District Court of New South Wales 2023 Annual Conference

Criminal Law Review

The Honourable Acting Justice R A Hulme

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SCOPE OF PAPER

The purpose of this paper is to provide brief notes concerning the range of issues that have been considered in appellate criminal decisions in the 12 months to 17 March 2023. Cases concerned with practice and procedure in the Court of Criminal Appeal itself are excluded.

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

I am most grateful for the assistance in the compilation of this paper provided by Ms Alice Petch LLB (Hons) BA and Ms Julia Saab BA LLB.

BAIL

Bail Act, s 22B – bail between conviction and sentence

Section 22B came into effect on 27 June 2022 after Mr van Gestal's bail had been continued following his conviction at trial pending sentence. It requires that "special or exceptional circumstances" must exist before bail may be granted following conviction and before sentence for an offence for which the accused "will be sentenced to imprisonment to be served by full-time detention". The prosecutor brought a detention application.

Garling J, sitting as a single judge in the Common Law Division Bails List determined that the prosecution must establish that no sentence other than full-time detention was lawfully available. In the Court of Criminal Appeal in ***Director of Public Prosecutions (NSW) v van Gestal*** **[2022] NSWCCA 171**, Gleeson JA, Wright and Cavanagh JJ held that the section required the court to make a realistic evaluative assessment of the sentencing outcome, rather than consider what is theoretically available. If an alternative sentence to full-time imprisonment is lawfully, and therefore theoretically, available, that does not mean that the court could not reach the opinion or state of satisfaction that the person will be sentenced to full-time imprisonment.

A condition requiring a person to accompany a person released on bail away from gaol to another location is not a "pre-release" requirement

Section 29 of the *Bail Act 2013* provides that there can be no pre-release requirements other than the four mentioned in the section (surrendering a passport, a security requirement, a character acknowledgement, or an accommodation required). Judicial officers sometimes prefer to impose a condition that the applicant not be released until a nominated person is in attendance at the gaol for the purpose of accompanying them to a certain location. This has sometimes been said to be a "pre-release" requirement which is not authorised under the Act.

In ***WR v Director of Public Prosecutions (NSW)*** **[2023] NSWCCA 38**, Beech-Jones CJ at CL avoided this controversy by specifying that a condition of this kind imposed an obligation upon the applicant and was thereby a "conduct" requirement, not a "pre-release"

requirement. A "conduct" requirement is defined in s 25(2) to mean "a requirement that the accused person do or refrain from doing anything".

COSTS

Question of costs in favour of a successful appellant

In *Higgins v R* [2020] NSWCCA 149 the Court quashed convictions for a number of offences and entered acquittals in lieu. Subsequently in ***Higgins v R* (No 2) [2022] NSWCCA 82** the Court considered an application by Mr Higgins for a certificate under s 2 of the *Costs in Criminal Cases Act 1967* so that he could seek payment for his legal costs. Section 3(1) provides that a certificate may not be granted unless it would have been unreasonable for the prosecution to institute proceedings if it had been in possession of evidence of all of the relevant facts. This was the only question to be considered in this case; errors by the trial judge and the means by which Mr Higgins' legal costs had been paid were irrelevant. The court was not satisfied that it would not have been reasonable to institute the proceedings against Mr Higgins, noting that good character and consistent denial of guilt are not uncommon features of individuals accused of child sexual assaults.

Failure by an *accused person to alert the prosecution to a fact fatal to its case may be considered against the* accused in an application for costs

An application for costs by the applicants, after charges against them for taking water when metering equipment was not operating were dismissed by the primary judge, was refused: ***Harris v Natural Resources Access Regulator; Timmins v Natural Resources Access Regulator* [2023] NSWCCA 16**. Beech-Jones CJ at CL held that the applicant's failure to notify the prosecution that digital engine meters were attached to the water pumps at the time of the offence until after the prosecution case had ended entitled the primary judge to refuse costs in accordance with Kirby and Johnson JJ's observations in *Southon v Plath* [2010] NSWCCA 292; (2010) 181 LGERA 352 at [85]: "Where an accused person held back from the prosecution an expert report until after the prosecution had closed its case, this would operate strongly against that accused person in any subsequent application for costs by that accused person".

EVIDENCE

Compliance with rule in Browne v Dunn

The appellant in ***Scaysbrook v R* [2022] NSWCCA 69** was found guilty of assaulting two police officers after being stopped for a random breath test. He appealed against his convictions for inflicting grievous bodily harm, being reckless as to causing actual bodily harm. He contended the Crown did not put to him in cross examination that he was reckless, and so the jury was bound to accept his account of the police officers being the aggressors and him pushing an officer over only in reaction to the pain of being aggressively searched. In other words, the jury were bound to find him not guilty.

Bellew J held that Mr Scaysbrook was on notice that the Crown was alleging he acted recklessly, and therefore that proposition did not need to be put to him in cross-examination. This submission in essence relied on the allegation that the Crown had breached the rule in *Browne v Dunn:* where it is intended to submit that a witness is giving untruthful evidence that proposition must be put to them in cross examination to give them an opportunity to respond. However, an additional component of that rule is that where "notice has been distinctly and manifestly given to the other party, specific questions do not need to be put in cross-examination".

Admissibility of expert opinion evidence by Dr Shackel as to the responses of children to sexual abuse

Mr Aziz was tried for nine child sexual assault offences against his visually impaired niece. The evidence included that the child did not immediately complain because she was tired, embarrassed, uncomfortable and scared; also that she did not know how to react. She had also persisted with contact with her uncle and his family. The Crown led expert opinion evidence from Dr Rita Shackel about the behavioural responses of children who are victims of sexual abuse. The defence did not object to this evidence, or cross examine the expert, but on appeal argued that the evidence was not admissible opinion evidence under s 79 and s 108C of the *Evidence Act*.

According to Simpson AJA (Lonergan J agreeing) It was immaterial that the expert relied upon the research of others as it was still evidence given by a suitably qualified person. The expert evidence was relevant, contextualising the complainant's behaviour and failure to make immediate complaint about the offences. It could rationally affect the jury's assessment of her credibility and of facts in issue in the trial. Leave to raise the matter on appeal was granted, as was leave to appeal itself but the appeal was dismissed**: *Aziz v R* [2022] NSWCCA 76**.

(Adamson J preferred to express no view about a "post-conviction objection to evidence". The issue was under consideration in another reserved judgment of the Court. She proposed refusing leave pursuant to r 4.15.)

Admissibility of expert opinion evidence by Dr Shackel as to the conduct of children and perpetrators in relation to child sexual abuse

***AJ v R* [2022] NSWCCA 136** was another conviction appeal in relation to child sexual assaults upon two children in which there was an issue about the admissibility of evidence by Dr Rita Shackel. She had given evidence about the responses of children generally to such assaults and also about the behaviour of perpetrators committing offences in a sometimes brazen manner. It was held that the evidence as to the former was admissible pursuant to ss 79(2) and 108C(2) of the *Evidence Act*. However, there was no evidence that she was qualified as an expert pursuant to s 79(1) in relation to the behaviour of perpetrators and the evidence on that subject should not have been admitted as it was not within either of ss 79(2) or 108C(2). It could not be assumed that a psychologist with a focus on developmental psychology, or expertise on trauma affected responses of children to sexual assault, also has expertise on patterns of offending by perpetrators.

(The above two cases received consideration in *BQ v R* [2023] NSWCCA 34 – see below.)

Warning under Evidence Act, s 165 not required where criminal activity of complainant did not make him "criminally concerned" in events giving rise to the proceedings

Complaint was made in ***Blair v R*** **[2022] NSWCCA 176** that the judge in a judge-alone trial should have given himself a warning under s 165(1)(d) of the *Evidence Act* in respect of the evidence of the victim of kidnapping and related offences because he was criminally concerned in the events giving rise to the proceedings. The victim was involved in drug-related criminal activity and was engaged in intended drug supply on the night in question. However, that was merely the context in which the alleged kidnapping and other offences occurred. He was not criminally concerned in those offences and so no warning was required. A further reason for that was that the applicant had not requested a warning. The trial judge acknowledged the need to scrutinise the victim's evidence carefully because his criminal activity was relevant to his credibility and reliability. The appeal was dismissed.

Tendency evidence based upon a single incident and whether it could establish an interest in sex with children under 16

Krojs v R **[2022] NSWCCA 209** concerned an appeal against conviction for one count of sexual intercourse with a child under 14 years (contrary to s 66C of the *Crimes Act 1900*). The appeal was based upon the admission of tendency evidence which sought to demonstrate his sexual interest in girls under 16 and a tendency to act upon that interest. The applicant argued that a single act of intercourse with a 15-year-old girl could not constitute evidence of a tendency, let alone one to have and act upon a sexual interest in children under 16.

The appeal was dismissed. Adamson J found that the evidence was sufficient to support the tendency alleged. It was considered that a 19-year-old male having intercourse with a 15-year-old was indicative of a unusual sexual interest in females under the age of 16 which was significantly probative in relation to the alleged offence of having sexual intercourse with a 12-year-old.

No requirement for tendency evidence relied upon to prove identity of offender to have close similarity with charged conduct

The dismissal of an appeal against conviction by the NSW Court of Criminal Appeal was upheld by the High Court in ***TL v R*** **[2022] HCA 35**. The applicant had been convicted of the murder of his stepdaughter and sentenced to imprisonment for 36 years. It was argued on appeal that tendency evidence to prove the applicant had a tendency to deliberately inflict physical harm on the deceased was wrongly admitted, as it was not sufficiently similar to the conduct of which he was charged. The applicant relied on an observation made by the majority in *Hughes v The Queen* (2017) 263 CLR 338 at [39] that where tendency evidence is adduced "to prove the identity of the offender for a known offence, the probative value

of tendency evidence will almost certainly depend upon close similarity between the conduct evidencing the tendency and the offence".

The High Court observed that there is no general requirement for close similarity between the conduct evidencing the tendency and the charged conduct in cases where the identity of the offender is in issue. The evidence had significant probative value, as there were only two other possible perpetrators and other compelling evidence which pointed to the applicant as having committed the murder. The evidence was correctly admitted.

Evidence of a disclosure of sexual abuse by another offender not admissible as an exception to s 294CB of the Criminal Procedure Act 1986

Cook v R **[2022] NSWCCA 282** was an appeal against conviction for 17 sexual offences against a child. The applicant sought to lead evidence of a disclosure the complainant made to him 18 months before his alleged offending began of sexual abuse by another person in Queensland. He sought to lead evidence of the proceedings against the Queensland offender, arguing that the complainant had experience making complaints of sexual abuse. The evidence, it was submitted, should be admitted as an exception to the rule in s 293(2) and 293(3) of the *Criminal Procedure Act 1986* (now s 294CB) as it was evidence relating to a relationship that was existing or recent at the time of the offending. The trial judge refused to admit the evidence.

Adamson J, with Bellew J agreeing, dismissed this ground of appeal (Beech-Jones CJ at CL dissented). The complainant's disclosure could not be regarded as occurring at or about the time of the applicant's offending. The aftermath of the Queensland offences was distinguished from the offences committed by the applicant. Further, Adamson J also rejected the contention that the Queensland sexual abuse related in any way to the relationship of confider and confidant between the complainant and applicant.

Evidence of sexual experience or activity 5 years prior to offending not admissible as an exception to s 294CB of the Criminal Procedure Act 1986

Elsworth v R **[2022] NSWCCA 276** concerned an appeal against conviction for a single count of sexual intercourse without consent. Prior to the commencement of the trial, the applicant had sought leave to adduce evidence of a conversation between the applicant and complainant concerning a sexual assault alleged by the complainant to have been committed by another individual 5 years ago. The trial judge refused leave, finding that the evidence did not satisfy the requirement in s 293(4)(a)(i) (now s 294CB) of the *Criminal Procedure Act 1986*.

Wilson J upheld the trial judge's decision, finding that the evidence was rightly excluded. The "sexual activity" or "experience" with which the legislation is concerned could not be said to encompass a complainant's memory of some past activity or experience just because the memory is held at the time of offending, or because the memory informed the present conduct of the complainant.

Complaints about evidence given by Assoc/Prof Shackel about the responses of victims of child sexual assault rejected

In ***BQ v R*** **[2023] NSWCCA 34** there was further consideration by the Court of evidence given in a child sexual assault trial of the evidence of Associate Professor Shackel. It was accepted by the trial judge that she could give evidence about the behaviour and responses of children generally but could not speak of the specific behaviour and responses of the two complainants themselves. This was in conformity with the subsequent authority of *Aziz v R* [2022] NSWCCA 76. On appeal, but not at trial, there was a complaint that her evidence entered the territory of speaking about the behaviour of perpetrators, contrary to the subsequent holding of the Court in *AJ v R* [2022] NSWCCA 136. The complaint was without foundation. It was based upon A/P Shackel referring, for example, to how children respond to abuse occurring in the context of "everyday activities" which was not concerned with the behaviour of the perpetrator, where and when a perpetrator might choose to offend, but the response of the victim.

Cross-examination about other sexual activity

An attempt was made at trial to cross-examine a complainant about sexual assaults of which she was a victim when she was detained in an institution in the early 1970s under the *Child Welfare Act*. The trial was concern with sexual abuse by the accused but defence wanted to cross-examine her about abuse by the Deputy Superintendent of the institution to show she may have misattributed the abuse she suffered to the accused or that she had not mentioned him when she had complained about the Deputy Superintendent which would supposedly cast doubt upon the reliability of her memory.

In ***Valentine v R*** **[2023] NSWCCA 43**, Basten AJA held that the trial judge was in error in regarding the proposed cross-examination as irrelevant but the judge was nonetheless correct in disallowing it. The subject matter did not come within an exception in s 293 (now s 294CB); the sexual assaults by the Deputy Superintendent were not "at or about the time" of the offences alleged against the accused, and nor were they "part of a connected set of circumstances in which" the alleged offending by the accused occurred.

Assessment of admissibility of tendency evidence on appeal and generally

Geraghty v R **[2023] NSWCCA 47** raised a question about the admissibility of tendency evidence in a drug importation case, the tendency sought be established by evidence of the accused's involved in previous importations. As held in *The Queen v Bauer* (2018) 266 CLR 56; [2018] HCA 40 at [61], the question of admissibility at trial of such evidence was a matter for the appellate court to determine for itself by a correctness standard.

Basten AJA held (at [28]) that among a range of possibilities, it was appropriate for the CCA to consider admissibility at the time the trial judge ruled upon the question, but to allow for the possibility that any clarification as to the issues in dispute which occurred after the ruling but before the evidence was adduced could be relied upon.

(The judgment is also of interest in the way in which the question of admissibility was actually assessed by the Court:[45]ff.)

JUDGE-ALONE TRIALS

Conviction quashed following judge-alone trial for offences of five decades previously

In ***Hodgson v R*** **[2022] NSWCCA 72**, the appellant had been convicted by judge alone of 11 counts of indecency and buggery against boys aged between 5 and 12 in the 1970s. He appealed on the grounds that the trial judge had given herself inadequate directions, and that the guilty verdicts were unreasonable. The appeal was allowed and acquittals were entered on each count. The trial judge had given weight to her perception of the complainants as credible and regarded the appellant's evidence as evasive and contrived.

Leeming JA found that the trial judge, had she adequately considered troubling aspects of the complainant's evidence, and unchallenged aspects of the appellants evidence, would have had a reasonable doubt as to the appellant's guilt. Both complainants, for example, had made the same mistake about the presence of a pool on the property of the appellant at the material time, and the trial judge should have considered the possibility of contamination of the evidence. Further, she recited applicable warnings and directions but gave no indication of actually taking them into account. Some of them "had a deal of work to do".

Explanation for delay is a material consideration when determining an application for leave to file for judge alone trial less than 28 days before the date fixed for trial

Alameddine v R **[2022] NSWCCA 219** concerned the trial of two offenders. Evidence was brought before the trial judge that the applicant HA had initially consented to seek an order for a judge alone trial, but had not proceeded with the application after becoming aware the other applicant, RA, would not consent to the order. RA had initially instructed to seek a trial by judge alone, but subsequently changed his mind. After being able to discuss the matter with counsel, RA changed his mind again and sought to proceed before a judge alone. However, RA's consent was given less than 28 days before the date fixed for their trial to begin and so leave was required. The application leave to apply out of time was refused, with the trial judge finding the accounts of why there had been a delay unconvincing. Both applicants sought leave to appeal against the decision.

Beech-Jones CJ at CL, Hamill and N Adams JJ allowed the appeal. The alleged appearance of "judge shopping" was not a sufficient reason to refuse leave to file out of time. Any explanation for the delay that discloses some reason for making the late application, and dispels the appearance of applying merely because of the identity of the trial judge, is sufficient to warrant granting leave under s 132(2) of the *Criminal Procedure Act 1986.*

JURY ISSUES

No error in not discharging jury after Crown witness said to accused, "Don't worry. We'll get you off…"

A Crown witness in Mr Cox's jury trial said to the accused in the presence of the jury, "*Don't worry. We'll get you off Greg*". Mr Cox contended on appeal that there was a miscarriage of justice arising from the judge's failure to discharge the jury. Beech-Jones CJ at CL dismissed the appeal, finding that any prejudice arising from the comment was sufficiently addressed by the judge's direction: **Cox v R [2022] NSWCCA 66**.

The trial judge provided a thorough direction to the jury, stating that what the witness said is not evidence and that "It's really important… that you decide this case based on the evidence. Not on a loose cannon's comment on his way out of the courtroom." The trial judge emphasised that no prejudice should be drawn against either the Crown or the applicant from what the witness had said, and further asked the jury not to discuss what the witness said while leaving the courtroom, stating that "it should not be the subject of any discussion other than to say we've dismissed it."

Beech-Jones CJ at CL identified five features of this direction which made it appropriate to address any potential prejudice caused by the witness: (1) the comments made by the witness were not repeated; (2) it addressed the potential for the jury to form an adverse view of the accused based on what was heard; (3) the reference to the witness as a "loose cannon" ensured the jury would not think the witness was acting in concert with the applicant; (4) a reference to the possibility that the witness was under the influence similarly mitigated the risk that the jury would think he made the comment because he was acting in concert with the applicant; and, (5) neither the Crown nor the applicant took issue with the direction.

Mandatory discharge of juror where juror misconduct occurred

Hoang v The Queen **[2022] HCA 14; (2022) 96 ALJR 453** concerned a trial for 12 sexual offences committed against children where a juror conducted an internet search about the requirements of a working with children check and in doing so came across legislation relevant to the trial. The District Court Judge took verdicts for a number of the charges, and then dismissed the relevant juror before the remaining jurors continued deliberations before returning verdicts for the remaining two charges. The Court of Criminal Appeal of NSW (Hoeben CJ at CL, N Adams J, Campbell J dissenting) dismissed the appeal against conviction on the basis that the juror's purpose in conducting the search was to satisfy herself as to why she herself (a teacher) had not been required to undertake a working with children check. Her actions did not satisfy the requirement in s 68C(1) of the *Jury Act 1977* that the inquiry be for the purpose of obtaining information about "matters relevant to the trial": *Hoang v R* (2018) 98 NSWLR 406; [2018] NSWCCA 166

The High Court allowed the appeal in part. It was held that s 68C(1) is not limited to asking whether the juror intended to obtain information about an issue on which the guilt of the accused depends. Rather, its interpretation was broader, and the section included conduct

of a juror the purpose of which was to obtain information about "matters of evidence given or addresses to the jury at trial." As one purpose of the internet search was to obtain information relevant to the trial, the juror had engaged in misconduct and the judge was therefore required to discharge that juror prior to taking any of the verdicts. Those convictions were set aside and a new trial in respect of those counts was ordered. The two convictions based on verdicts returned after the juror was discharged were not set aside; the matter was remitted to the CCA to decide what to do.

Miscarriage of justice by discharging juror who would have been in favour of acquittal

A jury indicated it was not unanimous, being 11:1 on some counts and with a smaller majority on others. The judge gave a majority verdict direction. The jury indicated they would like to leave and resume the next day. Before leaving, a juror (juror G) sent a note saying he doubted he could continue because his blood pressure was increasing to dangerous levels. He was advised to seek medical attention. The next day he did not attend and could not be contacted. He was discharged and the trial continued with a jury of 11. Soon thereafter they returned verdicts of guilty on 12 counts and not guilty on 2 counts. There was no indication as to whether the verdicts were unanimous or by majority of 10:1. It was held in ***Addo v R*** **[2022] NSWCCA 141** that with the benefit of hindsight there was a miscarriage of justice.

The Court referred to the three categories of case in which a question may arise as to whether a trial should continue with a reduced number of jurors as set out by Adamson J in *BG v R* [2012] NSWCCA 139; (2012) 221 A Crim R 215. Her Honour said that unless a case falls in the first category of there being no indication of how the discharged juror would have voted there will be a substantial miscarriage of justice. The Court concluded that while it may be that some of the verdicts returned by the 11 member jury were unanimous, and thereby unaffected by the discharge of juror G, there was a possibility that other verdicts were not. In those circumstances, the continuation of the trial without juror G is in the third category referred to in *BG v R*.

Jury only to be discharged where irregularity would lead to substantial miscarriage of justice

The applicant in ***Watson v R*** **[2022] NSWCCA 208** sought leave to appeal against orders made by the trial judge to discharge the jury. Following the close of the Crown case at the applicant's trial for murder, a note from a juror had been passed to the trial judge. It expressed a number of concerns about the juror's own relapsing mental illness, and the questionable conduct of other jurors inquiring about the population of a town mentioned in evidence. On examination, the foreperson stated they were not aware of any inquiry being made by the jury into the town's population, though noted one juror had simply been aware of that information. The trial judge made an order under s 53B of the *Jury Act* discharging the juror, and an order under s 53C(1)(a) discharging the balance of the jury.

Bell CJ, Price and Yehia JJ allowed the appeal, finding no proper evidentiary basis for the discharge of the balance of the jury. Trial judges are required to be satisfied to a high degree of necessity before discharging a jury, and such an order should only be made to prevent a

miscarriage of justice. The Court agreed that circumstances which might give rise to a substantial miscarriage might be difficult to determine. Following a substantial review of the authorities, however, it was found that the risk of a miscarriage of justice arises where the possibility the applicant might have been denied a chance of acquittal cannot be excluded beyond reasonable doubt. Considerations relevant to the decision of whether to discharge the jury in such a case include the extent of prejudice to the accused; the ability to ameliorate that prejudice through direction, comment or other step; and the stage that the proceedings have reached.

In the applicant's case, the Court held that the conclusion that a number of jurors had disregarded directions was largely unfounded. The decision to discharge the balance of the jury, as such, was made in error.

Provisions of Jury Act*, s 55G(2) mandatory – foreperson excluded from ballot for verdict jury*

Ward ACJ found that the trial judge in ***Fantakis v R*** **[2023] NSWCCA 3** erred by including the foreperson of an expanded jury in the ballot to select the verdict jury. The foreperson, who was consequently not selected for the verdict jury, should have been exempt from the ballot in order "to avoid the need for another foreperson to be elected" (at [377]).

However, Ward ACJ also concluded that the exclusion of the foreperson from the verdict jury was not "such a departure from a mandatory provision relating to the authority and constitution of the jury" so as to result in a substantial miscarriage of justice (at [388]). The error had no perceivable impact on the basis on which the jury actually reached its verdict, and the proviso could thereby be applied.

OFFENCES INCLUDING THEIR ELEMENTS

Avoidance of stereotypical misconceptions about the post-sexual assault conduct of a complainant

A significant plank in a defence case at trial and in submissions in support of an unreasonable verdict ground in relation to a conviction for sexual intercourse without consent was that the complainant's denial that the sex was consensual was undermined by text messages sent to the applicant after the event. In cross-examination she did not deny that they suggested to the applicant that she might be interested in seeing him again. She explained that this was not in fact what she wanted; she wanted to learn of the intentions of the man who had sexually assaulted her.

It was held by Beech-Jones CJ at CL in ***Nguyen v R*** **[2022] NSWCCA 126** that this was not an improbable or even unlikely explanation for a victim's state of mind, especially a victim who, at that point, had decided to stay silent and live with regret for placing herself in danger. (It was only on the urging of her boyfriend that she ultimately reported the matter to the police.) His Honour noted a number of recent cases in the Court in which emphasis had been given to the necessity to avoid using stereotypical assumptions about how victims

respond to the trauma of sexual assault: for example, *Rao v R* [2019] NSWCCA 290 at [98]; *Neto v R* [2020] NSWCCA 128 at [79]; and *Maughan v R* [2020] NSWCCA 51 at [99].

Sexual act – meaning of "with or towards a child" in Crimes Act, s 66DC*(a)*

Dhanji and Hamill JJ, Basten AJA dissenting, held in ***Director of Public Prosecutions (NSW) v Presnell*** **[2022] NSWCCA 146** that a trial judge was correct in granting a permanent stay of proceedings in a prosecution for the respondent having carried out a sexual act "with or towards a child" under the age of 10 on the basis the prosecution was foredoomed to fail. The Crown case was that the respondent was seen masturbating in a room with the child but they both had their backs to each other and, while he was looking at the child while carrying out the act, the child was unaware of his presence. The judge concluded that Mr Presnell was hiding what he was doing so the act was not done "towards" the child.

Grievous bodily harm may be constituted by loss of a tooth

This seemingly remarkable conclusion was reached by the Court in ***ST v R*** **[2022] NSWCCA 169**. The facts, however, were that the offender's conviction for maliciously inflicting grievous bodily harm (*Crimes Act*, s 35(1)(b) – as it was at the relevant time) concerned him punching his then partner in the mouth causing the harm described by the judges as follows:

> Here, there is ample evidence on which it was open to the jury to have been satisfied beyond reasonable doubt that the applicant's punch to KR's face caused the loss of at least one tooth (and that it was the front tooth). … And it was open to the jury to conclude beyond reasonable doubt that the loss of a front tooth amounts to serious disfigurement (even if it was capable of being remedied by cosmetic dental surgery – which KR could not afford at the time; and even if the injury was only managed at the time by conservative treatment, namely Panadol).

"Breaking" turns on consent of the occupant, not person's legal right of entry

Although the CCA judgment in this matter is more than 12 months' old, it has been retained as special leave to appeal was granted on 17 June 2022: *BA v The Queen* [2022] HCATrans 111 and the hearing occurred on 7 February 2023: [2023] HCATrans 2.

After their relationship broke down, BA moved out of premises in which he had lived with his former partner and of which they were co-tenants. Two months later he kicked open the front door causing a deadlock to shatter a wooden doorframe. He successfully obtained a directed acquittal on a charge under s 112(2) of the *Crimes Act 1900* of break, enter and commit serious indictable offence (intimidation) in circumstances of aggravation (use of corporal violence). The Crown appealed: ***R v BA*** **[2021] NSWCCA 191; (2021) 105 NSWLR 307**. The Court unanimously held that the trial judge had erred and ordered the quashing of the acquittal and that there be a retrial.

It was held by Brereton JA and Fullerton J that the manner of entry was irrelevant; the test was whether BA had permission of the occupant to enter. BA's breach of s 51(1)(d) of the

Residential Tenancies Act 2010, which provides a tenant must not intentionally or negligently cause or permit damage to the premises, was irrelevant. All the prosecution had to prove was that BA entered without the express or implied consent of the actual occupant. Adamson J, in dissent as to this reasoning, held that a co-owner or co-tenant whose entry to commit a criminal offence was not forcible would not be guilty of an offence against s 112 of the Crimes *Act 1900*. BA's right to enter the premises was qualified by s 51(1)(d); he did not have a right of entry by the use of force which caused damage.

Conviction for offences against both s 114 and s 115, Crimes Act, arising out of same circumstances

Darcy v R **[2022] NSWCCA 54** involved an appellant who pleaded guilty to a number of offences of both being armed with intent to commit an indictable offence and being a convicted offender armed with intent to commit an indictable offence (s 114 and s 115 respectively). Each of the s 114 offences was based on the same facts and circumstances as each of s 115 offences which were additionally charged on the basis that he had previously been convicted of break, enter and steal. Darcy submitted there had been a miscarriage of justice as the offences against s 115 were to be considered aggravated forms of the offences against s 114, and having entered a guilty plea on the s 115 offences the s 114 offences should not have been dealt with.

Beech-Jones CJ at CL found that the two offences were separate and distinct, and that "the applicant could be convicted of both without there having been an abuse of process in the form of some "double jeopardy"." While conceding that the "procedure is odd" and appears "counterintuitive", s 152(1) of the *Criminal Procedure Act* is based on the premise "that an offence under s 115 is a separate offence to an offence under s 114 and not an aggravated version of the same offence". The court stated that "section 152 cannot be read out of existence. It follows that the concerns about double jeopardy in that circumstance must give way to the operation of s 152".

The meaning of "intentionally chokes" in s 37(1A) of the Crimes Act

The Crown appeal in **GS v R; Director of Public Prosecutions (NSW) v GS [2022] NSWCCA 65** concerned a contention that the trial judge incorrectly directed the jury as to the meaning of "choking". Payne JA considered the legal principles relevant to the construction of s 37(1A) as well as authorities dealing with "choking". While the trial judge construed "choking" in s 37(1A) as requiring "pressure that, at least, results in restriction in the victim's breathing", the direction should have been that "intentionally chokes" within the meaning of s 37(1A) means "intentionally apply[ing] pressure to the neck so as to be capable of affecting the breath or the flow of blood to or from the head".

Payne JA stated that "intentionally chokes" should not be ascribed a narrow definition but rather was intended to capture a "broad range of conduct". The court found that there was nevertheless a limit to the range of conduct that could be caught by the section, and that pressure on the back of the neck that was "incapable of affecting the breath of the person or the flow of blood" could not be encompassed. Ultimately, the Court set aside the order

for the acquittal of GS on the charge of intentionally choking; however, the Court declined to remit GS to the District Court for a re-trial.

Persistent sexual abuse of a child (s 66EA, Crimes Act)

R v RB **[2022] NSWCCA 142** was a dual appeal by each party in respect of a sentence imposed after RB was found guilty by a jury of the offence in s 66EA of the *Crimes Act* of persistent sexual abuse of a child. It was the iteration of s 66EA that was enacted in 2018 as a consequence of a recommendation of the Royal Commission into Institutional Responses to Child Abuse. It provides in s 66EA(1) that it is an offence for an adult to maintain "an unlawful sexual relationship with a child". That term is defined in sub-s (2) as "a relationship in which an adult engages in 2 or more unlawful sexual acts with or towards a child over any period". The Crown is not required to allege the particulars of any unlawful sexual act (sub-s (4)(a)); the jury must be satisfied beyond reasonable doubt that an unlawful sexual relationship existed (sub-s (5)(a)); the jury is not required to be satisfied of the particulars of any unlawful sexual act (sub-s (5)(b)); and they are not required to agree on which unlawful sexual acts constitute the unlawful sexual relationship (sub-s 5(c)).

The sentencing judge was invited by the Crown to find all the underlying sexual acts particularised in the indictment proved beyond reasonable doubt. The offender invited the judge to sentence on the basis that the unlawful sexual relationship found by the jury was one in which he had engaged in only the two least serious acts alleged. The judge felt bound by authority to accept the latter.

The judge had directed the jury that one element the Crown had to prove was that the accused maintained a relationship. In this case it was a relationship of father/daughter, and it was "maintained" in the sense of being carried on, kept up, or continued. It would be an "unlawful sexual relationship" if within that relationship there were two or more unlawful sexual acts.

Fagan J found (at [54]-[55]) that "the word 'maintains' when used in relation to a sexual relationship, as occurs in subs (1), would refer to successive acts committed frequently enough to provide an element of connection and continuity so that the coherent course of activity that they constitute may be seen to be maintained by the perpetrator". His Honour did not consider that Parliament intended in sub-s (2) that an "unlawful sexual relationship" could be constituted merely by the commission of at least two unlawful sexual acts.

His Honour held (at [62]) that the gravamen of the offence was that "multiple unlawful sexual acts must have been perpetrated not merely in isolated circumstances or sporadically but with such a degree of continuity and habituality as to constitute an ongoing association or connection with respect to sexual activity".

The matter was remitted to the District Court for rehearing on sentence.

The elements of the offence in s 66EA were further considered in ***Towse v R*** **[2022] NSWCCA 252**, where Basten AJA at [22] expressed doubts about the correctness of aspects of *R v RB*, and ***RW v R*** **[2023] NSWCCA 2**, where Harrison and Fagan JJ accepted a Crown concession of error for failure to comply with the reasoning in *R v RB*. Basten AJA, however, expressed

the view that what was said in *R v RB* was incorrect and, being obiter, need not be followed until such time as the Court definitively determined the issue. He suggested "at some stage, it may be appropriate for this Court to determine whether the South Australian Full Court was correct (in *R v Mann* (2020) 135 SASR 457; [2020] SASCFC 69) or the dicta in *R v RB* should be preferred".

A conviction appeal in RB and another s 66EA case are now listed for hearing before a five-judge bench of the Court of Criminal Appeal on 21 June 2023.

Grievous bodily harm - age of victim to be considered where assessing extent of harm but speculation as to future harm not relevant

In ***Reyne v R* [2022] NSWCCA 201**, the applicant sought leave to appeal against his conviction for recklessly causing grievous bodily harm to his 13-month-old foster daughter (contrary to s 35(2) of the *Crimes Act 1900*). It was argued that the conviction was unreasonable and could not be supported by the evidence on two bases; first, it was not proven that the skull fracture injury which represented the grievous bodily harm offence occurred within the essential time period; and second, the skull fracture did not amount to grievous bodily harm. Dhanji J allowed the appeal, concluding that the skull fracture was not proven to have occurred within the essential period beyond reasonable doubt.

The second basis regarding whether grievous bodily harm occurred, however, was rejected. It was noted that the age of the victim may be relevant where the injury is more serious by reason of the victim's age; the same injury that a younger person might recover from relatively quickly might, for example, leave an older person immobile. In deciding whether injuries are grievous, an assessment must be made of the effect of that harm on the particular individual at the time. Dhanji J further stated, however, that speculative possibilities of *future* harm to individual victims are not relevant. Any prognoses as to future harm or immobility must be informative of that actual harm suffered, not harm that might come to be in the future.

Extended joint criminal enterprise and constructive murder

The High Court considered an appeal from South Australia as to whether liability for murder could be established by combining the common law doctrine of extended joint criminal enterprise (eJCE) could operate with constructive murder provided for by s 12A of the *Criminal Law Consolidation Act 1935* (SA) in ***Mitchell v The King; Rigney v The King; Carver v The King; Tenhoopen v The King* [2023] HCA 5**. It quashed the convictions for murder and ordered a new trial. Section 12A extended liability for murder to a person who commits or agrees to an intentional act of violence causing death while acting in the course of or in furtherance of a major indictable offence punishable by imprisonment for at least 10 years.

The appellants had agreed to break and enter a home to steal cannabis and in the course of doing so one or more of them violently assaulted an occupant causing his death. The Crown alleged that each appellant had foreseen that in the course of carrying out the agreed crime one of them might perpetrate an intentional act of violence. The jury were directed that

the Crown need not prove contemplation that one of them might commit an act of violence with intent to kill or cause grievous bodily harm.

The High Court held that the requirement in s 12A that a person commit or agree to an intentional act of violence cannot be proved by derivative liability of a secondary participant under eJCE principles where that participant foresaw the possibility of an intentional act of violence but did not agree to the act. The way in which the pathway to guilt via eJCE principles broadened the reach of s 12A beyond that which it could bear.

PRACTICE AND PROCEDURE

Non-publication requirements may impede general deterrence for child sex offending

In **R v PC [2022] NSWCCA 59**, the Crown appealed against community correction orders imposed in respect of sexual offences PC committed against his stepdaughter. Section 15A of the *Children (Criminal Proceedings) Act* 1987 (NSW) required the redaction of the respondent's name to "PC" as well as avoiding any reference to the locality in which the offences occurred and details about others connected to the events. Fagan J noted that this affords the offender anonymity and protects them from the community acquiring knowledge of their crimes: "The anonymization of the offender that is required, indirectly, by the Act operates in a way that is likely to detract greatly, if not completely, from the general deterrent effect of the sentences passed in such cases". He said the Law Reform Commission would be apt to consider "whether there is a means by which adequate and meaningful publicity could be given to deterrent sentences in these cases without compromising the privacy and protection of young victims".

"Inflammatory" Crown Prosecutor's closing address

***Crockford v R* [2022] NSWCCA 115** concerned an appeal against conviction on the ground that the inflammatory closing address of the Crown Prosecutor led to a miscarriage of justice. Basten AJA dismissed the appeal, finding that although some passages of the Crown Prosecutor's address were beyond what was acceptable, no miscarriage of justice was occasioned.

Three relevant positions were identified, citing *Glenn (a pseudonym) v R* [2020] NSWCCA 308: a prosecutor has a duty to maintain the fairness of a trial and while they may put their case firmly, they must also exercise restraint; a fair trial may be in jeopardy where a prosecutor makes statements that inflame prejudice, misrepresents the evidence, or expresses personal opinions; and colloquialisms, especially if of a pejorative nature, should be avoided. Basten AJA noted that some of the comments made in the closing address breached an appropriate level of restraint. It was found that although there were "colourful phrases" used and the characterisation of the defence case as "red herrings" and a "myth" was unnecessary and not appropriate, the applicant was not deprived of a fair trial.

R v Middis factors may be present but to not require separate trials

The well-known judgment in *R v Middis* (Supreme Court (NSW), Hunt J, 27 March 1991, unrep) included that a separate trial will usually be ordered if three factors are present:

1. Evidence against an applicant is significantly weaker than and different to that against a co-accused;

2. evidence against the co-accused includes material highly prejudicial to the applicant although not admissible against him/her; and

3. there is a real risk that the weaker Crown case against the applicant will be made immeasurably stronger by reason of the prejudicial material.

All of these factors were present in ***R v Houda*** **[2022] NSWCCA 179** but Adamson J concluded that despite this it did not follow that a foreshadowed risk eventuated or that the conviction ought to be set aside. On an appeal against conviction it was for the applicant to show there was some positive injustice that was not ameliorated by directions to the jury. Her Honour listed (at [250] the directions given in the trial and concluded that they were sufficient to remove any prejudice which might otherwise have arisen.

Pleas of guilty should be personally confirmed by the offender

A defence solicitor informally told the Local Court at committal and the District Court on sentence that his client was pleading guilty but the client was never asked to confirm this. In ***Stuart v R*** **[2022] NSWCCA 182**, Kirk JA held that pleas of guilty to two of the charges were made in circumstances suggesting they were not a true admission of guilt. The integrity of the pleas as an admission of guilt was affected by "mistake or other circumstance". An appeal against conviction for the two charges was upheld. Kirk JA reaffirmed a statement of Kirby P in *R v Duffield* (1992) 28 NSWLR 638 at 655-6 about the importance of requiring a public plea of guilty by an accused in a criminal matter.

Permissible scope for Crown Prosecutor's closing address to a jury

In ***Xie v R*** **[2022] NSWCCA 185**, the Court considered by rejected a ground of appeal asserting that a Crown Prosecutor had caused a trial to miscarry by reason of an improper closing address. Leave to rely upon the ground was refused. However, Bell CJ at [67]-[73] usefully discussed the principles to be applied for determination of a ground of appeal such as this which arises reasonably frequently.

Crimes Act, s 80AF only applies to trials commenced after it came into effect

In ***Stephens v The Queen*** **[2022] HCA 31** the prosecution alleged offences without precision as to when they occurred, except to say that they were committed either before 8 June 1984 when s 81 of the *Crimes Act* provided for the appropriate offence (indecent assault upon a male) or after that date when s 78K was the appropriate offence (homosexual intercourse

with a male aged 10-18 years). Section 80AF came into force on 1 December 2018 and had the effect that previously the Crown would have to charge an offence against s 81 and then an alternative offence against s 78K but it was now able to charge an offence against s 81 (because it had the lower maximum penalty of the two) that would cover the entire period in which it was alleged the relevant incident occurred. The problem was that Mr Stephens had been arraigned on 29 November 2018, two days before s 80AF came into force.

The NSW Court of Criminal Appeal, by majority, held that this did not matter because the section applied retroactively to trials that had begun before the commencement. A majority of 4/5 in the High Court took a different view, holding that because of textual indications and reasonable expectations of the law's operation, it could not apply after a trial had commenced.

Crown entitled to pursue its case forcefully

Mr Krojs was convicted in a jury trial for sexual intercourse with a child aged between 10 and 14. He contended in his conviction appeal in ***Krojs v R*** **[2022] NSWCCA 209** that the Crown Prosecutor's use of "we and "us" in questioning witnesses, taking advantage of his mental difficulties in cross-examination, and provoking him to become emotive in front of the jury was unfair and/or inappropriate. Adamson J dismissed the appeal, finding no misconduct. No objection was taken to any of the questions asked, or the conduct of, the prosecutor during trial. Further, Adamson J observed that the prosecutor's duty is to put the Crown case before the jury as forcefully as appropriate: *Zurshig v R* [2021] NSWCCA 309 at [115]. A Crown Prosecutor is not prohibited from firmly rejecting defence evidence, nor from calling upon the jury to reject the defence case as implausible.

State law governing committal proceedings not constitutionally invalid

The applicant in ***Landrey v Director of Public Prosecutions (DPP)*** **(NSW) [2022] NSWCA 211** instituted a challenge to the constitutional validity of Ch 3, Pt 2 of the *Criminal Procedure Act 1986* (as amended by the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017*). It was argued that the recent amendments moving the function of assessing the capacity of the evidence to establish the elements of the charged offence onto the prosecutor now require the magistrate to rubber-stamp the prosecutor's opinion on the merits of the case. Imposing such a function onto a judicial officer raised an issue as to whether Ch 3, Pt 2 contravened the constitutional constraint imposed on state legislative power by impairing the institutional integrity of the Local Court.

Basten AJA dismissed the appeal, finding Ch 3, Pt 2 was not constitutionally invalid. No obligation is imposed on a magistrate to assess the merits of the prosecution case or assess the correctness of the content of the charge certificate through Ch 3, Pt 2. There is, as such, no sense in which the Local Court must rubber-stamp any determinations at to the strength of the prosecution case. Ch 3, Pt 2 does not enlist judicial officers into the executive or force them into a non-discretionary function to approve findings by executive officers. The constitutional challenge was rejected.

Where intervention by trial judge is deemed excessive

It was contended in ***Mehajer v R*** **[2022] NSWCCA 240** that excessive intervention by the trial judge in a judge-alone trial resulted in a miscarriage of justice. Bell CJ, Gleeson JA and Yehia J dismissed the appeal, stating that the judge's questioning was intended to resolve issues that arose during trial. No pre-judgment could be inferred from the questions, nor did the intervention hinder the presentation of the defence case.

The Court provided an overview of authorities that might be followed when assessing whether a judge's intervention may be held as excessive and result in a miscarriage of justice (see [144]-[150]). Per the judgment of Kourakis CJ in *R v T, WA* [2014] SASCFC 3; (2013) 118 SASR 382 (endorsed by the Court in *Ellis v R* [2015] NSWCCA 262), there are three grounds upon which excessive intervention might be argued: where the questioning unfairly undermines the proper presentation of a party's case (disruption ground); where the questioning gives an appearance of bias (bias ground); and where the questioning is such an egregious departure from the role of a judge presiding over an adversarial trial that it unduly compromises the objective evaluating of the evidence (dust of conflict ground). Greater latitude regarding the questioning of witnesses is afforded where a judge is sitting alone (see *FB v R; R v FB* [2011] NSWCCA 217). Generally, however, where judicial questioning creates a real danger of unfairness, a miscarriage of justice may be found. This notion of fairness will ultimately depend on the manner and timing of the questioning, the opportunities given to the parties to deal with answers given by witnesses, and the degree to which the judge appears to be partaking in 'cross-examination'.

Distinction between withdrawal of guilty plea before and after conviction

The applicant in ***White v R*** **[2022] NSWCCA 241** sought to withdraw a plea of guilty entered after arraignment at the beginning of what was intended to be a pre-trial hearing concerning evidence admissibility. The application to withdraw had been refused, and he was subsequently convicted and sentenced. Bell CJ, Button and N Adams JJ allowed the appeal, finding that the judge applied an incorrect legal test when refusing the application. The new and different test to be applied where an accused seeks to withdraw a guilty plea prior to conviction is whether the "interests of justice" require the plea be withdrawn.

The Court found a distinction between an application to withdraw a plea before conviction (first scenario) from an application to appeal against conviction on the ground that the court should find that the plea be permitted to be withdrawn (second scenario). The distinction, founded in the concept of "finality", recognises that any attempts to disturb the outcome after conviction will necessarily impact upon the finality of the verdict and sentence. Where a conviction has not yet been entered, however, nothing has been made final. It is thus open for the Court to allow a guilty plea to be withdrawn where necessary to the interests of justice in the *first* scenario, but not the second.

Permanent stay of special hearing refused – not an "affront to humanity"

Kitchingman v R **[2023] NSWCCA 4** concerned an appeal against an interlocutory order refusing a permanent stay of a special hearing. The applicant had been charged with the

(now repealed) offence of buggery but had been found unfit for trial. The applicant argued that a special hearing would be "unfair" to him, given the long delay in complaint since the time of the offence (1977-1978), because important evidence supporting his defence was no longer available and his health and cognitive capacity was greatly impaired because of advanced age. The lost evidence comprised medical records which would have confirmed he had a medical condition rendering him unable to sustain an erection, thereby rebutting the complainant's account he engaged in an act of intercourse. The applicant's wife, however, was in a position to give evidence on the subject.

Basten AJA dismissed the appeal holding in accordance with the test in *Subramaniam v The Queen* (2004) 79 ALJR 116, the applicant's "current requirement of care and treatment" for his health and cognitive impairment were not so dire that allowing the trial to continue would be an "afront to is humanity". The loss of evidence was acknowledged by the trial judge as of substance but something that could be taken into account in the judge-alone special hearing. No error was established in that respect.

Permanent stay granted when police action denied availability of a complete defence

Boxes containing a border-controlled drug which had been imported into Australia were intercepted and reconstructed by police and sent on for delivery to a person who was then charged. It is a defence in s 307.5(4) of the Criminal Code (Cth) if the person establishes they were ignorant the drugs were imported. In reconstructing the boxes, a police officer affixed a Singapore Airlines label which clearly conveyed their foreign origin. It was not clear whether such an indication was on the boxes previously.

In ***La Rocca v R*** **[2023] NSWCCA 45** it was held that a District Court judge erred in refusing an application for a permanent stay of proceedings. It would bring the administration of justice into disrepute to permit the prosecution to proceed when the accused was practically deprived of the potential to raise the defence by the investigating officer's actions.

SENTENCING – GENERAL ISSUES

Good character to be taken into account, even where it facilitated the offending (except for child sex)

Fenner v R **[2022] NSWCCA 48** involved an appeal against a sentence imposed for a number of sexual offences committed by a teacher against a 17–18-year-old where the sentencing judge found that prior good character should not be taken into account as a mitigating factor as it was that very good character which led to the offender's role as a schoolteacher with access to the victim. The CCA found that the sentencing judge erred in doing so because it was not a child sexual offence.

While the Crown had submitted that Mr Fenner's character "should carry less weight" in the context, the sentencing judge misstated this submission when he provided that those factors "should not be taken into account as mitigating". Davies J noted the significance of the fact Mr Fenner had demonstrated actual good character for a long period as a

schoolteacher, rather than obtaining the trusted position for the specific purpose of committing offences.

Hardship to family or dependents must be taken into account in sentencing for Federal offences

The offender in **Totaan v R [2022] NSWCCA 75, (2022) 365 FLR 69** appealed against her sentence for a term of imprisonment in respect of revenue fraud offences, on the grounds that the hardship to which a sentence of imprisonment would subject her mother and children was not taken into account but should have been per s 16A(2)(p) of the *Crimes Act 1914* (Cth). The ground was upheld, and the applicant's sentence was set aside accordingly.

A bench of five judges found that s 16A(2)(p) should be applied according to its terms. Decisions from the CCA or other intermediate appellate courts which found that "a court imposing a sentence for a federal offence may only have regard to hardship of a family member or dependent where the circumstances of hardship satisfy the epithet "exceptional" are "plainly wrong" and should not be followed".

The courts reasons for this were (at [77]ff):

- There was no textual support for the requirement of that any exceptional hardship be shown in order for the hardship to be taken into account.

- Although judges may naturally be reluctant to "let go" of common law principles where they are replaced or overlaid by statute, "…It would be most odd if the legislature, in enacting s 16A(2)(p) in the plain language in which that provision appears, intended that it be read and understood, by reason of a pre-existing common law position, in a way that was different from and more limited than that suggested by the words in fact used…".

- A requirement to show exceptional circumstances not only is not supported by the text, but in fact "runs contrary to the language of the subsection, which provides that the probable effect of the sentence on family members and dependents 'must' be taken into account".

The Court of Criminal Appeal noted that two early intermediate appellate court decisions (*Sinclair* and *Matthews*) "took an immediate wrong turn" in asserting that s 16A of the *Crimes Act* did not intend to alter the common law, where s 16A(2)(p) plainly did. The Court drew a comparison between this case and the court's assessment in *Parente v R (*2017) 96 NSWLR 633 that the *Clark* "principle" (the principle that drug trafficking in any substantial degree should lead to a term of imprisonment absent "exceptional circumstances") was incompatible with the judicial sentencing discretion and should no longer be applied:

> "[91] … The requirement for 'exceptional circumstances' or 'exceptional hardship' to be shown has no 'statutory root' (cf *Parente* at [101]) and, to adopt the words of Simpson JA in *Robertson v R* [2017] NSWCCA 205 at [89] in relation to the *Clark* principle, the grafting on of such a requirement imposes 'an unlegislated judicially created constraint on the sentencing discretion'."

Conflating offences when determining whether no penalty other than imprisonment is appropriate

An offender pleaded guilty to two offences that had been committed two weeks apart (affray and assault occasioning actual bodily harm in company) and was sentenced to a term of imprisonment on the basis that the threshold in s 5 of the *Crimes (Sentencing Procedure) Act 1999* had been crossed and that only a sentence of imprisonment would address the need for general deterrence. It was held in ***Sarhene v R*** **[2022] NSWCCA 79** that it was not open to her Honour to reach the conclusion that the only appropriate punishment in relation to the affray offence was imprisonment.

The two offences should not have been conflated in consideration of the s 5 issue. The "threshold" question arising from s 5, as to whether no sentence other than imprisonment is appropriate, is required to be considered independently in respect of each offence. Hamill J determined that the affray offence was not one that required the imposition of a sentence of imprisonment given the applicant's limited role and that he committed no acts of violence himself, combined with his good character and youth.

Misapplication of s 25D of the Crimes (Sentencing Procedure) Act 1999

Mr Doyle pleaded guilty in the Local Court to a drug supply offence. The District Court imposed a term of imprisonment which incorporated a 25% discount to reflect the utilitarian value of the guilty plea, acceptance of responsibility for the offence, and the offender's willingness to facilitate the course of justice. On appeal in it was argued that these three factors were impermissibly conflated and that the sentencing judge therefore failed to give effect to s 25D of the *Crimes (Sentencing Procedure) Act* (providing for sentencing discounts under the EAGP scheme) or failed to give weight to the other two factors.

In ***Doyle v R*** **[2022] NSWCCA 81**, Bell CJ dismissed the appeal on the basis that no lesser sentence was warranted. He held there was error on part of the sentencing judge in the attribution of the sentencing discount. The applicant's criticism of "the rolled-up way" the three considerations of the utilitarian value of a plea, remorse, and willingness to facilitate the course of justice were dealt with was "well made". Section 25D makes clear that "sentencing discounts pursuant to that section are to be made solely 'for the utilitarian value of a guilty plea' and no particular or individualised assessment of that utilitarian value is required". An offender's acceptance of responsibility and willingness to facilitate the course of justice are "conceptually distinct" and "require separate treatment".

Whether error in stating test of "recklessness" in sentencing for a Commonwealth offence

In ***Kemal v R*** **[2022] NSWCCA 83** the applicant had pleaded guilty to a Commonwealth offence of importing a commercial quantity of a border-controlled drug contrary to s 307.1 of the *Criminal Code 1995* (Cth). The fault element of the offence was recklessness, i.e. Mr Kemal was aware of a substantial risk that such drugs were in the suitcase in his possession, and it was unjustifiable for him to have taken that risk and brought the suitcase to Australia. Recklessness for the purpose of Commonwealth offences is defined by the *Criminal Code*,

but the applicant appealed on the basis that the sentencing judge erred in applying the common law test of recklessness rather than the statutory test. The appeal was dismissed. The sentencing remarks had to be read as a whole. The sentencing judge's reference to the applicant turning his mind to the possibility that he was carrying a border-controlled drug was not an application of the incorrect test; it was merely a paraphrasing of what the applicant himself had said about his state of mind.

Parity where one shared offence but co-offender also sentenced in respect of multiple other offences

Mr Wood was sentenced to a term of imprisonment for 4 years with a non-parole period of 2 years 6 months for an armed robbery offence. His co-offender, Mr Layton, was sentenced to an aggregate sentence of 5 years 3 months for that and other offences. The indicative sentence for the armed robbery was 4 years 3 months. His aggregate sentence was ordered to be accumulated by 10 months on a pre-existing sentence of 5 years with a non-parole period of 3 years. Mr Wood successfully raised a parity ground of appeal in ***Wood v R*** **[2022] NSWCCA 84**.

Dhanji J, allowing the appeal, found that Mr Wood had no justifiable sense of grievance based on the indicative sentence for Mr Layton's shared offence, but he did in respect of the aggregate sentence imposed upon Mr Layton for the entirety of his offending. That aggregate sentence encompassed the shared offence, two further armed robberies, a police pursuit, an offence of take and drive conveyance and an offence of possession of an unauthorised pistol. The application of the principal of totality led to the sentencing judge extending significant leniency to Mr Layton "with no corresponding amelioration of the sentence imposed on the applicant".

Doubt whether aggregate sentence under State law can be imposed for Commonwealth offences

The Court in ***Patel v R*** **[2022] NSWCCA 93** when engaging in a resentencing exercise for Commonwealth offences concerned itself with a question of whether s 53A of the *Crimes (Sentencing Procedure) Act* 1999 (which allows for aggregate sentences) was picked up by s 68 of the *Judiciary Act 1903* (Cth). Brereton JA considered there was doubt about this, notwithstanding its past acceptance, so he was "more comfortable" imposing individual terms for each of the two offences pursuant to s 19(2) of the *Crimes Act 1914* (Cth).

Treatment of unchallenged evidence on sentence

Mr Care's appeal against sentence took issue with his sentencing judge having rejected unchallenged evidence relied upon in respect of remorse and childhood disadvantage. Rothman J referred in ***Care v R*** **[2022] NSWCCA 101** at [71]-[72] to a principle of any judicial proceeding being that evidence should be accepted where it is not challenged, or contradicted by other evidence, or glaringly improbable. In such circumstances, the court is left with the conclusion that the parties have accepted the evidence and it would be to

deny the party adducing the evidence a proper opportunity to present its case if it were to be rejected.

Error in application of parity principle

In ***B v R*** **[2022] NSWCCA 102** the applicant had pleaded guilty to two counts of supplying a large commercial quantity of a prohibited drug. The applicant appealed on the ground that he should have been regarded as a co-offender with another person who had been sentenced earlier in relation a separate purchase of part of the same Mexican import that one of B's offences related to, and therefore the parity principle should apply. Price J allowed the appeal, because while the two offenders had different roles they were nevertheless involved in the same criminal enterprise and "there was a marked interconnection between their offending."

Distinction between abuse of trust and abuse of authority

PC v R **[2022] NSWCCA 107** concerned an offender who had pleaded guilty and was sentenced in respect of offences involving sexual intercourse with his child who was between the ages of 8 and 12. He was sentenced to 16 years imprisonment and appealed on the basis that it was manifestly excessive. The applicant argued that the offence was not aggravated by a breach of a position of authority, as the offences (contrary to s 66C(2) of the *Crimes Act 1900*) already involved an element that the victim was under the applicant's authority. The appeal was dismissed. No party had made a submission in the court below that taking into account a breach of trust would involve an element of "double counting." Although s 21A(2) of *the Crimes (Sentencing Procedure) Act* provides that the court should not have regard to an aggravating factor where that factor is an element of the offence, an "abuse of trust" is not an element of the offence created by s 66C(2).

Applying totality principle where there is a fragmentation of sentencing proceedings

The respondent to the Crown appeal in ***R v Obbens*** **[2022] NSWCCA 109** had been sentenced for a serious indecent assault on a child who was a student at a school at which the respondent was headmaster, with a further offence taken into account. The offence occurred in 1989 and the sentencing judge imposed a community correction order. In doing so he had regard to the fact that the respondent had served a three-year sentence for three counts of similar offences committed between 1987 and 1989. The Crown appeal was based on assertions of manifest inadequacy and failure to apply the principle of totality.

It was held by Hamill and Dhanji JJ that the Court's task was not to consider whether the judge who imposed the three year sentence in relation to the other offences would have imposed a longer term had this additional indecent assault been known. The correct question was whether the three year sentence together with the 18 month community corrections order could encompass the whole of the criminality. The six year period that passed since the offender served that custodial sentence was not a "period in which the offender went about life free of opprobrium", meaning that an additional sentence of imprisonment rather than a longer initial term was "likely to involve a significantly greater

punishment." This in combination with the offender's personal circumstances meant that the sentence imposed was not manifestly inadequate.

Applying totality principle where sentence imposed for both State and Federal offence

Mr Bisiker pleaded guilty to 2 aggravated offences under the *Criminal Code (Cth)* (using a carriage service to transmit child abuse material) and to offences under the *Child Protection (Offenders Registration) Act 2000* (NSW) of possessing child abuse material and failing to comply with reporting obligations. There was a degree of accumulation of the sentences. He contended on appeal that the sentence was manifestly excessive because of a failure in application of the totality principle.

The appeal in ***Bisiker v R*** **[2022] NSWCCA 110** was dismissed. Kirk JA found no error in the application of the totality principle. The Commonwealth offences, while factually similar, related to a different period of offending and concurrency was not required. Further, the State offences were distinct. The purposes of the State offence relating to reporting obligations was to assist with the management of offenders in the community and deter offenders from non-compliance with its requirements. To allow punishment for this offence to be "subsumed with any subsequent offences which occurred in connection with something which should have reported" would be to undermine that purpose.

Delay in sentencing for offending as a child

Young v R **[2022] NSWCCA 111** concerned an applicant who was sentenced when he was in his 30s for physical and sexual offences he committed against his niece (aged 9 to 11) when he was aged 14 to 16. The *Bugmy* principles applied on the basis that the offender (and victim) had been subject to sexual abuse by the offender's father. The appeal was allowed on the ground that the sentence of 3 years with a non-parole period of 18 months was manifestly excessive, as the Children's Court could have considered the availability of suspending a control order while no equivalent was available in the adult jurisdiction. N Adams J (Bell CJ agreeing) held that the sentence did not reflect the significant factor of the extended delay. The delay led to a limitation of sentencing options and meant that "rehabilitation was no longer the primary sentencing principle" over deterrence. Further, the delay meant that "the possibility that the cycle of abuse" could have been addressed earlier was lost, and if he had been sentenced as a child, he would not have had a criminal history, as he did at the time he was sentenced by the District Court.

S 25AA(1) of the *Crimes (Sentencing Procedure) Act*, commencing in 2018, meant that the court was required to sentence in accordance with the practices at the time of sentencing rather than at the time of the offence. Other changes to the statutory sentencing regime in NSW commencing in 2018 also meant that an ICO was no longer an available punishment. This meant that the extended delay in bringing proceedings after 2018 further disadvantaged the offender. The sentence imposed did not "reflect the exceptional accumulation of subjective factors", and a lesser period of imprisonment was warranted "in the highly unusual circumstances of this case".

Significance of involvement of undercover operative in events leading to the commission of an offence

In ***Jomaa v R*** **[2022] NSWCCA 112** the applicant had pleaded guilty to attempting to import a commercial quantity of a border-controlled drug and was sentenced to 21 years imprisonment. The applicant appealed, arguing that the sentence was manifestly excessive, and that the judge had failed to give adequate weight to the principles from *R v Taouk* (1992) 65 A Crim R 387. Cavanagh J (Hamill J agreeing) allowed the appeal: the sentence imposed did not reflect that the role of the undercover operative diminished the applicant's culpability. The applicant was resentenced to a term of 18 years imprisonment. Beech-Jones CJ at CL dissented, contending that nothing about the undercover operative's conduct diminished the culpability of the offender. Although the undercover operative "provided the opportunity for this particular importation to take place at this particular time", there was no "assistance, encouragement or inducement" which would diminish the offender's culpability and which would be required to engage the *Taouk* principle.

Whether prior record is aggravating, mitigating or neutral

Meis v R **[2022] NSWCCA 118** concerned an appeal against a sentence imposed in respect of drug supply and manufacturing offences. The offender had been placed on a bond 10 years previously for supplying a prohibited drug. There was no further offending until the index offences. The sentencing judge considered the prior offence as an aggravating factor under s 21A(2)(d). While the judge did not necessarily err in doing so, Simpson AJA held that there was error in failing to provide a reasoned explanation.

Section 21A(4) ensures that factors are not considered "in a way inconsistent with general sentencing principles and policy." Section 21A(2)(d) required the sentencing judge to take into account the offender's "record of previous convictions" as an aggravating factor, while s 21A(3)(e) recognises "that a record of previous convictions may exist but not be significant for sentencing purposes." Whether or not a record of previous convictions is determined to be significant will determine whether sub-s (2)(d) "comes into play." If it is not to be treated as significant, the offender may be entitled to their record being regarded as a mitigating factor.

The sentencing judge accepted the Crown submission that s 21A(2)(d) applied but provided no reason for preferring that position. Specifically, he did not consider "whether the present offending was an uncharacteristic aberration", whether there was the manifestation of "a continuing attitude of disobedience of the law" and whether the prior offence 'illuminates his moral culpability…or shows a dangerous propensity" (*Veen v The Queen (No 2)* (1988) 164 CLR 465). While the prior offending was a relevant circumstance to consider on sentence, the sentencing judge erred in failing to provide "a reasoned explanation for treating the previous offence as an aggravating factor." Simpson AJA, proceeding to the question of resentence, determined that the applicant's criminal history was not to be treated as aggravating or mitigating, but rather was to be treated as neutral.

Parity comparison of a single actual sentence with an indicative component of an aggregate sentence

***Smith v R* [2022] NSWCCA 123** in part concerned an aggregate sentence for three State drug-related offences. One was a manufacturing offence for which the judge indicated a sentence of 6 years 7 months after a 45% reduction for the offenders plea of guilty and assistance. The starting point was 12 years. A co-offender, L, was sentenced for the same manufacturing offence and received a sentence of 4 years 6 months after a 25% reduction from 6 years for his plea of guilty. The pseudonym appealed on a parity ground, claiming a justifiable sense of grievance that his starting point for the manufacturing offence was 12 years compared to the 6 years for L.

Bell CJ dismissed the appeal, finding the two offenders' involvement in the criminal enterprise was significantly different and there was no justifiable sense of grievance. The appropriate consideration for the court was whether the differentiation made by the judge was open to him in the exercise of his discretion (*Lloyd v R* [2017] NSWCCA 303). The Court found that the disparity was not "such as to warrant appellate intervention", and "bearing in mind the discretionary nature of the sentencing process, the sentence imposed by the sentencing judge was plainly open to him".

Bugmy and Fernando principles and whether a causal link to offending is required

The applicant in ***DR v R* [2022] NSWCCA 151** was sentenced for serious child sexual abuse offences. There was evidence of his deprived upbringing but no causal nexus with the offending. His counsel submitted that the case was "not classic *Bugmy*" but described it as "*Bugmy*-esque". The judge made extensive references to the applicant's background in his sentencing remarks but said it had not been submitted and he did not suggest that Bugmy and Fernando principles had any relevant application. It was contended, but rejected, on appeal that the judge had failed to find the applicant's moral culpability was reduced by reason of his deprived upbringing and social circumstances. R A Hulme J said that when it is apparent that an offender's profound childhood deprivation was taken into account, there is no merit in a complaint on appeal about a failure to find reduced moral culpability.

"Crushing" sentences aren't necessarily excessive

The applicant in ***Hraichie v R* [2022] NSWCCA 155** committed four very serious offences which were met with a substantial sentence imposed in the Supreme Court. One of them involved carving an ISIS slogan into his cellmate's forehead. There were terrorism offences related to plans to attack law enforcement officers and another concerned a letter threatening to kill the Commissioner for Corrective Services. He contended on appeal that the application of the totality principle was erroneous and that a sentence which was "crushing" upon him had been imposed. Beech-Jones CJ at CL held that a sentence may be "crushing" upon an offender but that is just a factor to be taken into account in assessing whether it is manifestly excessive.

Parity comparison requires acceptance of the conclusions of the judge who sentenced the co-offender

In ***Narayan v R*** **[2022] NSWCCA 163** it was held by Chen J (at [54]) that a parity appeal accepts the sentence of the co-accused which is used as the benchmark from which to determine whether there is erroneous disparity. It is inappropriate and inconsistent to also contend that the sentencing judgment in respect of the co-offender is vitiated by significant factual error that underpins that sentencing outcome.

Objective seriousness is not assessed by reference to a list of all factor that are potentially relevant

In ***SB v R*** **[2022] NSWCCA 164**, Wilson J held that factors listed by Fagan J in *TO v R* [2017] NSWCCA 17 as potentially relevant to the objective seriousness of an offence of sexual intercourse with a child under the age of 10 is not a checklist that must be applied in the assessment of any instance of the offence. The gravity of an offence is to be assessed by the particular features that are in fact present, not by the absence of factors that would otherwise make the offence worse.

Accumulation of sentences - restraint imposed in summary jurisdiction

Section 58 of the *Crimes (Sentencing Procedure) Act* provides that in summary jurisdiction a new sentence cannot be ordered to be served partly or wholly consecutively with an "existing sentence" (defined to mean an "unexpired sentence") if the expiry date of the new sentence would be more than 5 years after the day the "existing sentence" began. In ***R v Perrin*** **[2022] NSWCCA 170** two questions of law were submitted to clarify the situation of there being a pre-existing sentence upon which a new sentence might be accumulated but where the pre-existing sentence has, as at the date of sentencing, expired.

Wright J held that whether there is an "existing sentence" is to be determined at the date of imposition of the new sentence. (The primary judge had constructed it to mean a sentence that was "existing" or "unexpired" as at the date the new sentence was backdated to commence.) So if a new sentence is backdated to commence upon an already expired previous sentence, the 5-year constraint in s 58 does not apply.

Applying totality principle – sentencing for breach ADVO and for offence constituting the breach

The violence involved in an offence of detain for advantage and occasioning actual bodily harm constituted a breach of an ADVO. A judge imposed a sentence of 2 months for the latter and consecutive sentence of 3 years and 3 months for the former. In ***Thorp v R*** **[2022] NSWCCA 180** it was contended that the judge doubly punished the applicant by taking the breach of the ADVO into account in assessing the objective seriousness of the detain offence and then imposing consecutive sentences.

Ierace J considered that the judge had clearly explained that the contravention of the ADVO contributed to the seriousness of the detain offence but also warranted discrete punishment for contravening a court order by an act of violence. The relative short sentence of 2 months was consistent with it reflecting primarily the criminality of the breach of a court order. The appeal was dismissed.

Borderline intellectual functioning not required to be considered as a mitigating factor on sentence

The applicant in ***Anderson v R*** **[2022] NSWCCA 187** was found guilty of reckless wounding. On sentence, evidence of his borderline intellectual functioning and persistent depressive disorder were relied upon as mitigating factors. The sentencing judge accepted that the applicant did not have a high-level of intellectual functioning but refused to make any findings beyond that. On appeal, it was argued that the sentencing judge erred in failing to consider evidence of his borderline intellectual functioning and depressive disorder.

Bell CJ, Davies and Fagan JJ dismissed the appeal. Borderline intellectual function is not a diagnosis, nor is it a mental disorder that necessarily requires mitigation on sentence. Further, the Court found it was open to the sentencing judge not to be satisfied that the applicant suffered a persistent depressive disorder on the balance of probabilities.

Agreed facts in sentencing proceedings must clearly set out respective roles of co-offenders

The applicant in ***Kareem v R*** **[2022] NSWCCA 188** pleaded guilty to offences related to a fraudulent scheme established by a co-offender and which was in operation between 2013 and 2017. Although there were differences between the contents of the agreed facts for the applicant and co-offender, the sentencing judge proceeded on the basis that the two sets of facts were largely the same and concluded that the objective seriousness for both offenders was equal. An appeal was brought against the 4-year sentence imposed on the basis that the judge erred in sentencing according to material contained in the co-offender's agreed facts.

Ierace J allowed the appeal, finding error in the sentencing judge's consideration of extraneous material. Assessing the objective seriousness identically for both offenders meant that the lesser criminal culpability on the part of the applicant was not adequately reflected in his sentence. A new sentence of 3 years and 7 months was imposed.

Proper operation of s 16AAC of the Crimes Act 1914 (Cth)

Glasheen v R **[2022] NSWCCA 191** concerned a successful sentence appeal brought against a judge's failure to give full effect to available sentencing reductions in accordance with s 16AAC(2)–(3) of the *Crimes Act 1914* (Cth). The applicant had pleaded guilty to an offence of using a carriage service to access child abuse material (contrary to s 474.22(1) of the *Criminal Code* (Cth)). Since the decision of *R v Delzotto* [2022] NSWCCA 117, it was not necessary for the sentence to be the mandatory minimum sentence, or even in the lowest category of objective seriousness, before the deductions in s 16AAC could be applied.

Absconding from previous trial does not entitle accused to 10% discount for plea prior to new trial date

The term "vacated" in s 25C(1) of the *Crimes (Sentencing Procedure) Act 1999* does not apply where the trial was aborted because of an accused's abscondment: ***Gurin v R*** **[2022] NSWCCA 193**. The applicant had initially pleaded not guilty to two counts of robbery, but no jury trial was able to take place due COVID-19 restrictions. Around 7 months later in October 2020, a fresh trial date was fixed but Mr Gurin failed to appear. He was subsequently arrested and he pleaded guilty on his first day before the court in July 2021. He argued that his plea warranted a 10% discount per s 25(D)(2)(b)(i).

Mr Gurin's appeal was dismissed. Campbell J held that the operation of s 25D was dependant on the timing of the plea, with its purpose being to present a graduated discount based upon the timing of the guilty plea. Once a trial commences, only a 5% reduction is available. In the circumstances of this case, the absconding did not reset the opportunity to obtain a 10% reduction.

Balancing Bugmy *factors against* Munda *principles of specific deterrence not erroneous*

Kennedy v R **[2022] NSWCCA 215** concerned an appeal the applicant against a 7-year sentence imposed after trial for an offence of detaining a person without consent with intent to obtain an advantage occasioning actual bodily harm. It was argued on appeal that the sentencing judge had erred in his consideration of the principles in *Bugmy v R* (2013) 249 CLR 571; 302 ALR 192; [2013] HCA 37 and *R v Fernando* (1992) 76 A Crim R 58.

Adamson J dismissed the ground of appeal, finding that the sentencing judge had given appropriate weight to the *Bugmy* principles. The judge had correctly applied the dicta in *Munda v Western Australia* (2013) 249 CLR 600; 302ALR 207; [2013] HCA38: specific deterrence was an important consideration in sentencing for domestic violence offences. This reference to *Munda* was sufficient to explain why the *Bugmy* factors relevant to the applicant's personal background (deprived childhood, poverty, drug use from early age, sexually assaulted at young age, mental health struggles) did not lessen the significance of general deterrence in the applicant's case. General deterrence is not confined to merely discouraging potential offenders from committing crime, but also has an important role in maintaining public confidence in the administration of justice. Although the sentencing judge clearly found that the applicant had suffered an incredibly deprived childhood, her Honour was entitled to also place significant weight on denunciation and punishment for a brutal domestic violence crime.

How to apply discounts when imposing aggregate sentence for a large number of offences

Basten AJA, Fullerton and Garling JJ found error in the applicant's sentence, though held that no lesser sentence was warranted in ***TS v R*** **[2022] NSWCCA 222**. The applicant had been convicted of 130 sexual and related offences committed against various members of his family and was sentenced to an aggregate term of 32 years. Following his successful

sentence appeal (and unsuccessful conviction appeal) however, controversy arose as to how the 15% discount given for numerous early pleas of guilty should be considered when resentencing.

Basten AJA stated that, given the sheer number of offences involved, the discount for the guilty pleas will have "little or no impact on the aggregate sentence" (see [285]). Alternative ways in which the discount might be taken into account were discussed. It was posited that the number of the serious charges to which the applicant pleaded could be taken as a proportion of the total number of convictions (approx. 76%), and then discount the sentence by the same proportion (76% of 15%). Another way, and that which was adopted by the sentencing judge, was to abandon the attempt to give transparency to the effect of each guilty plea by simply taking them into account, without arithmetical calculation, in determining the aggregate sentence. Even if slight numerical discount was given to the aggregate sentence, however, Basten AJA was satisfied that the term imposed was within the range of appropriate sentence for the totality of the offending.

Fullerton and Garling JJ agreed that no lesser sentence was warranted but emphasised that discounts for guilty pleas are required to be considered when determining indicative sentences for each offence. Calculating discounts, or applying their effects, to aggregate sentences is incorrect.

Some leniency to be given for "limited criminal history" – precision of description in sentencing remarks

In ***Musa v R*** **[2022] NSWCCA 221**, the applicant appealed against sentence on the ground that the sentencing judge failed to properly consider his lack of a significant criminal record as a mitigating factor. The applicant had previously been convicted of a dishonesty offence, a drink driving offence and two disqualified driving offences. Harrison J dismissed the appeal, finding that the sentencing judge's reference to the applicant's "limited criminal history" indicates she had afforded him some leniency (at [23]). It was noted that the comparison made by her Honour between the applicant's limited criminal history and a "fully clear criminal history" did not mean the sentencing judge had disregarded his lack of significant offending when deciding on sentence. Rather, when read as a whole, the sentencing remarks showed the issue was considered in the applicant's favour.

Argument regarding hardship to offender's family – exceptional hardship required for State offences

Leave was refused for the applicant in ***O'Brien v R*** **[2022] NSWCCA 234** to appeal against sentence on the ground that the sentencing judge erred in not fully assessing the effect the sentence would likely have on his family, especially his 13-year-old son with multiple severe disabilities. Button J referred to it being conceded by the applicant that for State offences (even after *Totaan v* R [2022] NSWCCA 75) exceptional hardship must be shown. No evidence of hardship was provided. It was absurd for the applicant to claim that the family would be denied his financial support when he had been providing financial support through fraudulent offending against elderly and vulnerable victims.

Hardship by loss of financial support to family where monies derived from ill-gotten gains

A ground of appeal was conceded by the Crown that a sentencing judge erred by refusing to take into account hardship to the offender's family because it was not exceptional, contrary to *Totaan v R* [2022] NSWCCA 75, in ***Rasel v R* [2022] NSWCCA 239**. The applicant's wife and parents each suffered from physical illnesses and were financially dependent on him. The applicant also supported two other siblings studying at universities in Melbourne and Sweden. Bell CJ dismissed the appeal on the basis that no lesser sentence was warranted. It was held that "[m]otivation to assist one's family, usually a matter to be admired, generally loses any positive character when that assistance is secured by unlawful means" (at [41]).

Mandatory minimum sentencing under the Criminal Code (Cth)

The offender in ***R v Taylor* [2022] NSWCCA 256** pleaded guilty to using a carriage service to procure a person under the age of 16 for sexual activity (contrary to s 474.26(1) of the *Criminal Code* (Cth)). A sentence of 3 years, with a recognisance release order after 18 months, was imposed. The Crown appealed, arguing that the sentence did not reflect the principle that the mandatory minimum sentence of 4 years for persons previously convicted of child sexual abuse offences (as prescribed by s 16AAB of the *Crimes Act 1914* (Cth)) was for the "least serious category of offending" as set out in *R v Delzotto* (2022) 108 NSWLR 96; [2022] NSWCCA 117. Simpson AJA held there is no such requirement, as a matter of law, that a sentence exceeding the mandatory minimum to be imposed where the offence is anything but the least serious category of offending". The mandatory minimum is to be viewed as part of the sentencing process, not as a "check" after an assessment of what a just and appropriate sentence might be (see [71]). The appeal was dismissed.

General deterrence applies to sentencing for environmental crime

Grafil P/L was a sand and soil company and Mackenzie was its managing director. Both were found guilty of stockpiling waste without a license. Mackenzie received a dismissal of charge (per s 10(1)(a) of the *Crimes (Sentencing Procedure) Act 1999*, and Grafil P/L received no penalty. The Environment Protection Authority appealed against the sentences imposed on the offenders: ***Environment Protection Authority v Grafil Pty Ltd; Environment Protection Authority v Mackenzie* [2022] NSWCCA 268**. It was argued that the sentencing judge erred in finding an absence of moral culpability, and that general deterrence was not relevant in the imposition of sentence due to the low objective gravity of the offending.

Bellew J allowed the appeal. It was held that the sentencing judge's conclusion that the offending was "not substantial" went against the objective facts of what the offence involved (at [92]). Further, there was no explanation given to support the finding that there was no moral culpability on the part of either offender.

Bellew J also concluded that the sentencing judge had erred in concluding that general deterrence was of no relevance to the determination of sentence. The authorities expressly

note that the principle of general deterrence is an important aspect of sentencing for environmental crime (see, for example, *Bentley v BGP Properties Pty Ltd* [2006] NSWLEC 34). A $100,000 fine was imposed on Grafil P/L . Mackenzie was not re-sentenced.

No requirement to give reasons why a finding of special circumstances is not made

In ***R v Pickard*** **[2023] NSWCCA 7**, the issue on appeal was whether the sentencing judge was required to provide reasons for failing to make a finding of special circumstances. N Adams J held that such reasons were not expressly required. So long as the matters *capable* of constituting special circumstances were acknowledged, the sentencing judge was not obliged to provide further reasons.

Impact of depressive illness on general deterrence must be considered by sentencing judge

The applicant in ***Chu v R*** **[2023] NSWCCA 13** was sentenced for numerous serious drug supply offences, after storing commercial quantities of illicit drugs in his parent's home on behalf of another person. A very strong subjective case was raised for the applicant, and a 25% discount was given in recognition of his early guilty plea. It was argued on appeal, however, that the sentencing judge erred in not taking into account the applicant's depressive illness in relation to general deterrence when imposing an aggregate term of 9 years.

Hamill J allowed the appeal and re-sentenced the applicant to an aggregate term of 7 years 6 months. Hamill J noted there is "little doubt that [the sentencing judge] accepted the evidence" surrounding the applicant's illness. Yet, the sentencing judge failed to describe how the depressive illness affected the issue of general deterrence. The Court concluded that the sentencing judge erred in either failing to give full effect to the impact of the applicant's mental illness on the principles of general deterrence, or by imposing a sentence outside the "legitimate discretionary range".

Jurisdictional error if failure to make full assessment per Crimes (Sentencing Procedure) Act, s 66

Ms Stanley was convicted and sentenced in the Local Court for multiple firearm offences. She appealed to the District Court against the severity of her 3-year sentence, arguing that an intensive correction order ('ICO') should be imposed in lieu of a full-time imprisonment. The appeal was dismissed, as was a subsequent judicial review application in the Court of Appeal.

The High Court, however, allowed a further appeal, set aside the sentence and remitted the matter to the District Court: ***Stanley v Director of Public Prosecutions (NSW) & Anor*** **[2023] HCA 3**. The majority found that the District Court judge had failed to directly assess whether full-time detention was more likely to address the applicant's risk of offending, as required by s 66(2) of the *Crimes (Sentencing Procedure) Act*. Their Honours noted that the sentencing procedure involved a three-step process: first, a determination per s 5(1) that no penalty other than imprisonment would be appropriate; second, a determination regarding what term of imprisonment is appropriate; and third, a determination of whether an ICO might

be imposed. Once that power to make an ICO has been enlivened, the legislative requirements relating to the imposition of that order must be addressed. Failure to do so is a jurisdictional error of law.

No requirement to expressly use the phrase "moral culpability"

The applicant in ***TA v R*** **[2023] NSWCCA 27** was 16 ½ years of age when she committed a series of serious crimes for which she was sentenced to a term of imprisonment. There was unchallenged evidence of her having experienced an upbringing that attracted application of the principles in *Bugmy v The Queen* (2013) 249 CLR 571; [2013] HCA 37 and a mental condition that required consideration of the principles in *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1; [2010] NSWCCA 194 at [177]. She contended on appeal that the judge erred by failing to make findings that her moral culpability was reduced as a consequence of these issues. However, Garling J held that the judge had substantively addressed the relevant factors and there was no essential requirement to expressly use the phrase "moral culpability".

Western Australia summary of principles for sentencing aged offenders approved by NSW CCA

An issue about whether a sentencing judge adequately factored into a sentence the principles relating to offenders of advanced age was the focus of the appeal in ***Liu v R*** **[2023] NSWCCA 30**. Campbell J, with the agreement of Adamson JA and McNaughton J, found the summary of principles provided in *Gulyas v Western Australia* [2007] WASCA 265; (2007) 178 A Crim R 539 to be "accurate and well-summarised" and set them out in full in his judgment at [39]. They reflect long-standing authority in this State and, in short, comprise the following:

> 1. Moral culpability will be reduced when advanced age is accompanied by a consequential factor such as mental impairment.
> 2. Imprisonment may be more arduous because of some consequential factor such as continuous ill-health or ill-health coupled with physical or mental frailty.
> 3. Hardship may flow from the offender's knowledge that a lengthy sentence will likely destroy any reasonable expectation of a useful life after release.
> 4. The general public will understand if factors associated with age justify a more lenient sentence while still serving the purposes of deterrence and denunciation.

Campbell J also noted (at [40]) that these principles are nuanced and not capable of mechanical application. There is no automatic requirement for a lesser sentence than the objective circumstances of the offending require.

Objective seriousness of offences determined by reference to findings in other cases

JG v R **[2023] NSWCCA 33** was a sentence appeal in relation to an aggregate sentence imposed for a multitude of child sexual abuse and child abuse material offences. It included an issue about the primary judge's assessment of the objective seriousness of two offences of persistent sexual abuse of two children contrary to s 66EA of the *Crimes Act*. One involved

10 to 15 acts of sexual touching over a 15 month period constituted by the applicant touching the penis of a 13-15 year old, found to be "just below the middle range". The other involved 10 incidents of increasing sexual assaults over a 39 month period involving touching and masturbating the penis of a 12-14 year old, found to be "above the midrange".

Davies J, Simpson AJA agreeing, Wilson J dissenting, found the determination of the objective seriousness of the s 66EA offences outside the proper exercise of the judge's discretion. This was based upon a consideration of CCA cases in which the gravity of such offences had been considered. The fact that the judge's attention was not drawn to the seven cases referred to in the judgment of Davies J was influential in overcoming the usual reluctance to interfere with such findings by a sentencing judge: citing *Mulato v R* [2006] NSWCCA 282 and *Magro v R* [2020] NSWCCA 25. In re-sentencing, it was found that the first s 66EA offence was in the low range and the second was in the midrange.

Threshold for imposing a sentence of imprisonment

The threshold for a court to impose a sentence of imprisonment is to be found expressed in very similar terms in s 17A(1) of the *Crimes Act 1914* (Cth) and s 5(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). In ***Woods v R* [2023] NSWCCA 37** the Court was required to consider in sentencing for a Commonwealth offence whether there was error in a judge finding that no alternative to imprisonment was available.

Wright J held that the fact that one sentencing option is available or open does not mean that other options are not also available or open. The question is whether out of all the sentencing options which are available or open, the judge is satisfied only a sentence of imprisonment is "appropriate" having regard to "all the circumstances of the case".

SENTENCING - SPECIFIC OFFENCES

Commonwealth child sex offences – a further mandatory factor to be taken into account

***Darke v R* [2022] NSWCCA 52** concerned an appeal from a sentence imposed for the offence of engaging in conduct in relation to a child under 16 years of age with the intention of procuring the child to engage in sexual activity outside Australia (contrary to s 272.14(1) of the *Criminal Code (Cth)*. The sentencing judge did not consider s 16A(2AAA) of the *Commonwealth Crimes Act* which had become operational one month prior to the commencement of the sentencing proceedings. It provides:

> "In determining the sentence to be passed, or the order to be made, in respect of any person for a Commonwealth child sex offence, in addition to any other matters, the court must have regard to the objective of rehabilitating the person, including by considering whether it is appropriate, taking into account such of the following matters as are relevant and known to the court:
>
> (a) when making an order – to impose any conditions about rehabilitation or treatment options;
>
> (b) in determining the length of any sentence or non-parole period – to include sufficient time for the person to undertake a rehabilitation program."

The CCA found that "a mandatory requirement in imposing the sentence has been missed", as s 16A(2AAA) was not referred to in the remarks on sentence at all. Lonergan J held the sentencing discretion miscarried and the Court was required to resentence.

Offence contrary to s 33B of the Crimes Act 1900 is aggravated where victim is a police officer

The applicant in ***Courtney v R*** **[2022] NSWCCA 223** pleaded guilty to an offence of using an offensive weapon to prevent lawful apprehension (contrary to s 33B(1)(a) of the *Crimes Act 1900*), after using his motor vehicle to ram a police car on four occasions while trying to resist arrest. On appeal, it was argued that the sentencing judge had "double counted" in finding an aggravating factor of the victims being police officers. The applicant submitted that s 33B specifically intended to protect police officers and so it follows that police victims are not unusual for this particular offence. Bellew J held that s 33B offences are not intended solely to protect police officers. After a thorough review of the authorities, it was observed that the power to apprehend or detain is not exclusively exercised by police. The victims, thus, are not exclusively police officers and the offence can be aggravated if they are.

Wound with intent to cause grievous bodily harm – injuries amounting to grievous bodily harm can be considered when determining objective seriousness

The applicant in ***Maybury v R*** **[2022] NSWCCA 233** was convicted of two offences, one being wounding with intent to cause grievous bodily harm (contrary to s 33 (1)(a) of the Crimes Act 1900). He argued on appeal that the sentencing judge's statement that "the nature and extent of the injuries clearly amount to grievous bodily harm" when speaking of objective seriousness caused error in his assessment of that issue. It was contended that taking into account the grievous bodily harm done to the victim when the offence was wounding with intent to cause such harm was incorrect. Wright J dismissed the appeal. The sentencing judge was entitled, and required, to take into account the extent and type of all injuries inflicted on the victim when determining the objective seriousness of the offense. It is not an error to have regard to where the injuries fit on the *spectrum* of grievous bodily harm.

Dangerous driving causing death or grievous bodily harm – dangerousness began from deliberate decision to drive overweighted caravan

R v Russell **[2022] NSWCCA 294** concerned a Crown appeal bought against the sentence imposed on the applicant for two offences of dangerous driving cause death, and one of dangerous driving causing grievous bodily harm. The offender had been towing a caravan overloaded by 813kg on an intended journey of 250 km. The collision occurred when the caravan began to sway down a hill around 130 km into the drive. It was argued that the initial sentence imposed was manifestly inadequate, and that the sentencing judge erred in assessing the length of the journey during which others on the road were exposed to risk. There was a dispute regarding the length of the journey during the sentencing hearing, and the judge had accepted a submission by the defence that the dangerous driving period commenced "after the first sway".

McNaughton J allowed the appeal, finding that the dangerousness of the driving began from the decision to drive towing an extremely overweighted caravan. The passengers, and general public travelling the same roads, were exposed to risk for the entire length of the journey. It was the fact that the caravan was overloaded which made the driving itself dangerous, not any lack of skill or attentiveness on the part of the offender.

Child sexual assault – "substantial harm" to victims

In ***Grange v R*** [2023] NSWCCA 6, the applicant was sentenced to an overall term of imprisonment for 30 years for multiple offences relating to child sexual assault and child abuse material. He argued that the sentencing judge erred in her assessment of the objective seriousness of the child sexual assault offences, which led to the imposition of a manifestly excessive aggregate sentence. The argument was founded on whether that the judge had found there was "substantial harm" caused to the victims, thereby aggravating the seriousness of the offending per ss 21A(2)(g) of the *Crimes (Sentencing Procedure) Act*.

Beech-Jones CJ at CL (Bellew J agreeing, Fagan J dissenting) dismissed the appeal. It was found that the sentencing judge did not take into account any finding that the victims suffered substantial harm. Rather, the high-level of objective seriousness was determined based on the young age and vulnerability of the victims, the "depraved nature of the applicant's acts", and the breaches of trust involved in the offending (at [14]).

Child sexual assault - good character must contribute to the commission of offence in order to disregard as mitigating factor

Bhatia v R **[2023] NSWCCA 12** concerned an appeal against sentence, imposed after the applicant was convicted at trial of sexual intercourse with a child under 10 years. The sentencing judge held that the applicant's former good character was not to be considered as a mitigating factor on sentence as it had, rather, enabled him to have access to the complainant and commit the offence, as authorised by the exception in s 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). The applicant argued against this finding, contending that the sentencing judge had erred in depriving him of a mitigating factor that might have reduced his sentence.

The Court allowed the appeal, with Hamill J finding that the sentencing judge's conclusion that the applicant's former good character had assisted him in committing the offence was erroneous. The exception is more appropriately used where offenders gain access to children by taking advantage of their "trusted position" or "good reputation" in a particular institution or society. The applicant was a long-standing family friend of the complainant's parents. The Court found no evidence that the applicant's good character played any material role in allowing him to gain access to the complainant.

SUMMING UP

Errors in directions, unbalanced summing up and in not discharging jury; murder conviction quashed

Mr Haile challenged his conviction for murder on the basis of errors the trial judge made in summing up and error in his refusal to discharge the entire jury following the discharge of an individual jurors for stress. Mr Haile's case was that he discharged a firearm at the deceased in self-defence. The trial judge declined to give a *Liberato* direction to the jury (informing them that even if they rejected Mr Haile's account, the Crown was still required to its case). Instead, he told the jury that they would have to "choose" between the account provided by the accused and the account provided by the Crown's principal witness.

The accused applied for a discharge of the whole jury after one juror was excused due to a medical certificate citing a stress condition, on the basis that it indicated the possibility of undue pressure being on the jury to reach a unanimous verdict in circumstances where they had been in deliberations for an extended period of time and in which a modified *Black* direction had already been given. A further juror was individually discharged for similar reasons, creating an overwhelming indication that those two jurors suffering from stress were not persuaded of the accused's guilt. Bellew J found that the trial judge erred in failing to discharge the jury, and in the directions he provided: ***Haile v R* [2022] NSWCCA 71**.

Erroneous aspect of a Markuleski direction causes miscarriage of justice

In ***Sita v R* [2022] NSWCCA 90** the court allowed an appeal on the ground that a *Markuleski* direction given to the jury was erroneous. There were 10 counts of child sexual assault offences, 8 concerning complainant J and 2 concerning complainant K. Complainant K gave evidence about the two counts that concerned herself and also about two of those concerning K. The judge's direction was that the jury could use a doubt about the evidence of a complainant on one count in considering whether the Crown had proved the other counts concerning that complainant but precluded the jury from applying such doubt about the counts concerning the other complainant. The applicant was convicted of only one count; an offence against J about which K had also given evidence.

Beech-Jones CJ and CL held that there was a miscarriage of justice in that the direction precluded the jury from using any doubts they had about the evidence of the second complainant K when considering the counts concerning the first complainant J. There was a "real chance" the erroneous direction affected the jury's verdict.

Whether forensic disadvantage (delay) directions must be given in absence of request

***Brown v R* [2022] NSWCCA 116** concerned a judge alone trial for a number of allegations of child sexual assault occurring between 1978 and 1980. No application was made in relation to a s 165B(6)(b) direction regarding the forensic disadvantage occasioned by the delay in bringing proceedings; however, on appeal the applicant argued that the failure of the trial judge to give herself that direction caused a miscarriage of justice. The appeal was

dismissed. Bell CJ noted that no duty to give a s 165B(6)(b) direction arises in the absence of an application that sets out the particular forensic disadvantage caused by the delay.

Coincidence evidence directions should be fashioned to suit purpose evidence adduced

A judge allowed evidence in a sexual assault trial that the mother of the complainant had been subjected to a sexual assault by the accused which was described as being in a very similar fashion to the complainant's description of the charged offences. It was obviously tendency evidence but the Crown characterised it as coincidence evidence and the judge admitted it on that basis. It was contended on appeal that the judge's directions to the jury as to the process of reasoning in relation to the evidence were deficient and erroneous. It was held in ***Addo v R*** **[2022] NSWCCA 141** that the jury did not receive any sensible, much less permissible, instruction on how to use the evidence.

The direction was drafted by the Crown at the judge's insistence. It was fashioned on the suggested direction in the Criminal Trial Courts Bench Book which is a direction designed for a case in which the identity of the perpetrator is sought to be proved by coincidence evidence. In this case identity was not in issue. The relevance of the evidence was in potentially establishing the improbability that such similar accounts would be given by different persons coincidentally and so they were most probably true. From this the jury could reason that the complainant's evidence should be accepted and thus the appellant committed the charged offences.

Directions as to tendency evidence – no requirement for proof beyond reasonable doubt

In ***JS v R*** **[2022] NSWCCA 145** there were two charges of child sexual assault and evidence of an uncharged act of sexual touching all concerning the one complainant aged 4-6. The Crown relied upon tendency reasoning as between the two counts and the uncharged act. It was contended on appeal that the judge erred by directing the jury that when considering the tendency evidence, "you are not, in this exercise, considering whether those episodes of misconduct have been proven beyond reasonable doubt". The direction was fashioned upon the suggested direction in the Criminal Trial Courts Bench Book and was held to be correct, per Basten AJA at [35]-[49]. The jury may look at all of the alleged activity and determine whether the tendency was established. It could then look use that in its consideration of whether the charges had been proved beyond reasonable doubt.

Oral directions to the jury cannot be substituted with written directions

Another point arising in ***Cook v R*** **[2022] NSWCCA 282** was that during the summing up the jury was given a document titled "Jury Question Trail", which set out the elements of the charged offences. They were instructed to send a note of any questions they might have about the document. No further directions regarding the elements were given, and no objections were raised at trial regarding the approach taken by the judge. On appeal, the applicant argued that the trial judge erred in failing explain the content of the document to the jury.

Adamson J found that the trial judge's failure to orally direct the jury and explain the elements was an error. The lack of oral directions deprived the trial judge, prosecutor and defence counsel of watching the jury at the crucial time in which they were taken through the elements. Any concern, confusion, or inattentiveness the jury may have expressed thus went unobserved. Adamson J stated that written documents are "designed to augment oral directions…not [to] be a substitute for them". The appeal was allowed, and the applicant's convictions were quashed. A new trial was ordered.

Directions regarding special caution under s 89A of the Evidence Act 1995 not required where no reliance is placed upon it

The applicant in ***CV v R*** **[2022] NSWCCA 264** was convicted of several child sexual assault offences. The offending occurred from 1984 to 2009 and involved five complainants. At trial, the mother of two complainants was cross-examined about a debt she allegedly owed the applicant. She denied all suggestions regarding such a debt. The applicant's partner then gave evidence that a debt *had* been owed. She stated that the mother had demanded money from the applicant and made threats after learning of the allegations against him. The applicant also gave evidence at trial, asserting that the mother had owed a debt and threatened him after learning of the allegations of sexual assault. This was not mentioned by the applicant in his earlier interview with police, but the Crown did not draw upon s 89A of *Evidence Act 1995* to undermine the veracity of the evidence.

The applicant sought leave to appeal against his convictions, arguing the trial judge erred in failing to direct the jury that no adverse inference could be drawn from his failure to mention the debt and threats when questioned by police. Beech-Jones CJ at CL granted leave but dismissed the appeal. The Crown did not invite the jury to draw any adverse inferences from the evidence. There was thereby no real risk the jury would do so. The fact that directions were given regarding the applicant waiving of his right to silence would not of itself indicate to the jury that he had some obligation to disclose facts he might be expected to mention.

Directions as to right of silence should be given at the time evidence is given regarding accused's refusal to participate in recorded interview

Ward v R **[2022] NSWCCA 271** concerned a conviction appeal against the trial judge's failure to give the standard direction when a police officer gave evidence that the applicant had declined to take part in a recorded interview. It was argued that the jury may have reasoned that the applicant was guilty because he had not chosen to participate in the interview, and had only decided to give evidence once he had sufficient time to think over what he was going to say. Adamson J dismissed the appeal, stating that there was no real chance the jury adversely used evidence of the applicant's decision not to give an interview. There was no miscarriage of justice. It was noted, however, that a direction should be given to the jury at the time evidence is given that no adverse inference should be drawn from the accused exercising their right to silence.

Where judicial comment during summing-up may give rise to prejudice

The applicant in ***Cook v R*** **[2022] NSWCCA 282** was convicted of 17 counts of child sexual assault offences. During the summing-up, the trial judge gave the jury directions regarding their obligation to consider each count separately and return separate verdicts. The trial judge noted, "It is a matter for you but I would have thought, speaking only for myself, that there would have to be 17 one way or 17 the other". On appeal, the applicant argued the trial judge erred in this respect and caused a miscarriage of justice.

Adamson J allowed the appeal, noting that the applicant had indeed been prejudiced. It was held that such expressions of opinion by trial judges are ultimately inconsistent with their function during trial, and risk influencing the jury to adopt that position. Though the statement was no more than a brief comment, there is a risk the jury might feel constrained by the force of such a comment from a judicial officer. As such, the applicant was denied the potential prospects of different verdicts for different counts. A re-trial was ordered.

Leaving manslaughter to jury not sought and no obligation on judge to do so

A conviction appeal brought years after a trial and sentencing was brought on the sole ground that the trial judge erred by failing to leave manslaughter to the jury: ***Evans v R*** **[2023] NSWCCA 11.** The applicant was sentenced to 48 years imprisonment for offences committed during two home invasions, including a murder in the second one. It was argued by Mr Woods of counsel that, if the jury were satisfied that the applicant had inflicted the fatal injuries on the deceased (which he had denied, claiming not to have been present), it was then open to the jury to doubt whether he had formed the requisite intent to kill because he was under the influence of ice at the time. This was not an issue was raised by different counsel at trial.

Price J dismissed the appeal. While the trial judge would have been obligated to direct the jury on the alternative verdict if there was evidence with which the jury could reasonably find manslaughter, there was no such evidence. The quantity of ice consumed by the applicant, as well as how the drug affected him, was not specified at trial. The jury could not find that the applicant was intoxicated by ice without such evidence. Further, the jury was entitled to consider how the "strong similarities between the two home invasions" indicated that the applicant conducted both with the same state of mind. Price J noted that, as the evidence pointed to the fact that the second invasion had been planned beforehand, the applicant thereby had likely resolved to commit the offence before becoming intoxicated. Pursuant to s 428C(2) of the *Crimes Act*, intoxication could not therefore be taken into consideration.

Anti-tendency direction not always required in respect of relationship evidence

In Mr Latu's trial for the murder of his domestic partner the Crown was permitted to lead relationship evidence which included evidence of his abuse, jealousy and controlling behaviour. Part of this was a threat that he would "cave" the deceased's head in. The blunt force to her head which caused her death included something the forensic pathologist described as "the point of the bone actually caved in". The Crown was also allowed to

adduce tendency evidence comprising eight incidents of violent conduct towards the deceased when he was angry with her. On appeal it was contended that the judge erred in not warning the jury about avoiding tendency reasoning when considering the relationship evidence.

Davies J held that leave to appeal should be refused: ***Latu v R* [2023] NSWCCA 19**. A warning may be necessary if there is a significant risk the jury might reason impermissibly. No request for the direction was made experienced defence counsel at the trial which is significant in determining whether one was necessary. A consideration of the whole the trial showed that there was no real chance or significant risk of the jury using the relationship evidence in an impermissible way to reason that the applicant had a relevant tendency. There were reasonable explanations for counsel not seeking a direction. There was no miscarriage of justice.

CCA changes its position in relation to a standard direction about complaint evidence

***WS v R* [2023] NSWCCA 52** marked a shift in the Court's attitude to a direction that used to be commonly given to juries about evidence of complaint being "some evidence independent of the evidence given to you by the complainant [in the witness box, JIRT interviews, or pre-recorded evidence]". Beech-Jones CJ at CL, with the concurrence of Davies and Hamill JJ, said it was "doubtful" that such a direction was erroneous. This is to be contrasted with statements made about the direction being erroneous in *SB v R* [2020] NSWCCA 207 and *Long v R* [2021] NSWCCA 212.

In response to *SB v R*, the Criminal Trial Courts Bench Book was amended to avoid further misconstruction. The direction at [5-020] now states that evidence of complaint: " can be regarded as additional evidence the complainant was assaulted in the way [*she/he*] described"

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