to consider the mandatory factors.

Intensive correction orders – no statutory requirement to give reasons for concluding that a sentence of full-time custody was more appropriate than an ICO

A man was sentenced for a drug supply offence to 2 years' imprisonment following a plea of guilty. It was contended on appeal in ***Karout v R* [2019] NSWCCA 253** that by imposing a sentence of full-time custody instead of an intensive correction order, the sentencing judge failed to have regard to protection of the community per s 66 of *Crimes (Sentencing Procedure) Act 1999* (CSPA). Fullerton J (with whom Hoeben CJ at CL agreed, Brereton J in dissent) dismissed the ground. Her Honour held that the ground of appeal was premised on a flawed understanding of s 66 of the CSPA which provides:

> "(1) Community safety must be the paramount consideration when the sentencing court is deciding whether to make an intensive correction order in relation to an offender."

Fullerton J said that she did not consider that s 66(1) elevated community protection to a mandatory consideration that dominated "broader sentencing principles, including considerations which may dictate that no lesser sentence than one involving a full-time custodial term is appropriate". Skipping over the controversy as to whether s 66 should be interpreted in a restrictive or facilitative way (see Basten JA in *R v Fangaloka* at [63]-[67] and Beech-Jones J in *Casella* at [107]-[108]), her Honour agreed with the analysis of Basten JA in *Fangaloka* at [60]-[61] in saying once a sentence of 2 years was imposed, there was no obligation to consider whether it should be served by way of ICO. Rather, once a sentence

of imprisonment is imposed, the Court must consider whether any alternative to full-time imprisonment should be imposed and in so doing ascertain whether there is a basis upon which a court should decline to consider imposing an ICO including broader considerations like adequate punishment, general deterrence, denunciation or for recognising the harm done to the victim and the community. Her Honour considered that the provisions relating to ICOs in the CSPA do not make plain that a Court has a statutory requirement to give reasons for considering that the appropriate sentencing outcome is full-time custody over an ICO.

In applying these principles to the asserted ground of appeal, Fullerton J held that the sentencing judge's ex tempore reasons, following detailed oral and written submissions from the parties, did not evince a failure to give adequate consideration to whether an ICO should be imposed. Due regard was given to the multiple considerations including the question of community protection, but the objective seriousness of the offence and general deterrence (mandatory considerations under s 66(3) overwhelmed other considerations. There was no error.

Facilitative interpretation of s 66 – protection of the community

In ***Casella v R*** **[2019] NSWCCA 201**, Beech-Jones J (to which N Adams J agreed with additional comments) questioned the so-called "restrictive" view expressed by Basten JA in *Fangaloka*. His Honour said that if the *Fangaloka* approach interprets s 66 as prohibiting the imposition of an ICO unless the Court "positively concludes that an ICO is more likely to address the offender's risk of reoffending as opposed to serving a sentence of full time custody", then it "appears to travel well beyond s 66" (at [108]). Beech-Jones J held that "s 66(2) only requires an assessment of whether making the order or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending".

ICO sentencing scheme reforms – clarification of principles

In ***R v Fangaloka*** **[2019] NSWCCA 173**, the Crown appealed the sentence imposed on Mr Fangaloka in the District Court. He had received 2 years imprisonment for the offence of robbery in company and 12 months for assault occasioning actual bodily harm, to be served concurrently and by way of intensive correction order. The Court of Criminal Appeal found that the sentencing judge had made factual sentencing errors, and had imposed a sentence that was manifestly inadequate. Despite the findings of error, the Court had to consider whether to exercise its discretion to intervene. The Court favoured intervention on the basis of an important issue of principle that arose in relation to the imposition of the intensive correction order – specifically, whether the District Court judge was correct in her approach to the 2018 amendments to the statutory scheme for ICOs in Pt 5 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA). The issue was if a judge considers the imposition of an ICO, whether this immediately renders the purposes of sentencing set out in s 3A "subordinate" because of the operation of s 66.

Basten JA considered the earlier decision of *R v Pullen* [2018] NSWCCA 264 (discussed above), in which the sentencing judge said that he was obliged to consider the appropriateness of an ICO in circumstances where the sentence was less than two years,

and applied s 66 on the basis that community safety was the paramount consideration. However, Basten JA held that the *R v Pullen* approach to ICOs was not supported by the statute. This was so first because this would mean that the Local Court would be required to consider imposing an ICO in every case where it was determined that imprisonment was appropriate, and second because the effect would be that as soon as a court gives consideration to making an ICO, the broader considerations that would have fed into the issue of whether there is no alternative to a sentence of imprisonment would be reduced to a subordinate role, which Basten JA considered was an inflexible and artificial result. Instead, Basten JA held (Johnson and Price JJ agreeing):

> "[t]he paramount consideration in considering whether to make an ICO is the assessment of whether such an order, or fulltime detention, is more likely to address the offender's risk of reoffending. That is, unless a favourable opinion is reached in making that assessment, an ICO should not be imposed. At the same time, the other purposes of sentencing must all be considered and given due weight."

Of the other purposes of sentencing, Basten JA held that the most fundamental is whether an ICO reflects the imposition of an adequate punishment proportionate to the offending, which is not displaced by the 2018 amendments. His Honour held that s 66(1) identifies community safety as a mandatory element for consideration in relation to the risk of reoffending. The s 3A purposes expressly identified by s 66(3) are similarly mandatory – not subordinate to s 66(1). Applied to the present circumstances, Basten JA held that fulltime imprisonment was required because there was no finding that imprisonment would not adversely affect the offender's advances in rehabilitation. In other words, "in assessing 'community safety' there was no evidence to support the view that one form of imprisonment was more likely to reduce the risk of reoffending than another". The offender was resentenced to 2 years 6 months imprisonment with a non-parole period of 20 months.

Intensive correction order: maximum term for an individual offence where an aggregate sentence imposed

The Crown appealed against the adequacy of the sentence imposed after the offender pleaded guilty to supplying a large commercial quantity of methylamphetamine contrary to s 25(2) of the *Drug Misuse and Trafficking Act 1985* (NSW). The sentencing judge imposed a sentence of imprisonment for 2 years and 6 months to be served by way of an intensive correctional order (ICO), taking into account a 25% guilty plea discount and 61 days served in custody. There was a dispute as to whether the sentencing judge had also sentenced for a related summary offence of resisting arrest that was not explicitly dealt with by the sentencing judge. Ground 1 turned on the asserted inadequacy of the sentence. Ground 2 was a jurisdictional argument querying the judge's power to impose an ICO on a sentence over 2 years.

In ***R v Qi*** **[2019] NSWCCA 73**, the Court of Criminal Appeal allowed the appeal on Ground 1, holding that the sentence was manifestly inadequate and it was necessary to resentence to a term of imprisonment. In relation to Ground 2, Button J considered he did not have to decide the issue but went on to discuss it anyway. The issue was whether the sentencing judge had indeed sentenced the offender for two offences, the result of which would be

that her Honour would have been entitled to impose an ICO under s 68(2) (to a maximum period of 3 years); but if not, then her Honour would have been acting beyond jurisdiction by imposing an ICO for a single offence for more than two years in breach of s 68(1). Button J noted that the sentencing remarks were an amalgam, reflecting a slip by the judge who initially noted but did not subsequently impose a sentence for the resist arrest charge, and also did not even implicitly impose an aggregate sentence. This slip was not picked up or brought to the sentencing judge's attention. Button J went on to conclude that if required to consider Ground 2, he would uphold it, correct the wrongly entered acquittal on the resist arrest charge and then re-impose an ICO now within jurisdiction – and refuse to impose a greater sentence on the basis of the error regarding the second offence.

COMMENT: In this case, and in *Pullen v R* [2018] NSWCCA 284, s 68 was construed as meaning that if a sentence was being imposed for an individual offence, s 68(1) limited the term for which an ICO could be imposed to 2 years, but if the offence was a component of an aggregate sentence, that restriction did not apply in that s 68(2) simply provided for a maximum term of an aggregate sentence that could be served by way of an ICO of 3 years. Parliament's evident intention to restrict an ICO for a single offence to 2 years does not sit easily with the prospect that (using an extreme example) an aggregate sentence of 3 years could be imposed for two offences, one for which there is an indicative sentence of 3 years and the other for which there is an indicative sentence of some trivial length, implicitly regarded as appropriately concurrent with the former. It also does not sit easily with the provision in s 68(3) that where individual sentences are imposed, an ICO cannot be made where the duration of any individual term exceeds 2 years and the duration of all the offences exceeds 3 years.

An example of the potential for unfairness in the above construction of s 68 was provided in ***Cross v R* [2019] NSWCCA 280**. For each of two offences a judge imposed terms of imprisonment of 2.5 years, ordering them to be served concurrently. Her claim on appeal that the judge erred in not considering an ICO failed because it was beyond power according to s 68(3). But if the judge had imposed an aggregate sentence of 2.5 years, she would have had the power to impose an ICO. An offender should not be denied the opportunity to be eligible for an ICO simply because a judge imposes individual sentences rather than an aggregate sentence.

Application of reforms to ICO sentencing scheme in Court of Criminal Appeal

The Crown was successful in its appeal on the manifest inadequacy of the aggregate sentence imposed in ***R v Pullen* [2018] NSWCCA 264** (discussed below). Harrison J then resentenced the offender, which required consideration of the sentencing reforms in the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017*. His Honour treated an assessment report prepared two and a half months earlier under the old scheme (s 70) as sufficient to satisfy the conditions under the new scheme (ss 17B-17D), finding that to require a new report because of the law reforms would be a "statutory absurdity". In addition, his Honour held that the only relevant limitation to the making of an ICO where the Court imposes an aggregate sentence is that the relevant term of sentence does not exceed three years (s 68(2)).

Finally, his Honour discussed the amendments in s 66 providing that the paramount consideration when imposing an ICO is "community safety" (s 66(1)). Harrison J noted that this assessment is "inextricably linked with considerations of rehabilitation" and its paramountcy means that those other considerations, including the s 3A purposes of sentencing, are secondary to the assessment process, an approach supported by statements in the second reading speech. This means that an ICO may be available even if it was not available under the old scheme. The issue for the Court in imposing an ICO is whether community protection is best served by incarceration, if a person poses a serious risk to the community, or if the offender avoids gaol in order to facilitate medium to long term behavioural change through community supervision, stable employment and treatment.

NOTE: This decision has been considered in *R v Fangaloka* [2019] NSWCCA 173.

NOTE: A new regime in relation to intensive correction orders, within a range of other amendments to the *Crimes (Sentencing Procedure) Act 1999* came into force on 21 September 2018: *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017*. Controversy was soon to emerge in relation to new provisions in s 66(1) and (2) that "Community safety must be the paramount consideration when the sentencing court is deciding whether to make an intensive correction order" and that in considering this, the court "is to assess whether making the order or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending".

Drug trafficking to a substantial degree - common factors like a need for substantial supervision and recidivism do not give rise to "exceptional circumstances" justifying an ICO

The respondent in ***R v Ejefekaire*** **[2016] NSWCCA 308** pleaded guilty to an offence of ongoing supply of methylamphetamine. He was sentenced to a term of imprisonment of one year and ten months to be served by way of an Intensive Correction Order (ICO): s 7(2) of the *Crimes (Sentencing Procedure) Act 1999*. The Crown appealed, contending that the sentencing judge erred in finding exceptional circumstances. The CCA allowed the appeal, holding that exceptional circumstances justifying the imposition of an ICO had not been demonstrated.

It is well established that an offender involved in supply of prohibited drugs "to a substantial degree" (it was unchallenged that the respondent was) must receive a full-time custodial sentence unless there are "exceptional circumstances". A guilty plea, remorse and rehabilitation are not matters constituting an exception unless together they render the case "one of real difference from the general run of cases": *Smaragdis v R* [2010] NSWCCA 276 at [31]. Whilst a sentence other than full-time custody is possible for drug trafficking offences (as per *EF v R* [2015] NSWCCA 36) the sentencing judge erred in making a finding of exceptional circumstances in this case. There was nothing exceptional in the respondent's subjective case; a need for "substantial supervision" applies to many offenders; recidivism was not outside the common range, and nothing in the circumstances of the offending was exceptional.

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.

Sentencing following revocation of a s 12 bond

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

Judge manipulates legislation to achieve a desired result

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

Intensive correction orders not confined to offenders in need of rehabilitation; all offenders in need of rehabilitation

In ***R v Pogson, Lapham and Martin*** **[2012] NSWCCA 225**, five members of the Court of Criminal Appeal overturned a previous decision in *R v Boughen; R v Cameron* [2012] NSWCCA 17. In *Boughen*, Simpson J had held that intensive correction orders were only available where the offender was in need of rehabilitation, in the sense of reducing the risk that he or she would reoffend. In Pogson, McClellan CJ at CL and Johnson J (Price, R A Hulme and Button JJ agreeing) held, firstly, that as a matter of law intensive correction orders were not only available for offenders in need of rehabilitation; and secondly that the Court in Boughen had been mistaken as to the meaning of "rehabilitation". McClellan CJ at CL and Johnson J found, at [122]-[125], that rehabilitation encompasses the reincorporation of an offender into a community and, in that sense, rehabilitation was a relevant consideration to all offenders. In particular, the court held that intensive correction orders are not an inappropriate sentencing option for "white-collar" crimes.

NOTE: Periodic detention was abolished and intensive correction orders were introduced by the *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* which took effect on 1 October 2010.

Judicial recommendations/orders

Powers of sentencing judges – caution required in giving directions to Corrective Services NSW; no power to make recommendations to Parole Authority

A woman used her position as a valued and trusted employee in a small family business dishonestly to obtain a financial advantage for herself by deception. She made over $2.9 million dollars over a period of 7 years. The deception was discovered, and she was convicted following a trial. The sentencing judge sentenced her to imprisonment for 11 years with a non-parole period of 6 years, 6 months. Following his remarks on sentence, the sentencing judge purported to give directions to the "Corrective Services Commission" to assist the woman with rehabilitation programs, and made recommendations to the Parole Authority with respect to potential parole conditions.

Simpson AJA said in ***Whyte v R*** **[2019] NSWCCA 218** that the judge acted without power in purporting to give directions to authorities administering sentences. Further, it was inappropriate for a judge to intervene in these types of administrative decisions – it may cause confusion and engender disrespect. Her Honour noted that sentencing judges can make recommendations to such authorities, but they should be made with caution as they are not binding and judges lack the requisite information about resourcing and priorities. It is also inappropriate to make recommendations in view of the elaborate structure of the parole systems and the qualifications of those who administer it.

Order that a sentence be served in a juvenile detention centre past offender's 18th birthday

In ***JM v R*** **[2012] NSWCCA 83** the appellant had committed a number of violent offences as a minor and was sentenced to 7 years imprisonment with a non-parole period of 4 years. The judge made a recommendation that the sentence be served in juvenile detention until he was 21 years and 6 months, purportedly under s 19 of the *Children (Criminal Proceedings) Act 1987*. Whealy JA (with whom Hoeben J agreed) held that the sentencing judge should have made an order pursuant to s 19 rather than a recommendation. His Honour also stated (at [23]) that it would be contrary to the principle set down by Howie J in *TG v R* [2010] NSWCCA 28 to impose "a sentence which has in contemplation a statute which prohibited a person from remaining in a juvenile detention centre unless the non-parole period is below a certain figure… even where that is merely one consideration and the sole determinant". A sentence cannot be structured in order to avoid a statutory outcome: *R v Zamagias* [2002] NSWCCA 17.

Parole orders

In ***R v Muldrock; Muldrock v R*** **[2010] NSWCCA 106**, the sentencing judge imposed a total term of imprisonment for 9 years with a non-parole period of 96 days (enabling immediate release) and purported to make a condition that the offender only be granted parole on the basis that he be taken to a facility that provides a supervised therapeutic environment for sex offenders with an intellectual disability. Section 51 of the *Crimes (Sentencing Procedure) Act 1999* – now repealed – only provided a court the power to impose conditions "on any parole order made by it". The power to make a parole order provided by s 50 only applied where a sentence was for a term of 3 years or less.

L. Setting terms of imprisonment

Accumulation and criminality

Sentencing judge should be mindful of impact of accumulation on ratio between non-parole period and head sentence

In ***Hardey v R*** **[2019] NSWCCA 310**, the applicant pleaded guilty to an aggravated break, enter and steal offence. The sentencing judge made a finding of special circumstances (primarily a need for assistance on release). To give effect to this, her Honour sentenced the applicant to a three-year head sentence with two-year non-parole period – a ratio of 66%. However, the applicant had recently been sentenced to a term of imprisonment for other offending. The sentencing judge was aware of this, but the effect of the accumulation was that the applicant would serve 80% of his overall sentences in custody. The applicant appealed on the basis that the finding of special circumstances was not given effect.

Bellew J allowed the appeal on this ground. His Honour held that the sentencing judge had expressly intended a 66% ratio and that this had been frustrated by the accumulation. His Honour quoted Bell P in *Huang v R* [2019] NSWCCA 144 in noting that prisoners should not be left to wonder whether their sentence was deliberate or the result of a miscalculation – an issue solvable by reference to the transcript and sentencing remarks.

Offence committed in custody – need for accumulation of sentence to reflect separate criminality

The respondent in ***R v Jeremiah*** **[2016] NSWCCA 241** was being held on remand for several charges at Parklea Correctional Centre, during which time he assaulted a fellow inmate causing actual bodily harm. For that assault he was sentenced to imprisonment for 1½ years with a non-parole period of 1 year 1 month, concurrent with the sentences for the original charges. The Crown appealed against inadequacy of the sentence. The CCA (Meagher JA, Davies and Fagan JJ) allowed the appeal, finding that the sentence appealed against was manifestly inadequate by reason of its concurrence with the pre-existing term of imprisonment. The Court found totality error. The mere fact that the later assault occurred inside prison, after 11 months of remand, whereas the earlier offences were outside prison before his arrest, was sufficient to support a conclusion that the assault in custody involved entirely separate and unrelated criminality. The Court held that full concurrence would undermine public confidence in the administration of criminal justice.

In the present case, the sentence must affect sufficient general deterrence to demonstrate that violence and disorder between prisoners in custody will not be tolerated by the courts: *R v Fyffe* [2002] NSWSC 751 at [33]. The Court held that the sentence should have been fully accumulated on the non-parole period for the original offences. It was observed that full accumulation was consistent with the legislative policy underlying s 56(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) which provides that, if a "convicted inmate" commits an offence against the person while in custody, that sentence is to be consecutive upon the pre-existing term, unless otherwise ordered.

Suspended sentences, Local Court and accumulation

In ***R v Nicholson*** **[2010] NSWCCA 80**, the offender was sentenced in the District Court for malicious wounding with intent to cause GBH after he stabbed a woman. At the time of the stabbing, he was on a suspended sentence imposed by the Local Court. Howie J was critical of the prosecution for not calling up the suspended offence in the Local Court prior to proceeding with the District Court offence. This was because the Local Court had no power to accumulate sentences, so was forced to allow the offender to serve his sentences concurrently.

Special circumstances and accumulation

A sentencing judge who accumulated sentences overlooked the fact that the result was a non-parole component was 80 per cent of the total term. In ***Wakefield v R*** **[2010] NSWCCA 12**, Grove J intervened to reduce the non-parole portion of the sentence to 75 per cent of the total.

Undesirable to delay sentencing until more serious charges finalised

A problem arose in ***Smale v R*** **[2009] NSWCCA 220** when the resolution of proceedings in the District Court was deferred for three years until the offender was dealt with for more serious matters in the Supreme Court. The offender was sentenced for murder and robbery in company to 18 years. The District Court then dealt with the other matters and a judge assessed the appropriate sentence as being 7 years with a non-parole period of 5 years with a finding of special circumstances being made. He was then faced with little option but to partially accumulate that sentence with the result being an overall non-parole period that was 86 per cent of the new total sentence. Observations were made (at [31]) about the undesirability of deferring sentencing until more serious charges are dealt with.

Aggregate sentences

Totality and accumulation in aggregate sentencing

Mr Taitoko pleaded guilty and was sentenced to an aggregate sentence of 4 years for 5 offences. The offences reflected an hour of random, drunken violence. He appealed on nine grounds, many of which were spurious and without merit, but was successful on manifest excess: ***Taitoko v R*** **[2020] NSWCCA 43**.

Leeming JA held that the sentencing judge misunderstood the purpose of aggregate sentencing. It is not to avoid "crushing" sentences but rather to relieve courts of the burden of having to cascade sentences when accumulation is required. Here, the aggregate sentence did not appropriately represent the totality of the offending, given that the criminality of the offences elided across the hour of encounters.

Indicative sentences not actually operative – no need for accumulation

The offender in ***Vaughan v R*** **[2020] NSWCCA 3** was sentenced for domestic violence offences – namely, GBH with intent to murder and wounding with intent to cause GBH – against his former partner and her co-worker. He was imprisoned for an aggregate term of 21 years (NPP 14 years). The single ground of appeal advanced was that there was a calculation error in the accumulation of indicative sentences. Johnson J refused leave for an extension to appeal. Indicative sentences assist with totality and transparency, but are not actually passed by the court so have no operative effect. The aggregate sentencing regime is intended to simplify sentencing, not complicate it further. The indicatives merely indicate; they do not cascade into the aggregate.

When imposing an aggregate sentence the judge should first announce the head sentence

An aggregate sentence was imposed upon the appellant in ***Hunt v R*** **[2017] NSWCCA 305**. One ground of appeal was that the judge had failed to comply with s 44(2A) of the *Crimes (Sentencing Procedure) Act 1999* because his Honour had set the non-parole period for the aggregate sentence before setting the head term of the aggregate sentence. Counsel for the appellant contended that the error was not "merely technical" and had therefore occasioned a miscarriage of the sentencing discretion.

The appeal was dismissed on the basis that the error was purely technical which did not occasion a miscarriage. Adamson J (Bellew J agreeing) held that the starting point (per *Eid v R* [2008] NSWCCA 255) is that the statutory provisions relating to the setting of terms or non-parole periods regulate the pronouncement of the sentence but not the reasoning process behind the determination. Her Honour considered the legislative history of the provisions, and held that because the error in the pronouncement of the sentence was no more than technical it did not lead to invalidity. Her Honour cited a similar conclusion reached by the High Court in *Kentwell v The Queen* regarding s 44(1).

Aggregate sentencing – whether discounts should apply to the aggregate as well as the indicative sentences

An issue arose in ***PG v R*** **[2017] NSWCCA 179** as to whether discounts for pleas of guilty (and assistance to authorities) should be applied not only to the indicative sentences for the individual offences but also to the aggregate sentence. It arose in a parity argument where the applicant sought to compare his 9 year aggregate sentence with an identical aggregate sentence imposed upon a co-offender. He received a combined discount of 50% for his pleas of guilty and assistance while the co-offender received a 25% discount for pleas of

guilty. Therefore, so it was argued, the starting point for the applicant's aggregate sentence was 18 years whereas the starting point for the co-offender was 12 years.

Basten JA examined the terms of the statutory provisions and the case law and concluded that the discounts should apply to the aggregate as well as the indicative sentences.

Button and N Adams JJ gave 9 reasons why this was wrong. They included that it would create complications in the sentencing process (what if some offences warranted different discounts, or no discount?) The introduction of aggregate sentencing was for a purpose of simplifying the sentencing task and not to make substantive changes to sentencing law. There was (and is) no requirement to discount the total head sentence in a traditional multiple offence sentencing exercise. The approach proposed in *JM v R* [2014] NSWCCA 297 at [39](3) and adopted on many occasions since (on appeal and at first instance) is correct.

An indicative sentence is a sentence and not a non-parole period

The applicant in ***Dimian v R*** **[2016] NSWCCA 223** pleaded guilty to an offence of detain for advantage and cause substantial injury and one of aggravated sexual assault, the aggravation being malicious infliction of actual bodily harm. The offences arose from a single incident in 1993. The identity of the applicant was only established in 2013 as the result of a cold case notification concerning the DNA profile obtained from the victim contemporaneously to the offence. He was sentenced to an aggregate sentence of 9 years with a non-parole period of 6 years. The judge indicated a sentence of 2 years for the kidnapping offence and 5 years 6 months for the sexual assault offence.

Davies J allowed the applicant's appeal against sentence on the basis that the judge erred by imposing an aggregate sentence that exceeded the sum of the indicative sentences. His Honour rejected the Crown contention that the sentences indicated by his Honour should be understood to be the non-parole periods as opposed to the head sentences. On any proper construction of s 53A of the *Crimes (Sentencing Procedure) Act 1999*, seen in the context of the whole of that Act, the indicative sentence must be a reference to the overall sentence. Any suggestion that an indicative sentence is the non-parole period is inconsistent with the legislative provisions. The strongest indications of this are the requirement in s 54B(4) to indicate the non-parole period of an indicative sentence where the penalty for the offence carries a standard non-parole period and the absence of a requirement to state a non-parole period in s 53A: see *JM v R* [2014] NSWCCA 297 at [39]. The only circumstance where an indicative sentence might be thought to equate with a non-parole period would be where the sentencing judge expressly said that the indicative sentence was to be treated as a fixed term. (In relation to the latter, his Honour referred to the somewhat controversial suggestion of Basten JA in *McIntosh v R* [2015] NSWCCA 184.)

Aggregate sentencing - related summary offences may be included

The respondent in ***R v Price*** **[2016] NSWCCA 50** pleaded guilty to a number of offences. Three of them were committed to the District Court for sentence and three further offences were placed before the judge on a s 166 certificate. The judge imposed a single aggregate sentence for all six of those offences. On appeal the Crown challenged that approach as

prohibited by s 168(3) of the *Criminal Procedure Act 1986*. In so doing, it was acknowledged that the question was an open one that had not previously been decided by the Court. Button J rejected the construction of s 168 advanced by the Crown and held that it does not prohibit the incorporation of Local Court offences within aggregate sentences imposed in the District or Supreme Court. First, reading the provision in light of others, specifically ss 53A and 49 of the *Crimes (Sentencing Procedure) Act 1999*, shows that there is nothing to suggest explicitly or implicitly that a s 166 offence cannot be picked up by an aggregate sentence. Second, the purpose of aggregate sentencing provisions is facilitative, aimed at freeing the sentencing process of unnecessary technicality and fragmentation. Third, it would be a strange result if the Local Court could impose aggregate sentences for Local Court offences placed before it, but the District and Supreme Courts were prohibited from doing so with regard to the very same offences.

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.

Specifying fixed terms in aggregate sentencing

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 would 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. (As of 2019, this approach has not received any support.)

A range of errors at first instance and in re-sentencing on appeal

The applicant was sentenced for seven counts involving child sexual assault offences relating to three victims between 1981 and 1986. On appeal against sentence in ***RL v R* [2015] NSWCCA 106**, three errors were alleged to have infected the sentencing process: a finding that the offences were aggravated by planning; sentencing the applicant as if he were an adult for offences committed when he was 14 to 16 and finally, having regard to matters improperly included in a victim impact statement. The appeal was allowed, the Court finding that each of the alleged errors were made out. It was held that in order for planning to constitute a circumstance of aggravation, the offence must be "part of a more extensive criminal undertaking" (see *Williams v R* [2010] NSWCCA 15 at [20]) and not a spontaneous or opportunistic exercise as was evident in this case. The sentencing judge erroneously imposed lengthy sentences notwithstanding his own observations that the applicant's age was particularly relevant and that he might have been dealt with under legislation relating to juveniles. In relation to the victim impact statement, the court was satisfied that it included matters "which went beyond the limits of legitimate content" (at [54]). The sentencing judge erroneously used the statement as a basis for finding that the impact of the offending extended beyond the victim and extended to the victim's family.

The approach taken by the Court in re-sentencing the applicant was problematic. The Court precisely specified the extent of notional accumulation of indicative sentences (at [69]) which is tantamount to expressing commencement dates for each sentence: Cf *JM v R* [2014] NSWCCA 297 at [39](8). The Court said that the outcome was "an overall period of six years" but, in fact, the accumulation specified yielded only 5 years 6 months. It also led to the final indicative sentence being entirely subsumed within longer indicative sentences upon which it was partially accumulated. Further, in dealing with Form 1 offences, the observations of the court, at [59], are likely to be interpreted in a way that suggests that a sentencing court can exercise discretion as to which primary offence it might assign Form 1 offences to. This is impermissible under Pt 3 Div 3 Crimes (Sentencing Procedure) Act 1999 and is contrary to the signed request of an offender which nominates a primary offence in respect of which offences on the form are to be taken into account.

Problems with aggregate sentencing

In ***Miller v R* [2015] NSWCCA 86** the Court allowed an appeal against the asserted severity of an aggregate sentence imposed for offences of aggravated break enter and steal and specially aggravated break enter and steal. It was held that the aggregate sentence was manifestly excessive. The sentencing judge had applied a discount for the offender's pleas of guilty to the aggregate term, not to the indicative sentences. In an analysis of the indicative terms, Simpson J compared them to the standard non-parole periods prescribed and found them to be excessive given a finding of less than mid-range seriousness. In doing so she took into account a discount for the pleas.

Note: it is unfortunate that the Court made no comment about the correct approach to aggregate sentencing, particularly in light of the observations in *JM v R* [2014] NSWCCA 297 at [39](3). It was wrong of the judge not to apply the discount for pleas of guilty to the indicative sentences. Section 53A(2)(b) of the *Crimes (Sentencing Procedure) Act* requires that indicative sentences must take into account "such matters as are relevant under Part 3 or any other provision of" the *Crimes (Sentencing Procedure) Act*. Part 3 includes s 22 (taking guilty pleas into account). Had the sentencing judge complied with this requirement, the excessiveness of the indicative terms might have been apparent to him.

Errors in imposing an aggregate sentence

***R v Cahill* [2015] NSWCCA 53** highlights a range of errors that are encountered with District Court judges imposing aggregate sentences. The principles applicable to aggregate sentencing were summarised in *JM v R* [2014] NSWCCA 297. In this case the errors included not specifying a non-parole period for an indicative sentence where the offence carried a standard non-parole period; discounting the aggregate sentence for the offender's plea of guilty (discounts should be applied to indicative sentences); and one indicative sentences exceeding and two indicative sentences equally the aggregate sentence. Finally, it was held that the aggregate sentence did not reflect the totality of the criminality involved.

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

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

Aggregate sentencing

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

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

The criminality of each offence needs to be assessed individually. And each indicative sentence must be assessed by taking into account such matters in Part 3 or elsewhere in the *Crimes (Sentencing Procedure) Act* as are relevant: s 53A(2)(b). Commonly encountered ones in Part 3 include aggravating, mitigating and other factors (s 21A); reductions for guilty pleas, facilitation of the administration of justice and assistance to law enforcement

authorities (ss 22, 22A and 23); and offences on a Form1 taken into account (Pt 3 Div 3). Commonly encountered matters elsewhere in the Act are the purposes of sentencing in s 3A, and the requirements of s 5 as to not imposing a sentence of imprisonment unless a court is satisfied that there is no alternative and giving a further explanation for the imposition of any sentence of 6 months or less.

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

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

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

Aggregate sentence not properly imposed

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

Accumulation in aggregate sentencing

In ***R v Rae*** **[2013] NSWCCA 9**, the respondent had been sentenced for three offences. The sentencing judge had imposed an aggregate sentence in accordance with s 53A *Crimes (Sentencing Procedure) Act 1999*. The first offence was an aggravated break enter and steal committed against a veterinary practice. The second and third were firearm offences relating to a separate incident, some three days later, where the respondent shot and wounded another man. The sentence ultimately passed reflected exactly the indicative head sentence for the more serious firearm offence. In allowing the Crown appeal, Button J said it was an error to not reflect any accumulation in the sentence for the earlier break enter and steal offence. His Honour concluded at [45]:

Of course, the newly available option of aggregate sentencing will free sentencing judges and magistrates from the laborious and complicated task of creating a cascading or "stairway" sentencing structure when sentences for multiple offences are being imposed and partial accumulation is desired. That will be especially beneficial in cases where an offender is to be dealt with for a very large number of offences. However, merely because an offender is to receive an aggregate sentence does not mean that considerations of accumulation, whether partial or complete, need no longer be taken into account.

Aggregate sentencing requires separate consideration of criminality of each offence

An offender received an aggregate sentence for a number of sexual offences committed against a child. The Crown appealed against the sentence and submitted inter alia that the sentencing judge had not assessed the individual criminality of each offence. In ***R v Brown*** **[2012] NSWCCA 199** Grove AJ agreed and allowed the Crown's appeal. For four of the offences, the offender had been allocated equivalent sentence indications of 5 years' imprisonment. The variations in criminality between the offences suggested that individual criminality had not been assessed by the sentencing judge and Grove AJ stated (at [17]) that imposing an aggregate sentence did not remove the obligation to assess criminality for each offence: s 53A(2)(b) of the *Crimes (Sentencing Procedure) Act 1999*.

NOTE: Aggregate sentencing became available on 14 March 2011 pursuant to the *Crimes (Sentencing Procedure) Act 2010*.

Backdating

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.

Backdating commencement of sentence

McClellan CJ at CL held in ***Aiken v R*** **[2011] NSWCCA 208** that it was erroneous to backdate an offender's sentence to commence after the expiry of an earlier parole period where no decision had been made to deny release on parole. In this situation the offender was being punished twice for the latter offence. On re-sentence, the commencement date was put back to the date of expiry of the earlier non-parole period.

Pre-sentence Custody

The preferred manner of taking into account pre-sentence custody is to back-date the sentence: ***Wiggins v R* [2010] NSWCCA 30**. In this case the sentencing judge had back-dated the sentence to a date when the offender returned to custody following conviction and said that he had also taken into account an earlier four month period of custody. This lead to argument on appeal as to whether the judge had in fact taken that period into account. Howie J referred to numerous authorities for the proposition that back-dating is the preferable course and said, "this is yet another case where the sentencing judge has not taken that course and yet given no reasons for not having done so".

There was a different approach to taking pre-sentence custody into account in **Pulitano v R [2010] NSWCCA 45**. A judge imposed a suspended sentence and there was a question as to whether he had taken into account a four month period of pre-sentence custody. Giles JA referred to the option of back-dating sentences as "generally to be preferred" but noted that such a course was not available when a sentence is suspended, the only option being to reduce the term of the sentence.

Deferral of commencement

Commonwealth offences – cannot defer commencement date of a sentence other than s 47 Crimes (Sentencing Procedure) Act 1999 (NSW)

The applicant in ***Shi v R* [2017] NSWCCA 126** absconded during the course of his trial and was convicted of Commonwealth offences in his absence. Sentencing proceedings subsequently proceeded, also in the absence of the applicant. A sentence of imprisonment was imposed but a commencement date was not specified. The sentencing judge said the sentence will commence when the offender is located, if ever, and the commencement should be backdated by six days from his time of apprehension or surrender. The applicant was later arrested and brought back to court. His counsel sought to adjourn the proceedings but the judge refused, indicating that the sentencing function was complete. The CCA (Hoeben CJ at CL, Harrison and Bellew JJ) allowed the appeal, holding that there was no power to defer the commencement to an unspecified date in the future. New South Wales law on commencement of sentences applies to Commonwealth offences: s 16E of the *Crimes Act 1914* (Cth). The only post-dating permitted in s 47 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) is when the sentence is served consecutively or partly concurrently with another sentence of imprisonment, which was not the case here. The matter was remitted to the District Court.

Irrelevant Considerations

Discontinued charges as irrelevant considerations in sentencing

The offender in ***Farrell v R* [2020] NSWCCA 195** pleaded guilty to charges that he posted the details of "informer" witnesses on Instagram (with the hashtag "supergrass"). N Adams J

held that the trial judge erred by placing weight on the similarity of these charges to other charges that were discontinued against the offender in 2017, and therefore were not established in fact. Moreover, the trial judge placed minimal weight on a character reference written by the offender's partner, who had been a co-accused before charges against her were discontinued. N Adams J found that, where the charges had been discontinued (and therefore her involvement not proven), and the referee not called or cross-examined, the trial judge had had regard to an irrelevant consideration without appropriate warning. The appeal was upheld.

Personal isolation, discomfort, loss arising from imprisonment irrelevant

R v Hunter **[2010] NSWCCA 54** concerned an offender who drunkenly drove his vehicle into pedestrians in retribution for a perceived slight. The Crown appealed against sentence, submitting (inter alia) that the sentencing judge gave too much weight to the offender's subjective circumstances. One subjective consideration was that the offender – due to his personal and professional background – couldn't relate to other prisoners, and so suffered greater discomfort and isolation in prison. Howie J, in upholding the appeal, found that isolation, discomfort, frustration and loss were normal effects of imprisonment and it was inappropriate to have regard to them once a judge had determined that full-time custody was necessary.

Erroneous to reduce sentence to ensured juvenile released on parole instead of transferred to correctional centre

A 17 year-old overtook an acquaintance's car at night on a wet and winding road. In doing so, he crossed unbroken lines, exceeded the speed limits on both his provisional licence and the road. He crashed, causing the death of his four passengers but emerging with only minor injuries himself. He was charged with four counts of dangerous driving causing death and sentenced (in 2009) to 4 years imprisonment, non-parole of 2 years. The offender appealed, contending, inter alia, that the sentencing judge could've structured the sentence such that the offender would've remained in a juvenile facility. In ***TG v R*** **[2010] NSWCCA 28**, Howie J found that – if anything – the sentence was probably inadequate. His Honour "firmly rejected" the submission that a sentence could be constructed around a specific custodial arrangement.

Mandatory sentences

Commonwealth offences with mandatory sentences

In ***Karim & ors v R*** **[2013] NSWCCA 23**, Allsop P (Bathurst CJ, McClellan CJ at CL, Hall and Bellew JJ agreeing) held that it was within the province of Parliament to dictate minimum sentences in respect of specific offences (at [94]). Following the decisions of intermediate appellate courts in Western Australia and Queensland, the Court held that the correct way to sentence an offender to whom a minimum sentence applies is to approach the minimum sentence as the "floor" of the possible range, in the same way as the maximum sentence is the "ceiling". It is not correct for the sentencing judge to fix what he or she considers a "just

and appropriate" sentence and then modify that sentence in accordance with the mandated minimum.

Non-parole period and special circumstances

Is a fixed term sentence a head sentence or a non-parole period?

In ***Waterstone v R*** **[2020] NSWCCA 117**, the offender was convicted of state offences (aggravated acts of indecency) and Commonwealth offences (carriage service sexting) committed against his stepdaughter. The trial judge imposed an effective fixed term sentence, which was overturned on appeal because of a lack of reasons for how that effective term was reached. N Adams J, in obiter, provided a detailed historical analysis of the controversial question of whether a fixed term of imprisonment is set at the level of the overall sentence or represents a reduction of a sentence to the level of the non-parole period, the latter being despite any legislative authority to do so. (Proponents of the latter appear to favour the flawed argument suggested in *Tuvunivono v R* [2013] NSWCCA 176 at [10]: see (2020) 27(6) Crim LN [4293].)

Special circumstances in varying statutory ratio should not be double-counted if already considered when formulating head sentence

The applicant in ***PW v R*** **[2019] NSWCCA 298** had been convicted of 12 counts of sexual offences against his 16-year-old daughter. The applicant sought a finding of special circumstances (first time in custody, ill-health and rehabilitation) to justify a shorter non-parole period. The sentencing judge refused. Firstly, a first-time custodial sentence was not enough to constitute a special circumstance. Secondly, the applicant's poor health had already been taken into account to determine the head-sentence, so should not also be considered as a special circumstance. Thirdly, there was no need for a longer parole period to facilitate rehabilitation.

Macfarlan JA embraced the approach of the sentencing judge and dismissed the appeal. The applicant's argument that the indicative sentences were manifestly excessive also failed – though some of the indicatives were stern, the aggregate sentence was well within an acceptable ambit.

"Special circumstances" – failure to find is not an error

A man sexually abused his granddaughter for over seven years. He was sentenced to an aggregate sentence of 21 years with a non-parole period of 15 years and 9 months following a guilty plea. During his sentencing, the judge declined to find "special circumstances" which would vary the statutory ratio between the head sentence and the non-parole period on the basis that "[t]he length of parole contemplated here will be appropriate to serve the purposes of parole". It was submitted in ***Facer (a pseudonym) v R*** **[2019] NSWCCA 180**, that similar cases with older offenders with limited criminal antecedents there had been findings of special circumstances. Leeming JA expressly referred to reasoning in *R v Boon* [2019] NSWSC 813 and *R v Yavuz (No 6)* [2019] NSWSC 95, where submissions in favour of special

circumstances were rejected because, considering the matters of rehabilitation and community reintegration, the period of time on parole is sufficient to address the matters. Leeming JA applied this reasoning, finding that there was no error, and noted that the original sentence would potentially entitle the applicant to 5 years of supervised parole.

Commonwealth offences – non-parole period 75% of total sentence – no error

The applicant in ***Aboud v R*** **[2017] NSWCCA 140** was sentenced for several Commonwealth offences arising from his use of Facebook accounts to engage in offensive and sexually explicit communications with underage girls. The sentencing judge imposed an overall effective sentence of 7 years, with a non-parole period of 5 years and 3 months. One ground of appeal was that the sentencing judge erred in her approach to setting the non-parole period, which was 75% of the head sentence. The applicant complained the non-parole period was higher than the usual proportion, punitive and "was not open" in his case. Harrison J rejected this ground of appeal. It is a discretionary decision to impose the non-parole period in the first place. Since that decision is unassailable, it becomes a matter of indeterminate relativity to criticise its length by reference to the proportion it bears to the overall head sentence. There is no "norm" for the ratio of the non-parole period to head sentence when sentencing for Commonwealth offences: *Hili v The Queen; Jones v The Queen* (2010) 242 CLR 520; HCA 45. Harrison J noted that before *Hili* courts had considered a non-parole period of 75% the total sentence to be punitive. Since Hili it has been noted that the range of non-parole periods customarily imposed is likely infected by the 'norm' jurisprudence. An appropriate non-parole period confers a benefit on an offender and also serves the interests of the community: *Afiouny v R* [2017] NSWCCA 23 at [45]. Further, the sentencing judge's failure to give reasons for why a non-parole period of 75% was chosen does not amount to error. The appeal was dismissed.

Special circumstances – basis for finding

The respondent in ***R v Lulham*** **[2016] NSWCCA 287** was given a sentence of 2 years imprisonment with a non-parole period of 1 month and 13 days for wounding with intent to cause grievous bodily harm. The Crown appealed, contending that the sentence was manifestly inadequate, in part asserting that the sentencing judge gave undue weight to the respondent's subjective circumstances, which in turn directed attention to the finding of special circumstances. The appeal was heard on the same occasion and by the same five-judge bench as *Jonson v R* [2016] NSWCCA 286. On this issue, Bellew J held that there was no evidence before the sentencing judge to support a finding of special circumstances (ultimately finding manifest inadequacy, but using the residual discretion to dismiss the appeal). There was a divergence of opinions as to what was a proper basis for a finding of special circumstances.

Bellew J said: "before a finding of special circumstances can be made, it is necessary for a sentencing judge to be satisfied that there exist significant positive signs which show that if the offender is allowed a longer period on parole, rehabilitation is likely to be successful as opposed to a mere possibility". The Chief Justice held that, in dealing with rehabilitation, "a judge would be entitled to find special circumstances if there is evidence before him or her that demonstrates that the offender has prospects of rehabilitation and that these

prospects would be assisted if a longer parole period was allowed." Beazley P stated that, whilst Bellew J's statement is supported by authority, the "seemingly unqualified nature of his Honour's observation would not be appropriate in every case." Her Honour stated that one situation where the statement may be inappropriate is in the case of a long prison sentence, where the prospects of rehabilitation may be difficult to assess or even be non-existent. The Court may nevertheless be satisfied that a finding of special circumstances is appropriate to assist or promote an offender's rehabilitation: *R v Simpson* (2001) 53 NSWLR 704; [2001] NSWCCA 534 at [58]; *Dashti* at [81]-[91]. Hall and N Adams JJ also expressed their disagreement with the statement and agreement with the position of Bathurst CJ (and others, in the case of N Adams J).

A non-parole period comprising 20% of the overall sentence will generally be manifestly inadequate

The respondent in ***R v Tuhakaraina*** **[2016] NSWCCA 81** was convicted of a single count of aggravated dangerous driving causing grievous bodily harm, the circumstance of aggravation being that the prescribed concentration of alcohol was in his breath or blood (0.187). He was sentenced to 2 years and 6 months imprisonment with a non-parole period of 6 months. The Crown appealed against the asserted manifest inadequacy of the non-parole period. Supporting that ground was a submission that the judge reduced the non-parole period to an impermissible extent because of the ill-health of the respondent's wife. Wilson J (R A Hulme J agreeing; Garling J agreeing in the result but for different reasons) found the judge's approach to be erroneous but dismissed the appeal in an exercise of the residual discretion. While there is no general rule or formula for the determination of a proper ratio of sentence following a finding of special circumstances, that being a discretionary matter, it should be very rare for a non-parole period to comprise only 20% of an overall sentence. That is because, absent some highly exceptional feature, it is difficult to see how such a non-parole period could perform the manifold functions of sentence specified by s 3A of the *Crimes (Sentencing Procedure) Act 1999*. While the ill-health of the respondent's wife was relevant to his subjective case (through its adverse impact on his psychological health), it was not something that could justify a departure of this magnitude from the statutory ratio.

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

Mr Wasson was found guilty by a jury of armed robbery. The sentencing judge found that special circumstances applied and that "the need for general deterrence in respect of the matter … will be dealt with in the head sentence". The Crown appealed on the basis that general deterrence should have been reflected in the non-parole period as well as the head sentence. R A Hulme J in ***R v Wasson*** **[2014] NSWCCA 95** allowed the appeal. The decision was contrary to *R v Simpson* [2001] NSWCCA 534 where Spigelman CJ said that the non-parole period must reflect all of the circumstances of the offence and the offender, including the need for general deterrence.

Special circumstances must be "special"

Mr Tuuta was found guilty of an offence of causing grievous bodily harm with intent. The maximum penalty for the offence is imprisonment for 25 years, and the standard non-parole period is 7 years. The offender received a sentence of 6 years with a non-parole period of 3 years 7 months and 6 days. The Crown appealed. Among other things, Bellew J in ***R v Tuuta*** **[2014] NSWCCA 40** concluded that "special circumstances" should not have been found and so the ratio between the non-parole period and the balance of the term should not have been altered. The non-parole period constituted 60% of the total sentence. The basis of the finding was that the offender needed a longer period of supervision in order to address issues of anger management, and that he had positively adapted to prison discipline. However, there must be "significant positive signs which show that if the offender is allowed a longer period on parole, rehabilitation is likely to be successful, and that this is not merely a possibility" for special circumstances to be made out: at [57] (citing *R v Carter* [2003] NSWCCA 243 at [20]. The evidence fell substantially short of satisfying that requirement.

Beware the effect of accumulation on ratio between non-parole period and total sentence

Dawson v R **[2013] NSWCCA 61** concerned an appeal against an asserted failure by a sentencing judge to reflect a finding of special circumstances in sentencing the appellant for a number of offences. The judge had fixed the ratio of the non-parole period and head sentence in respect of each offence at between 60 and 66 per cent. But the effect of his subsequent findings on concurrency and accumulation was to increase the ratio between the total non-parole period and the total sentence to 72%. Schmidt J agreed with the appellant that this exercise had led to mathematical error with the result that the finding of special circumstances was not reflected in the sentence.

Special circumstances - first time in custody

Mr Collier was sentenced to a non-parole period of 15 years imprisonment with a balance of 5 years. There was therefore no finding of special circumstances. On appeal it was argued that as she was 50 years old, it was her first time in custody and she had good prospects of rehabilitation there should have been a finding of special circumstances. In ***Collier v R*** **[2012] NSWCCA 213** McClellan CJ at CL, allowing the appeal but preserving the statutory ratio, stated that he had reservations about whether being sentenced to imprisonment for the first time alone could support a finding of special circumstance. At [36] his Honour stated that it is a fact relevant to the total sentence and non-parole period, but it is not a factor warranting further leniency by a further reduction of the non-parole period.

Disproportion between non-parole period and head sentence may indicate excessive sentence

AM was 16 years old when he committed a serious offence of causing grievous bodily harm with intent to cause grievous bodily harm. He was almost 18 when he was sentenced to 7 years with a non-parole period of 3 years. In ***AM v R*** **[2012] NSWCCA 203** an appeal against the head sentence was dismissed. It was submitted that the disproportion between the non-parole period and total sentence supported the contention that the head sentence was excessive. Johnson J (at [86]) said that while such a disproportion might support a finding

that that the sentence was excessive, the ratio in AM's case resulted from a "substantial indulgence extended to the Applicant after a finding of special circumstances". It was not otherwise demonstrated that the sentence was unreasonable or plainly unjust.

Non-parole periods and special circumstances – risk of institutionalisation

In ***Barrett v R*** **[2011] NSWCCA 213**, the offender committed a number of offences, some of which were committed while on parole. The offender was also still subject to suspended sentences imposed by the Drug Court. In addition to finding that the sentencing judge had erred in imposing a sentence with an effective non-parole period in excess of 75 per cent of the total term without providing reasons, Hidden J held that the risk of institutionalisation warranted a finding of special circumstances to assist in the rehabilitation of the offender.

Non-parole periods and special circumstances – the fact that offences were committed whilst on bail is an irrelevant consideration

In ***Bellchambers v R*** **[2011] NSWCCA 131**, the offender committed two of the four offences for which he was sentenced whilst on bail for the other two offences. Hoeben J held that the sentencing judge was wrong to have declined to make a finding of special circumstances for this reason. It was an irrelevant consideration.

Non-parole periods and special circumstances – small reductions in non-parole periods where a finding of special circumstances

In ***Caristo v R*** **[2011] NSWCCA 7**, the appellant pleaded guilty to two drug manufacturing offences, one relating to ecstasy and other to cocaine. The sentencing judge imposed a non-parole period that was 70.6% of the total sentence. R A Hulme J found that any intervention to reduce the non-parole period was unnecessary. The sentence was consistent with the findings provided by the sentencing judge which sought to extend the parole period for the ecstasy offence "because a longer period of supervision following release from custody was required" (at [36]), distinguishable from the circumstances in *R v Sutton* [2004] NSWCCA 225.

The decision was endorsed in ***Chen v R*** **[2011] NSWCCA 85**. The appellant had pleaded guilty to maliciously inflicting grievous bodily harm with intent and the sentencing judge imposed a non-parole period that was 60% of the total sentence. The severity appeal was dismissed. Garling J noted (at [50]) that the Court is slow to intervene in relation to findings of special circumstances, which are of a discretionary nature. The issue again emerged in *Kwong v R* [2011] NSWCCA 58, where it was argued that a sentence of 13 years with a non-parole period of 9 years for two offences of drug supply, a ratio of 69.2% of the overall sentence, did not reflect the judge's finding of special circumstances. The Court again demonstrated its reluctance to interfere in the circumstances, Harrison J noting at [44] that there is "no arithmetical or mathematical precision [that] can be applied to the exercise of the sentencing discretion".

Non-parole periods and special circumstances - delay leading to an effective non-parole period that exceeds 75 per cent of the total term

A slightly different situation to that in the above cases arose in ***Thorpe v R* [2010] NSWCCA 261**. The offender committed two offences in April 2007 for which he was sentenced in January 2008. While serving that sentence she was charged with a further offence that she had committed in May 2007. She was not sentenced for that matter, however, until August 2009. The judge on that occasion was aware of the earlier offences and sentences. Reference was made to the principal of totality and a finding of special circumstances was made that went beyond the partial accumulation that he proposed. However with the accumulated term then imposed the overall sentence became one in which the non-parole component was just under 82 per cent of the total term.

In this case it was the delay in charging the offender with the May 2007 offence which created the difficulty. Kirby J referred to authorities concerned with delay in sentencing (*R v Todd* (1982) 2 NSWLR 517 and *Mill v R* (1988) 166 CLR 59). His Honour referred to the fact that that it would have been preferable if the offender had been charged with the May 2007 offence before the sentence hearing in January 2008. If that had been done the sentence under appeal would probably have been dealt with by way of a fixed term with partial accumulation upon the sentences imposed in respect of the other more serious charges. Obviously that was not possible when it came to sentencing in August 2009. The appeal was allowed and the non-parole period for the May 2007 offence was reduced so as to render the overall non-parole period about 73 per cent of the total term.

Non-parole periods and special circumstances - effective non-parole period exceeding 75 per cent of total term

The offender in ***Russell v R* [2010] NSWCCA 248** was sentenced for multiple sexual assault offences to a term of imprisonment that resulted from a partial accumulation of individual sentences. The effective non-parole period was 79 per cent of the total term. It was argued on appeal that the sentencing judge had erred by failing to give reasons justifying the departure from the statutory ratio. Price J held that there was no such error. The sentencing judge had intended to set a non-parole period that was more than three quarters of the sentence. Section 44 of the Crimes (Sentencing Procedure) Act 1999 does not require the giving of reasons for setting a parole period that is less than one third of the non-parole period.

By way of contrast, in ***Maglis v R* [2010] NSWCCA 247** there was found to be error when a sentencing judge imposed an effective non-parole period which was 77 per cent of the total term of the sentence. Again this followed the partial accumulation of individual sentences. The error was more pronounced when regard was had to another sentence earlier imposed by another judge upon which these sentences were accumulated. The effect was to have a non-parole period which was 80 per cent of the combined total. Error was found in this case because it had been the intention of the sentencing judge to find special circumstances and to reflect that in the overall period of custody for all of the offences. This, of course, was not reflected in the final result.

Non-parole periods and special circumstances - accumulation of sentences

In ***Flynn v R*** **[2010] NSWCCA 171**, a sentencing judge expressly found that there were "special circumstances" but ordered that the sentences be partially accumulated. The result was that the non-parole period exceeded 75% of the total term. On appeal the appellant argued, inter alia, that the finding of special circumstances was not reflected in the total effective sentence. Price J held that it was apparent that the judge overlooked the effect of accumulation on the ratio of the effective non-parole period to the total term of the sentence.

This case is but one illustration of a situation that has been commonly encountered in the Court of Criminal Appeal since the Sentencing Act 1989 introduced the notion of what is sometimes referred to as a "statutory norm" or "statutory ratio" and the need for there to be "special circumstances" for imposing an additional term, now the "balance of the term of the sentence", that exceeds one-third of the non-parole period. Another commonly encountered situation is where there is no finding of special circumstances and individual sentences conform to the statutory ratio but accumulation results in an effective non-parole period that exceeds three quarters of the total term.

Non-parole periods and recognizance release orders for Commonwealth sentences

For some years it has been regarded as the "norm" for the period of mandatory imprisonment under a Commonwealth sentence to be between 60 and 66 per cent of the total term. However in ***Hili v R; Jones v R*** **[2010] HCA 45**, the High Court of Australia held (at [44]) that there neither is, nor should be, a judicially determined norm or starting point for the period of imprisonment that a federal offender should actually serve in prison before release.

Quasi-custody

Participation in a residential rehabilitation program does not have to be compulsorily required by court order before it may be taken into account as "quasi-custody"

The appellant in ***Reddy v R*** **[2018] NSWCCA 212** pleaded guilty and was sentenced to imprisonment for aggravated dangerous driving occasioning grievous bodily harm. The aggravating factor was that the applicant had a blood alcohol concentration of 0.27. He had an alcohol abuse problem. Prior to sentencing, he voluntarily participated in 10 months of residential rehabilitation programs which satisfied the description of "quasi-custody". On appeal against severity it was contended that notwithstanding that the judge had not been asked to, the judge nonetheless erred by not backdating the sentence to take into account time spent in rehabilitation.

Campbell J allowed the appeal and backdated the sentence. First, his Honour cited the decision of Hoeben JA in *Renshaw*; in which a sentencing judge erred when recognizing an offender's rehabilitation but failing to take into account that time upon sentence. His Honour then considered *Bonett v R*, where Adamson J likewise held that a sentencing judge

may, in some circumstances, be obliged to take into account time spent in rehabilitation even when not specifically asked to.

His Honour held that there was evidence that the applicant had spent some 10 months in quasi-custody but that it makes no difference that participation in a residential rehabilitation program was voluntary rather than by compulsion of a court order.

Judge should backdate imprisonment to reflect quasi-custody whether or not such submissions were put to the judge

The appellant in ***Gardiner v R*** **[2017] NSWCCA 27** was sentenced with a co-offender, Bourke, for an offence of armed robbery in company. Both offenders received the same sentence. Gardiner, unlike Bourke, had attended a residential rehabilitation centre prior to sentencing. On appeal the appellant submitted that the trial judge erred by failing to backdate the sentence to take into account the time in quasi-custody he had already served.

The appeal was allowed. Simpson JA noted the decision of *Hughes v R* (2008) 185 A Crim R 155, in which Grove J held that recognition should be given for time an offender has spent in quasi custody, and that a calculation of 50% is often appropriate. Although counsel for the appellant had not, at trial, explicitly asked the sentencing judge to backdate the sentence to take into account time spent in rehabilitation, Simpson JA found that the submissions of counsel on that point had been extensive and detailed. Her Honour found that exceptional circumstances existed to allow the Court to consider arguments as to whether the Court should take into account time spent in rehabilitation. She held that 50% of the time spent in rehabilitation, 44 days, was not insubstantial.

Standard non-parole period

Standard non-parole period – where it is a small proportion of the maximum penalty

An offence against s 7 of the *Firearms Act 1996 i*s an example of where a standard non-parole period (recently increased from 3 to 4 years) is a small proportion of the maximum penalty (14 years). The sentencing judge in ***Tassis v R*** **[2017] NSWCCA 143** was perplexed and said that a higher sentence would have been imposed if not for the standard non-parole period. The notional starting point for the sentence imposed would ordinarily have a non-parole period that was slightly higher than then applicable standard and on this basis it was contended on appeal that the sentence was manifestly excessive for an offence found to be below the mid-range of objective seriousness.

Leave to appeal was refused. It was held by Bellew J (at [30]) that the judge was required to take into account all relevant factors and this included both legislative guideposts (the maximum penalty and the standard non-parole period) without giving priority to either one. The applicant's focus upon the standard non-parole period was contrary to the instinctive synthesis the sentencing judge was bound to apply. Moreover, careful attention must always be paid to maximum penalties: *Markarian v The Queen* (2005) 228 CLR 357 at [31].

Transitional provisions following the increase of a standard non-parole period

When D committed an offence against s 61M(2) of the Crimes Act 1900, the standard non-parole period was 5 years. But when he was convicted it had been increased to 8 years by the Crimes (Sentencing Procedure) Amendment Act 2007. The sentencing judge applied the longer non-parole period. On appeal in ***DS v R*** **[2012] NSWCCA 159**, the Crown conceded that the lower non-parole period applicable at the time the offence was committed should have been applied and so the Court reduced the sentence. The Court was clearly misled by the parties. No reference was made to the transitional provision in Pt 17 of Sch 2 of the Crimes (Sentencing Procedure) Act 1999 which provides that the amended 8 year non-parole period applied "to the determination of a sentence for an offence whenever committed", unless the offender was convicted or had pleaded guilty prior to the commencement of the amending legislation.

Standard non-parole periods - irrelevant in sentencing a child

Section 54D(3) excludes the operation of Div 1A Pt *4 Crimes (Sentencing Procedure) Act 1999* in the case of an offender who was under 18 years of age at the time of the offence. In ***AE v R*** **[2010] NSWCCA 203**, the offence in question was robbery in company with wounding for which a standard non-parole period of 7 years is prescribed. The offender, however, was aged 15. The sentencing judge had erred when he used the standard non-parole period as a factor or guidepost indicating parliament's intention as to the seriousness of the offence. Basten JA held (at [26]) that it was erroneous for the sentencing judge, whilst not imposing the standard non-parole period, to have taken it into account by using it "as a factor indicating Parliament's intention as to the seriousness of [the] offence, thereby justifying a higher sentence than might otherwise have been thought appropriate".

Standard non-parole periods - relevance that offence with a standard non-parole period could have been dealt with in the Local Court

The Court in ***Bonwick v R*** **[2010] NSWCCA 177** was required to consider the principle that a judge should take into account in certain circumstances that an offence dealt with in the District Court could have been the subject of sentencing in the Local Court where the offence in question carried a prescribed standard non-parole period. In this case, the offences were aggravated indecent assaults for which the maximum penalty is 10 years and the standard non-parole period is 8 years. Davies J, applying Palmer [2005] NSWCCA 349, held that the prescription of a standard non-parole period does not displace the principle and the fact that a matter could have been dealt with in the Local Court remains a relevant consideration.

Sentencing judge not required to craft middle range abstract offence to compare objective seriousness with present offending

Dunn was sentenced for a GBH offence. In the sentence appeal, ***Dunn v R*** **[2010] NSWCCA 128**, Dunn submitted that the sentencing judge erred by not contrasting the offending to an "abstract offence" – that being some hypothetical offence "unembroidered by the particular objective circumstances" of the case before the court. Grove J dismissed this contention as

unsupported by authority and little different to the standard and intuitive sentencing exercise.

A similar submission was dismissed by Johnson J in ***Hristovski v R*** **[2010] NSWCCA 129**.

No need to regard standard non parole periods when sentencing for offences committed prior to their introduction

In ***McGrath v R*** **[2010] NSWCCA 48**, the offender was convicted for multiple child sex offences committed in 2001 and 2002. A conviction appeal was dismissed but the sentence appeal was upheld. McFarlan JA found that the sentencing judge attributed greater seriousness to the offences by reference to the standard non-parole periods, which was erroneous because those periods were only introduced in 2003.

Requirement to give reasons as to objective seriousness and departure from standard non-parole period

In ***Mayall v R*** **[2010] NSWCCA 37** the sentencing judge simply observed that the offender had pleaded guilty and so he was not obliged to impose the standard non-parole period but would give consideration to it as a guidepost. Howie J held that the sentencing remarks were inadequate and the discretion clearly miscarried because there was no determination of objective seriousness or reasons given as to why the standard period was not being imposed. See, similarly, ***R v Parkinson*** **[2010] NSWCCA 89** where an overall non-parole period of 3 years 9 months was imposed for three offences each carrying a standard non-parole period of 10 years with the sentencing judge providing no reasons for departure from the standard to that extent.

Totality

Totality – criminality of proceeds of crime offence not subsumed by drug manufacturing and supply offences

A ground of appeal against an aggregate sentence imposed for three offences including drug manufacturing, drug supply, and knowingly deal with the proceeds of crime contended that the sentencing judge erred by implicitly accumulating the sentence for the proceeds of crime offence upon the sentences for the other offences in order to reflect additional criminality. The applicant relied on what was said in *Brent Redfern v R* (2012) 228 A Crim R 56 by Adams J where "the possession of the drug and the proceeds of sale are part and parcel of the primary offence" so that separate punishment would amount to impermissible double counting.

In ***Grogan v R*** **[2019] NSWCCA 51**, Harrison J rejected this submission, finding that the applicant failed to establish that the criminality of the proceeds of crime offence could be comprehended by that in the other two offences. Rather, in this case the money the subject of the proceeds of crime offence did not just arise from the supply of drugs but was being

used to purchase materials for further drug manufacturing, meaning the offences were "temporally and factually distinct". No double-counting error was made out.

Totality principle - no two-staged approach

In ***ZA v R*** **[2017] NSWCCA 132** it was contended that it was a matter of established principle that there is a two-staged approach in the application of the principle of totality. The first stage was said to focus on objective considerations involving an assessment of the overall criminality; the totality of offending. The second stage was said to focus on subjective considerations; considering what would be the impact on the offender of a significant extension of sentence by reason of accumulation and the need to avoid a crushing sentence. This notion of two stages, or limbs, was derived from D. A. Thomas*, Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (2nd ed 1979, London: Heinemann Educational). It was contended that the sentencing judge in the present case failed to have regard to the second limb.

The Court firmly rejected the contention as being contrary to the instinctive synthesis approach to sentencing required by various decisions of the High Court such as *Markarian v The Queen* (2005) 228 CLR 357 at 375 [39]; 377-378 [51]. It was also contrary to authorities in both the High Court and the Court of Criminal Appeal generally dealing with the totality principle such as *Postiglione v The Queen* (1997) 189 CLR 295 at 307-308, 313-314 and *Nguyen v R* (2016) 256 CLR 656 at [37]-[38]; [64].

Principles of totality in sentencing an offender already serving another sentence

R v DKL **[2013] NSWCCA 233** was a Crown appeal against sentences for offences of sexual intercourse with a child under 10 and using a weapon to intimidate. The sentence imposed for those offences amounted to, in total, a five-year non-parole period and an eight-year head sentence. The Crown did not cavil with that aspect. But the offender was already serving a substantial sentence of imprisonment for other sexual offences committed against a different complainant. The sentencing judge accumulated the new sentences on the existing sentences to such an extent that the effective additional non-parole period was reduced from five years to two years and three months. Adamson J, on the appeal, found that the degree of accumulation rendered the sentences so inadequate that it must have involved error. The new offences were different in time, character and victim to the other offences. The structural approach meant the new sentences did not sufficiently reflect the offender's criminality.

(The Court exercised its residual discretion to dismiss the Crown appeal because of the deterioration of the offender's health in custody.)

Totality - no error in non-parole period for offence of perverting the course of justice being subsumed within sentences for disqualified driving

In ***R v Moore*** **[2012] NSWCCA 3**, the respondent to a Crown appeal had been sentenced for a number of offences of driving while disqualified and for having perverted the course of justice. The commencement dates of the sentences were such that the non-parole period,

and most of the parole period, for the pervert the course of justice offence was to be served concurrently with the sentences for the driving offences. It was argued that by wholly subsuming the non-parole period for the pervert the course of justice offence there had been no real penalty imposed. Simpson J found (at [35]) that the offence was at the lower end of the range for offences of this type, though some punishment additional to the sentence for the driving offences was called for. However, the Crown had focused too narrowly on the non-parole period without recognising an additional 4 month parole period exclusively referable to the pervert the course of justice offence. Her Honour stated that a parole period is a sentence in itself and it could not be said that there was no additional penalty imposed for the offence.

Totality - concurrence and accumulation of sentences

In ***R v Cutrale*** **[2011] NSWCCA 214**, the offender pleaded guilty to two offences: attempting to choke or strangle with intent to commit an indictable offence, and sexual intercourse without consent. The offender had placed his hand across the victim's mouth and nose causing her to lose consciousness, and then had sexual intercourse with her. The sentencing judge imposed wholly concurrent sentences on the basis that the offences comprised "one course of criminal conduct". The Crown successfully appealed, contending that the concurrency of the sentences failed to reflect the totality of criminality.

Hidden J held that partial accumulation was warranted. His Honour referred to a passage from the judgment of Howie J in *Cahyadi v R* [2007] NSWCCA 1 at [27] which posed the question in the following terms: "can the sentence for one offence comprehend and reflect the criminality for the other offence?" His Honour answered the question in the negative, finding (at [33]) that the attempt to choke the victim involved a measure of criminality separate from the sexual intercourse.

Concurrence, accumulation and totality

The sentences imposed in ***R v SJH*** **[2010] NSWCCA 32** for 8 child sexual assault offences committed against the offender's daughter over a 6 year period failed to reflect the totality of criminality because the sentencing judge ordered that the sentences for 7 of the offences be completely subsumed within the longest sentence. The judge purported to comply with the totality principle by ordering that some of the subsumed sentences be partially accumulated with other subsumed sentences.

M. Sentencing for specific offences

Armed robbery

Aggravated robbery with wounding (s 96) – no error in taking into account "gratuitous act of cruelty"

An elderly man out walking in the early morning to collect a newspaper was assaulted by the applicant who was intoxicated. The applicant pushed the man who fell back against a fence and then punched him in the face several times. The applicant then robbed the man

of $300 cash. The elderly man required an operation for facial injuries as well as physiotherapy and walking assistance. Following pre-trial hearings, the applicant pleaded guilty to the charge of aggravated robbery with wounding, pursuant to s 96 of the Crimes Act 1900. He contended on appeal that the sentencing judge erred by finding that the conduct included "a gratuitous act of cruelty": ***Melvaine v R* [2019] NSWCCA 274**. He submitted, by reference to *McCullough v R* [2009] NSWCCA 94; 194 A Crim R 439, that a gratuitous cruelty finding can only be made if "the infliction of pain was an end in itself.

Cavanagh J noted that the sentencing judge's reference to "gratuitous cruelty" was not for the purpose of making out a finding of an aggravating factor. Rather, it was made in the context of a series of statements intended to describe the violence inflicted and to elaborate on the finding that the objective seriousness of the offending was "of an extremely high order". Furthermore, the additional punches inflicted on the elderly man were rightly described as "needless violence" and submissions that they served a purpose as part of continuing with the robbery were rejected.

Armed robbery - financial gain as an aggravating factor

Mr Couloumbis was convicted of an offence of conspiring to commit an aggravated armed robbery. The trial judge had noted the motive of financial gain as an aggravating factor. On Mr Couloumbis' sentence appeal (***Couloumbis v R* [2012] NSWCCA 264**), Harrison J held that there was no double counting: financial gain is a motive of the offence, not an element or "inherent characteristic".

Armed robbery, conspiracy to commit: permissible to take into account that the offence was going to be committed in company

It was held by Hoeben J in ***Auimatagi v R* [2011] NSWCCA 248** that there was no error for a sentencing judge to have taken into account as an aggravating feature when sentencing for an offence of conspiracy to commit armed robbery that the offence was intended to be committed whilst the offender was in company.

Armed robbery sentences too low

In **McIvor v R [2010] NSWCCA 7**, the appellant referred to comparable cases in arguing his sentence for three armed robberies was manifestly excessive. Howie J dismissed the appeal and took the view that the cases were of little help. In addition, his Honour noted that the sentences in other cases seemed to be manifestly inadequate.

Break, enter

Break, enter and steal - R v Ponfield – care is needed in considering a prior record for similar offences in assessing objective seriousness

The applicant in ***Dickinson v R* [2016] NSWCCA 301** pleaded guilty to five counts of break, enter and steal. He had a prior record for similar offences. Indeed, at the time of the

relevant offending he was on parole for such an offence. The sentencing judge referred to *R v Ponfield* (1999) 48 NSWLR 327; NSWCCA 435 (a guideline judgment for sentencing s 112(1) Crimes Act 1900 offences) and cited particular factors which were said in the judgment to increase the seriousness of the offence, including that an offender had a prior record for similar offences. The sentencing judge then found that the offences were objectively very serious.

On appeal, the applicant submitted that the sentencing judge erred in considering the fact that the applicant's prior record in his assessment of objective gravity. Hidden AJ rejected this ground of appeal (which was otherwise allowed), holding that the sentencing judge dealt with objective gravity as an issue separate from consideration of the applicant's history. The appeal nonetheless highlighted that *Ponfield* should be approached with care. The guideline judgment has been rendered of limited utility by the enactment of s 21A of the *Crimes (Sentencing Procedure) Act 1999*, which lists (more comprehensively) aggravating and mitigating factors: *Mapp v R* (2010) 206 A Crim R 497; NSWCCA 269 at [10]. Crucially, on the issue of an offender's prior record, Ponfield was decided before *R v McNaughton* (2006) 66 NSWLR 566; NSWCCA 242, which held at [24] that objective circumstances of an offence "do not encompass prior convictions".

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.

Car rebirthing offences

Error in assessing seriousness of car rebirthing offences

R v Tannous; R v Fahda; R v Dib **[2012] NSWCCA 243** was a Crown appeal against three sentences for car rebirthing offences on the ground of manifest inadequacy. The three respondents had each been in the business of buying repairable write-offs from others states, repairing and registering them in NSW, and then replacing the standard components with parts from other vehicles, some of which were later identified as having been stolen. All three received sentences of imprisonment of between 19 and 20 months, to be served by way of intensive correction in the community. The maximum penalty for each offence was 14 years imprisonment and carried a standard non-parole period of four years imprisonment. Basten JA found that the sentencing judge had erred in her assessment both of the subjective circumstances of the offenders, which were unremarkable, and the objective seriousness of the offence of car rebirthing. A judge sentencing for such offences must bear in mind the consequential effects of the activities, including facilitating the theft of vehicles and adverse public safety. The court re-sentenced the offenders to terms of imprisonment of between 20 and 24 months, to be served full-time.

Child abuse material

Objective seriousness of possess child abuse material - parents exploiting children

The offenders in ***R v LS; R v MH*** **[2020] NSWCCA 148** were sentenced for child abuse material offences relating to sexually explicit messages and an image they sent to each other. The material featured their newborn son and MH's infant daughter from a previous relationship. LS, the father/step-father, received an aggregate of 4 years with an 18 month non-parole period. MH received 3 years, with a non-parole period of 21 months. The Crown appealed on manifest inadequacy.

Wilson J, upholding the appeal, found that the sentencing judge underestimated the objective seriousness of the offending. In particular, her Honour noted that the children were real; vulnerable due to their age; in the care of the offenders; and the material was produced for their own gratification. These factors significantly elevated the seriousness of the offending. Meanwhile, a lack of conscious memory - due to the youth of the victims - did not diminish the gravity of the offending. Furthermore, the trial judge erred in taking into account that no more serious offending eventuated. More serious offending would have grounded its own charge - its absence did not detract from the seriousness of the actual offending.

Child abuse material and child pornography offences – factors affecting objective seriousness

In *Minehan v R* [2010] NSWCCA 140; 201 A Crim R 243 a non-exhaustive list of factors that may bear upon the assessment of the objective seriousness of offences concerning the possession, dissemination or transmission of child pornography and child abuse material

was provided which has been (apparently) cited regularly. In ***R v Hutchinson*** **[2018] NSWCCA 152** the Commonwealth Director asked the Court to consider augmenting the list with two further features that were evident in the case at hand. It was a feature of Mr Hutchinson's offending that he had persuaded pubescent males to send pornographic images of themselves to him while he pretended to be a young person of about the same or a slightly older age (he was in fact 29). The Court obliged and amended item 9 and inserted a new item 10:

> "9. The degree of planning, organisation, sophistication and/or deception employed by the offender in acquiring, storing, disseminating or transmitting the material.
>
> 10. The age of any person with whom the offender was in communication in connection with the acquisition or dissemination of the material relative to the age of the offender."

The complete list, as amended, may be found in *R v Hutchinson* at [45].

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.

Approach to sentencing for child pornography offences

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 – factors

In ***Minehan v R*** **[2010] NSWCCA 140** at [94], after a review of cases dealing with sentencing for child pornography offences, R A Hulme J listed 13 factors relevant to the assessment of the objective seriousness of offences of that nature. The judgment also includes (at [96] – [101]) a discussion of the significance of general deterrence, denunciation and prior good character in such cases.

Whiley v R **[2010] NSWCCA 53** was a case in which an excessive sentence was imposed for child pornography offences. The offender was sentenced to a total of 4 years for two counts of producing child pornography contrary to s 91H of the Crimes Act 1900 (maximum penalty 10 years). He was a prisoner with a bad record and one day when his cell was searched there were found 18 sheets of drawings and 24 pages of handwritten text, all of a highly graphic nature describing or depicting child sexual activity. James J determined that the objective gravity of the offences was near the bottom of the range. He had regard to a number of matters: the material was not produced for sale or distribution but was for the offender's own gratification; the images, being drawings and not photographs, and text were produced from imagination and did not involve the exploitation of any actual child; and the quantity of material was nothing like that considered in many other cases. The sentences were reduced to 12 months.

Child sexual assaults

Aggravated sexual intercourse with a child aged 10-14 (s 66C(2)) – victim's willingness does not mitigate – intellectual disability not self-evidently less serious than other aggravating circumstances

The applicant in ***Bell v R*** **[2019] NSWCCA 251** contended that the sentencing judge erred in his assessment of objective seriousness and that the sentence was manifestly excessive. The objective seriousness error was said to be twofold. First, the victim (a 12 year-old girl), while not capable of consenting, was a willing participant in the intercourse. R A Hulme J, quoting from *R v Nelson* [2016] NSWCCA 130, held that while coercion or force might aggravate offending, a lack of coercion or force (from an unresisting victim) would not mitigate its seriousness.

Secondly, the applicant submitted that the aggravating circumstance in question (a mild intellectual disability) was not as serious in comparison to the other aggravating factors in s 66C(5) *Crimes Act 1900* (NSW), such as threats, the infliction of harm or the deprivation of liberty. His Honour rejected this comparison because it was not put to the sentencing judge, nor was it necessary or inevitable that one circumstance would always be less serious than another. The manifest excess submission was upheld and the applicant resentenced to give greater weight to the applicant's subjective case.

Sexual intercourse with child under 10 – relevance of finding of no sexual motivation

An offender was sentenced for an offence of sexual intercourse with a child under 10. In the course of his sentencing remarks, the primary judge said "I do not find that the

offender's conduct was for the purposes of sexual gratification but rather was part of his overall conduct within the very narrow context in the course of which he inflicted harm upon this child". The sentence for the sexual assault ran concurrently with a sentence for manslaughter, involving the same victim – and effectively added 5 months to the non-parole period and nothing to the head sentence. In ***R v Toohey*** **[2019] NSWCCA 182**, the Crown appealed against the sentence, asserting that the sentence imposed was manifestly inadequate.

It became relevant to consider the effect of the absence of a sexual motivation in the offending. Gleeson JA (with whom Button and Lonergan JJ agreed) said that "The need to protect children from the harmful effects of such activity is not lessened by the absence of a sexual motivation on the part of the offender, albeit that matter is relevant to the objective seriousness of the offence". His Honour explained that whether the absence of a sexual motivation lessens the objective seriousness will depend on the circumstances of the case, referring to *R v Dunn* (Court of Criminal Appeal (NSW), 15 April 1992, unrep) and *Essex v R* [2013] NSWCCA 11. Gleeson JA held that in this case, though the offending was not sexually motivated, it involved "the gratuitous and cruel infliction of harm" giving rise to a need for specific deterrence. His Honour held that the sentence was manifestly inadequate having regard to the totality of the circumstances.

Child sexual assault offences – assessment of objective gravity

A four year old boy was sexually assaulted on two occasions by his father (the applicant), once involving penile penetration of the boy's mouth and once involving penile penetration of the boy's anus causing bleeding. Following a trial, the applicant was convicted of two counts of aggravated sexual intercourse with a child under the age of ten years. The applicant received a sentence of 30 years with a non-parole period of 22 years, 6 months. In ***Gibbons (a pseudonym) v R*** **[2019] NSWCCA 150**, Simpson AJA (Lonergan J agreeing, Button J dissenting), dismissed the applicant's appeal against the severity of the sentence. One of the issues on appeal raised by the applicant was to do with the primary judge's assessment of objective seriousness.

One error asserted was that the primary judge characterised the offence as "objectively within the most serious category of offending". The applicant relied on *The Queen v Kilic* (2016) 259 CLR 256; [2016] HCA 48 where the High Court warned against describing an offence as "within the worst category" if it does not warrant the maximum prescribed penalty. Simpson AJA rejected this, finding that the primary judge did not make a characterisation "akin" to a finding of "worst category", but that she was placing the offence on a scale of objective gravity as she was obliged to do. Even if it was a "worst category" finding, it did not lead to any error because, as Simpson AJA held, "[t]he ultimate findings made by the sentencing judge were well within the boundaries available to her".

The second asserted error concerned the placement of the offences on a scale of objective gravity. It was said for the applicant that the absence of aggravating factors made the offence less serious. Simpson AJA cited authorities when rejecting this, including Grove J in *Saddler v R* [2009] NSWCCA 83; (2009) 194 A Crim R 452 who said at [3]: "it does not make what has been done by an offender less serious because it could have been worse".

Relying on *MRW v R* [2011] NSWCCA 260, the applicant also submitted that the primary judge gave undue weight to "abuse of trust" when an element of the offence was that the victim was "under the authority" of the applicant. Simpson AJA rejected this as well, finding that the primary judge used the term to evaluate the magnitude of the abuse of authority in this case – which was constituted by the "trust" between a parent and child.

Offences contrary to s 66EB(2) and (2A) of the Crimes Act 1900 (NSW) – accumulation required to reflect totality of criminality

The applicant in ***Miliner v R* [2019] NSWCCA 127** sent messages to a mother who he believed had an 11 year old daughter. The "mother" was actually an undercover police officer and the "daughter" was fictitious. The messages contained details of graphic sexual acts he wanted to engage in with the "mother" and "daughter". After five months of messaging, the applicant then attempted to meet them for the purpose of engaging in unlawful sexual activity. Upon arrival, he was arrested by police. The applicant pleaded guilty to two offences contrary to the *Crimes Act 1900*, ss 66EB(2) and 66EB(2A).

On appeal it was contended that the level of accumulation of the sentences was erroneous and the total sentence was manifestly excessive having regard to the totality of criminality. N Adams J noted that although the facts overlapped between counts 1 and 2, there was no double-counting error with respect to the element of "grooming". The primary judge did not err in accumulating the sentence for the offences which arose from an "ongoing episode of criminality with common factors", because her Honour was "not satisfied that the criminality of each offence comprehends and reflects the criminality of the other". N Adams J did, however, find that the degree of accumulation was excessive having regard to the principles of accumulation and concurrence, the fact that the police had encouraged messaging through the fantasy website, the common factors between the counts, the ongoing course of conduct, and the single "victim". The degree of accumulation was reduced from 2 years to 1 year, the overall sentence being 7 years with 4 years NPP.

Child sexual assault offences – both general and specific matters relevant to assessment of objective seriousness of multiple offences

In ***Bray v R* [2018] NSWCCA 301**, the applicant had been sentenced for five offences of aggravated indecent assault against his stepchildren, who were aged 11-12 and 10-11 at the time. He submitted on appeal that the trial judge had made a "global assessment" rather than having regard to the seriousness of the individual offences. R A Hulme J held that the judge (correctly) had regard to the general matters bearing on the assessment of objective seriousness of each of the offences as well as the specific matters pertaining to the individual offences. His Honour noted that the assessment of the objective seriousness of an offence is not something that can be described with absolute precision but that in this case, the trial judge's findings were open to her. General matters affecting each offence and making them significantly serious included the age of the victims, the position of authority held by the applicant, and the location of the offences (the victims' bedroom). These factors all supported the trial judge's finding, notwithstanding the applicant's

submissions that the nature of the physical acts (whether or not the touching included the victim's vagina) affects the objective seriousness of the offences.

Child prostitution offence – error in assessing objective seriousness

The respondent in ***R v Toma*** **[2018] NSWCCA 45** was sentenced to imprisonment for 20 months to be served by way of an intensive correction order for an offence of participating as a client in an act of child prostitution with a child under the age of 15. His defence at trial was that he only engaged in sexual intercourse with the child once and that at all times he honestly believed on reasonable grounds that the victim was over the age of 18. The Crown appealed on the basis of manifest inadequacy and on the basis of error in the assessment of objective seriousness.

It was held, per White JA, that the facts did not support the finding by the sentencing judge that the objective seriousness of the offence was towards the bottom of the range. His Honour held that it was irrelevant that the child appeared to be a willing participant; if the child opposed the intercourse it would be an aggravating matter. Such a conclusion ought not to have put the offence at the lower level of the range. It was also found to be irrelevant that the appellant did not seek out a child but that a child had been offered to him. (The sentence was manifestly inadequate but the appeal was dismissed.)

Cause child to engage in sexual intercourse or in sexual activity – assessing objective seriousness

A judge imposed an overall sentence of 10 years with a NPP of 6 years for a State offence of possessing child abuse material and 23 Commonwealth offences of causing a child to engage in sexual activity (x 1) or sexual intercourse (x 22) in the offender's presence. The offences concerned the offender, who was in Sydney, paying for and directing live sexual acts between adults and 17 child victims in the Philippines, via a real-time video link and by typing instructions to an adult in that country. The sentence was held to be manifestly inadequate, with a majority determining to resentence to an overall 14 years with NPP 10 years whilst Basten JA considered a sentence of at least 20 years with NPP 14 years was warranted: ***Director of Public Prosecutions (Cth) v Beattie*** **[2017] NSWCCA 301.**

The Commonwealth offences are in ss 272.8(2) and 272.9(2) and, although they are somewhat unusual, this case is useful for the listing by Price J (at [127]) of 14 factors that may be of relevance in assessing the objective seriousness of such offences.

Child sexual assault offences generally – relevance of paraphilic disorder

The Court in ***Director of Public Prosecutions (Cth) v Beattie*** **[2017] NSWCCA 301** was asked to consider the relevance of a diagnosis of paraphilic disorder. The appellant's submission was based on the judgment of Kirby J in *Ryan v The Queen* (2001) 206 CLR 267, in which his Honour held that it might be appropriate in sentencing such an offender to consider the common cause of the offences. However, Price J also considered the judgment of McHugh J in that case, in which his Honour said that there is no reason to give a paedophile a lesser sentence because of the paraphilic disorder; it may be that a paedophile ought to get a

heavier sentence to protect the community. Price J concluded (at [205]) that although the appellant's disorder might explain his offending and reduce his moral culpability, it also heightens the need for specific deterrence.

Historical child sex offences – temporary reduction in maximum penalty in intervening period irrelevant

The applicant in ***Woodward v R*** **[2017] NSWCCA 44** was sentenced for a number of child sexual assault offences, including rape, committed in the 1970s. Rape has been subject to varying maximum penalties over the years. At the time of the offending the penalty was life imprisonment. The "modern analogue" for such an offence committed against a child under 16 is s 61J(1) of the *Crimes Act 1900* with a maximum penalty of 20 years' imprisonment. In between, there was a period where the offence in this case would have been punishable by 10 years' imprisonment. The applicant contended that it would align with policy for him to be sentenced according to the maximum penalty at its lowest point in the history. R A Hulme J rejected this argument and dismissed the appeal. His Honour held that the correct approach is 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 inappropriate to grant the applicant leniency due to the fact that a lower maximum penalty had prevailed for a time before being abandoned prior to his sentence.

Child sexual assault - errors in approach to assessment of objective gravity

The respondent in ***R v Nelson*** **[2016] NSWCCA 130** pleaded guilty to seven offences of having sexual intercourse with a person aged 10-14 and 14-16 contrary to s 66C(1) and (3) of the *Crimes Act 1900*. They were committed against three complainants. The sentencing judge afforded a significant degree of leniency on the following bases: the respondent's youth, being aged 18-19 years at the time of the offences; he had suffered physical abuse as a child from his father and step-father; and he had significant cognitive disabilities and mental health problems. The respondent was sentenced to a range of non-custodial sentences, against which the Crown appealed. Basten JA (Rothman J agreeing with additional reasons; Fagan J dissenting) allowed the appeal, holding that the judge erred in his approach to the assessment of the objective gravity of the offending. The respondent was resentenced to an aggregate term of 3 years imprisonment with a non-parole period of 2 years.

The first error was in the approach taken to the assessment of harm caused to the victim, where his Honour found there was no evidence to support any such harm. There is a presumptive position that offending of this type will cause significant harm to the victim; that position in this case was in fact supported by an unchallenged victim impact statement. This error was contributed to by the judge's misunderstanding of the nature of the offending, whereby he described it as "consensual" and treated that matter as a mitigating factor. Given the victim's legal inability to consent, the activity might be better described as not being the subject of opposition. Second, the judge failed to properly take account of the consequences for each of the victims of the breach of security involved in the offences all taking place in their temporary home. Third, the judge's acceptance of the relationship in

each case as being a romantic boyfriend/ girlfriend relationship is apt to be highly misleading. The fact that the sexual aspect of that relationship was unlawful was a critical factor not to be ignored.

Good character in sentencing for child sexual assault offences

It was held in ***AH v R*** **[2015] NSWCCA 51** that there was error in a judge rejecting as a mitigating factor an offender's good character on the basis that it was a factor which had assisted him in the commission of child sexual assault offences (s 21A(5A) *Crimes (Sentencing Procedure) Act 1999*). The victim of the offences was the daughter of the offender's de facto partner. It was submitted on appeal that the applicant's good character played no part in his obtaining access to the victim and was not exercising a role in the community (such as a teacher, sports coach or pastor) which might have afforded him access to children. The submission was accepted but the appeal was dismissed on the basis that no lessor sentence was warranted.

Proper approach to sentencing for historical child sex offences

MPB v R **[2013] NSWCCA 213** was an appeal in respect of sentences imposed for a number of child sex offences committed by the appellant in the 1970s and late 1990s. Garling J (Basten JA agreeing with additional reasons, R A Hulme J agreeing) discussed the approach to be taken when sentencing for historical child sexual offences. He noted the difficulties in objectively ascertaining historical sentencing patterns, and the caution with which statistical tables should be approached. This is a pronounced difficulty when sentencing for child sex offences that historically encompassed a wider range of criminal conduct than their present analogues. Garling J warned that judicial recollection, which cannot be tested, should be applied with even greater care. His Honour stated, at [87], that the most reliable benchmarks were the maximum penalty and range of proscribed conduct:

> "The guide which is entirely objective and is easily ascertainable, and therefore which is likely to be of most use to a sentencing court, when attempting to impose sentences which accord with an earlier practice or pattern, is the maximum penalty fixed by the law for the offence charged, together with the range of criminality encompassed by the offence charged. By having regard to these features, a sentencing judge will be able to readily assess where the particular offence charged falls along the spectrum of conduct encapsulated in the offence, and accordingly how the particular offence ought be viewed against the maximum penalty fixed by the legislation."

Severity appeals in sentences for historical child sex offences

Mr Magnuson committed a number of sex offences against three child victims between 1977 and 1984. He was given a sentence of 19 years with a non-parole period of 13 years. He appealed, arguing that the sentencing judge had imposed a more severe sentence than was correct by failing to properly take into account sentencing patterns and practices at the time of the commission of the offences.

Button J granted the appeal, imposing a lesser sentence of 16 years, with a non-parole period of 9 years: ***Magnuson v R*** **[2013] NSWCCA 50**. As to sentencing patterns, his Honour

observed a general increase in sentences for all types of crimes in NSW over the last 25 years. But on a proper inspection of that generalisation, it was apparent that sentences for offences of rape committed against children had not markedly increased. Historical sentencing practices, on the other hand, showed a greater disparity. In particular, the approach to accumulation and concurrence was lax. As a result, while Button J was not convinced that the total sentence imposed in relation to any one victim was manifestly excessive, the overall sentence was.

Sexual intercourse committed without motive for sexual gratification

The appellant in ***R v Essex*** **[2013] NSWCCA 11** was sentenced for one offence of aggravated sexual intercourse of a child under 10. The offending occurred in unique circumstances. Mr Essex was, over a period of time, supervising the potty training of one of the children of his partner. In the course of cleaning the child's bottom with a garden hose, the offender deliberately inserted the nozzle of the hose into the victim's vagina. The offence was committed out of anger or frustration, rather than for sexual gratification. Mr Essex appealed on the basis that the sentencing judge had failed to reduce the objective gravity of the offence accordingly. On the appeal, Bellew J agreed with the appellant and held that the objective gravity of the offence was somewhat lower than had been found below.

Sexual assault: no need for specific evidence before judge can find that victim will would suffer as a result

The appellant in ***Enriquez v R*** **[2012] NSWCCA 60** pleaded guilty to sexually assaulting a girl under the age of 16. At sentencing, the judge remarked that "this young girl will suffer for the rest of her life. … The impact upon her in later life is likely to be an inability to trust men, to form satisfactory relationships and it may well impact upon her ability to bond with her own children." It was contended on appeal that there was no evidence to support this finding. McClellan CJ at CL held (at [48]-[49]) that although there was no specific evidence provided to the Court on this point, the consequences of offences of this nature on teenagers and young women is well known and it was open to the sentencing judge to draw on her general experience in these matters. That approach was supported by the decision of *R v Scott* [2003] NSWCCA 28.

Child sexual assault (persistent): permissible to sentence for more than three foundational offences

The appellant in ***ARS v R*** **[2011] NSWCCA 266** was found guilty of an offence of persistent sexual abuse of a child which is contrary to s 66EA(1) *Crimes Act 1900*. The offence requires proof that a person has committed sexual offences on "3 or more separate occasions occurring on separate days during any period". The Crown relied upon a multitude of offences. The sentencing judge expressed himself as being satisfied beyond reasonable doubt that all but one of the offences had been established and sentenced on that basis. The appellant contended that this was erroneous and that he should only have been sentenced on the basis of having committed three offences. It was argued that he had been sentenced for offences for which he had not been found convicted. The submission was rejected: per Bathurst CJ at [226] – [234]. It was the duty of the judge to determine the

facts relevant to sentence in a manner not inconsistent with the verdict of the jury and this is what had occurred.

Sexual assault upon a child - the younger the child the more serious the offence

Case law on the subject over the last two decades supports the general proposition that, in sexual offence cases, the younger the child, the more serious the criminality: ***PWB v R* [2011] NSWCCA 84**, per Beazley JA at [11]. Her Honour also observed (at [12]) that case law recognises that where the age of the victim is an element of the offence (i.e. indecent assault), while the court must endeavour to avoid double counting, a judge may still take into account the age of the child within the ranges of ages specified in the offence. Her Honour's analysis also involved a consideration of psychological research relating to a child's memory in the context of sexual abuse. Her Honour concluded ([15]):

> "… it seems to me that if a 6 year old child's memory is reliable, the likelihood that the child, both at the time and more particularly later in life, will have a real sense of violation, is a real one. I see no basis for differentiation, in this regard, in the impact on children of different ages."

The appellant in PWB was sentenced for offences of indecent assault against his younger sisters, aged somewhere between 10-12 and 5-6 respectively at the times of the respective offences.

The above in the judgment of Beazley JA may be contrasted with the view of RS Hulme J ([85]):

> " … I am also not persuaded that a 5 or 6 year old would have the same sense of violation as would a child of, say 9, or 15. Although I do not suggest the circumstances are on all fours, in that connection one has only to reflect on the gay abandon with which young children are prepared to run around naked and those at, or approaching puberty, guard their personal privacy with zeal."

Harrison J agreed with the reasoning of Beazley JA. There was a slight divergence in views as to the appropriate re-sentence; in that respect, Harrison J agreed with RS Hulme J.

Using a carriage service to groom a person under the age of 16 for sexual activity

It was contended in ***Rampley v R* [2010] NSWCCA 293** that an offence against s 474.27(1) of the *Criminal Code 1995* (Cth) of using a carriage service to transmit a communication to another person, the communication containing indecent material, with the intention of making it easier to procure the recipient to engage in sexual activity, with the recipient believed to be under the age of 16, was less serious because the person with whom the offender was communicating was, unbeknown to him, a police officer attached to a "Cyber Predator Team". The submission was made that sexual activity was neither positively intended nor objectively possible. McClellan CJ at CL rejected the submissions. His Honour (at [37]) regarded the offence as no less reprehensible when the offender is communicating with a fictitious person who they believe to be real than when communicating with a real person. His Honour also noted that the legislature had in mind that the offence could be

committed in the manner in which it was in this case and that detection of such offences served an important objective of deterrence.

Common law offences

Common law offences – sentencing where no maximum penalty

The appellant in ***Obeid v R*** **[2017] NSWCCA 221; (2017) 96 NSWLR 155** was convicted of the common law offence of wilful misconduct in public office. While a member of the NSW Legislative Council the appellant made representations to a public servant in relation to leases at Circular Quay with the intention of securing an outcome which would result in pecuniary benefits to himself or his family. As it is a common law offence, there is no maximum penalty. The sentencing judge found that the offences in Pt 4A *Crimes Act 1900* were statutory analogues, in particular s 249B(1) which criminalises most forms of bribery. The judge found that the appellant's offending was "broadly analogous" because his conduct involved him breaching his duty to the public by using his position to further his or his family's financial interests. The judge did not regard the offence in s 249B as being on all fours with the common law offence at hand; indeed he identified two significant differences.

On appeal, it was contended that the sentencing judge erred in finding that s 249B was "broadly analogous". This ground (and the appeal generally) failed. It was held that it was not to the point that the appellant could not possibly have been charged with an offence contrary to s 249B. The purpose of identifying a statutory analogue was merely to find a "reference point". It does not fetter the sentencing judge's discretion. The practice of identifying, where possible, a statutory analogue when sentencing for a common law offence where the penalty is at large does not involve identification of a statutory offence that the offender committed, or for which the offender could have been convicted. It was open to the sentencing judge to have regard to the offence in s 249B as broadly (not precisely) analogous; s 249B and the appellant's offending shared the common features of a breach of duty by the inducement of another person to show favour for the advancement of personal pecuniary interests.

Sentencing discretion not limited by lowest maximum among numerous offences committed in course of conspiracy

In ***R v Brown*** **[2010] NSWCCA 73**. The offender was sentenced for the common law offence of conspiracy to cheat and defraud, as part of a conspiracy of other offences. The sentencing judge had regard to the maximum penalty provided for the offence in s 178BA of the *Crimes Act 1900* (now repealed) of imprisonment for 5 years. The conspiracy, however, involved numerous offences including offences contrary to s 178BA and s 300 (maximum 10 years). Howie J held that the sentence was manifestly inadequate and the reasoning seriously flawed.

Corruption

Give corrupt benefit to Commonwealth public official – seriousness of such an offence

Rodgers was sentenced for two offences involving the supply of a large commercial quantity of cocaine as well as an offence of giving a corrupt benefit to a Commonwealth public official contrary to s 142.1(1) of the Criminal Code (Cth). He was sentenced to individual terms of imprisonment, with the Commonwealth sentence commencing first and the two drug supply sentences partially accumulated and commencing six months later. On appeal it was contended that the total effective sentence for the state and federal offences was manifestly excessive: ***Rodgers v R* [2018] NSWCCA 47**.

Johnson J considered the seriousness of the Commonwealth offence and found that the appellant was fortunate that only six months of the overall imprisonment was referable to it. The Commonwealth offence involved the appellant paying $10,000 to an AFP officer in order to obtain intelligence to be used for the importation of narcotics. His Honour considered the authorities dealing with the offence of providing a corrupt benefit to a police officer, which invariably categorised the offence as a very serious one that warrants severe punishment. Johnson J held that the assistance sought to be derived by the corrupt benefits offence for those involved in serious criminal activity increased the objective seriousness of the offence, and it was necessary for the sentence to involve general and specific deterrence.

Dangerous driving

Fail to stop and assist after impact causing grievous bodily harm – s 52AB(2) Crimes Act 1900 – assessing objective seriousness

While intoxicated by alcohol and cannabis, the respondent in ***R v Pullen* [2018] NSWCCA 264** drove through a roadworks zone in wet conditions at night, colliding with a semi-trailer, causing serious injuries to his passenger in the front seat. The respondent had to be restrained from fleeing the scene by road workers on two occasions. The respondent pleaded guilty to offences of dangerous driving occasioning grievous bodily harm (Count 1) and failing to stop and assist after impact causing grievous bodily harm (Count 2) (contrary to s 52AB(2)). The Crown appealed the aggregate 15 month sentence of imprisonment to be served by way of Intensive Correction Order (ICO) imposed by the primary judge on the ground of manifest inadequacy. The indicative sentences were 13 months (Count 1) and 3 months (Count 2), with the primary judge finding that the objective seriousness of the offending in Count 2 to be "well-below the mid-level".

Harrison J held that it was not open to the primary judge to make this finding having regard to the fact that the respondent attempted to flee the scene on two occasions, that he must have had actual knowledge of his passenger's injuries at the time, and that such actions would have frustrated police attempts to test his blood alcohol concentration. The 3 month indicative sentence failed to reflect the distinct criminality involved and did not give sufficient weight to the purposes of the fail to stop and assist offences under s 52AB,

particularly that of general deterrence and denunciation, designed to prevent unnecessary loss of life or suffering, as well as avoiding the frustration of evidence-gathering by police in order to determine cause and fault. The appeal was allowed and the respondent resentenced to an aggregate term of 3 years' imprisonment to be served by way of ICO.

Dangerous driving occasioning death - calculation of length of journey

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

Dangerous driving causing death/GBH – aggravating factor of the number of persons put at risk

While driving in Boat Harbour Park, south of Sydney, Mr Stanyard miscalculated his speed and launched his vehicle off the crest of a sand dune. The vehicle pitched forward and rolled on impact with the descending slope. Mr Stanyard's two passengers were seriously injured. He was convicted of two counts of driving in a manner dangerous to the public occasioning grievous bodily harm, contrary to s 52A(3) of the *Crimes Act 1900*. At sentence, Berman DCJ found (as was conceded by the defence) that the number of people put at risk, being the two passengers, was an aggravating feature of the offence. Mr Stanyard appealed Berman DCJ's severity findings.

On the appeal (***Stanyard v R*** **[2013] NSWCCA 134**), Fullerton J held that Berman DCJ had been in error in finding (and counsel had been in error in conceding) that having two passengers was an aggravating feature in the circumstances. Her Honour held, at 32:

> "In promulgating the guideline judgment in *Jurisic*, where the nature and extent of the injuries inflicted has been recognised as a discrete aggravating factor and where, as here, the suffering of grievous bodily harm is an element of the offence of dangerous driving, I am satisfied that the number of persons who may have been exposed to risk by the offender's dangerous driving must refer to people other than those identified as victims in the particulars of charge. Were it otherwise there is a danger of double counting and a corresponding risk that the sentence imposed will be excessive."

The judgment does not refer to *R v Berg* [2004] NSWCCA 300 in which Howie J (at [26]) regarded risk to a single passenger/victim as a matter of aggravation. Nor does it refer to *SBF v R* [2009] NSWCCA 231; 198 A Crim R 219 in which Johnson J (at [78]) adopted a similar approach. Pertinently, Johnson J said:

> "the fact that each of them was killed or seriously injured does not render it impermissible for the sentencing Judge to have regard to the number of people put at risk by the course of driving, as an aggravating factor".

Dangerous driving occasioning death – application of Whyte guideline judgment in serious case

WW was a minor who hit and killed a cyclist when his car veered across to the wrong side of a straight country road. The sentencing judge found that at the time WW had lost concentration sending a text message. He also failed to stop after the incident. WW was aged 17 years 3 months, had twice previously been caught driving without a license and did not have a license at the time of the offence. For the offence of dangerous driving occasioning death, the judge imposed a sentence of 7 years, and a sentence of 2 years 9 months for failing to stop after occasioning death. The total accumulated sentence was 8 years with a non-parole period of 5 years. WW appealed.

In ***WW v R* [2012] NSWCCA 165** it was submitted that the sentencing judge had not had sufficient regard to the guideline judgment of *R v Whyte* [2002] NSWCCA 343 where a typical case of dangerous driving occasioning death, where the offender has high moral culpability, was said to generally warrant a sentence of no less than 3 years imprisonment. Hoeben JA dismissed the appeal and held (at [74]) that the judge had not erred in his approach to Whyte. The absence or presence of factors set out in *Whyte* do not have a mathematical value that reduces or increases the sentence to be imposed: *R v Berg* [2004] NSWCCA 300. Rather, the further outside the typical case, the less important the guideline judgment to the sentence.

Hoeben JA found (at [75]) that there were three factors that set the appellant's case apart from the "typical case". The appellant was not of good character, there was no plea of guilty, and while he showed some remorse it was not unqualified. Further, there was no reference to an upper limit for sentence in *Whyte*. Three years was the limit below which a sentence would not generally be appropriate in a typical case.

The appellant criticised the sentencing judge's finding that his culpability for the offence was high. But Hoeben JA rejected the submission. His previous convictions, not having a license and failing to stop (although basis for the second offence) were all relevant to his culpability. Texting while driving, a deliberate act that is highly dangerous, was also relevant. His Honour stated (at [81]) that, as many young people take this deliberate and unnecessary risk, the trial judge was justified in placing particular importance on general deterrence in this case.

Driving offences involving death or grievous bodily harm

The fact that a single act of driving caused similar injuries to two victims who were in proximity to each other was not a proper basis to order that sentences for two counts of dangerous driving occasioning grievous bodily harm be served concurrently: **R v Read [2010] NSWCCA 78**. In the course of dealing with this issue, Giles JA reviewed a number of authorities concerned with the totality principle and the discretion to order sentences be served concurrently or otherwise.

Domestic violence

Domestic violence offences

The appellant in ***Patsan v R*** **[2018] NSWCCA 129** assaulted the victim with whom he was in a domestic relationship, causing grazing and bruising to her torso. The morning after the assault the victim told the appellant she was moving out, at which point the appellant grabbed her and punched her in the face, fracturing her jaw in two places. The sentencing judge assessed the objective seriousness of the offence as "just below the middle of the range" and the appellant was sentenced to full-time imprisonment. He contended on appeal that the judge erred in her assessment of the seriousness of the offence and that he should have received a suspended sentence. Leave to appeal was refused.

Adamson J rejected a submission that the sentencing judge had used the offender as a scapegoat for the prevalence of domestic violence. She held that there was no error in the manner in which the judge assessed the seriousness of the offence in its domestic violence context. She noted that the Court's experience and statistics relied upon by the Crown indicated that domestic violence offences not infrequently conform to a pattern, as the offence at hand did:

> "[A] male attacks (or kills) a woman with whom he is, or has been, in an intimate relationship when she expresses a wish to leave that relationship. Typically, the male is physically stronger than the female. The male is thus generally in a position to inflict considerable harm to the female and there is no real prospect of spontaneous physical retaliation because of the disparity between their respective strengths."

Her Honour applied *Munda v Western Australia* (2013) 249 CLR 600; [2013] HCA 38 and *R v Edigarov* [2001] NSWCCA 436 and held that the judge correctly characterised the offences as domestic violence and properly regarded that fact as a matter of real significance for the purposes of specific and general deterrence.

Domestic violence – importance of general deterrence

The respondent in ***Director of Public Prosecutions v Darcy-Shillingsworth*** **[2017] NSWCCA 224** assaulted his partner several times (punching her in the face, pulling her out of a car, and knocking her to the ground) and her father (when he tried to call the police). For three offences of violence, the sentencing judge imposed individual sentences of imprisonment and a community service order. The Crown appealed on the ground of manifest inadequacy. Basten JA held that general deterrence is a matter of some importance in cases of domestic violence. His Honour said that the current response of criminal law requires rigorous and demanding consequences for perpetrators of domestic violence in order to protect partners, family members and the community (referring to statements *The Queen v Kilic* [2016] HCA 48 at [21] and *Cherry v R* [2017] NSWCCA 150 at [78]). Basten JA also found that the community interest in general deterrence was not adequately reflected in the sentences imposed. Fagan J held that the purposes of sentencing that were particularly important in this case were deterrence, denunciation and recognition of harm to the victim and community. He found that offences of such gravity (even when committed by a man of otherwise good character) cannot be dealt with as leniently as was done in this case in order

for those sentencing purposes to be served and the criminal law to play its part in the endeavour to quell and redress domestic violence.

Drug offences (State)

Objective seriousness of drug supply where drug is fake

Mr Khoury supplied an undercover officer with 27.9 grams of cocaine. He went on to supply more than 2kg of a powder that was revealed not to be cocaine. He was arrested during this second supply. He pleaded guilty and was sentenced to 4 years and 3 months (non-parole period of 2 years, 9 months).

On appeal, Khoury argued that the sentence was excessive considering that no drug was actually supplied: ***Khoury v R* [2020] NSWCCA 190**. Johnson J dismissed the appeal, finding that while drug "rip-offs" are less serious than drug supplies in that no actual drug filters through to the community, there are a number of countervailing factors. The transaction was fraudulent; general deterrence was important (particularly given that most offenders escape punishment because victims don't report); and drug rip-offs beget further violent offending.

Drug supply – seriousness of GBL given modest profitability

Mr Petkos appealed his sentence for supplying a large commercial quantity of gamma-butyrolactone (GBL): ***Petkos v R* [2020] NSWCCA 55**. He alleged that not enough regard was had, when assessing seriousness, to the limited financial gain he would have reaped from the supply. Hamill J held that the sentencing judge took account of the modesty of the profits and concluded that the sentence was within the bounds of the judge's discretion.

Drug manufacturing and supply – purity an objective factor in sentencing despite "admixture" provisions in s 4 Drug Misuse and Trafficking Act 1985 (NSW)

The appeal in ***El Kheir v R* [2019] NSWCCA 288** arose from an asserted disparity between the applicant's sentence and that of his co-offender. Both men were sentenced, inter alia, for the manufacture of a 12.84kg liquid containing 2.6kg of pure methylamphetamine ("meth"). The indictment of the co-accused referred to the 12.84kg mixture, while the indictment of the applicant referred to the 2.6kg pure quantity. The thrust of the applicant's argument was that s 4 *Drug Misuse and Trafficking Act 1985* (NSW) – the admixture interpretation provision – required all mixtures or preparations of a drug to be treated as that drug, including at sentence. This would mean that the difference in indictment wording would result in different sentences.

Leeming JA dismissed the appeal. His Honour held that purity remained relevant as an objective factor. For example, a 5kg liquid distilling to 1g meth and another 5kg liquid distilling to 4kg meth might (by virtue of s 4) both result in prosecution for a large commercial quantity, but obviously the difference in purity accords with a difference in

objective criminality. The fact that the co-accused was sentenced for the larger quantity of a more dilute mixture did not result in disparity.

Drug supply – criminality of drug runner in sophisticated organisation

In ***Kay v R* [2019] NSWCCA 275**, the applicant sought leave to appeal in respect of a sentence for ongoing drug supply. The original head sentence was 4 years with a non-parole period of 1 year, 8 months. The sentencing judge found that the offending fell just under the mid-range of objective seriousness. Harrison J, allowing the appeal, held that the significant sophistication of the drug operation could not be attributed to the applicant, who was a mere "minnow". She contributed no expertise or capital and was paid partly in kind. The viability of the organisation did not turn on her involvement, which diminished her criminality. His Honour ruled that the sentencing judge erred in the objective assessment and reduced the sentence to 17 months with a non-parole period of 12 months.

Totality – no fixed principle that proceeds of crime and drug supply sentences should be concurrent

An offender was sentenced to an aggregate sentence of 3 years and 6 months with a non-parole period of 2 years imprisonment, following pleas of guilty to one offence of ongoing supply of prohibited drugs between 5 August 2014 and 21 August 2014 and dealing with the proceeds of crime on 21 August 2014, and an additional supply offence while out on bail. In ***Connell v R* [2019] NSWCCA 70**, the applicant appealed to the Court of Criminal Appeal against the severity of the sentence. One of the grounds contended that the sentencing judge erred by failing to order the indicative sentence of the offence of proceeds of crime be served completely concurrently with the indicative sentence for the ongoing drug supply offence.

Bellew J rejected the submissions of the applicant, which erroneously sought to rely upon the Court of Criminal Appeal's decision in *Jadron v R* [2015] NSWCCA 217 as authority for the proposition that sentencing for such offences should be served by wholly concurrent sentences. His Honour held that there are no generally applicable sentencing principles defining when offences are to be served cumulatively or concurrently. Whether a judge considers that sentences should be served concurrently is an issue of fact and context in each case, and his Honour noted that there may be cases in which concurrency is appropriate if the proceeds of crime are clearly derived from the supply of drugs. Bellew J noted that the issue on appeal was not pressed before the sentencing judge, who made no express finding as to connection between the offences. His Honour held the role of the appellate judge in reviewing aggregate sentencing is limited because the sentencing judge is not required to justify how accumulation and concurrence operated in the ultimate sentence. Bellew J held that the aggregate sentence imposed reflected the overall criminality of the offences and was not manifestly excessive – the ground of appeal was dismissed.

Drug manufacturing and supply offences – criminality does not coincide – need for some accumulation to reflect totality of criminality

In ***R v Campbell; R v Smith*** **[2019] NSWCCA 1**, Crown appeals were allowed upon the Court finding the sentences imposed on the respondents for offences of drug manufacturing and supply were manifestly inadequate. The Court accepted the primary judge's assessment of the objective seriousness of the offences, but found error in the failure to reflect this assessment in the indicative sentences imposed. In addition, drug supply and precursor offences represented distinct criminality beyond the manufacturing offences which should have been reflected in the aggregate sentences.

Drug supply – assessment of objective seriousness includes having regard to quantity

In ***Daher v R*** **[2018] NSWCCA 287**, the applicant applied for leave to appeal the sentence imposed after pleading guilty to two offences of drug supply (ss 25(1) and 25A of the *Drug Misuse and Trafficking Act 1985*) and a third offence under the *Poisons and Therapeutic Goods Act 1966*. Payne JA held that a proper assessment of the objective seriousness of the drug supply offences must include consideration of the quantity involved. This is the case even where the objective criminality of an ongoing supply offence against s 25A is directed at the business operation of drug supply. In the assessment of objective criminality for such an offence, the repetition, system and organisation of drug supply sits alongside the number and quantities of individual incidences of supply. Here the judge had only made findings about the applicant's "network" and role as a "wholesaler". The appeal was allowed.

Cultivation of cannabis by enhanced indoor means – sentencing standards

The appellant in ***Tran v R*** **[2018] NSWCCA 220** was sentenced to an aggregate sentence of 13 years 4 months for five offences of knowingly taking part in the cultivation by enhanced indoor means of not less than the large commercial quantity of cannabis plants and one offence relating to the commercial quantity. When assessing the sentence for one of the large commercial quantity offences the judge took into account the appellant's guilt in respect of charges of enhanced indoor cultivation which exposed a child to the cultivation process, and using electricity without authority. The trial judge found that each of the six offences approached the midrange of objective seriousness and that he had high moral culpability. The appellant appealed on the grounds the sentence was manifest excessive.

Johnson J, with whom Hoeben CJ at CL agreed (N Adams J dissenting) dismissed the appeal. His Honour held first that an examination of past sentencing practices does not reveal offending of the magnitude (by reference to the number of premises involved) of that of the applicant; his Honour described it as "virtually unprecedented in nature". His Honour considered the legislative history of the offence provisions, noting the legislative intention of increasing sentences for the offence of cultivation by enhanced indoor means. His Honour concluded that the applicant committed offences of a number and magnitude which required the imposition of a very substantial sentence and dismissed the appeal.

Supply drug – extended definition of "supply" applies to supplying on an ongoing basis

The *Drug Misuse and Trafficking Act 1985* defines supply as including "sell and distribute, and also includes agreeing to supply". The appellant in ***Nguyen v R*** **[2018] NSWCCA 176** pleaded guilty to two offences of supplying a prohibited drug on three or more occasions

during a 30 day period for material gain contrary to s 25A(1). On sentence the judge took into account that he had agreed to supply drugs well in excess of the minimum three separate occasions required under s 25A(1). On appeal against the severity of the sentence the appellant contended the judge had erroneously taken into account occasions when he had not in fact supplied drugs for financial or material reward.

Price J held that the extended definition of "supply" in s 3 applies to the offence in s 25A(1) so that the provision operates in the same way for agreements to supply as it does to actual supplies. His Honour held that s 25A must be read in context alongside s 3, and that the words "for financial or material reward" in s 25A do not displace the extended definition.

Incorrect classification of objective seriousness in relation to drug offence

Mr Cheuk Hang Yiu and Ms Mung Yi Yau were convicted in the District Court for the supply of 1kg of methylamphetamine and were each sentenced to 3 years with a non-parole period of 2 years. The methylamphetamine the subject of the charges totaled 999.1g with a 78.5% purity. The Crown appealed on the basis that the sentences were manifestly inadequate: ***R v Yiu; R v Yau*** **[2018] NSWCCA 155**. On appeal the Crown submitted that the sentences imposed on Mr Yiu reflected latent error and four patent errors: first, the finding that the criminality was "towards the lower end"; second, that the respondents' role was "at the bottom of the batting order"; third, failing to find as an aggravating factor that the offence was committed while on conditional liberty; and four, failing to take into account the Form 1 offences. With respect to the first contention, the Crown argued that a higher criminality was reflected in the quantity of drugs supplied and that the purity of those drugs was high. Ms Yau argued that the sentence was not manifestly inadequate on the basis that although the purity was high, she had no knowledge of the level of its purity.

The appeal was allowed. Rothman J considered the offence had a maximum penalty of life imprisonment and standard non-parole period of 15 years. He held that it was incorrect for the sentencing judge to assess the respondents' objective criminality as "towards the lower end" or "at the bottom of the batting order". His Honour, in doing so, had regard to the facts that the drug quantity was twice the large commercial quantity, its purity was very high, and the offence was not an isolated offence for either respondent. The sentence was manifestly inadequate.

Drug supply sentencing – Clark "principle" overruled

After the landmark decision in *R v Robertson* [2017] NSWCCA 205 (Simpson JA with whom Harrison and Davies JJ agreed), the Chief Justice agreed to sit a bench of five judges in ***Parente v R*** **[2017] NSWCCA 284** to consider a contention that the Court consign to history the so-called "principle" derived from *R v Peter Michael Clark* (Court of Criminal Appeal (NSW), 15 March 1990, unrep) that "drug trafficking in any substantial degree should normally lead to a custodial sentence and that only in exceptional circumstances will a non-custodial sentence be appropriate".

Mr Parente was sentenced for two drug supply offences, one involving a commercial quantity. The primary judge took into account the *Clark* principle. He imposed an aggregate

sentence of 4 years with a non-parole period of 2 years. On appeal the appellant argued that by applying *Clark* the sentencing judge had erred by impermissibly constraining his sentencing discretion.

The Court found error on the part of the trial judge but dismissed the appeal. The Court considered the general principles of sentencing as laid down by the High Court in *Hili v R; Jones v R* (2010) 242 CLR 520 and *Wong v R; Leung v R* (2001) 207 CLR 584. The Court held that the principle in *Clark* is apt to mislead in that once it is concluded that the offence involved trafficking in any substantial degree, it suggests that the defendant must then demonstrate some exceptional circumstances to negate a presumption of a full-time custodial sentence. This was held to be inconsistent with the majority view in *Hili v R*, in which the High Court held (at [44]) that "it is wrong to begin from some assumed starting point and then seek to identify 'special circumstances'". The Court affirmed the decision of Simpson JA in *Robertson v R*.

The Court went on to say that a sentence of imprisonment will generally be ordered in cases of drug dealing "to a substantial degree". However, the *Crimes (Sentencing Procedure) Act* stipulates that a sentencing judge should not impose a custodial sentence unless it is satisfied that no other penalty is appropriate. If that be the case, in accordance with cases such as *R v Zamagias* [2002] NSWCCA 17 at [22]-[29], it was then necessary for the court to determine the length of the sentence and whether any alternatives to fulltime incarceration are available and appropriate. In this case, with the judge determining upon an aggregate sentence of 4 years, no alternative to full-time custody was available and so the primary judge's consideration of whether there were "exceptional circumstances" was a rather arid exercise.

Error having been established, however, the Court was required to reconsider the exercise of the sentencing discretion. It concluded that no lesser sentence was warranted and the appeal was dismissed.

Drug supply - error to take into account purity of drugs when there is no evidence

The appellant in ***Murray v R* [2017] NSWCCA 262** was sentenced for supplying a large commercial quantity of methylamphetamine and MDMA. The sentencing judge had regard to the 80% purity of the 4.96kg of methylamphetamine, and determined that this would be diluted to a street level purity of 20% which would yield 20kg from the initial 4.96kg base. A ground of appeal against sentence was that there was a denial of natural justice because the judge postulated a theoretical street level purity without evidence; failed to provide the parties with an opportunity to address this finding; and placed undue weight on the purity of drugs when determining the objective seriousness of the offence.

Price J held that the trial Judge had failed to explain to the appellant's counsel his understanding of how the drug could be diluted and of its common street purity. The Court found that this omission was procedurally unfair and his conclusion was not based on evidence. Price J cited the decision of *Munday v R* [2017] NSWCCA 95, in which Beech-Jones J held that if a sentencing judge relies on facts ascertained from a source external to the

proceedings, the judge must provide parties with an opportunity to respond, and it may still be erroneous to rely on that evidence unless properly adduced and proven.

Error in imposing less than full-time custodial sentence for drug trafficking when no exceptional circumstances identified

In ***R v Cahill*** **[2015] NSWCCA 53**, a judge was held to have erred by imposing a sentence of 2 years to be served by way of intensive correction order for 3 offences of supplying commercial quantities of prohibited drugs and 13 offences of supplying prohibited drugs, with 4 further offences on a Form 1. In observations, with which the other judges of the Court agreed, Leeming JA said that any sentencing judge will be attuned to the possibility that a particular case is wholly exceptional, as well as to the possibility that it is merely claimed to be, but is not in fact exceptional. In such a case it will be essential for the judge to make appropriate findings of fact which will involve more than a mere recitation of undisputed facts and the parties' submissions. It will ordinarily require an express acknowledgement that the case is exceptional and an explanation of why what would otherwise be a distortion of the ordinary principles of sentencing is in fact an expression of their flexibility.

Judge errs in failing to consider alternatives to full-time custody for drug trafficking offences

The applicant in ***EF v R*** **[2015] NSWCCA 36** was sentenced for an offence of supply methylamphetamine. His car was searched following a random breath test and an amount of ice and other drug paraphernalia was found. Despite a powerful subjective case being advanced on his behalf at the sentence hearing, his lawyer conceded that a full-time custodial sentence would be imposed. Counsel for the applicant, appearing on appeal at short notice, argued that the judge should have considered imposing an intensive correction order (ICO). The Court allowed the appeal finding that the sentencing judge erred in failing to consider an ICO for the applicant. Schmidt J observed that while no submissions were made in the court below regarding the applicant's suitability for an ICO, "considerations of justice require that this important oversight be addressed on appeal" (at [60]). Simpson J held that the need for legal representatives to consider alternatives to full-time custody is not obviated by the authorities which indicate that full-time custodial sentences must be imposed for supply offences unless there is a finding of exceptional circumstances (see, eg. *R v Gu* [2006] NSWCCA 104).

It should be noted that it is unclear from the judgment whether exceptional circumstances were found to exist. But, a finding by the Court that the imposition of an alternative to full-time custody may be considered regardless whether exceptional circumstances exist would be contrary to a long line of authority.

Clarification of principle in R v Clark – substantial involvement in supply of drugs

In ***Youssef v R*** **[2014] NSWCCA 285** the Court of Criminal Appeal was given the opportunity to clarify the principle espoused in R v Clark that in drug trafficking offences the judge must find exceptional circumstances before non-custodial sentences may be considered. Mr Youssef pleaded guilty to an offence of supplying cocaine. 29.86 grams of the drug were

found in his car after a stop and search by police. The sentencing judge rejected Mr Youssef's explanation that he had purchased the cocaine for use at his birthday party. Rather, he found Mr Youssef to be a person "substantially involved in supply". There was no finding of exceptional circumstances so Mr Youssef was sentenced to imprisonment. McCallum J held that it was not open to the sentencing judge to be satisfied beyond reasonable doubt that the applicant was "substantially involved in supply". Noting the constraint that Clark imposes on the sentencing discretion of judges, her Honour observed that the decision "may warrant reconsideration in light of the remarks of the High Court (in a different context) in *Hili v R; Jones v R* [2010] HCA 45 at [36]-[38]" (at [32]).

Drugs manufactured to satisfy own addiction

Mr Dang was addicted to methamphetamine. He manufactured a quantity for his own use, and for his partner and friends. He was charged and sentenced for two offences of drug manufacture (and other offences). In ***Dang v R* [2013] NSWCCA 246**, he appealed his sentence, arguing under the umbrella of manifest excess that the sentencing judge had insufficient regard to the motive for the manufacture offences. Basten JA (Adams J agreeing, Latham J disagreeing) agreed. First, the manufacture of drugs for personal satisfaction is a less serious offence than the same manufacture conducted for profit (at [27]). And second, the circumstance of addiction is relevant to moral culpability (at [30]). Mr Deng was accordingly resentenced.

Drug supply - relevance of quantity

The appellant in ***Pham v R* [2013] NSWCCA 217** was convicted of supply offences relating to 30 kilograms of cocaine. In finding that the offence fell in the middle of the range of objective seriousness, the sentencing judge remarked that "no other finding is really open given the amount involved was thirty times the large commercial quantity for the offence". The appellant argued that this reasoning gave erroneous weight to the quantity.

McCallum J agreed that quantity was not the primary determinant of seriousness. Her Honour pointed to the ruling of the High Court in *Wong v R* [2001] HCA 64; (2001) CLR 584, and in particular to the observation of Gleeson CJ at [31] that, in certain cases, an offender's own state of mind about the amount of drug is far more important than the bare fact of quantity. The appellant's role was that of a middleman and he did not expect to benefit directly from the proceeds of sale of the drug. He did not appear to have an awareness of the exact amount he would be entrusted with. But the amount was not irrelevant. And the sentencing judge took into account the appellant's apparent contemplation, as disclosed by the evidence, that whatever amount he would be receiving would not be insubstantial. Read in context, the sentencing remarks revealed no error.

Drug supply: relevance that drugs supplied to an undercover officer and not disseminated into the community

In ***R v DW* [2012] NSWCCA 66** the respondent had pleaded guilty to conspiracy to manufacture amphetamines. An undercover police officer had prevented the drugs from being disseminated into the community. RS Hulme J considered (at [107-[114]) a number of

Court of Criminal Appeal cases that held no diminution, or only very limited diminution, of criminal culpability could result from the fact that drugs were not ultimately disseminated into the community. His Honour stated:

> "[115] With due respect to the authors of these statements, a number of them appear to be inconsistent with the long-standing principle that the criminal law is concerned with the consequences of offending. Thus is Savvas v R [1995] 183 CLR 1 at 6 the High Court embraced the proposition that, "A considerable number of more recently reported cases illustrate the imposition of sentences by reference to what was actually done in the transition of the conspiracy"…
>
> [117] … if the involvement of authorities prevents the transaction from resulting in harm, it is illogical not to afford appropriate weight just as in the converse situation on would take account of any damage that was a consequence of the offending."

Drug offences – When is a person a "principal"?

In ***Hanh Thi Nguyen v Regina*** **[2011] NSWCCA 92**, the appellant pleaded guilty to an offence of cultivating cannabis plants by enhanced indoor means. 317 plants (more than double the large commercial quantity) were found growing in a house that the appellant was renting. The appellant gave evidence at trial that she became involved in the operation at the behest of another man who had convinced her to lease the premises and it was supposedly he who had set up the electrical and hydroponic systems. The judge ultimately accepted that the appellant did not have the skills to install the systems, but was satisfied that she had intended to profit from the venture, was involved in the day-to-day management of it, and had recruited an assistant. The sentencing judge concluded that there were at least two principals involved in the operation, the appellant being one of them.

On appeal, the Court was divided on the question of whether the appellant was a principal. Grove J distinguished conceptually between "principal roles" and "subordinate roles" and concluded that the evidence of the appellant's activities in the operation supported the sentencing judge's findings. Simpson J, with whom Davies J agreed on this point, held that the sentencing judge had erred. Her Honour at [4] set out a non-exhaustive list of the characteristics that may indicate that an offender's role was that of a principal and went on to conclude that the evidence fell short of establishing those characteristics. The characteristics included, but were not limited to: the extent to which the offender contributed financially to setting up the operation; stood to share profits (as distinct from receiving payment); participated in day-to-day management; and had a hand in decision-making.

Drug offences - exceptional circumstances permitting a non full-time custodial sentence where there is "trafficking to a substantial degree"

In ***R v Pickett*** **[2010] NSWCCA 273**, it was not suggested that there was not "trafficking to a substantial degree" but the issue was whether there were "exceptional circumstances" which could permit a non full-time custodial sentence being imposed. The offender in this case was sentenced for an offence of ongoing supply of cocaine which related to the supply of a total of 6.5 grams in three transactions with an undercover police officer. Taken into

account were two further offences of supplying cocaine, each involving the supply of about 10 grams to an undercover officer. Mr Pickett was supplying the drug at the behest of another person who was well entrenched in drug supply activity. He owed that person a substantial amount of money and felt beholden to him as a result. The offender's evidence, which was accepted, was that all of the proceeds of the sales were returned to the other person. The offender became unwilling to continue with this activity and, so as to avoid further importuning by the other person, he went to the Northern Territory. The sentence which was imposed was imprisonment for 1 year 8 months with execution of the sentence suspended. The Crown appealed.

Simpson J referred (at [63]) to the well established principle that drug dealing "to a substantial degree" will, in the absence of exceptional circumstances, demand a sentence of full-time imprisonment. She concluded that the respondent's voluntary cessation of his criminal activity prior to arrest along with other circumstances of the case took it into the exceptional category. The Crown appeal was dismissed.

Drug offences - trafficking in drugs to a substantial degree

In ***Zahrooni v R*** **[2010] NSWCCA 252** the offender was found in possession of 69 grams of opium. The drug was concealed in 48 individual sachets. He was also in possession of just over $1000 in cash, a small knife, and two mobile phones, one of which had received a text message from somebody placing an order for "a quarter of an ounce". It was argued on appeal that there should not have been a full-time custodial sentence as the judge had not made any finding as to whether or not the offender was involved in "trafficking in drugs to a substantial degree". However, Simpson J referred to the fact that the judge had made specific mention of the extent of the offender's involvement in drug supply. He referred to the quantity of the drug, more than double the trafficable quantity; the packaging into individual sachets; the relatively large sum of money in his possession (having regard to his financial circumstances); the possession of two mobile phones; and the text message on one of those phones. Having regard to the judge's acceptance of those matters it was inevitable that if he had turned his mind to it he would have concluded that there was "trafficking to a substantial degree".

Drug offences – Relevance of drug being a precursor in the manufacture of another prohibited drug

Pham v R **[2010] NSWCCA 208** involved sentencing for an offence of knowingly taking part in the supply of not less than the large commercial quantity of a prohibited drug (pseudoephedrine). It was submitted that the sentencing judge erred when assessing the objective seriousness of the offence by failing to take into account that the drug was a precursor in the manufacture of another prohibited drug and that there was no evidence to suggest that he was involved in the manufacture of that drug. Simpson J held (at [44] – [45]) that the submission was misconceived. The relative harmfulness of the drug has been taken into account by the legislature in the determination of what constitutes the large commercial quantity of any drug, and is built into the penalties provided. Having so differentiated by reference to harmfulness, the legislature has determined that the penalty for supply of the relevant quantities shall not vary according to the nature of the drug.

The fact that the quantity of a drug is modestly in excess of the minimum required for the offence and that the purity was minimal were not mitigating factors

The challenge on appeal in ***Lorraway v R*** **[2010] NSWCCA 46** was to the sentencing judge rejecting a submission that the minimal purity and scant quantity (relative to the offence) operated in mitigation. The judge concluded that they were neither aggravating nor mitigating features. McClellan CJ at CL said they were matters which required consideration but it was inappropriate to speak in terms of aggravation or mitigation.

Drug offences (Cth)

Drug offences – general principles concerning serious federal drug offences

In the course of determining a Crown appeal against inadequate sentences imposed in ***R v Nguyen; R v Pham*** **[2010] NSWCCA 238**, the Court was required to consider general principles applicable to sentencing for serious offences arising from a drug importation. A useful collection of such principles and relevant factors appears in the judgment of Johnson J at [72].

Environmental offences

Clearing of native vegetation - penalty not to be determined solely by quantum of land cleared

Walker Corp Pty Ltd was convicted of an offence of clearing native vegetation without consent or a property vegetation plan which carries a maximum penalty of $1,100,000: s 12, Native Vegetation Act 2003. The company was fined $200,000 and appealed on the basis that the penalty was excessive. In ***Walker Corp Pty Ltd v Director-General, Dept of Environment, Climate Change and Water*** **[2012] NSWCCA 210** McClellan CJ at CL reviewed the penalties imposed and the area of land cleared in a number of decisions which indicated that the penalty imposed was high. But his Honour found (at [98) that the sentencing judge was not in error in determining the seriousness of the offence. In assessing the seriousness of the offence, undue weight should not be placed on the quantum of land cleared. It was open to the sentencing judge to give significant weight to factors such as the moral culpability of the corporation, and the need to sentence for specific and general deterrence. The appeal was dismissed.

Escape custody

Escape from custody: consideration of mandated accumulation of sentences on question of special circumstances

In ***Mattar v R*** **[2012] NSWCCA 98** the offender had escaped from custody while serving a sentence for drug supply of 5 years with a non-parole period of 3 years. A sentence of a further 2 years with an 18 month non-parole period was imposed. Pursuant to s 57(2) of the *Crimes (Sentencing Procedure) Act 1999* the sentence for escape commenced at the end of the non-parole period for the principal offence. The result was a total sentence of 4.5 years imprisonment without parole, with only a 6 month non-parole period. The appeal was upheld, Harrison J finding that the judge had failed to take in account the mandatory accumulation of the sentence for escape when determining that the appellant's circumstances did not warrant special consideration. The trial judge had also erred in not accounting for other circumstances that translated in harsher than normal custodial conditions (at [24]).

Explosive device offences

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

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

Financial crimes

Dealing in identification information with intent to facilitate fraud – financial gain is not an inherent characteristic

In ***Lee v R*** **[2019] NSWCCA 15**, the applicant appealed his sentence for offences related to his involvement in a criminal group making false ID cards to perpetrate frauds against financial institutions. The sentencing judge took account of the fact that the offences were committed for financial gain as an aggravating factor. On appeal, it was submitted that because financial gain was an inherent characteristic of the class of office (dealing in identification information contrary to s 192J Crimes Act 1900), the trial judge erred. Price J found that there are a number of examples of offences under s 192J where financial gain is absent. As a result, His Honour held that the sentencing judge did not err in finding that the offence was aggravated by financial gain.

Money laundering – relevant matters to take into account

The appellant in ***Fung v R*** **[2018] NSWCCA 216** was sentenced for an offence of dealing with money in excess of $1,000,000 with the intention it would become the instrument of crime, contrary to s 400.3(1) of the Criminal Code (Cth). He was resentenced following the decision in *Xiao v R* (2018) 96 NSWLR 1, it being accepted that he was not given credit for the utilitarian value of his guilty plea. In resentencing, the Court of Criminal Appeal made reference to relevant factors when sentencing for offences of this kind.

Price J held that in addition to the maximum penalty, other important considerations are the offender's belief that the money was the proceeds of crime; precisely what the offender did; the period of time over which the offence was carried out; the amount involved and the offender's role; whether the money or property was beneficially the offender's or not; and the value of any reward. His Honour also held that general deterrence was an important consideration. The Court concluded that no lesser sentence was warranted in the circumstances.

General and specific deterrence important in sentencing for serious credit card fraud

The applicant in ***Jeyavel Thangavelautham v R*** **[2016] NSWCCA 141** was convicted of several offences relating to his position as the ringleader in a conspiracy to use equipment including card skimming devices to obtain banking and other personal information. He was sentenced to an aggregate sentence of 11 years imprisonment with a non-parole period of 8 years and 3 months. He appealed against that sentence on the ground that it was manifestly excessive. Bathurst CJ rejected this ground (but the appeal was allowed on another). The object of the conspiracy was to obtain the details of one thousand people. Although the attempt was foiled, it does not lessen the seriousness of what was intended. It certainly does not require that the applicant be sentenced by reference to a single offence under s 192E of the *Crimes Act 1900*. Where the offence is capable of causing financial hardship to a large number of consumers and undermining this country's financial system, it is imperative that any sentence reflects the need for general and specific deterrence. This has been recognised in past decisions in this state and others.

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.

Seriousness of Commonwealth money laundering offences

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

Onus of proof on a question of financial gain or lack thereof in fraud offences

In ***Hinchcliffe v R*** **[2013] NSWCCA 327**, the applicant had pleaded guilty to offences of defrauding a body corporate, as a director, contrary to (then) s 176A *Crimes Act 1900*. He asked that a further seven Form 1 offences be taken into account on sentence. He was sentenced to two years imprisonment to be served by way of an ICO. The Crown appealed against the leniency of the sentence, raising among other matters a finding by the sentencing judge that the Crown had not proved beyond reasonable doubt that the respondent had gained personally from a substantial number of the offences. Johnson J held that the sentencing judge misconstrued the facts and also the law relating to the onus of proof. Given the pleas of guilty and the agreed statement of facts, which quantified the sums obtained by the respondent, the onus was on the respondent to establish, on the balance of probabilities, that he had not gained personally from the offences. If the respondent had established this, it may have operated to reduce sentence, and in line with *The Queen v Olbrich* [1999] HCA 54, this meant it was an issue upon which the respondent bore the onus of proof to the civil standard.

Insider trading offences in the nature of "tipping"

The applicant in ***Khoo v R*** **[2013] NSWCCA 323** pleaded guilty to four charges of insider trading and received an effective sentence of imprisonment for 1 year and 11 months. An appeal against the severity of the sentence failed. The offences were referred to as "tipping" (in effect, divulging inside information to a party who would be likely to acquire relevant financial products in the company in question). Leeming JA referred to *R v Glynatsis* [2013] NSWCCA 131 in which McCallum J said (at [79]) that the fact that people of otherwise good character and personal circumstances "are tempted to engage in [insider trading] emphasises the need for the clear deterrent that insider traders should expect to go to gaol". This was not obiter nor distinguishable from the "tipping" offences at hand. The primary contravention is the misuse of "inside information". "Tipping" may in fact be more serious than actual insider trading, given the potential for widespread dissemination of the information. Furthermore, the fact that the activities do not lead to variations in the price of securities does not detract from their seriousness. The injury derives from loss of public confidence in public securities. Bellew J set out the factors relevant to an assessment of

objective seriousness of "tipping" offences, including the type of information disclosed; the extent of the disclosure; whether the offender knew that the information would be used for trading; the nature and extent of any breach of trust; the level of sophistication or subterfuge; whether it involved a course of conduct; and the extent of any profit made.

General deterrence is important in sentencing for identity crimes and frauds utilising electronic banking systems

In **Stevens v R [2009] NSWCCA 260**, the offender was sentenced for voluminous fraud offences, including several identity thefts. The offender had engaged in systemic dishonesty on 139 occasions. Spigelman CJ noted the then imminent legislative change (*Crimes Amendment (Fraud and Forgery) Bill 2009*) involving more focussed offences and increased maximum penalties but stated that the significance of general deterrence would remain a matter to which particular weight must be given.

Firearms offences

Possess prohibited firearm – objective seriousness

Mr Andary rented out a basement for use as a clandestine meth lab. He and his family lived in premises across the road. A rifle was found in his bedroom. It lacked a retaining pin, which made it dangerous to the user if fired, and also lacked a magazine, meaning it was not self-loading. On appeal, Mr Andary established that the sentencing judge erred in finding that the drug operation and the firearms were located in the same premises – there was no evidence that the two were linked: ***Andary v R* [2020] NSWCCA 75**. Hamill J also held that the fact the rifle was disassembled placed the offence between the low and the mid-range of objective seriousness.

Firearms offences – differences between offences of possessing an unauthorised prohibited firearm and possessing a loaded firearm in a public place – assessment of moral culpability

At midnight outside a Parramatta motel, the drug-affected applicant was discovered by police in possession of a loaded pistol, 100g of ice, $8,200 in cash, and a patch infused with fentanyl. He pleaded guilty to all offences, including – in respect of the pistol - an offence of possessing a loaded firearm in a public place, contrary to s 93G(1)(a)(i) of the *Crimes Act 1900* (count 1) and possessing an unauthorised prohibited firearm contrary to s 7(1) of the *Firearms Act 1996* (count 3). After indicating individual sentences of 4 years, 10 months for each of the firearms offences, and 5 years, 3 months for the drug supply offence, the sentencing judge imposed an aggregate sentence of 9 years, 6 months. Ground 1 of the appeal in ***Taha v R* [2019] NSWCCA 240** contended that the sentencing judge made errors when assessing the applicant's culpability with respect to the firearms offences. For example, that he shouldn't have made a blanket assessment of criminality, that the judge shouldn't have taken into account the applicant's evidence that he used the pistol for protection, and that there was an element of double jeopardy because the two firearms offences warranted either complete or substantial concurrency.

In respect of ground 1, Button J held that there was no error in the assessment of the objective seriousness of both firearms offences for a number of reasons. With respect to the blanket assessment argument, it was held that first, counsel for the applicant and Crown had made submissions on gravity that did not differentiate between the offences. Second, there was evidence that the sentencing judge distinguished in his assessment, finding that count 1 (possessing a firearm in a public place) was aggravated by the applicant's intoxication and paranoia, and count 3 (unlawful possession of a readily concealed and semi-automatic lethal weapon) was aggravated by the lengthy period of possession. With respect to count 3 (the motive for possession), his Honour held the reasons for possessing a firearm cannot be taken into account in an objective assessment of seriousness but only as a mitigating subjective feature relevant to motive. And finally, his Honour considered that the relationship between the offences – they concerned the same pistol – did not mean that count 3 couldn't be the subject of additional punishment. (The appeal was allowed on another ground; this ground was rejected.)

Possess loaded firearm in a public place – non-criminal purpose of self-protection reduces gravity of offending

The applicant in ***Sumrein v R*** **[2019] NSWCCA 83** was arrested by police in Redfern after he had alighted from a car and ran, attempting to hide a fully loaded Ruger .357 magnum pistol behind a car tyre while fleeing. It was contended that the sentencing judge erred in the assessment of the objective seriousness of the offence. The appeal was allowed and the sentence reduced with the effect that the applicant was immediately released.

Hidden AJ (Ierace J agreeing, with Leeming JA agreeing overall, although not expressing a view on a certain point) held that the sentencing judge had erred in characterising the absence of a common feature of such offending – possession in connection with a criminal enterprise – as being "of minor consequence". In addition, he held that the failure to take the applicant's motive of self and family protection (there was evidence that the applicant's home had recently been the subject of a drive-by shooting) should have been taken into account, despite a concession by senior counsel during sentencing that it was not a mitigating factor. His Honour said that the fact that the applicant was motivated by fear was relevant to the offence's objective gravity and moral culpability; although it was considered that the risks of carrying a firearm involved a real danger to the public.

Sentencing for firearms crimes where multiple offences arise from possession of single firearm

Bejanov v R **[2013] NSWCCA 207** concerned a Mr Bejanov, who was sentenced for a number of firearms offences. Two offences related to a .22 calibre rifle with a box magazine and telescopic sight that was found at his house. The first offence arose from that weapon being unregistered and prohibited (s 36 *Firearms Act 1996*); the second from it being unauthorised and prohibited (s 7 *Firearms Act 1996*). On the sentence appeal, Button J held that the sentencing judge had erred in not affording a substantial degree of concurrency.

Firearms offences not a category of offence for which prior good character is of less weight

Mr Athos plead guilty firearms offences relating to a cache of guns, gun parts and ammunition he was transporting for his associates. It was his first criminal offence. The sentencing judge remarked that because the possession of illegal firearms by a person of prior good character was less likely to come to the attention of police, he would give the mitigating feature of good character less weight than he would otherwise. Mr Athos appealed his sentence: ***Athos v R* [2013] NSWCCA 205**. On the appeal, Price J held that firearms offences were not regarded as within the category of offences where less weight is afforded to prior good character (e.g. white-collar crime, child sex offences, drug couriering). It was erroneous, in the absence of evidence about how such crimes are typically committed, to extend the same reasoning as applies to drug couriers to firearms offences of this kind. His Honour also found that the facts of the individual case did not support a finding that the "good character" of the offender facilitated the crime. It would have been permissible to find that good character was not, in general, a factor of great weight, but it was an error to base that finding in the category of offence.

Grievous bodily harm

Assaults – extent of injury not determinative of objective seriousness

The applicant in ***Waterfall v R* [2019] NSWCCA 281** was a prison officer who was convicted of recklessly inflicting grievous bodily harm (GBH) to a prison inmate. The sentencing judge found that although the injury was at the lower end of seriousness (for GBH), the offending was aggravated by the abuse of authority. The applicant submitted that the seriousness of the injury should have been the determinative factor.

Cavanagh J rejected this submission and dismissed the appeal, holding that the extent and nature of an injury was always important but not always critical. There was no need, in his Honour's judgment, to fetter the sentencing discretion by ranking objective factors.

Recklessly causing grievous bodily harm

In ***Reberger v R* [2011] NSWCCA 132**, the offender was sentenced to the offence of recklessly causing grievous bodily harm. The circumstances were that the offender glassed the victim, an act that resulted in the victim losing an eye and suffering significant scarring of the face. Evidence was led that the offender was mildly to moderately retarded and also suffered from attention deficit disorder. The evidence also indicated that the act was impulsive and was, to an extent, caused by the offender's mental deficiencies. The sentencing judge primarily focused her consideration on the injuries sustained.

Campbell JA held that the sentencing judge erred in her Honour's consideration of the objective seriousness of the offence by having regard exclusively to the injury. His Honour found that the sentencing judge failed to consider such matters as the mental capacity of the offender, the absence of premeditation in the act and that it involved only one blow. Reference was made to the principles for assessing objective seriousness set out in *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168 at [85] - [88].

Homicide

Solicit to murder – objective seriousness assessment

In ***R v Baker*** **[2019] NSWCCA 58**, the Crown appealed against the leniency of the sentence imposed on the respondent after pleading guilty to two counts of soliciting to murder and three counts of sexual intercourse with a 14 year old child. The respondent, having been charged and remanded for the sexual offences, had recruited his estranged wife to act as an agent and meet with a hitman (actually an undercover agent) in order to make arrangements to kill the complainant and his natural son (who was another victim in the sexual offences case). The Crown contended that the sentencing judge's assessment of the objective seriousness of the solicit to murder offences as "just above middle range" was in error. Hoeben CJ at CL agreed, finding that the objective seriousness of the criminality of the offences was "significantly higher" due to the respondent's role in instigating the plan, in persuading and directing his estranged wife to assist him in procuring the intended murders, the fact that the intended victims were children (including his own son), and that the murders were an attempt to interfere with evidence in his case and frustrate the criminal justice system, and having regard to the many opportunities the accused had to withdraw from the plan. His Honour revised the assessment of objective seriousness to "well above the middle of the range and approaching the higher range".

Murder/manslaughter – verdict of guilty of manslaughter but no discount for earlier offer to plead guilty to it

In ***Merrick v R*** **[2017] NSWCCA 264**, the offender had offered prior to trial to plead guilty to manslaughter. No factual basis for such a plea was advanced. The matter went to trial but the jury rejected murder and returned a guilty verdict for manslaughter. The sentencing judge declined to provide a discount for the earlier offer to plead to the offence for which the offender was ultimately found guilty. On appeal, reference was made to authorities to the effect that a discount may be allowed for an earlier offer to plead guilty to a lesser offence which was rejected by the Crown but where the jury returned a verdict for that lesser offence. The primary judge in this case noted that the offender's evidence was inconsistent with acceptance by him of his guilt for manslaughter. She considered his earlier conditional offer to plead to manslaughter was no more than "exploratory". The Court held there was no error in not providing a sentencing discount.

Sentencing for manslaughter on the basis of excessive self defence

Mr Smith was tried for murder and convicted of manslaughter. In the trial, the sole issue was whether the Crown could negative that Mr Smith was acting in self defence. He had arranged to meet his victim on the day in question for what was thought to be a fist fight. Mr Smith armed himself with a loaded rifle and the victim had a pair of knuckle dusters in his jeans. Mr Smith argued that he thought the victim had a gun and was about to shoot him so he responded by firing a shot at the victim's head which caused the victim's death. In finding Mr Smith guilty of manslaughter on the basis of excessive self defence the jury first must have found that it was a reasonable possibility that Mr Smith believed that the

conduct was necessary in the circumstances and second must have been satisfied beyond reasonable doubt that the conduct was not a reasonable response in the circumstances as perceived by Mr Smith. Mr Smith appealed against the severity of his sentence, arguing that he was not sentenced on the basis that he perceived the victim had a gun and was about to shoot him. In ***Smith v R*** **[2015] NSWCCA 193**, the appeal was allowed with the Court finding that the sentencing judge's failure to make an explicit finding as to what the circumstances were as perceived by the applicant was inconsistent with the jury's verdict. Simpson JA held that the failure to make such a finding "had repercussions in the evaluation of the degree of unreasonableness (excessiveness) of the applicant's response" (at [61]).

Relevance of the act causing harm/death not being the sole cause of such harm/death

The murder victim in ***Davis v R*** **[2015] NSWCCA 90** was a 73 year-old man with undiagnosed chronic heart disease. The offender stabbed him a number of times causing serious injury. The victim was hospitalised where he underwent surgery and thereafter was making "a fantastic recovery". Three days later he suffered cardiac arrest and died. The jury's verdict of guilty meant that the stabbing materially contributed to death occurring. A question arose as to whether it was a mitigating feature that the stabbing was not the sole cause of death. It was held by Simpson J that the focus must be on the objective criminality of the act of the offender; the fact that some other circumstance contributed to the death was not a mitigating factor. Basten JA said that the moral culpability of the offender is properly assessed by reference to the severity of the attack, amongst other factors. Here it was less than it otherwise might have been, given that the attack was not so violent as necessarily to cause death in a healthy individual.

Manslaughter by way of substantial impairment by abnormality of mind – significance of mental condition on sentence

Mr Catley pleaded not guilty on the grounds of mental illness to killing his mother (and her two cats). He was found guilty of manslaughter and this was accepted to be on the basis of the partial defence of substantial impairment having been made out. A complaint raised on appeal against the asserted severity of the sentence imposed was that the judge had erred by failing to hold that the offender's moral culpability was reduced because of his mental condition: ***Catley v R*** **[2014] NSWCCA 249**. The judge said that he did not think that any psychosis the offender suffered played a very great part in the commission of the offence. To the extent that it did, the concomitant reduction in his culpability had already been taken into account because he had been found guilty of manslaughter rather than murder. It was held that there was no error in this approach. It had been open to the judge to find that the mental condition was not significantly beyond that which warranted liability for murder being reduced to manslaughter.

Violence towards the elderly will not be tolerated

In ***R v Wood*** **[2014] NSWCCA 184** the Court allowed a Crown appeal against the inadequacy of the sentence imposed for the manslaughter of a 71 year old woman. Mr Wood pleaded guilty to the offence, which involved him pushing the deceased to the ground after riding past her on his bicycle. She struck her head on the ground and died shortly after. In re-

sentencing, the Court emphasised the need for general deterrence in these types of offences, particularly given the increase in the number of aged and vulnerable persons in the community, and also the need for the specific deterrence of Mr Wood, given his poor subjective case.

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

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

Manslaughter - motor manslaughter – highest ever sentence not excessive

A 23 year old man was sentenced to a total of 15 years for two counts of manslaughter. He had stolen a high performance vehicle while under the influence of methylamphetamine and amphetamine. The following morning, without sleep and suffering from drug withdrawal, he drove the vehicle in wet conditions through busy suburban streets at speeds of up to 185 km/h. Police were forced to terminate a pursuit. Subsequently, there was a collision with another vehicle instantly killing its two occupants and the offender suffering significant injuries as well. To make matters worse, at the time he was on conditional liberty for a similar offence.

In ***Spark v R*** **[2012] NSWCCA 140** it was observed that the sentences are the highest ever imposed in NSW for motor manslaughter but they were not manifestly excessive. Fullerton J found that the level of recklessness exhibited was "extreme" and level of overall criminality was "high" (at [48]). The sentencing judge had regard to a number of motor manslaughter cases that attracted lower sentences, each with similarities and differences from the present case. However, they did not fix an upper limit on the sentencing discretion of the judge (at [51]). Fullerton J noted that referring to sentences imposed in other cases was of limited utility when arguing on appeal that a sentence was manifestly excessive (at

[49]-[50]). Ultimately, she found that it was open to the sentencing judge to find that the offences were at the higher end of seriousness for the cases comprehended by the offence of manslaughter (at [52]).

Manslaughter: changes in sentencing patterns since 2000

In ***Scott v R*** **[2011] NSWCCA 221**, the offender committed offences in 2000 for which he was not charged and ultimately sentenced until 2008 and 2010 respectively. The question arose during the offender's sentencing proceedings whether the sentencing patterns for manslaughter had moved adversely to the offender between 2000 and the sentencing date in 2010. If they had, then *R v MJR* (2002) 54 NSWLR 368 is authority for the proposition that the offender should be sentenced in accordance with the standards prevailing as at the time of the offence. The sentencing judge held that they had changed, yet seemingly proceeded to sentence the offender in accordance with standards prevailing as at the date of sentence.

On appeal, James J discussed the relevant principles. His Honour referred to, inter alia, the onus of proof resting on the offender to establish that sentencing patterns had moved adversely, and the evidentiary materials that can be used to discharge this onus (i.e sentencing statistics, individual sentencing decisions, recollections of judges having knowledge of what sentencing practices were at the time of the commission of the offences, legislative changes in the nature of the offence including changes to the maximum penalties and imposition of standard non-parole periods). His Honour concluded that the evidence did not establish that there had been any significant change in the sentencing patterns for the offence of manslaughter during that period. Consequently, his Honour held that no lesser sentence should have been imposed and dismissed the appeal, notwithstanding the sentencing judge's error.

Murder

The Court considered the assessment of the objective seriousness for the offence of murder in ***Tran v R*** **[2011] NSWCCA 116**. Hidden J reviewed a number of decisions on the subject and observed:

> "[39] What emerges from these cases is what one would expect. Whether a killing was premeditated or, in any event, whether it was accompanied by an intention to kill are important questions in an assessment of where a murder lies in the range of objective gravity, but of themselves are not necessarily determinative. Invariably, there will be other circumstances in the particular case bearing on that assessment."

Johnson J made similar observations at [44] when comparing the objective criminality for an intention to inflict grievous bodily harm with an intention to kill. The former is generally less culpable than the latter, but that is not always so.

General deterrence in sentencing for alcohol-fuelled offences of violence

In ***R v West*** **[2011] NSWCCA 91**, the appellant pleaded guilty to the manslaughter of his sister's partner, an act that resulted from an argument between the two that escalated into a fight following from a day of drinking and using cannabis. The judge imposed a sentence

of 6 years with a non-parole period of 2 years. A Crown appeal was upheld by a majority of the Court (Johnson J, Whealy JA agreeing, Hidden J dissenting). It was found (at [52]) that the sentencing judge's failure to refer to general deterrence supported the conclusion that the appellant's subjective circumstances (aged 18 and in need of rehabilitation for long standing alcohol and drug abuse issues) dominated the calculation of the non-parole to an impermissible extent. Johnson J then noted importance of general deterrence in sentencing for manslaughter resulting from alcohol fuelled violence:

> "[52] This Court has observed, in the context of sentencing for manslaughter by unlawful and dangerous act, that alcohol-fuelled offences of violence are frequently committed by young men and that general deterrence has a particular application for this reason: *R v Carroll* [2010] NSWCCA 55; 200 A Crim R 284 at 299 [61]."

Murder – worst case and life imprisonment where no intent to kill

A life sentence was imposed in ***Tan v R* [2010] NSWCCA 207** for engagement in a joint criminal enterprise that resulted in a most heinous murder. On appeal it was submitted that Tan had organised for the infliction of grievous bodily harm upon the victim. He intended that hydrochloric acid would be used to cause grotesque disfigurement of the victim and those who carried out the act went beyond the scope of the joint criminal enterprise. The appeal was dismissed. R S Hulme J held (at [56] – [62]) that a lesser sentence was not necessarily warranted where murder is committed with an intention to inflict grievous bodily harm rather than to kill. Others matters such as motivation and the infliction of cruelty or demonstrated criminality going beyond the necessary incidents of the killing are matters also to be taken into account. It follows that there is no blanket rule precluding a finding that a murder falls into the worst case category where the intention is to inflict grievous bodily harm.

Joint criminal enterprise

Assessment of culpability of offender in joint criminal enterprise when offender's particular conduct unknown

Mr Beale was sentenced for three offences, including two serious home invasions committed with two co-offenders. There was no evidence of the particular conduct engaged in by Mr Beale. As a result, Mr Beale was sentenced on the basis that he was criminally culpable for the full range of criminal activity. On appeal in ***Beale v R* [2015] NSWCCA 120**, it was contended that the sentencing judge erred in attributing to Mr Beale moral culpability for the acts of all three offenders. In dismissing the appeal, the Court was satisfied that Mr Beale was properly sentenced on the basis that he was criminally responsible for every act of the three offenders. The Court rejected Mr Beale's submission that the sentencing judge's reference to "criminally culpable" should be interpreted as a reference to his moral culpability for the entire criminal activity. An assessment of moral culpability as distinct from criminal responsibility cannot be undertaken in circumstances where the evidence does not differentiate between the acts of each of the offenders.

Distinction between legal responsibility and moral culpability

The appellant in ***KR v R*** **[2012] NSWCCA 32** pleaded guilty to a murder that occurred when he and another (LR) had kicked a man to death during a robbery. In the course of sentencing KR the judge stated that he was satisfied that "both offenders were equally responsible for the death" but proceeded to impose a longer sentence on KR than on his co-offender. KR appealed arguing that the finding that they were "equally responsible" should have resulted in an equal or relevantly similar sentence.

Latham J, dismissing the appeal, discussed the difference in law between criminal responsibility and culpability (at [15]-[22]). In the case of a joint criminal enterprise each participant will bear equal legal responsibility for the acts carried out all participants to the joint enterprise. However, the conduct of the individual participant to a joint criminal enterprise will be relevant to the level of culpability for which an offender is to be sentenced, culpability being the moral responsibility for an offence (at [19]-[21]). Latham J held that the sentencing judge's finding that the co-offenders were "equally responsible" related to their legal responsibility, while it was clear that the judge found KR was more morally culpable than LR for the offence (at [24]-[25]).

Differentiating the roles played by participants

In ***Johnson v R; Moody v R*** **[2010] NSWCCA 124**, there was a divergence of views as to whether any differentiation should be made in assessing the culpability of participants in an armed robbery. Johnson argued that as his role was as driver of the getaway car he was less culpable than Moody who entered premises and threatened people whilst armed with a firearm. Barr AJ was of the view that it was more serious to enter premises and threaten people's lives with a firearm. Simpson J was of the view that some caution needs to be exercised in drawing fine distinctions between what the participants of a joint criminal enterprise actually did. Johnson's participation made Moody's offence possible. James J noted that in sentencing participants in the same joint criminal enterprise a judge should "begin with" and "not lose sight of" the fact that they were all participants in the commission of the same crime but added that it is not the case that the offenders are necessarily to be regarded as having had the same objective criminality. It was open to the sentencing judge to decide to give some limited significance to the different roles played by the two offenders. However, drivers of getaway vehicles should not necessarily receive a lesser sentence.

Kidnapping

Kidnapping

The Crown appealed against the asserted inadequacy of a suspended sentence imposed in the District Court for an offence of aggravated kidnapping: ***R v Speechley*** **[2012] NSWCCA 130**. The appeal was allowed and the respondent was re-sentenced. The judgment of Johnson J contains a very useful analysis of the basic, aggravated and specially aggravated

offences of kidnapping contained in s 86 of the *Crimes Act 1900* and the approach to sentencing for them (at [47] – [64])

Kidnapping – objective factors

In ***Allen v R* [2010] NSWCCA 47**, Latham J reiterated factors relevant to an assessment of the objective gravity of an offence of kidnapping under s 86 of the *Crimes Act 1900*: the duration of the detention; the extent of fear or terror occasioned; the manner of treatment and what is demanded of the victim; the purpose of the detention; and the extent (if any) to which third parties were subjected to ordeal or anguish by reason of fear for the welfare of the victim.

Perjury

Perjury - when committed in relation to another offence, the sentence need not be cumulative on the sentence for that other offence

While awaiting sentence for arson, an offender was charged with perjury after telling lies during the sentencing proceedings at the District Court. He had given evidence that he had been emotionally affected by the death of his brother at the time of the offence, but his brother had not died until a week later. The judge imposed a sentence of imprisonment for the perjury which was entirely concurrent with the sentence imposed for the arson: ***R v King* [2011] NSWCCA 274**. A Crown appeal was dismissed when an argument that the sentences should not have been made entirely concurrent was rejected. The Crown contended that as the sentence for arson was appropriate, an additional term should have been imposed for the discrete, though connected, offence of perjury. However, Adams J held (at [21]) that this argument mistakenly turned "mere chronology into a substantive rule". The correct approach was to assess whether the sentence imposed, considering the overall criminality involved in all the offences, was manifestly too lenient. On this approach, his Honour could find no error with the decision of the sentencing judge.

Perverting course of justice

Perverting the course of justice – pretending to have cancer to get a reduced sentence

A woman committed an assault and then began falsely claiming to have cancer, aware that she may be convicted for the assault. At sentence, she failed to correct a statement by her solicitor to the magistrate that she had cancer. A magistrate imposed a section 9 bond for the assault, saying, "The only thing stopping you from going to goal is because of your medical condition." After her ruse was discovered, she pleaded guilty in the District Court to making an omission intending to pervert the course of justice. She appealed against the sentence imposed of 12 months imprisonment: ***Church v R* [2012] NSWCCA 149**. It was contended that the judge had considered a hypothetical outcome of the Local Court proceedings had she not lied. Button J found that the sentencing judge had not determined what "would" have happened had she not made the omission (at [26]); that would have

been an erroneous inquiry. Rather his Honour determined what "ought" to have happened taking into account all the evidence now before him. In doing so, he was making a determination relevant to the seriousness of the offence of perverting the course of justice. Button J noted that it would also have been an error to make up for the jail sentence evaded in the Local Court in imposing the sentence at the District Court. But there was no evidence that this had occurred.

Proceeds of crime

Proceeds of crime worth $1 million – 5 year imprisonment not unjust – moderately serious

The applicant in ***Olivier v R*** **[2020] NSWCCA 26** was the de-facto partner of an airport baggage handler who used his position to import cocaine. Around $5.4 million was found in their house, though the applicant only knew about $1 million. She pleaded guilty and was sentenced to 5 years imprisonment (3 non-parole). She appealed on the grounds that, inter alia, the sentence was manifestly unjust and the assessment of objective seriousness mistaken.

Harrison J held, dismissing the appeal, that both the finding of moderate objective seriousness and the 5 year sentence were open to the sentencing judge, who considered all the submissions raised by the applicant. The quantity of money was not insignificant and the applicant knew that it derived from crime (though not specifically that it was derived from cocaine importation). His Honour reiterated that manifest excess is not made out unless no judge exercising the discretion could reasonably have come to the result.

Proceeds of crime offence – substantial sentence of imprisonment not manifestly excessive

The applicant applied for leave to appeal against his sentence for proceeds of crime offences that related to the activities of a Vietnamese money laundering syndicate, as part of a more complex drug trafficking operation: ***Musgrove v R*** **[2019] NSWCCA 245**. The applicant received a head sentence of 4 years, 6 months with a non-parole period of 2 years, 9 months, reflecting a ratio of 61.1%. Bell P refused leave to appeal. The aggregate sentence was not manifestly excessive and within the range open to the sentencing judge in her discretion considering the degree of concurrency between the indicative sentences for the offences, the serious nature of the offences charged, and where the subjective circumstances were taken into account to a full and appropriate degree.

Proceeds of crime and abuse of process

The offender in ***Nahlous v R*** **[2010] NSWCCA 58** sold decoders (used to receive pay television without payment of a subscription to a service provider). On the last occasion before he was arrested he sold 50 to an undercover police officer and received payment of $15,000. He was charged with offences against the *Copyright Act 1968* (Cth) as well as with an offence of dealing with the proceeds of crime. McClellan CJ at CL, Howie and Rothman JJ held that he should never have been charged with the latter and that a permanent stay of

proceedings, if applied for, could not have been refused, because the proceeds flowed from a substantive offence also charged.

Unusual money laundering

The offender in ***Thorn v R*** **[2009] NSWCCA 294** was involved in the commission of GST fraud offences by himself and his partner. Because there were no joint criminal liability provisions in the Code he was only charged in respect of the offences he committed himself. He was also charged with a money laundering offence that related to the proceeds of some of his own frauds as well as the frauds committed by his partner. Howie J noted that more typically a money laundering offence relates to dealing with money the product of some other person's criminal activity so as to hide its source. In this case the offender merely transferred money obtained from fraudulent claims so that he could use it to gamble. It was found that the sentencing judge should have treated the offence as towards the lowest range of the type of offending covered by the section.

Reckless flying

Flying an aircraft recklessly leading to death and serious injury - objective seriousness and general deterrence

The respondent in ***R v Crumpton*** **[2016] NSWCCA 261** was flying a plane at a low level when it hit power cables and crashed. There were two passengers; an adult male was injured and an 11 year old girl died. The respondent was found guilty of two charges related to recklessly operating an aircraft, endangering life and endangering persons. The sentencing judge imposed suspended sentences of imprisonment (15 months and 9 months, concurrent). The Crown appealed on the basis that the sentence was manifestly inadequate. The Crown asserted errors in the assessment of objective seriousness and the approach to general deterrence.

The Court allowed the appeal. In the assessment of objective seriousness, the sentencing judge considered the fact that the maximum penalties for the offences were not substantial in relation to all criminal offences. Davies J held that this was an irrelevant consideration which infected the assessment of objective seriousness with error. His Honour also found that whilst the sentencing judge said he had considered general deterrence, it was doubtful whether it had been truly factored in. Davies J held general deterrence is a significant matter in relation to offences relating to the flying of aircraft. Smaller groups of society (such as pilots) are more likely to be deterred from offending than larger groups (such as drivers of motor vehicles). This group of people are likely to be aware of aircraft accidents, particularly those causing death. Punishment of reckless flying is calculated to come to the attention of this relatively small community of pilots. For this reason, there is a proper analogy with the effect of general deterrence on sentencing for white collar crimes: DPP (Cth) v Gregory (2011) 34 VR 1; [2011] VSCA 145 at [53].

Terrorism

Terrorist organisation membership – value judgment of terrorist organisation a matter for legislature – methods, not merits, relevant to assessing objective seriousness

The Kurdistan Worker's Party ('PKK') was listed as a terrorist organisation in 2005 under Div 102 *Criminal Code* (Cth). Australia granted Mr Lelikan refugee status in 1997 because of the persecution he faced due to his and his family's support for the PKK. From 2004 to 2015, he travelled with PKK guerrillas as a writer and interviewer, searching for his brother's grave. On his return to Australia, he pleaded guilty to being a member of the PKK and was sentenced to a community correction order.

In ***R v Lelikan*** **[2019] NSWCCA 316**, the Commonwealth DPP submitted that the sentencing judge gave impermissible weight to the nature and ideology of the terrorist organisation when assessing the objective seriousness of the offence and moral culpability of the offender. The sentencing judge determined that the PKK's ideology (national self-determination), subscription to international humanitarian law, de facto alliance with Australia during the Syrian conflict, and the selectiveness of their attacks, placed the offending on the middle to lower end of objective seriousness. The Director submitted that these value judgments lay within the realm of the legislature and not the judiciary.

Bathurst CJ agreed with most of the Director's submissions. His Honour held that the merits of terrorist organisations are a matter for the legislature that lists them as such. The organisation's activities are relevant – not the underlying ideology. In addition, Lelikan's knowledge of the PKK affected his moral culpability in joining, but this was mitigated by his torture at the hands of Turkish authorities in his youth. Nevertheless, due to the Crown's concessions before the sentencing judge, that she could consider the nature and quality of the organisation, and due to Lelikan's good behaviour while at liberty, the discretion to decline intervention and re-sentencing was exercised.

Sexual offences

Procure a person under 16 to engage in sexual activity – not all cases involve "grooming"

In ***Clarke-Jeffries v R*** **[2019] NSWCCA 56**, the applicant had pleaded guilty to Commonwealth Criminal Code offences of using a carriage service to procure a person under the age of 16 years to engage in sexual activity (s 474.26(1)) and using a carriage service to solicit child pornography material (s 474.19(1)(a)(iv)) and a State offence of making an unwarranted demand with menaces with the intention of making a gain (*Crimes Act*, 249K(1)(a)). The offending concerned the 18-year-old applicant and 15-year-old victim exchanging thousands of messages in which he asked her to send him naked photographs (which she sent), and to meet with him to have sex. He also sent messages detailing the explicit sexual acts he wanted to engage in, and used his possession of the photographs as a threat in order to demand money from her.

The appeal against a 4 year sentence was allowed. Bellew J noted that in sentencing, there was "displacement" between the judge's positive findings in relation to the applicant's youth, the victim's age and the applicant's mental state, and the ultimate sentences imposed. The judge should have found that the applicant's immaturity materially contributed to the offences, thereby lessening their criminality; that the case did not involve the grooming of a younger victim by a mature person; and the applicant's mental state meant he was an inappropriate vehicle for general deterrence. The cases relied upon by the Crown for the proposition that the sentence was not manifestly excessive each involved far more serious offending.

Domestic sexual assault compared to sexual assault by a stranger – generalisations as to relative seriousness cannot be made

The applicant in ***SC v R*** **[2019] NSWCCA 25** was sentenced for three offences: aggravated sexual intercourse without consent and two of assault occasioning actual bodily harm. They were committed in the context of a relationship where the applicant and his victim lived under the same roof. The sentencing judge imposed an aggregate sentence of 10 years imprisonment with a non-parole period of 7 years, 6 months. On appeal it was contended that the sentencing judge erred in his assessment of the gravity of Count 6 (aggravated sexual intercourse without consent), because domestic sexual violence was not of itself as serious as sexual violence committed by a stranger, and the offence was less serious because it occurred after consensual sexual intercourse. Adamson J rejected both propositions. Her Honour held that "the proposition that domestic violence, of itself, is less serious than sexual assault by a stranger only has to be stated to be rejected". Further, generalisations about seriousness by reference to whether the victim knew the offender or not cannot be made, as the consequences of both kinds of offending can be extremely significant for the victim either way. In addition, earlier consent to intercourse cannot be taken into account to mitigate the seriousness of the subsequent offending.

No error in taking into account a risk of pregnancy in an offence involving sexual intercourse

In ***KAB v R*** **[2015] NSWCCA 55** it was held by Wilson J, Ward JA agreeing, Simpson J contra, that there was no denial of procedural fairness for a judge to take into account that there was a "high risk of pregnancy" when the agreed facts included that the offender had had penile/vaginal intercourse with his stepdaughter and had ejaculated into her vagina. Neither party had raised the issue and it was an inference unilaterally drawn by the sentencing judge when she came to sentence. The offender complained on appeal that if he had known the judge was going to take it into account he would have brought forward evidence that he had undergone a vasectomy. In dissent on this issue, Simpson J considered that the risk of pregnancy was not an agreed fact and so it was wrong for the judge to have taken it into account as a matter elevating the seriousness of the offence. However, she also considered that the impact of the error was almost non-existent given the sentence for the offence in question was ordered to be served entirely concurrently with other sentences

Sexual assault - form of intercourse is relevant to, but not determinative of, seriousness

The applicant in ***Simpson v R*** **[2014] NSWCCA 23** had been in an on/off domestic relationship with the victim. The offences involved him accusing her of sleeping with another man, physically assaulting her, threatening to kill and harm her, and forcing his fingers into her vagina and wiping his fingers on her face, claiming that he could smell the other man's semen. The abuse lasted into the morning. Hoeben CJ at CL rejected the proposition that since the form of intercourse was digital and not penile, as well as short in duration, the judge had overestimated the seriousness of the offences. The Court found that the objective seriousness of sexual offences "is not confined to the nature of the act committed by the offender". The form of intercourse is important, but not the sole consideration. "Also important in assessing the objective seriousness are the degree of violence, the physical hurt inflicted, the form of the forced intercourse, any circumstances of humiliation and the duration of the offence" (at [30]). The surrounding circumstances of the case made the duration of the acts of intercourse largely irrelevant. Furthermore, the offender sought to degrade and humiliate the victim, and, looked at in context, the offences involved substantial violence.

Sexual assault - relationship between offender and complainant a relevant consideration

NM was convicted of five counts of sexual assault against the complainant all occurring on a single evening. The complainant had been in a relationship with NM until the month before and had invited him to her home for sex on the night the offences occurred. NM appealed against the sentence of 9 years 6 months with a non-parole period of 6 years 6 months on the ground that it was manifestly excessive. Allowing the appeal in ***NM v R*** **[2012] NSWCCA 215**, Macfarlan JA found that the sentencing judge had erred by assessing the offences as in the mid-range of seriousness and failing to attach significance to the relationship between M and the complainant.

His Honour held (at [58]-[59]) a prior sexual relationship between an offender and complainant might, depending on the circumstances, be an important mitigating factor in determining sentence for an offence of sexual assault. This assault could not be equated to those involving strangers, which would be accompanied by extreme terror and fear. Macfarlan JA emphasised that he did not discount the seriousness nature of the offence of sexual assault, but viewed the offences committed by NM as falling well below the mid-range of seriousness for that offence.

Threats

Threatening harm not always less serious than causing harm

In ***Linney v R*** **[2013] NSWCCA 251** the applicant had pleaded guilty to threatening to cause injury to a judicial officer on account of something lawfully done contrary to s 326(1) of the *Crimes Act 1900* (NSW). There was an issue about the sentencing judge having assessed the seriousness of the offence by referring solely to threatening behaviour without acknowledging that an offence will be more serious if it involves the actual doing or causing of injury or detriment, all of which is contemplated by the offence-making provision. R A Hulme J held that the sentencing judge did not err in his assessment of the seriousness of

the offence. The sentencing judge did not merely compare various sorts of behaviour encompassed by the section, in which case the applicant's argument would have had force, but referred to a wide range of threatening behaviour. It was open to him to conclude that the offence fell above the mid-range, given that the threats encompassed the worst types of threatening behaviour (i.e. to kill the judge).

Wildlife offences

Illegal exportation, importation, and possession of wildlife – ICO manifestly inadequate

The applicant was an ex-rugby league player who had turned to international wildlife smuggling as a way of making money following a ban for breaching anti-doping policies. He was charged with a number of offences under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) that carried a maximum penalty of 10 years or 5 years imprisonment, as well as a proceeds of crime offence under the Criminal Code (Cth) (maximum penalty 2 years). A judge imposed an aggregate sentence of 3 years' imprisonment to be served by an intensive correction order. An inadequacy appeal brought by the Commonwealth Director was upheld and a 4 year full-time sentence was imposed in ***R v Kennedy*** **[2019] NSWCCA 242** (Payne JA and Fullerton J, with Adamson J agreeing with additional reasons).

The Court held that the 3 year ICO was outside the discretion available to the sentencing judge in view of: the maximum penalties for the relevant offences; the potentially catastrophic effect that the importation offences could have on the Australian ecosystem; the fact that some of the reptiles were listed on the CITES appendices III and II; that the offences were discrete episodes of repeat offending involving different but substantial risks to the Australian ecosystem; and in circumstances where such offending is notoriously difficult to detect. The Court went on to hold that it was not a case where the residual discretion should not be exercised because of a number of factors, including the seriousness of the conduct and range of breaches of the EPBC Act, which meant that the sentence would be of significant utility for future sentencing courts.

Chapter 5
Appeal

5. APPEAL

A. Appeal procedure

Appeals – time served

Time served pending an appeal may not count

The applicant in ***Vai v R*** **[2015] NSWCCA 303** was convicted after trial of six offences relating to the violent robbery of a club with two co-offenders committed while he was on parole for an earlier similar robbery. The criminality involved planning, violence and the use of weapons against mature-aged patrons. Five of the six offences carried maximum penalties of 25 years imprisonment. The applicant had an unfavourable subjective case that did not call for any mitigation. He was sentenced to an aggregate term of imprisonment of 10 years with a non-parole period of 6 years 6 months. He sought leave to appeal against that sentence on the ground that it was manifestly excessive. R A Hulme J refused leave and found the proposed appeal so devoid of merit that it could be characterised as "unarguable or frivolous" in the context of s 18(3) of the *Criminal Appeal Act 1912* (NSW). That provision empowers a court to order that any time spent in custody pending the determination of an appeal does not count as part of any term of imprisonment under the appellant's sentence. While s 18 was not applied in this case because the Court did not give prior warning of any such intention, future courts may be minded to do so.

Corrections to court orders

Power of Court of Criminal Appeal to amend incorrectly entered orders

Mark and Paul Akkawi successfully appealed the severity of their sentences for various kidnapping and firearm offences. There was a disparity in the appeal judgment between the sentences proposed in the body of the judgment and those recorded on the coversheet. The sentences entered on JusticeLink were those appearing on the coversheet. After the passing of almost a year from the appeal judgment, the brothers applied to the Court of Criminal Appeal for confirmation of the orders as entered on JusticeLink. In ***Akkawi v R; Akkawi v R (No 2)*** **[2013] NSWCCA 72**, the Court of Criminal Appeal (as originally constituted) observed that r 50B(2) of the Criminal Appeal Rules state that orders of the Court are taken to be entered when recorded on JusticeLink. But it held that it had the power, in its capacity as the Supreme Court, a superior court of record, to amend the sentences on the basis that the judgment did not manifest the intention of the Court.

(The Crown had filed a request for correction of the order in accordance with Criminal Appeal Rules r 50C(2) twelve days after the appeal judgment, on 29 February 2012. Apparently the error was corrected on 24 August 2012 by an Amended Notification of the Court's determination. It may be the case that the Court reflected it would need to issue reasons (at [26], "The reasons for that correction are contained herein") or that there were delays in reconstituting the original bench.)

Extensions of time

Applicant for extension of time to appeal to Court of Criminal Appeal does not need to demonstrate substantial injustice

Mr Kentwell applied to the Court of Criminal Appeal for an extension of time to apply for leave to appeal against sentence because of *Muldrock* error. The CCA applied the test in *Abdul v R* [2013] NSWCCA 247 and refused the application on the basis that substantial injustice was not made out. The High Court in ***Kentwell v The Queen*** **[2014] HCA 37; (2014) 252 CLR 601** set aside the decision of the CCA and remitted the matter for determination. The Court in *Abdul* drew on a line of English decisions that were concerned with re-opening a conviction because of a correction of law by a superior court. Reviews of old convictions may raise issues surrounding availably of witnesses and stress to victims. This is distinct from reviewing a sentence that has been imposed upon wrong sentencing principle. "The wide discretion conferred on the Court of Criminal Appeal under the Act and Rules is to be exercised by consideration of what the interests of justice require in the particular case": [30]. At least in the case of an out-of-time challenge to a sentence, the principle of finality does not provide a discrete reason for refusing to exercise the power.

The High Court also considered the discretion conferred by s 6(3) *Criminal Appeal Act 1912*. When patent error is disclosed in a sentencing decision, it is the duty of the CCA to exercise the discretion afresh taking into account the purposes of sentencing and any other factors required or permitted by law. This is not to say that the Court is required to re-sentence. Furthermore, not all errors in sentencing vitiate the exercise of discretion, for example, setting a term of imprisonment before the non-parole period.

Principles applicable to extension of time to appeal

[Following the High Court's decision in *Kentwell*, the following is retained only for historical interest.]

In ***Abdul v R*** **[2013] NSWCCA 247**, the Court (Hoeben CJ at CL, Johnson and Bellew JJ) considered the principles to be applied in considering whether to grant an extension of time for an appeal based on a change of law. It was the first case brought by the Legal Aid team responsible for identifying apparent Muldrock error in cases previously refused assistance on the basis of low prospects of success.

The Crown opposed the granting of an extension of time. It relied primarily on the statements of principle of Campbell JA (Latham and Price JJ agreeing) in *Etchell v R* [2010] NSWCCA 262; 205 A Crim R 138 at [18]-[25]. Campbell JA held, at [24], that, "something beyond the presence of factors that would be sufficient to result in a sentence being varied" is required, and that it is proper to assess the appeal in a summary fashion. The Court also gave consideration to a series of "change of law" decisions in the United Kingdom regarding extensions of time, such as *Jawad v The Queen* [2013] EWCA Crim 644. In that case, the Court (Lord Justice Hughes, Mr Justice Foskett and Judge Radford) held, at [29] that an

extension would only be granted, "if substantial injustice would otherwise be done to the defendant".

In *Abdul*, the Court adopted, at [52]-[53] an amalgamation of Campbell JA's conclusion in *Etchell* with the UK approach. The "something beyond the presence of factors that would be sufficient to result in a sentence being varied" required in Campbell JA's test is the occurrence of a substantial injustice if an extension of time is refused. In undertaking that test, it is proper to assess the proposed grounds of appeal in a summary fashion.

The Court ultimately concluded that notwithstanding the conceded error, no lesser sentence was warranted in law (s 6(3) *Criminal Appeal Act 1912*). No substantial injustice could occur if an extension was refused, and it accordingly was.

In ***Alpha v R* [2013] NSWCCA 292**, Leeming JA and Bellew J agreed that the approached described in *Abdul* was to be applied in all criminal appeals where an extension of time was required. *Alpha* was also notable for Leeming JA's useful encapsulation of the relevant principles at [1]-[2]. R S Hulme AJ agreed with the orders proposed but was (mildly) critical of the degree to which the merits of the case had been examined in the principal judgment; more in keeping with an appeal than an application for an extension of time.

An extension of time to apply for leave to appeal was also required in ***WA v R* [2014] NSWCCA 92**. The applicant had pleaded guilty and been sentenced for manslaughter on 26 October 2012 and filed a Notice of Intention to Appeal on 6 November 2012. There was a grant of legal aid on 10 December 2012 but a Notice of Application for Leave to Appeal was not filed until 17 January 2014. After the Court of Criminal Appeal reserved its decision, the High Court granted special leave in *Kentwell v The Queen* and *O'Grady v The Queen* [2014] HCA Trans 113, leaving open the question of whether *Abdul* and *Alpha* were correctly decided. Notwithstanding this, the Court said that if and until the High Court revisits the principles in *Abdul* and *Alpha*, they represent the settled approach of the Court. They were not disputed in the parties' written submissions. The principle of finality also informs this approach and to ignore it would flout the time limits imposed by the legislature.

Extension of time to appeal

In ***McCall v R* [2010] NSWCCA 174**, the appellant was convicted and sentenced in late 2007. An application for extension of time to appeal against both conviction and sentence was filed on 23 December 2009. McClellan CJ at CL refused to extend the time to appeal against conviction but granted it in respect of sentence (because of the length of the 29 years 4 months sentence). The application in respect of conviction was refused on the basis of a finding that there was no satisfactory explanation for the delay and a lack of merit in the ground of appeal. Reference was made to *R v Lawrence* (1980) 1 NSWLR 122 in which the Court said (at 148, per Nagle CJ at CL and Yeldham J) "where any considerable delay has occurred, exceptional circumstances will be required before the appeal is permitted to proceed" (emphasis added).

In the subsequent decision of ***Arja v R*** [2010] NSWCCA 190, Basten JA referred (at [5]) to the reference to "exceptional circumstances" as undesirable as it suggested the imposition of a fetter on the exercise of discretion which is not to be found in the statutory scheme.

Refusal of extension of time to appeal

In ***Edwards v R*** **[2009] NSWCCA 199** there was an application for an extension of time to apply for leave to appeal against sentence when more than two years had elapsed since the applicant received a suspended sentence of imprisonment. She had breached the good behaviour bond by the commission of further offences and the order of suspension was revoked and the sentence activated. The Court refused the application for extension of time. Johnson J (at [9] – [18]) set out a variety of matters that were relevant to consideration of such an application aside from the merits of the appeal itself.

Fact finding (appellate)

Findings of fact – proper approach to challenge on appeal – (does "mistakes the facts" mean "makes a mistaken finding on the facts"?)

In ***Hordern v R*** **[2019] NSWCCA 138**, the applicant pleaded guilty to indecently assaulting two young girls in circumstances of aggravation and breaching an extended supervision order. The primary judge made a finding of fact in relation to pre-planning of the offence which was challenged on appeal. The Court of Criminal Appeal (Basten JA, Hamill and Lonergan JJ) agreed that the finding of fact was not open to be made by the sentencing judge. There was, however, a discussion of the principles relevant to the proper approach to challenges to findings of fact on appeal.

Basten JA (with whom Hamill J specifically agreed) noted the differing views of the members of the Court on this issue. He noted that in his earlier judgment of *Clarke v R* [2015] NSWCCA 232 (again with the in principle agreement of Hamill J), he rejected the approach taken by previous authorities (including *O'Donoghue*) that "factual error can only be found where there is error of law or something very close to it" (at [6]). His Honour extracted the relevant points from his judgment in Clarke v R, in which it was said that such a "constrained approach" is not supported by authorities in *Kyriakou* (where appeal courts should examine issues of fact for themselves), *House v The King* (where appellable errors include a primary judge having "mistaken the facts") and *Kentwell* (where the sentencing discretion miscarries if the judge "mistakes the facts or does not take into account some material consideration"). Basten JA then went on to provide additional points in support of the proposition that "if the court is satisfied that the sentencing judge made a mistake with respect to a particular factual finding, which was material to the exercise of the discretionary power, the court should identify error and then enter upon its own consideration of the appropriate sentence" (at [36] in Clarke).

First, Basten JA said that the jurisdiction of the Court comes from the *Criminal Appeal Act 1912* (NSW), in which s 6(3) does not constrain the grounds on which a court may intervene. Further, the Court is not limited to the evidence before the sentencing judge, but has the

specific powers conferred in s 12(1). Second, the principles of statutory interpretation preclude an approach that implies limitations where they are not clearly manifested in the express words of the statute; particularly where such a limitation would restrict personal liberty. Third, it would be anomalous in view of the executive powers of the court to reconsider a sentence on the basis of factual error under Part 7 of the *Crimes (Appeal and Review) Act 2001* (NSW), that it could not do so under a conventional appeal in s 5(1) of the Criminal Appeal Act 1912 (NSW). Fourth, the judgment of Barton ACJ in *Skinner v The King* (subsequently referred to with approval in *Lacey, Kentwell* and *Betts*), is authority for the proposition that "[t]o give weight to a fact not proved in evidence must be a material error" (at [13]). Fifth, and finally, Basten JA noted the approach in *O'Donoghue* followed *Kyriakou*, which the High Court had said "does not accurately express the role of an appellate court when a challenge is made to such a finding of fact by a trial judge". Basten JA noted that other decisions have preferred the more constrained approach, but that those decisions could be distinguished because "none provides a reasoned justification for such a position by reference to principles of statutory interpretation or general law principles underlying the administration of criminal justice" (at [15]).

On this issue, Lonergan J declined to express a view on the principles on the basis that it was not necessary to decide in the circumstances of the case. Her Honour did, however, observe that at [90]:

> "[90] Analyses by Simpson JA in *AB v R* [2014] NSWCCA 339 at [44]-[59] and Button J in *Turnbull v Chief Executive of the Office of the Environment and Heritage* [2015] NSWCCA 278 at [26]-[36] provide cogently reasoned support for the orthodox view."

OBSERVATIONS: The issue was discussed and decided by the majority of the Court without having been raised by the parties. *AB v R* [2014] NSWCCA 339, decided prior to *Clarke v R*, involved an applicant directly challenging the authority on this issue. The applicant and the Crown were each represented by senior counsel. Simpson JA provided a considered (and unanimous) decision in support of the longstanding authority.

Similarly, in *Turnbull v Chief Executive of the Office of Environment and Heritage* [2015] NSWCCA 278, decided after *Clarke v R*, Button J (Meagher JA agreeing, McCallum J declining to express a view) preferred the longstanding authority ("if it be the case that there is a real difference between the two formulations"). The five-judge bench in *Xiao v R* (2018) 96 NSWLR 1; [2018] NSWCCA 4 did not determine the issue, but said the preferable approach was one that is "consistent with the preponderance of authority in this Court".

In ***Azzopardi v R* [2019] NSWCCA 306**, the applicant sought to rely on *Hordern v R* as a basis for challenging a sentencing judge's factual finding at sentence. No submissions were made as to how that authority might support the applicant's case, and counsel for the applicant did not make any submissions on whether the Hordern position is correct or not. Though not deciding the matter, and proceeding on the basis that review of findings of fact concern whether it was open to be made, R A Hulme J noted that the view of Basten JA and Hamill J is "not an approach that has been embraced by any other member of this Court.

Confirmation that the Court of Criminal Appeal is a "court of error"

In what was described by Simpson J as a "bold and novel proposition" it was contended in ***AB v R* [2014] NSWCCA 339** that a century of jurisprudence should be overturned and that the Court should adopt a position of making its own assessment of the facts of a case regardless of findings made by a judge at first instance. In short, it was submitted that the Court should adopt the approach applied in civil appeals of applying *Warren v Coombes* [1979] HCA 9; 142 CLR 531 and *Fox v Percy* [2003] HCA 22; 214 CLR 118. After a detailed review of the jurisprudence (in the absence of other than "pithy" argument in support of the proposition but is of interest nonetheless as to the Court's jurisdiction) it was held that no proper basis had been advanced to warrant a major departure from established authority and practice.

Conduct of counsel at sentence hearing in taking no objection to agreed facts is binding on applicant

The applicant, a former police officer, pleaded guilty to and was sentenced for a range of corruption related offences. At the sentence hearing a statement of agreed facts was tendered by the Crown. Counsel for the applicant tendered a bundle of documents which included an incomplete statement of facts. It was, nonetheless, indicated by the applicant's counsel that the applicant consented to the tender of the agreed facts. On appeal, the applicant contended, inter alia, that the sentencing judge erred in fact-finding: ***CL v R* [2014] NSWCCA 196**. Adamson J rejected the contention, finding that the applicant was bound by the conduct of his counsel at the sentence hearing. Her Honour noted that exceptional circumstances must exist to permit an applicant on appeal to depart from the approach taken by counsel in a lower court.

Jurisdiction

"Conviction" in s 5(1) Criminal Appeal Act 1912 includes where a guilty verdict has been returned but no formal conviction has been entered

In ***Cabot (a pseudonym) v R* [2018] NSWCCA 265**, the appellant was tried for offences of aggravated indecent assaults contrary to s 61M(2) (nine counts) and sexual intercourse with a child contrary to s 66A(2) (two counts) committed against his stepson. The jury acquitted the applicant of three courts, returned a guilty verdict for two counts, and could not reach a verdict for the remaining counts. The appellant appealed to the Court of Criminal Appeal under s 5(1) *Criminal Appeal Act 1912*, which provides that "a person convicted on indictment may appeal under this Act to the court: (a) against the person's conviction …". As the appellant had not yet been sentenced, the Court was required to be satisfied of its jurisdiction to hear and determine the appeal.

Leeming JA followed the approach applied in *R v MAJW* [2007] NSWCCA 145; (2007) 171 A Crim R 407. First, His Honour accepted that a jury's verdict is not the judgment of the court and imposes no liability, but does have the legal consequence of a judgment of conviction, and that the word "conviction" has multiple meanings that turn on the context in which it is

used. His Honour was, however, concerned to avoid producing improbable or capricious results as a matter of the statutory construction of the word "conviction" in this context. To this end, His Honour noted the close correlation between the right of appeal "against the person's conviction" in s 5(1)(a) and the judge's power to refer a question of law to the Court of Criminal Appeal in s 5A(1) to be dealt with as a s 5 appeal, and held that it would be a strange result if s 5A(1) but not s 5(1)(a) were available in the absence of a formal conviction. Similarly, it would be strange if it were held that a jury's verdict is sufficient for s 5(1)(a) but not for s 5(1)(b), where the two paragraphs are intended to cover the field. Therefore, Leeming JA concluded that the appellant had a right to appeal under s 5(1) following a guilty verdict, even if no formal conviction or sentence has taken place.

Whether a conviction appeal may be heard on behalf of a deceased offender

Frederick McDermott was convicted of murder in 1947 and sentenced to death, later commuted to life imprisonment. A subsequent Royal Commission found that the jury in his trial might have been misled by incorrect evidence, and Mr McDermott was released in 1952. He died in 1977. The remains of the victim were not discovered until 2004. Neither the location of the body nor the injuries sustained were at all consistent with the case Mr McDermott was convicted upon. The Attorney General referred the case to the Court of Criminal Appeal for a review of conviction under s 77 of the *Crimes (Appeal and Review) Act 2001*.

The Court determined, as a threshold matter, that it was irrelevant to the exercise of the power under s 77 that the offender was deceased. In making that finding, Bathurst CJ held, "The fact that a wrongly convicted person has died does not mean an injustice has not occurred". The conviction was overturned and a verdict of acquittal entered: ***A reference by the Attorney General for the State of New South Wales under s 77(1)(b) of the Crimes (Appeal and Review) Act 2001 re the conviction of Frederick Lincoln McDermott*** **[2013] NSWCCA 102**.

Practice

Unreasonable verdict – appellate court should not view recorded evidence unless in an exceptional case for a real forensic purpose

Pell was convicted of child sexual offences in a second jury trial, the first having been unable to return a verdict. The prosecution were obliged to call witnesses who gave evidence of practices inconsistent with the complainant's account. While leave to cross-examine was granted, much of this evidence went unchallenged – the prosecution sought to show that the practices left open a reasonable *possibility* of the offending taking place. The High Court held unanimously that, in fact, the prosecution were required to exclude the reasonable possibility of the offending *not* taking place – an issue further confused by defence counsel's assertion of "impossibility": ***Pell v The Queen*** **[2020] HCA 12**.

Pell appealed, unsuccessfully, to the Victorian Court of Appeal, which watched the video recordings of evidence and conducted a view of the cathedral. The High Court criticised

this, holding that the mere availability of recordings is not enough to justify watching them on appeal – there must be some real forensic purpose, likely only to arise in an exceptional case on application by the parties.

The advantage of the jury is not the mechanical or technical advantage of access to the evidence (the sort of advantage replicated by recordings), but a "constitutional" advantage: the jury's role as a unanimous representative of the community leaves it best placed to determine credit and reliability. An appellate court's analysis, therefore, should proceed on the basis that the jury assessed the complainant's evidence as credible and reliable, and ask – notwithstanding that assessment – whether a rational jury should have entertained a reasonable doubt.

Here, the unchallenged evidence of direct inconsistencies and inconsistent practices should have enlivened a reasonable doubt. The conviction was quashed and a verdict of acquittal entered.

Appropriateness of appeal judges viewing video recordings of complainant's evidence

CLC was convicted of four offences involving sexual assaults committed upon his step grand-daughter. Two video recorded interviews to police became the complainant's evidence in chief at the trial. Her cross-examination at trial was also recorded. It was contended on appeal that the verdicts were unreasonable and could not be supported by the evidence. There was reliance upon inconsistencies in the two interviews. At the hearing of the appeal there was a discussion about whether the Court should view the video recordings. Initially, counsel for CLC invited the Court to do so but withdrew from this position after the hearing. The Crown agreed that the appeal could be determined without the court viewing the recorded interviews. The appeal was dismissed, but the members of the Court took different views about the appropriateness of viewing the recordings: ***CLC v R*** **[2015] NSWCCA 248**.

Basten JA viewed the recordings for the purpose of resolving uncertainties evident in the transcript of the interviews. His Honour did not consider that this approach would lead to potential unfairness to the applicant. Wilson J and RS Hulme AJ expressed reservations about the appropriateness of viewing the recordings. Wilson J was satisfied of CLC's guilt based on the transcript of the evidence and did not consider it "necessary or even desirable" to view the recordings. RS Hulme AJ also elected not to view the recordings coming to the view that it was unnecessary following his consideration of the transcripts.

Refusal to listen to recording of summing up where transcript is uncontested

A man was convicted of two sexual offences committed against his stepdaughter. In ***Versi v R*** **[2013] NSWCCA 206**, Basten JA (Latham J agreeing, Adams J differing on this point but agreeing with the result) held that it was not appropriate for the Court to listen to the summing up of the trial judge, either in whole or part, in order to assess whether the trial judge's directions with respect to coincidence and tendency evidence were confusing and misleading. The transcript was corrected by the solicitors for the applicant and was provided to the Court without objection from the respondent. Nor was it contended that

any words noted as untranscribable were of critical importance. Furthermore, there is no way for an appellate court to be sure that the sound recording conveys an accurate impression of what the jury heard. In addition, there is a question as to the extent an appeal court should seek to place itself in the shoes of the jury, as well as time and resource considerations. Adams J agreed to listen to the portions of the summing up concerning coincidence and tendency evidence, accepting that there were some obscurities and misspeaking but not such as to lead to a risk that the jury would have been confused or misled.

Court undertaking its own research

DPP (Cth) v De La Rosa **[2010] NSWCCA 194** is notable for an issue concerning the Court carrying out its own research. The Court requested assistance from the parties in identifying cases in which sentences had been imposed for similar offences throughout Australia. In response, the parties referred the Court to a relatively small number of such cases. McClellan CJ at CL conducted his own research and located another 78 decisions. Further submissions were invited from the parties. Different views were expressed in the judgment regarding the appropriateness of the course taken.

Allsop P (at [71]) said that neither party put any submission against the Court undertaking research and so there was no need to definitively deal with the issue. It would appear, however, that he was not necessarily convinced that such a course was appropriate in the context of a Crown appeal. Basten JA (at [73] and [129]) was of the view that the course taken was inappropriate and demonstrated a departure from established practice in relation to the proper role of an intermediate criminal appeal court. The Court should not have required the parties to have undertaken further research and should not have engaged in further research itself. If the prosecutor's case was inadequate, the appeal should have been dismissed on that basis. However, Simpson J expressed the view (at [283] – [290]) that on occasion it is both appropriate and desirable that the court undertake its own research, especially in circumstances where the Court does not receive adequate assistance.

Unhelp actions of senior counsel deprecated

Unhelpful actions of counsel in the conduct of an appeal were the subject of criticism in **Rasic v R; Johnny Lee Vella v R; Damien Charles Vella v R [2009] NSWCCA 202**. The three appellants were represented by the one senior counsel who prepared separate written submissions for each. Six grounds of appeal had been notified but counsel informed the court at the hearing of the appeal that only one ground was being pressed. That ground asserted that the verdicts were unreasonable and could not be supported having regard to the evidence at the trial. Johnson J (at [7] – [12]) deprecated the voluminous and repetitive nature of the submissions, the late notice of the abandonment of five of the grounds of appeal and the need for leave to appeal to be sought when the ground being pressed did not involve "a question of law alone".

Procedural fairness

Denial of procedural fairness in resentencing by Court of Criminal Appeal

A 16-year-old boy killed a 15-year-old girl by stabbing her 48 times. He was found guilty of murder and sentenced to 22 years' imprisonment. On appeal it was conceded by the Crown that "Muldrock error" infected the sentencing: *DL v R (No 2)* [2017] NSWCCA 58. However, the majority determined that no lesser sentence was warranted and the appeal was dismissed. The sentencing judge had found that it was probable that the appellant was acting under the influence of some psychosis at the time of the murder and he was not satisfied beyond reasonable doubt that there was premeditation or an intention to kill. Aside from describing the findings as generous, the prosecutor in the CCA did not challenge them. However, the majority made findings that were adverse to the appellant, partly on the basis of evidence tendered "on the usual basis".

It was held in ***DL v The Queen*** **[2018] HCA 32; (2018) 92 ALJR 764** that the parties were not on notice that the findings of the primary judge might not be applied. There had been a denial of procedural fairness and therefore a miscarriage of justice. It was unnecessary to address a second ground of appeal which invited the High Court to state a principle respecting the power of an appellate court to substitute aggravated factual findings for the unchallenged findings of a sentencing judge.

Trial judge not disqualified from sitting on Court of Criminal Appeal

The Commissioner of Police applied to the Court to set aside an order to produce in relation to documents pertaining to a reward that was thought to have been paid to a significant prosecution witness. The application was upheld by a single judge of the Court but it was then sought to have the issue determined by the full Court (see s 22 of the *Criminal Appeal Act 1912*). At the outset of the hearing in ***Perish v R; Lawton v R*** **[2015] NSWCCA 237** an application was made that one member of the Court should recuse himself on the basis that he had been the trial judge. Price J said that the issues before the Court had nothing to do with issues raised during the trial and noted that the verdicts had been returned by a jury, not by himself as trial judge. Accordingly, there was no basis to conclude that a fair-minded lay observer might reasonably apprehend that he might not bring an impartial and unprejudiced mind in determining the issues for decision on the application.

Requirement to give reasons

Sufficiency of reasons by appellate court in unreasonable verdict appeal

BCM was charged, in Queensland, with three counts of indecent treatment of a child under 12. He was convicted of two of those counts, with the jury being unable to reach a verdict on the third. He appealed his conviction to the Court of Appeal of the Supreme Court of Queensland, arguing, inter alia, that the verdict was unsafe and unreasonable (referring to *SKA v The Queen* [2011] HCA 13; (2011) 243 CLR 400). The QCA succinctly dismissed the appeal in *R v BCM* [2012] QCA 333. The conclusion in relation to the unreasonable point was stated by Chief Justice de Jersey at [24]:

Having reviewed the evidence as required, I am satisfied these convictions are not unsafe. This is a case where the jury, alive to the competing considerations, were entitled, reasonably, to accept the evidence for the prosecution and convict.

The High Court (Hayne, Crennan, Kiefel, Bell and Keane JJ) held in ***BCM v The Queen*** **[2013] HCA 48; (2013) 88 ALJR 101** (at [31]) that the obligation to provide sufficient reasons in such a case "was not discharged by observing that the jury was entitled to accept [the complainant's] evidence and act upon it". However, rather than remitting the matter, the Court then examined criticisms of the evidence that were advanced in support of the unreasonable verdict ground and held that "none of the criticisms of [the complainant's] evidence discloses inconsistencies of a kind that lead, on a review of the whole of the evidence, to a conclusion that it was not open to the jury to convict".

Rule 4

Rule 4 of the Criminal Appeal Rules

Four grounds of appeal were raised in ***Greenhalgh v R*** **[2017] NSWCCA 94**, each concerning criticisms of the trial judge's summing up. Rule 4 of the Criminal Appeal Rules applied to each ground. Basten JA analysed the application of r 4. Button J agreed without qualification. N Adams J agreed generally but added a comment.

As to the application of r 4, Basten JA (at [8]-[9]) was doubtful (at least) of reliance by the Crown upon what was said by McHugh J in *Papakosmas v The Queen* (1999) 196 CLR 297 at 319 [72] (the Court must be satisfied that the asserted error or failure caused a miscarriage of justice). Basten JA noted that Gaudron and Kirby JJ (at 311 [44]) expressly disassociated themselves from that statement. (The other two members of the court (Gleeson CJ and Hayne J) said nothing about it.) Basten JA (at [10]-[11]) was also negative in his treatment of two other often cited authorities on r 4: *R v Tripodina* (1988) 35 A Crim R 183 and *R v Abusafiah* (1991) 24 NSWLR 531. His Honour (at [14]) made a number of points in relation to the purpose and effect of r 4 but added that it was not possible to be prescriptive. He continued:

> "It must, in some sense, be in the interests of justice that leave be granted; otherwise leave should be refused."

Basten JA went on to discuss "the importance of not limiting the scope and operation of a discretionary power, particularly in relation to the fairness of a criminal trial". He referred to *Nudd v The Queen* (2006) 80 ALJR 614 where (at [7]) Gleeson CJ said (at [9]), in part, "It is the fairness of the process that is in question; not the wisdom of counsel. As a general rule, counsel's decisions bind the client." Reference was also made to Gleeson CJ having said that there was a need to assess unfairness "by reference to an objective standard without an investigation of the subjective reasons for that conduct". Basten JA noted (at [19]) that an objective assessment may be inconclusive and cited as examples the possibility that the failure of counsel to raise the matter in question was attributable to tactical reasons, instructions, or inadvertence. He commented (at [20]) that inadvertence will often not be

decisive and attempts to adduce evidence from counsel to that effect should not be readily acceded to. Finally, he said that where the complaint is the failure of a judge to give a direction, "it will usually be a precondition to a grant of leave under r 4 that the omitted direction should be expressly formulated".

N Adams J added the comment that the "correct test", in her view, was as stated by Bathurst CJ in *ARS v R* [2011] NSWCCA 266 (citing the observations of McHugh J in *Papakosmas v The Queen* at [72] and drawing from *Picken v R* [2007] NSWCCA 319 at [20]-[21]):

> "The applicant must establish that he or she has lost a real chance (or a chance fairly open) of being acquitted."

Rule 4 applies where objection taken at trial but different issues argued on appeal

An objection was taken by the defence at trial to certain prosecution evidence on the basis that it was not relevant. On appeal however, notwithstanding it was conceded that the evidence was relevant, it was contended that the trial judge erred by failing to exclude it pursuant to s 137 of the *Evidence Act 1995*: ***Poniris v R* [2014] NSWCCA 100**. It was argued that r 4 of the Criminal Appeal Rules did not apply because there had been an objection at trial. Macfarlan JA concluded, first, that the trial judge was not obliged to consider exclusion under s 137 of his own motion. Secondly, after referring to authorities including *Vickers v R* [2006] NSWCCA 60; 160 A Crim R 195 and *Bin Sulaeman v R* [2013] NSWCCA 283, his Honour held that r 4 did apply: "To hold otherwise would be contrary to the purpose of r 4 and the discouragement of "armchair appeals" which that provision seeks to achieve". (Ultimately, leave under r 4 was refused; the appellant had not lost a real chance (or a chance fairly open) of being acquitted.)

Section 11 reports

Judges' reports under s 11 of the Criminal Appeal Act 1912 – whether report can be in the form of an email from sentencing judge to CCA Registrar

When sentencing for 27 counts of dishonestly obtaining a financial advantage by deception, the sentencing judge accepted a submission that the factor that the offences were committed for financial gain aggravated the offence: s 21A(2)(o) *Crimes (Sentencing Procedure) Act 1999* (NSW). In ***Whyte v R* [2019] NSWCCA 218**, it was contended that to do so was an error pursuant to s 21A(2) which precludes courts from having regard to aggravating factors that constitute an element of the offence.

The sentencing judge sent the CCA Registrar an email saying that he agreed that he ought not to have taken that factor into account. There was an issue as to whether the Court could treat the email as a report under s 11 of the *Criminal Appeal Act 1912*. Simpson AJA with Ierace J agreeing (Wilson J dissenting on this point) held that the judge's email could be treated as a s 11 report, to the extent and for the purpose of confirming that the sentencing

judge had not taken financial gain into account as an aggravating factor, as might have been permissible, because he considered it to be beyond the norm for such offences.

Judge's reports under s 11 Criminal Appeal Act – circumstances in which a report would be considered or disregarded

The applicant in ***Cummins v R*** **[2019] NSWCCA 163**, concerning severity of sentence, pleaded guilty to a number of armed robberies in the south western suburbs of Sydney. The sentencing judge purported to provide a report under s 11 of the *Criminal Appeal Act 1912* (NSW) in which he sought to inform the appellate court that he did not accept ground 1 and to justify the matters identified in ground 3. The Court of Criminal Appeal refused to consider the judge's report.

Price J (with whom Bathurst CJ and N Adams J agreed) referred to *Zhang v R* [2018] NSWCCA 82, and to the analysis cited therein by Wood CJ at CL in *R v Sloane* [2001] NSWCCA 421; 126 A Crim R 188. There, the permissible functions of s 11 Reports were set out, including to inform the appellate court of problems or irregularities which may raise significant doubt about a guilty verdict that do not appear on the face of the record, or in response to a specific request from the Court of Criminal Appeal. Only in exceptional circumstances should a s 11 Report be provided to justify or explain a decision; otherwise, justification of such matters should only be included in the Reasons for Sentence and nowhere else. Price J did not consider that there were any exceptional circumstances justifying the provision of the report, and the Court agreed that it would disregard it.

Suitor's Fund

Suitors Fund Act certificate unavailable when an appeal withdrawn

It was held in ***Director of Public Prosecutions (DPP) v Moradian, Saliba and Sparos*** **[2010] NSWCCA 27** that a certificate under the *Suitors Fund Act* 1951 is unavailable where an appeal is withdrawn. On the day of hearing, the prosecutor withdrew an appeal under s 5F(2) against the refusal of a magistrate to grant an application for witnesses in committal proceedings to give evidence by audio visual link, saying that the issue would be revisited in the Local Court on the basis of further evidence. The respondents sought a certificate under the Suitors Fund Act. The Court (Basten JA, Howie and Johnson JJ), however, noted that s 6(1)(a) only applied to an appeal to the Supreme Court that "succeeds". This appeal was withdrawn and dismissed and so did not "succeed".

B. Conviction appeal

Apprehended bias (appeal ground)

Reasonable apprehension of bias

The appellant in ***Tarrant v R*** **[2018] NSWCA 21** was charged with the murder of her partner with whom she had a turbulent relationship. The Crown case was that she had incapacitated the victim with sleeping pills before he was killed by another man who was her sexual partner. The evidence of psychiatrists called by both parties was that the appellant was suffering from "battered-woman syndrome". The jury returned a verdict of not guilty of murder but guilty of manslaughter on that basis. Ms Tarrant was subsequently called to give evidence in the trial of the principal offender. Certain things said by the trial judge during both trials were said to give rise to a reasonable apprehension of bias but the trial judge refused to recuse himself.

An appeal against conviction was allowed. Basten JA held that a lay observer might well think that the judge might have stepped beyond the role of an impartial arbiter and so there was a reasonable apprehension of bias. His Honour enunciated a number of key principles applicable to the "double might" test of apprehended bias. First, that it is public confidence in the administration of justice which is sought to be preserved. Secondly, that the test is objective, being a third party's assessment of the judge's conduct and capacity. Thirdly, that the test is two-staged, it being necessary to articulate the connection between the events giving rise to the apprehension and the possibility of departure from impartial decision-making. Fourthly, that the use of the term "might" lowers the threshold below the balance of probabilities.

Basten JA held that the trial judge's recusal judgment was of very limited value. His Honour held that in light of the judge's conduct, particularly that relating to the expert witnesses' testimony, and the active way in which the judge intervened in the witnesses' examination, might have led an objective lay observer to perceive an apprehension of bias. At [72], his Honour found that the lay observer might have thought that the judge would not make findings of fact based on the evidence or the prosecution case, but on the judge's pre-judgment.

Admissibility of evidence on appeal

Admissibility on appeal of post-conviction admissions

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

Incompetence of counsel (appeal ground)

Incompetence of counsel – principles

In ***Roach v R*** **[2019] NSWCCA 160**, the applicant appealed against his conviction following a trial for offences including conspiracy to dishonestly obtain a financial advantage (contrary to s 192E *Crimes Act 1900* (NSW)). Ground 4 of the appeal was that he was denied a fair trial or deprived of a fair chance of acquittal due to the incompetence of his trial counsel. The Court of Criminal Appeal (Bathurst CJ, Bell P, Johnson J agreeing) dismissed Ground 4. Noting the statements of principle in recent case law, the Court held that in relation to making out an incompetence of counsel ground, it "is necessary for an applicant to establish that what did or did not occur at trial occasioned a miscarriage of justice".

The Court considered that the "strong allegations" made against trial counsel by the applicant constituted the necessary "exceptional circumstances" to justify the use of an affidavit from trial counsel (read by the Crown). The Court held that the applicant needed to "demonstrate that there is a significant possibility that the acts or omissions of which he complains affected the outcome of the trial", which "involves a practical and substantive inquiry". Applied to the facts of this case, the Court considered that "the objective circumstances" contained in the record of trial did not support the applicant's complaint in Ground 4. The Court considered this conclusion was fortified by the response of trial counsel contained in his affidavit. Ground 4 was rejected.

Principles governing allegations on appeal of incompetence of counsel at trial

The applicant in ***Alkhair v R*** **[2016] NSWCCA 4** was convicted of aggravated break, enter and steal contrary to s 112(2) of the *Crimes Act 1900*. He appealed on a number of grounds alleging that the incompetence of his counsel denied him a fair trial including the opportunity to give evidence and call certain witnesses. Macfarlan JA dismissed the appeal finding that it was not open to conclude that there was a miscarriage of justice whereby the applicant lost a chance of acquittal. A consideration of the objective features of the trial show counsel followed a reasonable course in an attempt to secure an acquittal for the applicant. His Honour considered a range of authorities concerning allegations of this nature and distilled four principles governing such appeals at [31]:

> "(1) To the extent possible, an appellate court should determine an appeal involving complaints about a trial counsel's conduct of a case by examining the record of the trial to determine from the objective circumstances whether the accused has had a fair trial.
>
> (2) Ordinarily, an affirmative answer to this question is required where the impugned conduct is capable of being rationally explained as a step taken, or not taken, in the interests of the accused. This is so even if the accused alleges on appeal that he or she did not authorise the conduct because the nature of the adversarial system means that the client is bound by the manner in which the trial is conducted on his or her behalf.

(3) Only in exceptional circumstances will an appellate court find it necessary to resort to subjective evidence concerning the appellant's legal representatives' reasoning at trial or to evidence as to communications between the appellant and those representatives.

(4) The ultimate question for an appellate court is whether the appellant has established that what occurred at the trial gave rise to a miscarriage of justice in the sense that the appellant lost a chance of acquittal that was fairly open."

Admissibility of affidavit of trial counsel on conviction appeal where incompetence alleged

Mr Ahmu was convicted of a number of sexual assaults. At trial, in the course of cross-examination of the complainant, prejudicial evidence was adduced and made available before the jury. Mr Ahmu appealed against conviction arguing that his trial counsel was incompetent in adducing such evidence. In ***Ahmu v R; DPP v Ahmu*** **[2014] NSWCCA 312** , a question arose as to the relevance of an affidavit of trial counsel, adduced by the prosecution as evidence of how the prejudicial material came to be before the jury. The appeal was ultimately dismissed, but there was a divergence of opinion regarding the relevance of the affidavit. Basten JA held that the affidavit was inadmissible finding that "it took the matter of miscarriage no further than the inferences available from the course of the trial" (at [31]). Adams J disagreed, finding that the affidavit revealed the reasons for trial counsel's approach to the cross examination of the complainant and was therefore admissible. Fullerton J did not find it necessary to decide on the admissibility of the affidavit.

Misconduct of counsel sufficient to cause a miscarriage of justice

Matthews v R **[2013] NSWCCA 187** concerned, relevantly, an appeal against conviction on the basis that defence counsel had been so negligent as to engender a miscarriage of justice. The ground of appeal was not upheld, the Court holding that the complaints were without substance. In so doing, the Court, at [63], noted the important features in an inquiry on appeal into asserted misconduct of counsel below:

1. Counsel for the accused is vested with responsibility for and control over the conduct of the case.
2. Unfairness is not established by a rational choice by counsel at trial leading to an adverse outcome for an accused.
3. The inquiry is objective search for a reasonable explanation for the impugned action.
4. But despite the above, evidence relevant to the subjective position of counsel, such as the accused's instructions, may in exceptional circumstances be relevant.
5.

Inconsistent/unreasonable verdicts (appeal ground)

Inconsistency of verdicts – disagreement as to extent to which jury's failure to agree on some counts can be used to underpin ground of appeal

The applicant in ***Daaboul v R*** **[2019] NSWCCA 191** pleaded not guilty to eight counts of sexual assault offences. The jury could not agree on verdicts for counts 1-7, but convicted the applicant for count 8. Relevantly, counts 7 and 8 arose out of the same incident, where count 7 was an allegation of choking so as to render the complainant incapable of resistance with intention of enabling the applicant to commit sexual assault, and count 8 was an allegation of aggravated sexual assault where the applicant inflicted actual bodily harm by choking the complainant. The applicant appealed his conviction on the final count on two grounds. The appeal was allowed and the verdict on count 8 was quashed on the basis that the verdict on count 8 was unreasonable and not supported by the evidence (ground 2).

The other ground of appeal (ground 1) considered by the Court was the inconsistent verdicts ground – the issue was the extent to which the applicant could rely on the jury's failure to agree on counts 1-7 to demonstrate that the verdict was inconsistent. Bathurst CJ, Bell P and Hamill J all came to the same conclusion that there was no inconsistency between guilty verdict for count 8 and the failure of the jury to agree on counts 1-7. Bathurst CJ and Bell P, however, expressed reservations about whether the principles relating to an appeal ground based on inconsistent verdicts applies to a situation where the applicant relies on counts where the jury failed to agree to demonstrate inconsistency. Bathurst CJ held that the principles would not apply where the circumstances of each charge and supporting evidence are different. In addition, his Honour said that "it could not be said that a failure to reach a verdict on one charge cast doubt on the complainant's credibility such as to render a conviction on a different charge dependent on the acceptance of her evidence as illogical and unreasonable". Agreeing with the Chief Justice, Bell P noted that the risks of second guessing the jury's reasons are "very great" and that "great caution" should be exercised when entertaining a ground of appeal of this nature.

Hamill J did not share the reservations expressed by Bathurst CJ and Bell P on the issue of the extent to which the jury's failure to agree on certain counts could underpin an inconsistent verdicts ground of appeal. Hamill J preferred the approach in which "the jury's failure to reach a verdict, in particular circumstances, provide some support for a ground of appeal based around an assertion that a guilty verdict reached by the same jury is unreasonable or unable to be supported". His Honour held that the relevant test is "unreasonableness rather than inconsistency" and the Court must "examine any differentiation in the verdicts to see if it can be justified".

Erroneous acceptance of a reasonable hypothesis inconsistent with guilt of murder when accused gave evidence that excluded it

The respondent in ***The Queen v Baden-Clay*** **[2016] HCA 35; 258 CLR 308** was convicted of murder. At trial he denied any involvement in his wife's death and the disposal of her body. He appealed to the Queensland Court of Appeal on the basis that the verdict was unreasonable. The QCA substituted a verdict of not guilty of murder but guilty of manslaughter, finding that there was a reasonable hypothesis that he did not have the requisite intention for murder. The hypothesis was that there was a physical confrontation in which the respondent delivered a blow which killed the deceased without intending to cause serious harm. The Crown appealed to the High Court. French CJ, Kiefel, Bell, Keane and Gordon JJ allowed the appeal and restored the murder conviction. The QCA's

conclusion was not based on evidence; it was mere speculation or conjecture. The only evidence which actually related to the hypothesis (which was evidence given by the respondent) was inconsistent with it. It is unacceptable to contend for a hypothesis on appeal which was not put to the jury for tactical reasons, which is directly contrary to the evidence of the respondent at trial, which is directly contrary to the way in which the respondent's counsel conducted the defence and which, in response to direct questions from the trial judge, was expressly rejected by the respondent's counsel. The hypothesis identified by the QCA was not open and once it is rejected, no other hypothesis consistent with guilt of manslaughter, but innocence of murder, has ever been identified at trial or on appeal. None of the hypotheses to account for his wife's death raised by the respondent at trial involved him playing any part in her death. The case was one of murder or nothing.

Trial judge's comments not to be taken into account in assessing the unreasonableness of a guilty verdict

Mr Mansaray was accused of entering the bedroom of a young female child, his niece, and having sexual intercourse with her. He was convicted by a jury of an offence of sexual intercourse with a person under the age of 16 without consent (s 61J(1) *Crimes Act 1900*). During the course of an exchange with the Crown prosecutor, the trial judge commented that, "this case is one of the weakest I've ever seen presented in these courts". Mr Mansaray appealed his conviction arguing that the verdict was unreasonable and not supported by the evidence. In ***Mansaray v R* [2015] NSWCCA 40**, the Court dismissed the appeal finding that the comments of the trial judge should not be taken into account. Hoeben CJ at CL held that the Court of Criminal Appeal should assess the evidence for itself and draw its conclusions independent of the opinion expressed by the trial judge.

A verdict of guilty cannot be inconsistent with a failure to reach a verdict on another count

The applicant in ***PA v R* [2015] NSWCCA 18** (a judgment which became publicly available in March 2016) was charged with five sexual offences against his daughter. After trial the jury returned verdicts of not guilty on three counts, guilty on one and were unable to reach a verdict on the fifth. The applicant appealed against his sole conviction on the basis that the verdict was inconsistent with the inability of the jury to reach a verdict on the fifth count. This was supported by a submission that both counts arose from the same incident yet there was nothing in the evidence to distinguish the different jury outcomes. The Crown submitted that those circumstances could not support an argument of inconsistent verdicts. There was no prior authority on the issue in this state and interstate authorities were conflicting. Hoeben CJ at CL (Johnson J agreeing, Hamill J agreeing in the result but not expressing a final opinion on the issue) rejected the ground of appeal, holding that guilty verdicts are incapable of being "inconsistent" with a failure to reach a verdict. To suggest there is no difference between a verdict of acquittal or guilt on the one hand and a failure to reach a verdict on the other is contrary to law and common sense. In reaching this conclusion, his Honour rejected Victorian authorities and instead endorsed a line of authority from Queensland, Western Australia and South Australia.

Erroneous consideration of a ground asserting that a verdict was unreasonable and not supported by the evidence

In ***SKA v The Queen*** **[2011] HCA 13; (2011) 243 CLR 400**, the appellant was convicted of a number of counts of sexual assault against a child. He appealed to the Court of Criminal Appeal on the ground that the verdicts of the jury were unreasonable and not supported by the evidence but the appeal was dismissed.

There was a real issue in the trial as to when two of the offences were alleged to have incurred. The indictment alleged a period of 25 days but the complainant suggested, without being dogmatic, that they occurred on a particular day. SKA adduced alibi evidence that accounted for his movements on that day and the days either side of it. The Court of Criminal Appeal did not make any finding as to when the offence had occurred. It did find that the complainant's evidence, if accepted, was sufficient to enable the jury to conclude that the offence had occurred. It was concluded that it was open to the jury to arrive at the verdicts that it did. Simpson J added, "to the extent that it is relevant, I would also be satisfied beyond reasonable doubt, on the evidence, that the [applicant] committed each of the offences charged."

An appeal to the High Court was upheld by a majority (French CJ, Gummow and Kiefel JJ). It was held that there had been a failure to determine the issue as to when the offences in question occurred and then to adequately evaluate the competing evidence which was the task required in determining whether the verdicts were unreasonable or unsupported.

Two other issues were considered in *SKA*: (a) whether the Court of Criminal Appeal was in error in not viewing a recording of the police interview of the complainant which amounted to the complainant's evidence in chief; and (b) whether regard should have been had to a report by the trial judge. As to (a), it was held that it was correct for the Court to have not viewed the recording. As to (b), it was said that a report by a trial judge should be confined to matters that are not apparent from the record. The judge's view of the evidence was irrelevant when it was the task of the Court to make its own assessment.

Conviction appeal from a judge alone trial where it is contended that the verdict is unreasonable or cannot be supported

In ***Arun v R*** **[2010] NSWCCA 214**, consideration was given to the principles to be applied in an appeal against conviction where it is contended that a verdict of guilty is unreasonable or cannot be supported, having regard to the evidence. Hall J (at [50] – [56]) referred to a number of authorities on the point before confirming that the Court can only intervene if, after making its own independent assessment of the evidence, it concludes that it was not open for the trial judge to have been satisfied beyond reasonable doubt of the guilt of the appellant. In undertaking that task, the credibility findings of the trial judge with respect to witnesses remain significant.

Conduct of interview with complainant in child sexual assault matter

Criticisms were made in ***GSH v R*** **[2009] NSWCCA 214** of the manner in which a 9 year old complainant had been interviewed by a Department of Community Services officer and a police officer. There were three interviews which were later tendered as the child's evidence in chief. In total the recordings spanned 5 hours and contained what the appellant's counsel on the appeal described as "re-hashing, re cross-examining, inducing confusion, adding more dates and getting the person back to run through the story again". Latham J (at [36] – [42]) agreed with this description but, despite the forensic problem created by the manner in which the complainant's evidence was presented, the challenge to the verdict as being unreasonable was dismissed.

Orders – dismiss, retrial or acquittal

Factors influencing discretion to order new trial – s 8 Criminal Appeal Act 1912

In ***A2 v R; Magennis v R; Vaziri v R*** **[2020] NSWCCA 7**, the Court considered whether to exercise its power to order a new trial under s 8 *Criminal Appeal Act 1912* (NSW). Convictions for female genital mutilation had been quashed in the CCA, but a Crown appeal to the High Court was upheld in *The Queen v A2; The Queen v Magennis; The Queen v Vaziri* [2019] HCA 35; (2019) 93 ALJR 1106. The matter was remitted to the CCA for determination of one ground, which was then abandoned.

The Court (Hoeben CJ at CL, Ward JA and Adams J) granted a retrial. The factors in favour included that there was a reasonable prospect of conviction, the abandonment of the unreasonable verdicts ground, and that it would not be unfair to retrial the appellants. The error in interpretation was not the fault of the Crown. Most importantly, the public interest in the administration of justice required the resolution of the charge. The Court considered a new trial the most effective option to remedy any potential miscarriage of justice.

Appellate discretion – following quashed conviction, whether to order retrial or verdicts of acquittal

The appellants in ***Castagna v R; Agius v R*** **[2019] NSWCCA 114** had been convicted of conspiracy to defraud or cause financial loss to the Commonwealth, and conspiracy to deal with money which was the proceeds of crime. The charges arose out of the failure to declare payments made by Macquarie Bank to a company controlled by one of the appellants, which provided the consultancy services of the other appellant, as "assessable income". The Court of Criminal Appeal allowed the appeal and quashed the convictions on the basis that the trial judge had made errors in relation to the appellants' applications for a directed verdict, and in directing the jury that it could consider the circumstances surrounding the agreements when assessing if the payments qualified as "ordinary income" which should have been declared as "assessable income".

The Court went on to consider whether to order a new trial or to direct the entry of verdicts of acquittal. Cases in which a similar question was discussed were referred to, including *King v The Queen* (1986) 161 CLR 423, *Jiminez v The Queen* (1992) 173 CLR 572; [1992] HCA 14, *Parker v The Queen* (1997) 186 CLR 494; [1997] HCA 15 and *The Queen v Taufahema*

(2007) 228 CLR 232; [2007] HCA 11. In its reasons for directing a verdict of acquittal, the Court discussed the competing considerations. On the one hand, there is the potentially strong case (although the Court noted that it is difficult to form such an assessment when a different case is proposed to be led in a new trial) and the desirability of a jury determining a verdict. However, the stronger countervailing factors in this case included the fact that the appellants were entitled to a directed verdict, that the new trial would proceed on a "new case" (a circumstance which Dawson J in *King* suggested should not be permitted), the passage of time since the events in question (10-20 years), the burden of having already undergone an eight week trial with the listing of a new trial not expected until 2020, the time already served by one of the appellants, and their advanced age (69 and 71).

Proviso (s 6(1))

Proviso in s 6(1) proviso – error in misdirection on element of offence

A woman was punched in the face, and then sexually assaulted, in 1994. That evening, she made statements to a doctor and a police officer detailing the alleged offences. As the woman had died in 2004, those statements were admitted as hearsay evidence in the trial against the applicant, which took place in August 2017 following his identification as a suspect and later DNA profile match to a semen sample taken by the doctor in 1994. The jury were directed on mental element of the offence in force at the time of the trial – s 61HA *Crimes Act 1900* (NSW) – being that one of the ways the Crown can establish the mens rea is by proving the accused had no reasonable grounds for believing the complainant consented. However, the applicable law was the law at the time of the offence, and relevantly, the then s 61R did not contain the 'no reasonable belief' component. The Crown conceded there was a misdirection. The issue then was whether the proviso in s 6(1) of the *Criminal Appeal Act 1912* (NSW) applied; in other words, that the appeal on this ground be allowed unless the Court of Criminal Appeal concluded that "no substantial miscarriage of justice has actually occurred".

The proviso was applied: ***Priday v R*** **[2019] NSWCCA 272**. Macfarlan JA referred to *Kalbasi v Western Australia* (2018) 264 CLR 62; [2018] HCA 7. There, it was held that the proviso may apply even if the error arises from misdirection on an element of the offence. In the present case, there were two counts. Count 1 was the assault occasioning actual bodily harm (the punch immediately prior to the assault). Count 2 was the aggravated sexual assault. On the appellant's case there was no punch – rather, the sexual intercourse was consensual, following on from kissing and the complainant undoing the appellant's trousers. Because the jury found the appellant guilty of the preceding assault, Macfarlan JA held that the jury could not have found the appellant guilty on the basis that he had an honest but unreasonable belief that the complainant consented to the intercourse. The conviction on Count 1 indicated that the jury accepted the complainant's account and did not consider there was a reasonable possibility that the appellant's version was correct. The conviction on Count 2 was on the basis of the complainant's account, being that the appellant positively knew there was no consent. There was no miscarriage of justice.

s 6(1) Criminal Appeal Act – proviso applies in context where Crown Prosecutor referred to evidence inadmissible against the accused

Two brothers stood trial with a third co-accused on charges of murder. The Crown Prosecutor submitted in closing that evidence only admissible against the co-accused could be used against the brothers. The trial judge immediately gave a corrective direction in which his Honour informed the jury that the Crown Prosecutor should not have referred to the evidence and directed that, except for a small amount of material relevant to one of the brothers, it could not be used against them. The brothers appealed to the Court of Criminal Appeal arguing that there was a miscarriage of justice: ***Charbaji v R*** **[2019] NSWCCA 28**. The appeal was dismissed.

The Court (Beazley P, Price and Wilson JJ) acknowledged that the Crown Prosecutor's reference was "impermissible". The issue was whether the proviso in the third limb of s 6(1) Criminal Appeal Act could be rightfully applied; whether notwithstanding a point being decided in an appellant's favour, the Court can dismiss the appeal if there is "no substantial miscarriage of justice". The Court examined the authorities on the meaning of "substantial miscarriage of justice", relying on the approach in *Kalbasi v Western Australia* (2018) 352 ALR 1; [2018] HCA 7 in which the High Court rejected approaching this assessment based on the outcome of a "hypothetical error-free trial", because the effect of error was an unknowable unknown. The Court referred to what the High Court said in *Weiss v The Queen* (2005) 224 CLR 300; [2005] HCA 81, in which error needed to be considered in every case as its nature and effect which may affect whether an appellate court can assess whether guilt has been proved beyond reasonable doubt.

Based on this approach, the Court held that its task required them to "consider each of the impermissible statements made by the Crown Prosecutor, their importance in the trial overall having regard to the other evidence in the trial, the corrective direction given by the trial judge and the other directions given to the jury". In the present case, the Court held that the trial judge's directions were sufficiently clear in explaining to the jury how they should deal with the evidence, and that having regard to the evidence admitted in the trial as a whole, the guilt of the brothers had been proven beyond reasonable doubt. The Court concluded there was no substantial miscarriage of justice.

Substituting a verdict when indictment inaccurately avers a circumstance of aggravation

In ***MM v R*** **[2018] NSWCCA 158** the appellant had been found guilty of aggravated sexual intercourse without consent contrary to s 61J of the *Crimes Act*. The circumstance of aggravation was that the victim had sustained actual bodily harm but s 61J(2)(a) requires that the harm be "intentionally or recklessly" inflicted, whereas the indictment simply averred that it was "occasioned". The judge directed the jury in accordance with the indictment and not the statutory provision.

Walton J (with whom the other members of the Court agreed), allowed the appeal and substituted a verdict under s 61I (sexual intercourse without consent). His Honour accepted that the trial judge had misdirected the jury. The verdict could only be allowed to stand if the proviso in s 6 of the *Criminal Appeal Act 1912* could be applied. His Honour considered

Kalbasi v Western Australia [2018] HCA 7 and *Lane v The Queen* [2018] HCA 28 and concluded that the proviso could not be applied because there was significant doubt that the injuries sustained by the victim were inflicted intentionally or recklessly. A verdict under s 61I was substituted and the appellant was resentenced.

Proviso should not have been applied where jury's verdict might not have been unanimous

Lane v The Queen **[2018] HCA 28; (2018) 92 ALJR 689** concerned a charge of murder in relation to two physical altercations between the appellant and the deceased, each of which was alleged by the Crown to have involved a blow capable of causing the deceased's death. The appellant was found not guilty of murder but guilty of manslaughter. On appeal the CCA held that the trial judge erred by failing to direct the jury that it must be unanimous as to which of the two actions caused the death. However, the court by majority applied the proviso to dismiss the appeal. No substantial miscarriage of justice had occurred because the jury could not have been satisfied beyond reasonable doubt that the first act caused the death.

The High Court (Kiefel CJ, Bell, Keane, and Edelman JJ, Gageler J agreeing), allowed the appeal and ordered a new trial. The majority first held that the likely effect upon the jury of the trial judge's failure to give a unanimity direction must be understood in the context of the trial; this included that the Crown alleged (and the trial judge left it open to the jury to find) that the first act was capable of causing death. The majority held that the absence of a specific unanimity direction, coupled with the trial judge's direction that it was open to the jury to convict on the basis that either acts caused the death, means that it is possible that some jurors might have convicted on the basis that the first act caused death. The majority held that this possibility could not be excluded by saying that the jury should have necessarily entertained a doubt as to whether the first act caused the death. The majority concluded that to dismiss the appeal despite the error disregarded the requirement of a unanimous verdict.

Post-conviction admissions may influence issue of retrial or acquittal

Mr P was convicted of multiple sex offences against his stepdaughter. Prior to sentence he admitted to having sexual relations with his step-daughter, which was inconsistent with his case at trial. In ***TDP v R; R v TDP*** **[2013] NSWCCA 303**, the Crown submitted that, in the event that the applicant succeeded in any of his grounds of appeal, the post-conviction admission was relevant to the application of the proviso under s 6(1) *Criminal Appeal Act 1912* (NSW) or in determining whether to order a new trial under s 8 rather than directing an acquittal. Hoeben CJ at CL expressed doubt as to whether the admission would have affected the application of the proviso; section 6(1) directs attention to the evidence that was before the jury at trial. However, his Honour concluded (at [128]) that it may have been significant if there was an issue as to whether the appropriate order was of acquittal or retrial. This is because of the tension between the public interest in the due prosecution and conviction of offenders, and the undesirability of allowing the prosecution to present a new case with fresh evidence at a retrial (referring to dicta of Johnson J *in Raumakita v R* [2011] NSWCCA 126 at [58]-[60]; 210 A Crim R 326).

Scope of conviction appeal

One indictment, one jury, one appeal

Mr Morgan had successfully appealed a conviction for two counts of robbery. Those counts had been accompanied by two counts of dealing with proceeds of crime, which Mr Morgan's counsel had declined to appeal. Before a retrial could commence, the DPP directed that there be no further proceedings for the robbery offences. Mr Morgan sought then to appeal his conviction for dealing with proceeds of crime (or for the Court to excuse his "abandonment" of the appeal in relation to those charges). In ***Morgan v R (No 2)*** **[2013] NSWCCA 80**, Beazley P confirmed the rule that one jury must proceed on one indictment and, consequently, that only one appeal may be had against a conviction against multiple offences on a single indictment. To conclude otherwise would offend the principle of finality. On the side issue of abandonment, her Honour held that it was not possible to abandon an appeal against some, but not all, convictions on a single indictment.

Conviction appeals in circumstances where the court has already ruled on an issue under s 5F of the Criminal Appeal Act 1912

The trial judge in ***DAO v R*** **[2011] NSWCCA 63** ordered that the accused be tried on an indictment containing allegations made by three separate complainants. The accused appealed under s 5F. A five judge bench was convened (Spigelman CJ, Allsop P, Simpson, Kirby and Schmidt JJ). In considering whether to grant leave to appeal, consideration was given to whether arguments advanced by the applicant and decided adversely on a s 5F appeal could be considered in any subsequent conviction appeal. Different views were expressed.

Spigelman CJ (at [15]) was of the view that a decision under s 5F does not preclude further consideration of the same issue under ss 5(1) and 6(1) of the Act. Allsop P expressed the view, inter alia, (at [107]) that his reasons for dismissing the appeal "should not have an effect on the scope of any argument or issues in any appeal under … ss 5 and 6". He found it unnecessary to decide the relationship, if any, between reasons for dismissal of a s 5F appeal and the disposition of any final appeal under ss 5 and 6. Simpson J, however, disagreed with Spigelman CJ and said that "once leave is granted, the Court has before it an appeal in the usual way" (at [206]). Her Honour felt that "a real question exists as to whether, if leave is granted, and the appeal dismissed, that issue is foreclosed, in the event of conviction, from any appeal against that conviction" (at [207]). Schmidt J (at [213]) was of the view that if the same issue as to admissibility of evidence be raised in a post-conviction appeal, considerations of issue estoppel would appear to arise for consideration.

C. Sentence appeal

Apprehension of bias (appeal ground)

Judge revoking bail part way through sentence proceedings, and other conduct, gave rise to reasonable apprehension of bias

The appellant in ***Anae v R*** **[2018] NSWCCA 73** was sentenced to imprisonment for 4 years and 6 months after having pleaded guilty to an offence of recklessly causing grievous bodily harm. At sentencing and after the Crown case was closed, the sentencing judge revoked the appellant's bail and said, "There is no sentence other than full time custody…" In the course of the appellant's counsel's submissions the judge said that counsel should not abandon her submissions because she may want to protect herself if the matter was taken on appeal. On appeal, inter alia, the appellant argued that the judge evinced an apprehension of bias.

The appeal was dismissed on the basis that no lesser sentence was warranted. Price J held that a fair minded observer might reasonably apprehend that the judge might not have brought an impartial and non-prejudiced mind to the sentencing task. He cited the decision of Callinan J in *Antoun v R* [2006] HCA 2; 224 ALR 51 and held that the principles of impartiality and procedural fairness require a judge to give some time to an offender's arguments which are to be listened to with an open mind. His Honour held that although all the factors before the sentencing judge strongly pointed to a full-time custodial sentence, the judge formed that view without giving the appellant's solicitor the necessary opportunity to present her case.

Delay

Delayed appeals against sentence can present major difficulties for the CCA and should not be tolerated

The sentence under appeal in ***Potts v R*** **[2017] NSWCCA 10** was imposed in December 2014. The application for leave to appeal was not filed until September 2016. It was unclear why the application for leave to appeal was not filed earlier. Error was established which required the CCA to re-sentence the applicant. Counsel for the applicant invited the Court to find special circumstances and reduce the non-parole period but the delay of 1 year 9 months caused difficulties. If the non-parole period was to be reduced, the applicant would have already outlasted that period in custody. Button J (Basten JA agreeing) held that post-discount, a sentence of 3 years 4 months should be imposed, commencing 24 April 2014. Basten JA observed that, with an unadjusted ratio, the non-parole period (30 months) would expire on 23 October 2016 and that date had passed before the appeal hearing took place on 2 February 2017. Basten JA (Button J agreeing) held that it would be inappropriate to find special circumstances as it would have no practical effect. The purpose of finding special circumstances is to give the offender the benefit of an extended period of conditional release on parole. That purpose would not be served in the present case because specifying an even earlier date of eligibility for release on parole would not change the applicant's period of time on supervised release.

The Court held that delay in bringing appeals is unacceptable. Basten JA said that such delay is not tolerated in civil proceedings and no such delay should be tolerated in criminal proceedings where an individual's liberty is at stake. Johnson J observed that such a delay

has a significant impact upon the discharge of the Court's functions on a sentence appeal; difficulties can arise with the Court hearing the appeal at a point so late in the sentence being served.

Issues not raised at sentence

Application of Bugmy where not raised at sentence despite evidence

The applicant in ***Kliendienst v R*** **[2020] NSWCCA 98** appealed his sentence for glassing a man who slept with his partner four years earlier. There was substantial uncontested evidence that the applicant was exposed to violence and alcohol abuse as a child, but there was no explicit reference to *Bugmy*. N Adams J granted the appeal on the ground that, inter alia, there should have been express recognition that the violent offending was caused in part by the applicant's disadvantaged upbringing, despite the failure of counsel below to submit on it.

Crown seeks to re-open and adduce fresh evidence in applicant's severity appeal

The offender in ***Barrett v R*** **[2020] NSWCCA 11** pleaded guilty to kidnapping, acts of indecency and murder. He detained, bound and gagged the victim – his wife's niece – in their shared home, photographed her, stabbed her 31 times and disposed of her body by throwing it off a cliff into a blowhole. After judgment was reserved, the Crown sought leave to bring fresh evidence that the victim was violently sexually assaulted while she was detained.

Garling J dismissed the motion for three reasons. Firstly, there was no challenge to the findings of fact below. Secondly, the new evidence was disputed, and the CCA is not suited to resolving factual disputes. Thirdly, the Crown could simply bring new charges, so there was no injustice in denying the application. His Honour dissented on the dismissal of the appeal. Bathurst CJ (Wright J agreeing) held that the 46 year aggregate sentence (34 years, 6 months non-parole) was severe but not disproportionate.

Fresh evidence of terminal medical condition may be admitted if compelling and previously unknown

In ***Lissock v R*** **[2019] NSWCCA 282**, the offender appealed the severity of his sentence for multiple child sexual assault offences. At the time of sentencing there was evidence that he suffered from cirrhosis of the liver. It was subsequently found that he had liver cancer at an advanced stage that was terminal. Button J allowed the evidence as it was compelling and not available at sentencing. He reduced the head sentence from 18 to 14 years to better reflect the greater toll imprisonment would take on the offender, but refused to make the sentence manifestly inadequate just so a terminally ill offender might enjoy liberty. That, to his Honour's mind, should be left to the State Parole Authority. Davies J dissented on varying the sentence because there was insufficient evidence to show that the illness made prison more onerous.

Approach of appellate court where submission in support of appeal ground contrary to submission made at first instance

The applicant in ***Adams v R*** **[2018] NSWCCA 139** pleaded guilty to an offence of aggravated break and enter and commit serious indictable offence. Two co-offenders were sentenced together and received identical sentences. At the urging of counsel, the same judge imposed an identical sentence to those imposed upon the co-offenders. Then, however, Mr Adams contended on an application for leave to appeal that his sentence should have been less.

Johnson J observed that a sentence appeal to the CCA is not an occasion for a rehearing of a plea in mitigation, especially where an argument is put which is contrary to what was put at first instance. His Honour noted that although the Court retains the discretion to hear new evidence in order to avoid miscarriages of justice, the High Court has held that justice does not miscarry where an appellate court refuses to allow an appellant to run a new and different case upon resentencing (*Betts v The Queen* (2016) 258 CLR 420; [2016] HCA 25 at 425-427). Leave to appeal was refused. His Honour held that the Court should not intervene because the approach urged by the appellant at first instance, and applied by the sentencing judge, was reasonably open in all the circumstances.

New facts arising after sentence – claim for backdating a sentence arises post-sentencing

The appellant in ***Little v R*** **[2018] NSWCCA 63** was arrested in July 2015 and subsequently pleaded guilty to various serious indictable offences. He was also charged on the same occasion with driving offences for which he was sentenced in the Local Court to 10 months' imprisonment. At sentencing in the District Court, the judge took into account the principle of totality and backdated his sentence to commence 4 months after the day he was arrested. An appeal against conviction for the driving offences was heard after the appellant was sentenced in the District Court and the convictions were quashed. The appellant contended on appeal of the District Court sentence that his sentence for the serious matters should be backdated to the date of his arrest.

The appeal was allowed and the sentence was backdated by a further 2 months. Hoeben CJ at CL first noted that this was an unusual case in which the sentencing judge had had regard to the principle of totality, but this was with reference to a sentence that was later quashed. Second, his Honour noted that although no error could be established, there was a close analogy to the present case in the line of authorities where a matter has been raised at sentencing but the full facts were not known at that time but have become known post-sentencing. His Honour held that the CCA could have regard to those changed circumstances.

Not erroneous for sentencing judge to fail to do that which he or she was not asked

The applicant in ***Hona v R*** **[2016] NSWCCA 119** was serving a control order in a juvenile detention facility when he was charged with recklessly causing grievous bodily harm, an offence having been committed prior to his incarceration. He was refused bail on that charge and was transferred from the juvenile facility to an adult remand facility where he

served the balance of the control order while also on remand. He was later convicted of the offence and sentenced to imprisonment for 6 years and 9 months with a non-parole period of 4 years and 9 months. He appealed against sentence on the ground that the judge erred by failing to take into account four months spent in adult custody solely referable to this offence prior to the commencement date of the sentence. The applicant asserted that the transfer to adult prison constituted "additional punishment" that should have been taken into account and reflected by some diminution of sentence or concurrency with the control order. Wilson J dismissed the appeal. The sentencing judge was never asked to allow the applicant some specific benefit on sentence to reflect the changed conditions of custody, nor was any evidence concerning such differences advanced. A sentencing judge could rarely be found to be in error for not doing that which he or she was not asked to do. An appeal is not an opportunity for a second chance at presenting a case to a sentencing court. Furthermore, to impose the degree of concurrency now sought would result in a sentence contrary to the interests of justice.

Mitigating features not relied upon below

***Pali v R* [2013] NSWCCA 65** concerned a sentence appeal based partly on the ground that the judge below had failed to take into account a mitigating factor. The offences in question were for breaking and entering and committing a serious indictable offence and for robbery. The mitigating factor cited on the appeal was the asserted fact that the offences were not part of a planned or organised criminal act. That fact had not been relied upon or identified in the hearing below, and the sentencing judge did not refer to it. Citing *Zreika v R* [2012] NSWCCA 44 and *Romero v R* [2011] VSCA 45; 206 A Crim R 519, Basten JA held that there was no erroneous failure to taking into account a relevant consideration where it had not been identified and relied upon before the trial or sentencing judge. The ground of appeal was rejected.

Approach on sentence appeal different to that taken before sentencing judge

***BT v R* [2012] NSWCCA 128** involved an appeal against sentence in respect of a number of sexual offences, in part, on the ground that the sentence imposed for count 2 was manifestly excessive. It was submitted that the judge had not adequately accounted for the effect of the applicant's mental illness. But the submissions made were substantially different from those raised before the sentencing judge. Counsel had conceded in the District Court that there was no causal relationship between mental illness and the offence whereas on appeal an attempt was made to pursue such a finding. Dismissing the appeal, Adamson J stated, "An appeal to the [Court of Criminal Appeal] is not an opportunity to recast the case presented to the sentencing judge." Her Honour referred to *Zreika v R* [2012] NSWCCA 44 where the Court said at [81]:

> "The Court will not lightly entertain arguments that could have been put, but were not advanced on the plea, and will have an even greater reluctance to entertain arguments that seek to resile from concessions made below or are a contradiction of submissions previously made."

Manifest excess (appeal ground)

Sentence appeal – submissions on excessive indicative offence do not demonstrate excessive aggregate sentence

The offender in ***TB v R*** **[2020] NSWCCA 108** committed six offences across two home invasions, including murder as part of an extended joint criminal enterprise. On appeal, the offender argued that a 38 year aggregate sentence was excessive because his liability for the murder was remote and he otherwise had a strong subjective case. Hoeben CJ at CL held, dismissing the appeal, that any excess in the indicative sentence for murder was of limited use in determining excess in the aggregate, because there was no way to tell how much accumulation and concurrency there was as between the murder sentence and those for the other very serious offences.

A sentence does not become manifestly excessive because of COVID-19

Mses Borg and Gray were sentenced for supplying a commercial quantity of meth. Ms Borg appealed, contending manifest excess while Ms Gray's appeal concerned manifest excess and parity. In Ms Borg's submission, COVID-19 was relevant not only on re-sentence but also in determining manifest excess. No evidence or authority was relied on – Ms Borg submitted, "the pandemic does not accord with principle". In ***Borg v R; Gray v R*** **[2020] NSWCCA 67**, Adamson J rejected this submission, noting that the Court hasn't the jurisdiction to overturn a sentence that was not excessive at the time it was imposed. McCallum JA agreed, finding that this form of post-sentence review was properly the domain of the Executive.

Re-sentence following successful appeal to an identical aggregate sentence

A primary school teacher was found guilty of multiple sexual offences against four students. For some reason, he was sentenced individually for the 15 counts and, with some partial accumulation, the overall effective sentence was 11 years' imprisonment. The teacher contended on appeal that the individual sentences were manifestly excessive. The contention was upheld: ***Thomas v R*** **[2019] NSWCCA 265**. Payne JA accepted the submission that the objective circumstances for the individual counts did not justify sentences that were near the halfway point of the maximum penalty; most of the individual sentences were manifestly excessive.

New individual sentences were indicated in the re-sentencing process and an aggregate sentence was imposed. The full-term and non-parole period of the aggregate sentence was the same as the previous total effective sentence. It was said (at [61]) that this was because it was concluded that the previous total sentence was not manifestly excessive.

Particularisation of specific error in grounds asserting manifest excess/inadequacy

Regina v Baker **[2017] NSWCCA 233** was a Crown appeal against sentence, where the only ground of appeal was manifest inadequacy. In submissions, however, the Crown alleged four "specific errors". McCallum J observed that the distinction between patent and latent

error is long-recognised and remains appropriate. The notion that particulars are required to support a ground of manifest inadequacy or excess is apt to blur that distinction. *R v Harris* [2015] NSWCCA 81 (where Adamson J commented that identifying specific error may assist to explain why a sentence is manifestly inadequate: at [46]) does not advocate that specific errors should be identified in support of a ground of manifest inadequacy/excess.

Judgment was given in *Hurmz v R* [2017] NSWCCA 235 a week later. The sole ground of appeal was that the sentence was manifestly excessive. It was submitted that the appellant was "unfairly disadvantaged" by the sentencing judge's assessment that a drug supply offence was "well into the middle range" of objective seriousness. The complaint was addressed, but Beech-Jones J noted that such complaints should be the subject of a separate ground of appeal and must establish one of the errors specified in *House v The King* [1936] HCA 40; 55 CLR 499 (citing *Mulato v R* [2006] NSWCCA 282).

Principles applying to manifest excess ground

In ***Obeid v R* (2017) 96 NSWLR 155; [2017] NSWCCA 221**, at [443], R A Hulme J compiled a statement of the principles applicable to a ground of manifest excess ([443]):

> "When it is contended that a sentence is manifestly excessive it is necessary to have regard to the following principles derived from *House v The King* (1936) 55 CLR 499; [1936] HCA 40 at 505; *Lowndes v The Queen* (1999) 195 CLR 665; [1999] HCA 29 at [15]; *Dinsdale v The Queen* (2000) 202 CLR 321; [2000] HCA 54 at [6]; *Wong v The Queen* (2001) 207 CLR 584; [2001] HCA 64 at [58]; *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25 at [25], [27]; and *Hili v The Queen; Jones v The Queen* (2010) 242 CLR 520; [2010] HCA 45 at [59].
>
> > Appellate intervention is not justified simply because the result arrived at in the court below is markedly different from sentences imposed in other cases.
> >
> > Intervention is only warranted where the difference is such that it may be concluded that there must have been some misapplication of principle, even though where and how is not apparent from the reasons of the sentencing judge, or where the sentence imposed is so far outside the range of sentences available that there must have been error.
> >
> > It is not to the point that this Court might have exercised the sentencing discretion differently.
> >
> > There is no single correct sentence and judges at first instance are allowed as much flexibility in sentencing as is consonant with consistency of approach and application of principle.
> >
> > It is for the applicant to establish that the sentence was unreasonable or plainly unjust."

Sentence appeal – focus upon the starting point of a sentence before discounting is appropriate (or not?)

In ***Xue v R*** **[2017] NSWCCA 137** divergence between members of the Court as to whether focusing upon a hypothetical starting point for a sentence before discounting deflects attention from whether the sentence actually imposed was unreasonable. Hoeben CJ at CL maintained that view and referred to what he had previous said in *Adzioski v R* [2013] NSWCCA 69 at [72] (Slattery and Bellew JJ agreeing) and *Graham v R* [2009] NSWCCA 212 at [40] (Macfarlan JA and Grove J agreeing) and to what R A Hulme J had said in *Yang v R* [2012] NSWCCA 49 at [63] (Macfarlan JA and RS Hulme J agreeing).

(The reliance upon *Yang v R* was inapt as there it was said that the focus should be on the sentence actually imposed because the argument on appeal involved an attempt to compare the starting point with statistics for sentences which had all been the product of discounting for pleas of guilty.)

Bathurst CJ (McCallum J agreeing) referred to the reasoning of Simpson J (as her Honour then was) in *TYN v R* [2009] NSWCCA 146; 195 A Crim R 345 at [33]-[34] and of Leeming JA in *McGeown v R* [2014] NSWCCA 314; 247 A Crim R 206 at [13]-[14] to the effect that where there was no dispute about the extent of discounting, the focus should be on the starting point. As Leeming JA put it, "it is necessary to have regard to the starting point lest the discounts be used to conceal and thereby sustain what might otherwise be a manifestly excessive sentence".

Five days after this judgment was handed down, in ***Tassis v R*** **[2017] NSWCCA 143** at [28], reference was again made to *Adzioski v R* for the "deflects attention" proposition. Reference was also made to *Hayek v R* [2016] NSWCCA 126 where Wilson J (Bathurst CJ and Schmidt J agreeing) said (at [90]), "It is generally neither appropriate nor helpful to take an assumed starting point of sentence as a basis upon which to argue that a sentence is manifestly excessive".

In relation to a different issue, parity, the Court recently accepted an analysis of the sentence imposed upon an appellant with that imposed upon a co-offender by reference to the notional starting points: ***AMZ v R*** **[2017] NSWCCA 184** (Hoeben CJ at CL, Price and Schmidt JJ agreeing). Curiously, however, in ***PG v R*** **[2017] NSWCCA 179** (Basten JA, Button and N Adams JJ agreeing on this point) considered a parity ground by comparing the notional starting point sentences for two offenders (that is, without their 25% discounts for pleas of guilty) but while taking into account a further 25% discount awarded the applicant for his assistance to authorities.

Manifest excess not made out by reference to small selection of cases

Mr Frahm pleaded guilty to an offence of larceny and an offence of knowingly dealing with the proceeds of crime. He took possession of proceeds that had been abandoned by robbers, with whom he was not associated, and spent some of the cash he took. He appealed his sentence on the basis of manifest excess. In so doing he referred to six cases, which he claimed involved more serious offences, but for which lesser sentences were imposed. Hoeben CJ at CL dismissed the appeal in ***Frahm v R*** **[2014] NSWCCA 10**. A small selection of cases “does not and cannot demonstrate that a particular sentence was manifestly excessive” (at [19]). Sentencing is a discretionary exercise and all that is required

is that relevant considerations (and only relevant considerations) are taken into account. An appellate court cannot substitute its own opinion for that of the sentencing judge merely because it would have exercised its discretion differently. In addition, the offences in question may be committed by various means involving different criminality, and no sentencing trend can be discerned from the six cases presented.

Summary of principles relating to manifest excessiveness

In ***Thompson-Davis v R*** **[2013] NSWCCA 75**, a sentence appeal, Campbell J had occasion to consider the principles relating to whether a sentence is manifestly excessive. His Honour helpfully collected the principles at [53] as follows:

a) manifest excess means the sentence below was unreasonable or plainly unjust;

b) there must have been some explicit or implicit misapplication of principle;

c) detection of manifest error is not purely intuitive, but is revealed by consideration of all matters relevant to the sentence;

d) a plea of manifest excess need not allege specific error;

e) consideration of past sentences may highlight excess, but must be limited to a "yardstick"; and

f) bare statistics are not useful in relation to a particular sentence unless the judge is informed of the reasons for those sentences being fixed as they were.

Judgment in DPP (Cth) v De La Rosa only to be used for general guidance

An offender sought to appeal against his sentence for importing a marketable quantity of heroin on the ground that it was manifestly excessive. He relied on the judgment of McClellan CJ at CL in *DPP v De La Rosa* [2010] NSWCCA 194 and submitted that his case fell between the second and third categories identified by his Honour. In ***Nguyen v R*** **[2012] NSWCCA 184** Davies J said (at [38]) that an applicant should be cautious about relying on the categories set out in *De La Rosa*. It is not a guideline judgment and should only be relied upon for general guidance and assistance: *Lindsay v R* [2012] NSWCCA 124 at [8]. His Honour held (at [41]) that the sentence imposed was not obviously wrong and was open to the sentencing judge; it was not manifestly excessive.

Manifest inadequacy (appeal ground)

Does an assertion of manifest inadequacy of a sentence raise a question of law alone?

The prosecutor in ***David Morse (Office of State Revenue) v Chan and Anor*** **[2010] NSWSC 1290** brought an appeal to the Supreme Court against sentences imposed in the Local Court on the ground that the sentences (s 10 bonds) were manifestly inadequate. Other grounds

were that the magistrate failed to have sufficient regard to a potentially aggravating factor and failed to have sufficient regard to the principal of totality. The appeal was brought pursuant to s 56 of the *Crimes (Appeal and Review) Act 2001* which provides for such an appeal to the Supreme Court "but only on a ground that involves a question of law alone". (There is a general provision for prosecution appeals against inadequate sentences from the Local Court to the District Court in s 23 of the Act). It was common ground between the parties that the appeal raised questions of law alone. Reliance was placed upon *Road and Traffic Authority of New South Wales v Fletcher International Exports Pty Ltd* [2008] NSWSC 936. However, Schmidt J referred to a number of subsequent authorities (*R v PL* (2009) NSWCCA 256; 199 A Crim R 199 and *Kostas v HIA Insurance Services Pty Ltd t/as Home Owners Warranty* [2010] HCA 32) before concluding that none of the grounds of appeal raised a question of law alone.

Leave to appeal

Subsequent application for leave to appeal not barred by initial refusal of leave

Mr Lowe was refused leave to appeal against sentences imposed in the District Court in 2009. A co-offender successfully appealed his sentence and had it reduced: *Sinkovich v R* [2014] NSWCCA 97. Mr Lowe then filed another application for leave to appeal. In ***Lowe v R* [2015] NSWCCA 46** the Court considered whether it had jurisdiction to hear and determine Mr Lowe's second application. The appeal was allowed, the Court concluding that the refusal of an application for leave to appeal is not a jurisdictional bar to a subsequent application. The reasoning of Davies J was based on the distinction which has consistently been drawn in the caselaw between an order refusing leave to appeal and an order dismissing an appeal. His Honour observed that there is no authority precluding a second application following the refusal of leave. Simpson J considered the issue as one of statutory construction. Her Honour found that the Criminal Appeal Act does not equate refusal of an application for leave with the dismissal of an appeal. Where a subsequent application for leave raises issues that have been determined on their merits in a previous application, there may be a discretionary bar, but, her Honour was satisfied that there is no jurisdictional bar to a subsequent application for leave.

Re-sentencing

Inadvertent sentencing error does not require full resentencing

The trial judge in ***Zeiser v R* [2020] NSWCCA 154** intended to impose the same sentence for armed robberies on the applicant and his co-offender (adjusted for the co-offender's discounts for pleas of guilty). The sentence imposed did not match this intention because the judge neglected to apply a plea discount for one of the offences. The Court held that this was merely an error of inadvertence that could be corrected without the full *Kentwell* re-sentencing exercise.

Application of s 25AA Crimes (Sentencing Procedure) Act to CCA re-sentencing where it came into force between sentence and appeal

The offender in ***Corliss v R*** **[2020] NSWCCA 65** appealed his sentence for historical child sexual offences. Between his sentence and his appeal, s 25AA *Crimes (Sentencing Procedure) Act 1999* came into force.

Johnson and Lonergan JJ, in separate reasons, dismissed the appeal. Johnson J held, Lonergan J agreeing, that if the Court had proceeded to re-sentence, he would have applied s 25AA *Crimes (Sentencing Procedure) Act 1999*. The language of the provision, confirmed by extrinsic materials, evinced a clear intent to displace any benefit an offender might glean from the historical nature of their offending. Its application to a court on re-sentencing, his Honour held, stemmed from the inclusion of the CCA in the definition of "a court" in s 3 *Crimes (Sentencing Procedure) Act 1999* and from the present tense of "is warranted in law" in s 6(3) *Criminal Appeals Act 1912*. (Brereton JA dissented.)

Administrative errors that do not impact discretion do not trigger a resentencing requirement under Kentwell v the Queen

The offender in ***Diri v R [2019]*** **NSWCCA 319** was sentenced in the District Court for several drug supply offences. At sentencing on 12 April 2019, the judge ordered a 9 month backdate to 15 July 2018. In fact, a 9 month backdate should have commenced on 12 July 2018. The offender appealed on this ground, as well as a ground that the sentencing judge erred in assessing objective seriousness.

Davies J upheld the first ground but did not embark on re-sentencing. His Honour held that the backdating error was purely administrative and had no effect on the sentencing judge's discretion, so therefore did not require resentencing per *Kentwell v The Queen* (2014) 252 CLR 601; [2014] HCA 37. The sentence was amended to be backdated to 12 July 2018. The objective seriousness ground was dismissed, as the assessment was well within the judge's discretion.

Discretion to re-sentence – whether length of sentence should be specified if court finds that a more serious aggregate sentence is warranted

RO v R **[2019] NSWCCA 183** concerned an appeal against an aggregate sentence for serious sexual assaults committed against the offender's step-daughter over a number of years. The Court of Criminal Appeal held that the sentencing judge had made errors, and allowed the appeal. The Court exercised its discretion to re-sentence pursuant to s 6(3), and came up against the question of whether a more or less severe sentence is warranted in law – and if a longer sentence is warranted, whether the Court is "required, permitted or precluded" from specifying the longer sentence that should be imposed before dismissing the appeal.

Beech-Jones J (with whom Bathurst CJ agreed) analysed the authorities, finding the Court should undertake an approach to re-sentencing consistent with *Turnbull v R* [2019] NSWCCA 97; that is, to put aside the sentence imposed at first instance. Then, his Honour continued, if the Court concludes that a greater sentence is warranted then it is not obliged to specify

what the sentence was but may instead simply dismiss the appeal (*Gal v R* [2015] NSWCCA 242; *O'Grady v R* [2015] NSWCCA 168) although it may decide to specify the sentence that was warranted (*Turnbull*). Beech-Jones J concluded that the latter approach should only be taken if warranted by "some particular circumstance" – i.e. in cases where, in applying s 6(3) to an aggregate sentence, the Court needs to "identify the particular indicative sentence that is warranted for each offence prior to the Court forming a conclusion about whether an aggregate sentence that it considers is warranted in law is more (or less) severe than the aggregate sentence the subject of the appeal".

Overall, N Adams J disagreed with the approach of the majority on this issue. Her Honour indicated that the preferred approach would be "to state the conclusion that a higher sentence is warranted without specifying it and then dismiss the appeal" consistent with Beech-Jones J's reasons in *Gal*. While agreeing that specifying the more severe sentence should only occur if warranted by a particular circumstance in the case, N Adams J was unable to concur with Beech-Jones J that a possible circumstance was the application of s 6(3) to an aggregate sentence. Her Honour's reasons for this were that in both of the proposed courses outlined by Beech-Jones J, a new aggregate sentence never ends up being imposed because "if after exercising the Court's independent sentencing discretion an aggregate sentence which is the same or higher is arrived at, it will not be imposed and the appeal is dismissed." Therefore, her Honour concluded, "it would be sufficient if it was simply noted that the new indicative sentences were higher without specifying them".

Resentencing – the correct approach to follow after the establishment of a Kentwell v The Queen error

In ***Turnbull v R*** **[2019] NSWCCA 97**, the Court of Criminal Appeal upheld a ground of appeal in which the sentencing judge erroneously asserted that the objective seriousness of the offence was aggravated because the offender was "on conditional liberty". This error required the fresh exercise of the sentencing direction: *Criminal Appeal Act 1912*, s 6(3); *Kentwell v The Queen* (2014) 252 CLR 601; [2014] HCA 37.

Simpson AJA remarked on the correct approach to be taken on resentencing. Her Honour characterised the error in this case as "all but inconsequential", but noted that it could not be said not to have affected the assessment of the sentencing discretion. The authorities, namely *Baxter v R* [2007] NSWCCA 237, *Kentwell v The Queen* and *Lehn v R* (2016) 93 NSWLR 205; [2016] NSWCCA 255 required that the Court exercise "an independent sentencing discretion" (at [40]). This means that "it is necessary to put aside the sentence imposed a first instance". In other words, it is wrong to start with the sentence imposed at first instance, then see if something different should be imposed – or otherwise that "no lesser sentence is warranted in law". The original sentence should be put out of mind, and the Court must take fresh account of the purposes of sentencing, legal requirements, agreed facts, assessment of criminality, the offender's personal factors, admissible post-sentencing factors, as well as any assessments and evaluations.

Kentwell v The Queen - if the error in the exercise of the sentencing discretion was a discrete error, the entire discretion should still be re-exercised (other than for a small subset of arithmetical or calculation errors)

The applicant in ***Lehn v R*** **[2016] NSWCCA 255** entered a plea of guilty at the earliest opportunity to aggravated dangerous driving causing death and stealing a motor vehicle. The Crown did not submit that less than the full 25% discount should apply. Without raising the issue at the hearing, the sentencing judge applied a discount of 20% on the basis that the full discount would result in a sentence unreasonably disproportionate to the nature and circumstances of the offence. It was common ground between the parties that this was a denial of procedural fairness. The Court (a bench of five judges) considered the issue of whether, if the error affected only a discrete component of the sentencing discretion (rather than the entire sentencing discretion), the CCA must re-exercise the sentencing discretion generally, or only in respect of that discrete component. The Court held that in such cases the entire sentencing discretion should be re-exercised.

Bathurst CJ held that, as a matter of language, s 6(3) of the *Criminal Appeal Act 1912* does not provide that if discrete error is found, the sentence can be adjusted to take into account of that error. Rather, it provides that if there is an error affecting the exercise of the sentencing discretion, the Court is to form its own view of an appropriate sentence. His Honour also noted difficulties with the alternative approach, including that a separate adjustment of a particular component of a sentence infected by error is inconsistent with the instinctive synthesis approach explained by McHugh J in *Markarian v The Queen* (2005) 228 CLR 357; HCA 25 at [51].

There will still be occasions where, notwithstanding error, it is unnecessary to re-exercise the sentencing discretion, including cases of arithmetical error in calculating relevant dates, or an error in the calculation of the effect of a discount where that discount was reached in accordance with proper principles. The Chief Justice discussed two cases where the CCA took a contrary approach and how the correct principle would have applied: *Daniels v R* [2016] NSWCCA 35 (where the relevant error was the imposition of an invalid parole condition) and *O'Connell v R* [2016] NSWCCA 43 (where the sentencing judge found special circumstances but erred in failing to adjust the non-parole period).

Whether the Court is required to nominate the sentence it would have imposed when a conclusion is reached that no lesser sentence is warranted in law

The applicant in ***Abdulrahman v R*** **[2016] NSWCCA 192** appealed against a 3 year 6 month sentence with a non-parole period of 2 years imposed upon him for an offence of aggravated break, enter and steal contrary to s 112(2) of the *Crimes Act 1900*. He successfully established a number of grounds so Price J (Hoeben CJ at CL agreeing) moved to resentence. Through an exercise of the Court's independent discretion Price J reached the conclusion that a starting point of 5 years was appropriate. That was greater than the starting point of the sentence at first instance so his Honour granted leave but dismissed the appeal. Bathurst CJ generally agreed with Price J's reasons but expressed the opinion that *Kentwell v The Queen* (2014) 252 CLR 601 allows for the Court to simply state the view that no lesser sentence is warranted and does not require the Court to nominate the

hypothetical sentence which would have been imposed. The Chief Justice concluded that leave to appeal ought to be refused.

Appellate court's assessment of whether some other sentence is warranted in law is to be made on the evidence that was before the sentencing court

The appellant in ***Betts v The Queen*** **[2016] HCA 25; 90 ALJR 758** appealed to the NSW CCA against sentences imposed upon him for offences of wounding with intent to murder and aggravated kidnapping. At the commencement of the appeal hearing, he handed up material "on the usual basis" that it would be admissible in the event the Court came to resentence. The material included expert opinions regarding factors said to be causative of the offences. The CCA upheld two grounds of appeal but dismissed the appeal on the basis that no lesser sentence was warranted in law. In reaching that conclusion, the Court declined to take into account the expert opinions. The appellant appealed to the High Court against that approach submitting that once error below is demonstrated, there can be no justification for the exclusion of evidence that is capable of bearing on the appellate court's determination of the appropriate sentence for an offence.

French CJ, Kiefel, Bell, Gageler and Gordon JJ dismissed the appeal holding that, exceptional cases apart, the question of whether some other sentence is warranted in law is answered by consideration of the material that was before the sentencing court and any relevant evidence of post-sentence conduct. For example, evidence of an offender's rehabilitation progress since the time of sentence is routinely received by the CCA on the limited basis that it may be taken into account on resentence. The appellant's submission is contrary to the conclusion in *R v Deng* (2007) 176 A Crim R 1 and should be rejected.

Failure to consider ceiling principle following successful conviction appeal

Paul Armstrong was convicted and sentenced for murder but then successfully appealed against that conviction. He was then convicted and sentenced in the District Court for unrelated sexual offences. Following re-trial for the murder offence, he was convicted of manslaughter and sentenced. The whole of the manslaughter sentence was accumulated on the non-parole period for the sexual offences, having the effect that the head sentence and non-parole period both expired at later dates than those of the original murder sentence.

In ***Armstrong v R*** **[2015] NSWCCA 273**, Bathurst CJ held that the judge fell into error by regarding the earlier sentences as irrelevant and failing to consider the principle that ordinarily sentences imposed in a first trial should be regarded as the upper limit of the sentence to be imposed following an appeal and second trial (the ceiling principle). The principle requires a consideration of all components of a sentence including its commencement date relative to others. The circumstances of this case are different to many other appeals on the same issue. First, conviction of a different, lesser offence followed the successful appeal. Second, both the head sentence and non-parole period of the manslaughter offence were less than those imposed for murder. Third, the sexual offences were entirely unrelated offences, meaning that apart from the ceiling principle, the only basis on which it could be concluded the sentences were to be served concurrently

would be by application of the principle of totality. However, it was not contended there was an error in approach to totality. Price J added the observation that, "It is regrettable that neither the Crown nor counsel for the applicant drew the ceiling principle, nor the cases that supported it, to the attention of the sentencing judge".

Post-sentence remorse taken into account in re-sentencing for Muldrock error

Mr Ali was found guilty by a jury of two counts of indecent assault and one count of sexual intercourse without consent. His sentence appeal was subsequently dismissed by the Court of Criminal Appeal. The appellant then brought an appeal pursuant to s 79 of the *Crimes (Appeal and Review) Act 2001* claiming *Muldrock* error. It was conceded Mr Ali should be re-sentenced and the Court of Criminal Appeal did so on the basis that the appellant's post-sentence conduct warranted a lesser sentence in law. Leeming JA in ***Ali v R* [2014] NSWCCA 45** found that firstly, Mr Ali's time in custody had been more arduous than many offenders, given the nature of his offences, and secondly, he had acknowledged his wrongdoing. This was demonstrated through the offender having signed on to rehabilitation programs before he was advised that his sentence was being reviewed. The latter finding was held to be of vital importance, given that the offender had shown no remorse at sentence. When courts give new meaning to existing statutes, the effect is retrospective. This entails that courts will also be required to have regard to evidence not available to a sentencing judge when conducting a review of sentence.

Sentence varied following acceptance of erroneous concession by Crown

The appellant had been found guilty of a number of offences, including an offence under s 61M(2) of the *Crimes Act 1900*. For this offence DS was sentenced to a term of imprisonment of 8 years with a non-parole period of 6 years. At the time of the offence the standard non-parole period for the offence was five years, but by the time of conviction it had been increased to eight years. DS appealed on the basis that the sentencing judge erroneously applied the later, higher standard non-parole period. The Crown conceded the point and the Court of Criminal Appeal acted on the concession. After DS was re-sentenced, the Crown made an application for the order to be set aside or varied. The Court in ***DS v R (No 2)* [2013] NSWCCA 313** found that the later standard non-parole period should have been applied. The increase applied to all offences under s 61M(2) *Crimes Act* whenever committed unless the offender had already been sentenced or entered a plea of guilty, neither of which had occurred. Referring to the principles in *Muldrock*, the Court concluded that a different sentence was warranted.

No fiddling with sentences imposed in the District Court

Mr Tabuan was sentenced for his part in the supply of a prohibited drug. He was present, for the purposes of security, at a sale of 460g of methylamphetamine. The jury verdict of acquittal of commercial supply could only be reconciled with a finding that Mr Tabuan did not know the quantity of drug involved. In his remarks on sentence, the judge found that Mr Tabuan would have known that the quantity of drugs involved was large, "in the order of 150 grams or thereabouts", or his presence would not have been required. Mr Tabuan appealed, and in ***Tabuan v* R [2013] NSWCCA 143**, Harrison J found that there had been an

insufficient factual basis for such a finding. But his Honour also found that no lesser penalty was warranted. His Honour also remarked, at [28]:

As an additional matter I consider that it is important to recognise that the judges in the District Court are faced on a daily basis with an almost unending onslaught of serious and complex sentencing exercises. The fact that an error or errors may be identified upon quiet reflection by others in circumstances that are unconstrained by the pressures under which the judges are required to operate is neither surprising nor derogatory. There is no doubt that the process must be undertaken according to the detailed and difficult sentencing principles that guide all sentencing judges. *But where, as in this case, the sentencing judge passes a sentence that in all of the circumstances of the case is a proper sentence howsoever it is viewed, it is not appropriate to make minor adjustments to the result in order only to give some practical recognition of or endorsement to the identified error if it is not otherwise warranted.* (Emphasis supplied)

(NOTE: *Kentwell v The Queen* [2014] HCA 37; (2014) 252 CLR 601 supersedes what was said here.)

Section 6(3)

Indicative sentences nominated notwithstanding conclusion no lesser aggregate sentence warranted

The offender in ***Maxwell v R*** **[2020] NSWCCA 94** was sentenced for 17 counts of child sexual offences against his daughter. The Crown conceded the sentencing judge erred by referencing standard non-parole periods in formulating the indicative sentences, given that those SNPPs were not operative at the time of the offending. Johnson J noted that the CCA should outline indicative offences when resentencing, particularly where those indicatives were impugned. Ultimately, his Honour came to an aggregate sentence that was higher than that below, so the appeal was dismissed.

The meaning of 'some other sentence" under s 6(3) of the Criminal Appeal Act 1912

In ***McMahon v R*** **[2011] NSWCCA 147**, a severity appeal in respect of sentences imposed for 81 offences, the Court was invited to determine the interpretation of the phrase "some other sentence" in s 6(3) of the *Criminal Appeal Act 1912*. Different views had been expressed by Basten JA and Price J in *Arnaout v R* [2008] NSWCCA 278; (2008) 181 A Crim R 149 as to whether the phrase referred to the individual sentences or to the overall effective sentence. As the appeal in *McMahon v R* was dismissed it was unnecessary for the issue to be resolved. However, Hodgson JA did note (at [3]) that even if the phrase referred to each individual sentence, it was not correct to say that the Court, in considering whether some other sentence is warranted, could not take into account other sentences imposed on the appellant. In support of this proposition his Honour provided some examples, including where the appeal raises questions of concurrency or accumulation, and where other sentences are directly relevant to the criminality of the particular offence (i.e. a planned ongoing criminal activity). His Honour further noted (at [4]) that where an appeal is

successful in showing error in one sentence but the practical result is that there would be no change in the total sentence, the court could refuse leave to appeal.

D. s 5B Case stated from District Court

Whether the facts found by a trial court support the legal description given to them by the trial court is a question of law

A man was convicted in the Local Court of two offences of assault occasioning actual bodily harm. Prior to sentence he admitted to a Corrective Services Officer that he had been involved in the assault but that he acted in self-defence, which contradicted his case at trial that he was not involved. The Crown was granted leave to adduce this as fresh evidence on appeal to the District Court but the applicant asked the judge to state a case to the Court of Criminal Appeal pursuant to s 5B of the *Criminal Appeal Act 1912* (NSW). Blanch CJDC refused to state the case on the basis that the submissions did not raise any questions of law. In ***Landsman v Director of Public Prosecutions*** **[2013] NSWCCA 369**, Macfarlan JA found that, while the original, written submission put by the applicant did not raise a question of law, a subsequent formulation made during the District Court hearing did. The first submission was whether the trial judge erred in concluding that it was in the interests of justice to allow the prosecution to lead the evidence. The later formulation was whether the uncontested facts before the judge were capable of supporting the judge's view that it was in the interests of justice that leave be given. This is supported by the plurality in *Vetter v Lake Macquarie City Council* [2001] HCA 12; 202 CLR 439 at [24]: "whether the facts found by the trial court can support the legal description given to them by the trial court is a question of law".

Duty on District Court judge to submit question of law only exists where certain conditions fulfilled

The District Court dismissed an appeal against conviction in the Local Court for two counts of making a false statement with intent to obtain financial advantage. The appellant sought judicial review of the decision pursuant to s 69 of the *Supreme Court Act 1970*, as well as requesting that the District Court submit a question of law to the Court of Criminal Appeal under s 5B of the *Criminal Appeal Act 1912*. The judge refused to submit the question of law, and the appellant amended the judicial review application to seek a review of the judge's refusal.

Basten JA in ***Elias v Director of Public Prosecutions (NSW)*** **[2012] NSWCA 302**, with Beazley JA agreeing, found that no duty to submit a question of law under s 5B had arisen and dismissed the summons. The appellant had placed reliance on the statement of Jordan CJ in *Ex parte McGavin; Re Berne* (1946) 46 SR(NSW) 58 that a District Court judge is to submit a question of law unless it is "obviously frivolous and baseless that its submission would be an abuse of process". Basten JA clarified (at [8]) that there is no duty, however, unless the power to submit a question of law has arisen. In this case the primary judge was not satisfied that there was a question of law and so was under no duty to submit the question to the Court of Criminal Appeal.

Procedure concerning stated cases from the District Court

In ***Lavorato v Regina*** **[2012] NSWCCA 61**, the secretary-manager of a registered club was convicted of three offences against the Liquor Act 2007. On 25 August 2010 he was unsuccessful in appealing to the District Court. He had sought dismissal without conviction pursuant to s 10 *Crimes (Sentencing Procedure) Act 1999*. He then requested the judge state a case pursuant to s 5B of the Criminal Appeal Act 1912, which requires that questions of law be submitted to the Court of Criminal Appeal within 28 days of the conclusion of the District Court proceedings. However, the stated case was not submitted until 2 June 2011 and it was necessary for an extension of time to be sought. Basten JA (at [20]) identified a number of factors to support an extension of time, including a lack of prejudice to the DPP, delay in receiving the transcript, that the District Court incorrectly required the parties submit objections and responses, the judge's decision to list the request for a stated case, and the judge's decision to make a preliminary assessment of the legal issues. Against the making the order to extend time was the failure to act promptly by the applicant, the DPP and the Court itself, contrary to the requirements of s 5B culminating in an unjustifiable delay. However, as all parties were at fault the extension was granted.

Schmidt J noted (at [68]-[70]) that there are difficulties with the stated case procedure that led to the issues arising in *Lavorato*. While the process is well established, it is complicated to implement and creates difficulties for the parties and the courts dealing with a request. Under the Act, the Court of Criminal Appeal cannot consider matters beyond the stated case, making it a burdensome process for the court below to make an adequate stated case. Her Honour pointed out (at [73]) that when materials, in this case the transcript, are not available delay inevitably follows. Schmidt J identified (at [74]) the s 5B procedure as one that "could profitably receive the consideration of the legislature or perhaps the Law Reform Commission".

E. s 5D Crown appeal

Denial of access to significant evidence a reason to refrain from intervention on a Crown appeal

In ***HT v The Queen*** **[2019] HCA 40,** it was held that the Court of Criminal Appeal should have refrained from intervening and increasing an inadequate sentence where the respondent was denied procedural fairness because she was denied access to material relating to her assistance to authorities because of a police claim of public interest immunity.

Role of current sentencing practices in sentence appeals

In ***Director of Public Prosecutions v Dalgliesh (a pseudonym)*** **[2017] HCA 41; (2017) 262 CLR 428** the Crown had appealed against the asserted inadequacy of sentencing for incest. The parties were notified that the Victorian Court of Appeal considered the case to be an appropriate vehicle for consideration of the adequacy of "current sentencing practices" for the offence but the Court also indicated that this would not affect the outcome of the

appeal. Ultimately it held that whilst the sentence was manifestly inadequate, it was within the range established by current sentencing practices and so the appeal was dismissed.

The High Court allowed the DPP's appeal. Kiefel CJ, Bell and Keane JJ held that consistency in sentencing does not warrant the application of an erroneous range just because that range is established by current sentencing practices. In this case the range was erroneous and the Crown appeal should not have been dismissed. The plurality criticised the two-step approach adopted by the Victorian Court of Appeal whereby it found error in sentencing practices but did not remedy that error in determining the outcome of the appeal. On the concern expressed for fairness to the respondent, their Honours said that an offender's only expectation on sentence is that a just sentence according to law be imposed.

Abolished principle of double jeopardy is not to be applied upon successful Crown appeals

The respondent in ***R v Mulligan*** **[2016] NSWCCA 47** pleaded guilty to recklessly inflicting grievous bodily harm in contravention of s 35(2) of the *Crimes Act 1900* after he attacked a stranger when their dogs became entangled in a brief scuffle. He was given a suspended sentence of 15 months. The Crown successfully appealed against that sentence on a number of grounds including manifest inadequacy. Upon resentencing the respondent, Harrison J took occasion to consider the principle of double jeopardy. His Honour observed that the insertion in 2009 of s 68A into the *Crimes (Appeal and Review) Act 2001* provided for the abolition of the double jeopardy principle following a successful Crown appeal. So much was authoritatively held by a unanimous five judge bench in *R v JW* [2010] NSWCCA 49. That position has been reaffirmed in decisions since then and to the extent that any different view may appear to have been expressed, it should be disregarded. Those contrary views have generally been expressed in situations where the appellate Court was not drawn to the authority of R v JW.

Twin hurdles in a Crown appeal against sentence

In ***CMB v Attorney General for New South Wales*** **[2015] HCA 9**, the offender had his sentenced increased by the CCA for a variety of child sexual assault offences. The Court determined the matter by regarding there being an onus on him to establish that the discretion not to intervene should be exercised in his favour. An appeal to the High Court was upheld unanimously. In the words of French CJ and Gageler J, "to enliven the 'residual' discretion, it is incumbent on the appellant … to demonstrate that the sentence pronounced by the court of trial turned on one or more specific errors of law or of fact, or, in the totality of the circumstances, was unreasonable or plainly unjust". Further, "once the discretion is enlivened, it remains incumbent on the appellant … to demonstrate that the discretion should be exercised".

Double jeopardy does not apply to Crown appeals against sentence in respect of Commonwealth offences

Mr Northcote pleaded guilty to an offence of using his position as a director dishonestly and two offences of making a false and misleading statement in a document lodged with ASIC. He was sentenced to concurrent terms yielding a total of two years imprisonment to be

served by way of an ICO. The Crown appealed against the leniency of the sentences. Garling J in ***Director of Public Prosecutions (Cth) v Northcote*** **[2014] NSWCCA 26** allowed the appeal and imposed a term of two years full time imprisonment. The Court held that the sentence they imposed would have been accumulated were it not for the principle of double jeopardy. However, in an addendum added on 7 April 2014, the Court noted that the High Court decision of ***Bui v Director of Public Prosecutions (Cth)*** **[2012] HCA** 1 established that double jeopardy does not apply to Crown appeals concerning Commonwealth offences. Notwithstanding this, the Court concluded that no other sentence would have been imposed.

Crown appeals and the prospect of creating disparity

In ***R v Green and Quinn*** **[2010] NSWCCA 313**, Green, Quinn and Taylor were sentenced in relation to a cannabis cultivation offence. The sentencing judge had assessed the sentences for Green and Quinn with reference to that which had been earlier imposed upon Taylor who was referred to as having played a lesser, but nevertheless significant, role in the enterprise. The Crown appealed against the sentences imposed upon Green and Quinn but not in relation to the sentence imposed upon Taylor. The Court of Criminal Appeal (a five judge bench), by majority, regarded the sentence imposed upon Taylor as manifestly inadequate, notwithstanding it was unchallenged. It increased the sentences for Green and Quinn despite this disturbing the relativity of their sentences with that of Taylor's.

Green v The Queen; Quinn v The Queen **[2011] HCA 49**: A majority in the High Court of Australia (French CJ, Crennan and Kiefel JJ) allowed the appeals. It was held that the Court of Criminal Appeal had failed to give adequate weight to the purpose of Crown appeals and the importance of the principle of parity. It had also erred on allowing the appeals, in part, on a basis that had not been raised at the hearing. It was not the case that a court must always dismiss a Crown appeal where intervention would give rise to disparity, but this is a powerful consideration enlivening the residual discretion of the court.

Constitutional validity of s 68A Crimes (Appeal and Review) Act 2001 (Cth)

Director of Public Prosecutions (DPP) (Cth) v De La Rosa **[2010] NSWCCA 194** concerned a Crown appeal in respect of a Commonwealth drug importation offence. An issue arose as to whether s 16A of the *Crimes Act 1914* (Cth) and s 68A of the *Crimes (Appeal and Review) Act 2001* (NSW) were inconsistent for the purposes of s 109 of the Constitution. That is, as s 68A removes any consideration of "double jeopardy" in relation to a Crown appeal against sentence (including consideration of distress and anxiety to which all respondents to a Crown appeal are presumed to be subject: *R v JW* [2010] NSWCCA 49), the question was whether it was contrary to s 16A(2)(m) which requires the sentencing court to have regard to the "mental condition" of the offender. It was held that there was no such inconsistency because s 68A is not to be construed as operating of its own force to sentencing for Commonwealth offences. McClellan CJ at CL (with Simpson J and Barr AJ agreeing) held (at [174] – [178]) that aside from s 68A, the "mental condition" of an offender must still be considered when re-sentencing as part of a Crown Appeal.

Double jeopardy in Crown sentence appeals – specification of grounds of appeal

In ***R v JW*** **[2010] NSWCCA 49**, a five-judge bench was convened to consider s 68A *Crimes (Appeal and Review) Act 2001* (NSW). Spigelman CJ held that, as a result of that section, the Court of Criminal Appeal was to have no regard to the "distress and anxiety" a respondent to a Crown appeal experiences as a result of again being before a court. It could neither justify a reduction in sentence nor the discretion not to intervene in a sentence. His Honour confirmed the existence of this residual discretion at [146]. His Honour also noted the desirability of the Crown specifying its grounds of appeal in a s 5D *Criminal Appeal Act 1912* (NSW) notice of appeal, despite there being no express provision to this effect in the *Criminal Appeal Rules*.

F. s 5DA appeal

Crown appeal to revoke an assistance to authorities discount

The appellant in ***R v OE*** **[2018] NSWCCA 83** was convicted of serious drug offences. At sentencing the trial judge allowed a discount of 65% to reflect the fact that the appellant had undertaken to give evidence against a co-offender; 15% of the 65% discount was for future assistance. The appellant failed to give that assistance and the Crown appealed pursuant to s 5DA of the *Criminal Appeal Act 1912*. An issue that arose – and one which may arise in the future – was whether the appeal was confined to adjusting the sentence to remove the 15% or whether the Court could take a broader assessment of the issues that may have influenced the discount as a whole.

The appeal was allowed. Rothman J found that this was a case where the offender had failed to do that for which he was given a 15% discount. His Honour stated (at [44]) that a Court may go beyond the limited issue of removing the future discount but declined to decide that point in this case. Button J agreed, and added that his judgment in *R v GD* [2013] NSWCCA 212 should be understood in the context of the problem in that case – a failure by a judge to separately discount for past and future assistance. It provided no support to the proposition sought to be advanced in the present case.

Failure to comply with an undertaking to give evidence for the Crown must be proved beyond reasonable doubt in a s 5DA appeal

Mr James was sentenced for the offence of accessory after the fact to an aggravated robbery. He received a 25% discount which reflected, in part, an undertaking to give evidence for the prosecution in a future trial. The Crown appealed pursuant to s 5DA *Criminal Appeal Act 1912* arguing that Mr James failed to fulfill his undertaking (the circumstances surrounding his failure were disputed): ***R v James*** **[2014] NSWCCA 311**. The circumstances surrounding the asserted failure to give evidence were disputed and it became necessary for the Court to consider, inter alia, the standard of proof for the purposes of a s 5DA appeal. In dismissing the Crown appeal, McCallum J held that it was necessary for the prosecution to prove Mr James' failure to comply with the undertaking beyond reasonable doubt.

G. s 5F appeal

A principal protected confider has standing to appeal to the Court of Criminal Appeal in relation to the sexual assault communications privilege

The respondent in ***PPC v Stylianou*** **[2018] NSWCCA 300** challenged the standing of the applicant (the Principal Protected Confider (PPC)) to apply for leave to appeal the decision of Berman DCJ, who had granted the respondent access to subpoenaed documents containing protected confidences to which sexual assault communications privilege attached. Macfarlan JA held that the PPC had standing to appeal as her application satisfied s 5F(3AA)(a) – she is a "person who is not a party" – and, although Berman DCJ was not strictly considering an application for leave under Ch 6 Pt 5 Div 2 of the Criminal Procedure Act 1986, he was considering access to documents subpoenaed pursuant to those provisions and the provisions were relevant to his determination.

In addition, His Honour found that the applicant also had standing under s 5F(3), as Berman DCJ's order was "interlocutory" and a "judgment and order" within the meaning of the section and – affirming the approach in *Tran v R* [2017] NSWCCA 93 – as the PPC was a "party to proceedings to which this section applies" because she had participated in the relevant hearing of those proceedings, and was formally recorded as a party on the Notice of Motion seeking access to the subpoenaed documents.

The Court of Criminal Appeal does not have jurisdiction under s 5F of the Criminal Appeal Act 1912 to entertain an appeal against a judge's refusal to disqualify him/herself

During sentence proceedings for drug supply offences, the appellant in ***Chamoun v DPP (NSW)*** **[2018] NSWCCA 182** made an application that the judge disqualify herself because of comments she had made during the proceedings. The application was refused and the appellant appealed both to the Court of Appeal seeking judicial review and to the Court of Criminal Appeal under s 5F of the *Criminal Appeal Act 1912*.

Gleeson JA held that the Court of Criminal Appeal had no jurisdiction to hear the appeal and refused leave to appeal. His Honour cited a number of authorities for the proposition that the Court does not have jurisdiction to hear the appeal because the refusal of a recusal application is not an interlocutory order. His Honour held that a similar view has been reached in relation to an appeal under s 127 of the *District Court Act 1973* concerning a judge's "judgment or order in an action". His Honour held that even if the refusal of the recusal application was an interlocutory order, the appellant had failed to demonstrate that a fair-minded observer might think that the judge might not have approached the hearing with objectivity.

Scope of "interlocutory judgment or order" in s 5F Criminal Appeal Act – orders that witnesses give evidence by way of AVL

The applicant in ***KN v R*** **[2017] NSWCCA 249** was charged with sexual offences. The trial judge ordered that the complainant and another witness could give evidence from a foreign jurisdiction via audio-visual link (AVL) using "Jabber" technology. The applicant sought an order temporarily staying the trial pending an appeal pursuant to s 5F *Criminal Appeal Act 1912* and an order refusing the Crown's application for those witnesses to give evidence via AVL by Jabber. The Court (Beazley ACJ, Walton and N Adams JJ) refused the temporary stay application and held that such orders do not fall within s 5F(3). An order permitting or authorizing the use of particular technology for the taking of evidence is not an "order" for the purposes of the subsection; it is not "a command to someone that a thing be done or not done and is enforceable by the Court should there be non-compliance, including by way of contempt". The decision was a discretionary one for the trial judge.

Whether a determination allowing/refusing a Basha inquiry is an interlocutory judgment or order for the purposes of s 5F(3) of the Criminal Appeal Act 1912

The applicant in ***Nicholson v R*** **[2017] NSWCCA 38** was charged with child sexual assault offences. The complainant had seen a counselor about the assaults but would not give their name. The applicant sought to question the complainant as to the identity of the counsellor through a Basha inquiry so as to then issue a subpoena on the counsellor. The trial judge refused the applicant's request. Her Honour said she was of the view that she could not force the complainant to disclose that information. The applicant sought leave to appeal that decision pursuant to s 5F(3)(a) of the *Criminal Appeal Act 1912*.

Garling J discussed the nature of a decision to permit a Basha inquiry, but held that the application did not need to be decided in the abstract. Dismissing the appeal, his Honour held that there was no interlocutory judgment or order for the purposes of s 5(3) because of the procedure undertaken by counsel for the accused. Counsel only asked the trial judge to permit questioning of the complainant; there was no request for an order or subpoena requiring her to give evidence. The only order the trial judge was asked to make was that proffered by a Notice of Motion (that leave be granted to subpoena the unknown counsellor's records) which had not been formally filed, attached no form of subpoena or wording of a schedule, and was not pressed by counsel. Garling J held that the request lacked formality; was unsupported by evidence demonstrating the utility of the procedure; and was not the subject of any demonstrated power in the Court.

In additional reasons, Beech-Jones J stated that given the variety of circumstances in which a Basha inquiry may be undertaken and the various steps involved in conducting such an inquiry, there is no single answer to whether the decision amounts to an "order" sufficient to ground an appeal under s 5F(2) or (3). His Honour discussed how in some situations (eg. with a new witness and the jury only being asked to leave the courtroom, where the matter could be re-agitated at a later time) the decision would not have the character and effect of an interlocutory order, whilst in other circumstances (eg. where the court needs to grant or refuse leave for the issue of a subpoena or an order under s 36(1) of the Evidence Act 1995) the trial judge's decision may have the "character and effect" of a determination capable of grounding an appeal.

An appeal under s5F(3A) of the Criminal Appeal Act 1912 is not an occasion for the Court to consider collateral challenges to a prosecution case

The respondents in ***R (Cth) v Rapolti; R (Cth) v Russell; R (Cth) v Speedy Corporation Pty Limited*** **[2016] NSWCCA 264** were alleged to have imported wheels from China, whilst holding out to Customs that the wheels were manufactured from Malaysia to avoid the dumping duty applicable to such imports from China. Under s 5F(3A) of the *Criminal Appeal Act 1912*, the Crown appealed against the trial judge's ruling to exclude material seized pursuant to a search warrant. The seized material included emails discussing strategies for avoiding the dumping duty. The Crown case was entirely circumstantial. The threshold issue for the NSWCCA was whether the trial judge's ruling to exclude the material seized pursuant to the warrant "eliminates or substantially weakens the prosecution's case". The respondents contended that a ruling cannot eliminate or substantially weaken a prosecution case that is doomed to fail. In part, that contention was based on a collateral issue; that there was a defect in the administrative notices imposing the relevant duty which may have rendered the notices invalid. N Adams J held that, for the purposes of s 5F(3A), the Crown case should be taken at its highest. Her Honour held that the concluding words of s 5F(3A) are not a backdoor means for a cross appeal; the Court assumes that the evidence will be accepted by the jury and that administrative decisions or instruments upon which the prosecutions depend are valid. There was no jurisdictional question other than the trial judge's exclusion of the seized evidence. The Court therefore had jurisdiction to hear the appeal.

Pre-trial ruling as to existence and availability of a common law defence is not an interlocutory judgment or order amenable to appeal under s 5F

The applicant in ***Gall v R*** **[2016] NSWCCA 82** was charged with dangerous driving causing death (x1) grievous bodily harm (x6). All counts arose from a single incident where he, in the course of an Army training exercise, allegedly drove in a dangerous manner and lost control of the vehicle. He sought a pre-trial ruling that a defence of superior orders existed at common law and that it was available on the facts. The trial judge ruled that such a defence was known to law but that it was not available in the present circumstances. The applicant sought leave to appeal that ruling, purportedly pursuant to s 5F(3)(a) of the *Criminal Appeal Act 1912*. Simpson JA refused leave to appeal for want of jurisdiction, holding that the relevant ruling was not "an interlocutory judgment or order" as required by s 5F(3)(a). It is well established that a ruling on the admissibility of evidence does not come within that category, nor does a preliminary ruling of a judge given in advance of matters affecting the trial. The question submitted to the trial judge had two components. The first concerned rulings on evidence that her Honour would make during the course of the trial because whether or not a defence of superior orders was found to exist would impact the evidence that was relevant and admissible. The second component of the question was no more or less than an advance ruling on what the trial judge might put to the jury at the conclusion of the trial by way of summing up the defence case and was thereby excluded from the operation of s 5F(3)(a) by settled authority.

Leave for prosecutor to elect committal to District Court out of time not amenable to s 5F(3) appeal

In ***Hall v R*** **[2015] NSWCCA 298** it was held that a magistrate's decision to grant leave to the prosecutor to make an election out of time for proceedings (which were not strictly indictable) to be committed to the District Court was not an "interlocutory judgment or order" amenable to appeal pursuant to s 5F(3) of the *Criminal Appeal Act 1912*. A further hurdle was that s 5F(3) extends to committal proceedings" but such proceedings had not commenced at the time the leave was granted.

Proposed jury direction on offence definition not an "interlocutory judgment or order" for purpose of s 5F(3) appeals

The applicants in ***A2 v R; KM v R; Vaziri v R*** **[2015] NSWCCA 244** were charged with female genital mutilation contrary to s 45(1)(a) of the *Crimes Act 1900* (NSW). The definition of "mutilates" in s 45 was raised by the parties as a pre-trial issue. The trial judge heard submissions before delivering a judgment as to his proposed jury direction. The applicants filed an application for leave to appeal against an interlocutory judgment or order pursuant to s 5F(3) of the *Criminal Appeal Act 1912* (NSW). R A Hulme J found the application not to be competent because the judge's ruling was not an "interlocutory judgment or order". There is no clear test for discriminating between judgments and orders on the one hand, and rulings not constituting judgments or orders on the other. Distracting or irrelevant considerations in this case include: the length and level of detail of the submissions and subsequent judgment; the possible courses of action for the applicants following the ruling; the importance of the ruling to the trial; and the mere fact that the ruling was made prior to the trial. Ultimately, senior counsel's concession at the hearing of the application that the proposed direction was liable to modification was fatal as it demonstrated that the ruling lacked the requisite finality to be an interlocutory judgment or order.

Order that cognitively impaired person give evidence by way of pre-recorded interview not an interlocutory judgment or order capable of appeal under s 5F

The complainant in a sexual assault trial was declared a "vulnerable person" under s 306M *Criminal Procedure Act* by reason of her cognitive impairment. The trial judge granted the Crown's application to permit the complainant's evidence to be given by playing her pre-recorded interview with police, the judge being satisfied that the facts of the case could be better ascertained if her evidence was given in such a manner: s 306P. AF sought leave to appeal this determination pursuant to s 5F *Criminal Appeal Act*. The critical issue in ***AF v R*** **[2015] NSWCCA 35** was whether the trial judge's decision could be properly characterised as an interlocutory judgment or order within the meaning of s 5F(3). The Court refused leave to appeal, R A Hulme J concluding that the ruling of the trial judge was not an interlocutory judgment or order. The decision was concerned with the manner in which evidence may be given and therefore could be likened to "a procedural matter which does not finally dispose of any discrete part of the proceedings" (at [32]). While it was accepted that the recording could not be unplayed if it was determined that the evidence should not have been given in that manner, the Court held that there were other remedies available to

a trial judge. Accordingly, the decision lacked the requisite degree of finality to be properly characterised as an interlocutory judgment or order.

Section 5F(3A) Criminal Appeal Act is not limited to evidence tendered by the prosecution

The respondent in ***R v Burton*** **[2013] NSWCCA 335** was charged with an offence of sexual assault. He and the complainant, as well as third man who was a mutual friend of theirs, had been celebrating on the night of the alleged assault. In a pre-trial ruling, the trial the judge granted an application that the complainant could be cross-examined about things she was alleged to have said during the night, concerning her expressed sexual interest in another man she met at a bar. The Crown sought to appeal against the ruling pursuant to s 5F(3A) *Criminal Appeal Act*. The issue was whether the ruling "substantially weakened the prosecution case". Ordinarily the section applies to prosecution evidence that has been ruled inadmissible. In this case, however, the prosecution asserted that defence evidence had been erroneously admitted. Simpson J found that the section is not limited to evidence tendered by the prosecution. The erroneous admission of evidence of the complainant's sexual interest in another person "would deflect the jury from a proper consideration of the true issues in the trial" and thereby substantially weaken the prosecution case (at [216]). The appeal was allowed.

What constitutes a ruling "on the admissibility of evidence" under s 5F(3A) of the Criminal Appeal Act 1912 (Cth)

In ***R v Jennings*** **[2010] NSWCCA 193** the trial judge ruled that certain evidence could be used as tendency evidence but later revoked that ruling. The Crown appealed pursuant to s 5F(3A) of the *Criminal Appeal Act* 1912. A question arose as to whether a ruling revoking an earlier ruling was "on the admissibility of evidence" pursuant to s 5F(3A). The appeal was allowed because the trial judge had misconstrued the meaning of "prejudicial effect" in s 101 of the *Evidence* Act 1995. On the preliminary point, the respondent contended that the evidence had been admitted and the Crown's complaint was only as to its use. Latham J referred (at [18]) to the judgment of Howie J in *R v Harker* [2004] NSWCCA 427 at [32]. Her Honour concluded that the trial judge's ruling was "in respect of the admissibility of evidence" and thus amenable to a s 5F(3A) appeal.

Non-publication orders amenable to s 5F appeal

Basten JA held in ***Nagi v DPP (NSW)*** **[2009] NSWCCA 197** at [27] that s 5F of the *Criminal Appeal Act 1912* should be given a construction which permits a challenge to an order involving non-publication of evidence, or of material revealing the identity of parties or witnesses, in the course of a criminal trial. The rationale was that where an order is made, it has consequences for third parties and can result in proceedings for contempt if breached. Where such an order is refused, there may be consequences for a third party, who may be a witness, or an informer, or, where non-publication is sought to preserve the fairness of a future trial, refusal may adversely affect an accused. In this case a sentencing judge set aside an earlier order prohibiting publication of information as to the appellant's HIV status. Leave to appeal was granted but the appeal dismissed.

A ruling on the admissibility of evidence that involves a constitutional question is amenable to appeal pursuant to s 5F

In ***Cheikho v R* [2008] NSWCCA 191; (2008) 75 NSWLR 323** there was a challenge to the admissibility of evidence which also involved a constitutional question (the validity of s 18(2) of the *Telecommunications (Interception and Access) Act 1979* (Cth)). It was held that the determination of the constitutional validity of this provision was an identifiable and separate part of the proceedings and so was a "judgment or order" within the terms of s 5F.

(Leave to appeal was refused. It was held that s 18(2) was not constitutionally invalid. The fact that it provided for a document which was conclusive evidence of the facts referred to did not mean that any trial in which such a document was tendered by the prosecution was not a trial by jury within s 80 of the Constitution.)

H. Application under rule 50C to re-open appeal

Power to re-open a concluded appeal where r 50C now requires leave of the Court

The Court (Basten JA, Simpson AJA and N Adams J) took the opportunity in ***b (No 2)* [2019] NSWCCA 289** to discuss the jurisdiction of the Court in relation to an application under r 50C to grant leave and re-open an appeal upon assertions that the Court had failed to deal with two of the grounds of appeal. A leave requirement in r 50C had been added by the *Criminal Appeal (Amendment No 1) Rule 2016*. The discussion (at [9]-[23]) may be useful in a case in which controversy arises as to the jurisdiction.

Power to re-open a concluded appeal

Rule 50C of the Criminal Appeal Rules has become a popular means of seeking to re-agitate issues after the dismissal of an appeal, particularly by persons who are not legally represented. In ***Miller v R* [2015] NSWCCA 205**, the applicant sought to raise a significant number of issues which went well beyond any complaint that there had been a misapprehension of fact or law in the determination of his appeal. Adams J had occasion to thoroughly review the Court's inherent power to re-open as well as pursuant to r 50C. His conclusions are summarised at [39]-[41]. They included that "the unsuccessful appellant cannot … have a backdoor appeal" and that "any application before the orders are perfected which requires more than a summary consideration and determination of the impugned judgment or order is likely to be outside the scope of the rule".

Rule 50C Application to re-open appeal dismissed

Bruce Gall was convicted of being an accessory after the fact to murder in 2012. He was tried with his son Kevin who was convicted of murder. The Court of Criminal Appeal dismissed their appeals against conviction and sentence in 2015: *Gall v R; Gall v R* [2015] NSWCCA 69. Bruce Gall brought an application under s 50C of the Criminal Appeal Rules to re-open his appeal on the basis that a transcript from a listening device was inaccurate. He contended that the new version of the transcript significantly undermined the reasoning

adopted by the Court in dismissing his conviction appeal. In ***Gall v R (No 2)*** **[2015] NSWCCA 152** the Court dismissed the application, failing to be satisfied that there was a misapprehension of fact enlivening Rule 50C. The accuracy of the transcript of the listening device was never disputed at trial or on appeal and was in fact accepted as accurate by all parties. In those circumstances, the Court characterised this application as an attempt by Bruce Gall to re-argue the appeal on a different basis to that adopted in the earlier proceedings. Any challenge to the accuracy of the transcript should have been raised at trial and/or on appeal. Even if there was a misapprehension of fact, it was solely attributable to the neglect or default of the applicant in running his case in the manner in which he did.

I. s 107 Crown appeal from acquittal

Crown appeal against directed acquittal – whether question of law alone

The respondent in ***R v PL*** **[2009] NSWCCA 256** had been acquitted of murder and manslaughter following a direction at the close of the Crown's (largely circumstantial) case. The Crown appealed under s 107 *Crimes (Appeal and Review) Act* 2001. The first issue was whether the grounds – that the trial judge erred in applying the direction principles, and that the trial judge erred in requiring the Crown to identify a particular act causing death – were "question[s] of law alone". Spigelman CJ found that the first question was a mixed question, as it required an assessment of facts. The second was a legal question and so was appellable. Nevertheless, his Honour held that the Crown's case was so weak on mens rea that a retrial was ordered on manslaughter only.

J. Appeal/review from inferior court to Supreme Court

Generally

Further appeal to Supreme Court incompetent if appeal from Local Court already determined by District Court

A Local Court Magistrate imposed sentence for two offences of stalking or intimidating with intent to cause fear of physical or mental harm. On appeal to the District Court, one conviction was set aside for duplicity and the other was confirmed. The offender then sought to appeal from the Local Court to the Supreme Court pursuant to s 52 of the *Crimes (Appeal and Review) Act 2001* (CAR Act): ***Stephens v Director of Public Prosecutions (NSW)*** **[2019] NSWSC 761**. No appeal or application for judicial review was sought from the District Court. The DPP sought summary dismissal of the proceedings pursuant to r 13.4 of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR).

On the basis of incompetence, Bell P dismissed the appeal because no reasonable cause of action was disclosed (r 13.4 UCPR). Applying the principle in *Wishart v Fraser* (1941) 64 CLR 470); [1941] HCA 8, approved in *Jamal v Director of Public Prosecutions (NSW)* [2019] NSWCA 121, his Honour found that "the orders challenged by the plaintiff are no longer operative, as they have been on one count, dismissed, and on the other, confirmed by the

District Court" (at [29]). To proceed otherwise would cause an "extraordinary result ... of two orders in existence at the same time" (per Rich ACJ in *Wishart v Fraser* at 477). In addition, Bell P held that there is no relevant distinction between appeals pursuant to s 52 and 53 of the CAR Act in determining the competence of the appeal. Furthermore, sections 29 and 60 of the CAR Act do not alter the common law principle.

Nature of appeals from the Local or Children's Court to the Supreme Court

In ***JP v DPP (NSW)*** **[2015] NSWSC 1669** there was an appeal to the Supreme Court against a conviction entered in the Children's Court for an offence of aggravated break and enter with intent to commit a serious indictable offence. The circumstances of the appeal prompted Beech-Jones J to provide a very useful review of the nature of appeals from the Local or Children's Court to the Supreme Court under the *Crimes (Appeal and Review) Act 2001* (NSW). His Honour paid particular attention to the circumstances in which an appeal involving a question of fact or a mixed question of fact and law, as opposed to a question of law alone, may be possible. In this case, leave was granted with respect to some grounds but the appeal was dismissed.

Judicial review

District Court – Power to stay proceedings as "abuse of process" – public confidence in the administration of justice – jurisdictional error

Director of Public Prosecutions (NSW) v Hamzy **[2019] NSWCA 314** concerned the judicial review of a District Court decision to stay a summary prosecution which was before it on appeal from the Local Court as an abuse of process, lest they undermine public confidence in the administration of justice "within the Correctional system". Hamzy had been convicted in the Local Court of assaulting a prison guard. He contended he had already been punished for that offence within the Correctional system by the revocation of most of his privileges. In the Court of Appeal, Gleeson JA held that the power to stay for abuse of process exists to ensure the integrity of a court's own processes. It was enlivened when there was a threat to confidence in the courts, not confidence in the Correctional system. Accordingly, the latter did not empower the District Court judge to stay proceedings and gave rise to a jurisdictional error. Nor did the administrative punishment rise to the level of substantial unfairness that might have grounded a stay for abuse of process by way of unjustifiable oppression, because the circumstances of that unfairness were again outside the control of the Court.

Establishing jurisdictional error on the part of an inferior court

A defendant sought a costs order pursuant to ss 212-214 of the *Criminal Procedure Act 1986* after charges brought against him were dismissed. However, the magistrate refused to make the order. Relief was sought pursuant to s 69 of the *Supreme Court Act 1970* on the basis that the magistrate had fallen into jurisdictional error or error of law on the face of the record: ***O'Brien v Hutchinson*** **[2012] NSWSC 429**. In determining the appeal, Beech-Jones J discussed (at [4]-[14]) the matters relating to jurisdictional error on the part of an inferior

court. His Honour referred to a relevant conception of jurisdictional error set out in *Craig v State of South Australia* [1995] HCA 58:

> "An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that a jurisdiction does exist."

Under the *Criminal Procedure Act*, the power of a Court to issue a costs order pursuant to s 213(1) is limited to circumstances where the Court is satisfied of any of the conditions in s 214(1)(a) to (d). Beech-Jones J stated (at [7]) that the Court would fall into jurisdictional error if it misapprehended the limits placed on it by s 214.

In determining this, his Honour stated that six matters should be kept in mind (at [8]-[14]). First, it must be established that the Court below "misapprehended" the limits of its power under s 214, not merely argued that the case in question sat beyond those limits. Second, matters of opinion in s 214, such as whether an investigation was "unreasonable", are not easily susceptible to errors of law. Third, errors may be found on the face of the record, in structure of the reasons, or in a disparity between those reasons and the Court's conclusion. However, where a finding of error relies on the phrases or terms of "common understanding" in s 214, it will be necessary to show that no other conclusion other than jurisdictional error is reasonably open. Fourth, that a Court failed to take account of a relevant matter, or relied on an irrelevant matter, will not in itself ordinarily establish jurisdictional error. Fifth, this may however constitute an error of law on the face of the record, so long as the "matter" was required to be considered (or prohibited from being so) as a matter of law. Sixth, his Honour reiterated the principle that the transcript of a Local Court's reasons are not to be read strictly; rather, the substance of the reasons should be examined to determine whether the correct test was applied.

Purported vacation of decision to grant parole

Lim v State Parole Authority **[2010] NSWSC 93** concerned a man convicted in 1992 of the murder of Dr Victor Chang. When his non-parole period was soon to expire the Parole Authority considered his case and determined that it would grant parole. However, before Lim was released, the Executive Director of State-wide Administration of Sentences and Orders wrote to the Parole Authority requesting that the decision be vacated. The Parole Authority acceded to the request and stood the matter over for a review hearing. At that hearing it rejected a submission on behalf of Lim that it had no jurisdiction to "vacate" its earlier decision. It then determined that parole should be refused.

McClellan CJ at CL quashed the Parole Authority's decision to vacate its earlier decision, holding that the Crimes (Administration of Sentences) Act provided no power for the Parole Authority to unilaterally vacate a final decision to release an offender on parole.

No uncertainty in a condition of parole that parolee "must not associate with any member of any outlaw motorcycle gang"

In ***Moefili v State Parole Authority*** **[2009] NSWSC 1146**, Hall J rejected a contention that there was uncertainty in conditions of parole that an offender "must not associate with any member of any outlaw motorcycle gang" and "must not frequent or visit any club, house or place where members of outlaw motorcycle gangs gather". He noted (at [92]) that the expression "outlaw motorcycle gangs" was one in use in the community and (at [93]) that case law references to the term confirmed such current usage of the expression and, to some extent, what is meant by it.

K. Review of convictions or sentence (*Crimes (Appeal and Review) Act 2001*)

Applications

Part 7 Crimes (Appeal and Review) Act referral of a sentence imposed by the Court of Criminal Appeal

Louizos v R **[2014] NSWCCA 242** was a case in which the Court of Criminal Appeal in 2008 allowed a Crown appeal and imposed a higher sentence. Years later an application was made under Part 7 of the *Crimes (Appeal and Review) Act 2001* for the case to be referred to the Court because there was *Muldrock*-error in the resentencing exercise. A question arose as to the nature of the Court's jurisdiction in such a case. Leeming JA, R A Hulme J agreeing, held that the correct approach for the Court to take if error was established was to deal with the question posed by s 6(3) of the *Criminal Appeal Act 1912* (whether some other sentence whether more or less severe is warranted). Fullerton J, on the other hand, considered that the Court should decide the merits of the Crown appeal afresh. Another issue was whether leave was required for the appellant to advance a ground that was not the subject of the referral. This has been the subject of some controversy in previous cases. It was held, unanimously, that leave is not required.

Finality principle does not preclude an application under s 78 Crimes (Appeal and Review) Act 2001

Mr Sinkovich's application for an inquiry into his sentence pursuant to s 78 of the *Crimes (Appeal and Review) Act 2001* (NSW) was rejected by Latham J in *Application by Frank Sinkovich pursuant to s 78 Crimes (Appeal and Review) Act 2001* [2013] NSWSC 1342. His application was made out of time, on the basis of *Muldrock* error made by both the sentencing judge and, on appeal, the Court of Criminal Appeal. He then invoked the supervisory jurisdiction of the Court pursuant to s 69 of the *Supreme Court Act 1970* (NSW). In the alternative, he sought declaratory relief under s 75 of the Supreme Court Act. In ***Sinkovich v Attorney General of New South Wales*** **[2013] NSWCA 383** Basten JA found that Latham J had made an error of law in rejecting the application. As a result, he granted a declaration that the Muldrock error made by the sentencing judge and the Court of Criminal Appeal may form the basis of a doubt or question as to the mitigating circumstances in the case (s 79(2) *Crimes (Appeal and Review) Act 2001* (NSW)). This provision acts as a 'gateway' to the direction of an inquiry (s 79(1)(a)) or a referral of the case to the Court of Criminal Appeal (s 79(1)(b)). While "appeals are, on one view, an affront to the principle of finality, rights of appeal are not narrowly confined. Nor is the supervisory power confined

within strict limits: rather the contrary". Sections 78-79 are "inherently an exception to the principle of finality" [at 46].

Fresh evidence

Overcoming the principle of double jeopardy by overturning an acquittal

Clinton Speedy, Evelyn Greenup, and Colleen Walker were three children who went missing from Bowraville over a 5-month period in 1990 and 1991. The respondent in ***Attorney General for New South Wales v XX*** **[2018] NSWCCA 198** was tried for the murder of Clinton Speedy in 1994 but acquitted. He was tried for the murder of Evelyn Greenup in 2006 but was also acquitted. In 2006 the *Crimes (Appeal and Review) Act 2001* was amended by the insertion of ss 99-106, allowing the retrial of persons acquitted for certain offences. Under s 100(1), the Court of Criminal Appeal may order an acquitted person to be retried if there is "fresh and compelling evidence against the acquitted person" and "in all the circumstances it is in the interests of justice for the order to be made". Evidence is "fresh" under s 102(2) if it was not adduced in the original proceedings and it could not have been adduced with the exercise of reasonable diligence. Evidence is "compelling" under s 102(3) if it is reliable, substantial, and it is highly probative of the case against the acquitted person. The Attorney General sought to set aside the acquittals in order for there to be a joint trial of XX for the murder of all three victims.

The Court dismissed the application. The Court held that the evidence relating to Colleen Walker, as well as most other categories of evidence relied on, was available prior to the trial for the murder of Evelyn Greenup. The Court held that it was therefore not fresh evidence within the meaning of s 102(2). The applicant contended that the word "adduced" in the definition of "fresh" in s 102(2) meant "admitted". The Court rejected that interpretation and held that "adduced" in the context of the provision means "tendered" or "brought forward". The Court held that s 102(2)(a) looks to whether the evidence was in fact "tendered" irrespective of its admissibility and that s 102(2)(b) looks to whether it could have been tendered or brought forward "with the exercise of reasonable diligence". Accordingly, evidence that was available but was not tendered due to its likely inadmissibility would not fall within the provision.

As a fallback position, the applicant contended that if "adduced" meant "tendered" or "brought forward", then the evidence upon which the applicant relied could not have been tendered "with the exercise of reasonable diligence" because it was likely inadmissible. The Court rejected that interpretation on the basis that it would lead to incongruous and anomalous results and that it does not accord with the rest of s 102.

Special leave to appeal was refused by the High Court on 22 March 2019: [2019] HCATrans 52.