District Court of New South Wales 2024 Annual Conference

Criminal Law Review

The Honourable Acting Justice R A Hulme

17 March 2024

CONTENTS

SCOPE OF PAPER

The purpose of this paper is to provide brief notes concerning the range of issues that have been considered in appellate criminal decisions in the year to 15 March 2024.

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 Mr Torey Politis BMedSc.

APPEAL

Pre-recorded evidence issue not a s 5F(3) interlocutory judgment or order

Schedule 3, cl 87(3) of the *Criminal Procedure Act* provides that further evidence cannot be given after a pre-recorded evidence hearing unless the court is satisfied it is in the interests of justice. A trial judge was not satisfied of this when, 12 months after the pre-recorded evidence hearing, the defence wanted the accused's daughter and her brother recalled for cross-examination about the possibility of concoction instigated by their mother. In ***PJ v* R [2023] NSWCCA 105** an application for leave to appeal was made pursuant to s 5F(3) of the *Criminal Appeal Act* which Basten AJA (at [28]-[31]), Walton J agreeing, Hamill J contra, dismissed on the basis that s 5F was not engaged; it was not an interlocutory judgment or order. One practical aspect was that the ruling was not final and could be reviewed in the course of trial.

Disqualification for bias decision amenable to appeal as an interlocutory judgment or order

There were cases which held that a decision on an application for disqualification for bias was not an interlocutory judgment or order amenable to appeal under s 5F of the *Criminal Appeal Act 1912*: *Barton v Walker* [1979] 2 NSWLR 740 and *R v Rogerson* (1990) 45 A Crim R 253. It was held in ***Maules Creek Coal Pty Ltd v Environmental Protection Authority*** [2023] NSWCCA 275 that these cases were no longer good law and should not be followed. Such a decision is an interlocutory order that is amenable to an application for leave to appeal under s 5F(3).

Evidentiary rulings are not amenable to appeal under s 5F of the Criminal Appeal Act

A trial judge refused to uphold an objection to the admissibility of evidence and then a consequential application for a permanent stay of proceedings. Beech-Jones CJ at CL refused leave to appeal pursuant to s 5F(3) of the *Criminal Appeal Act 1912* in ***Teshabaev v R* [2022] NSWCCA 186**. He held (at [23]) there was no jurisdiction in respect of the evidentiary ruling as it was not an interlocutory "judgment or order" and there was no merit in the permanent stay application.

(Judgment in this matter was published in late 2023 after a lengthy period of restriction due to outstanding proceedings with a jury.)

Question of law on case stated pursuant to s 5B of Criminal Appeal Act need not have been specifically articulated below

In ***Department of Education v Trad*** **[2023] NSWCCA 329** a question of law pursuant to s 5B of the *Criminal Appeal Act 1912* was stated at the request of the prosecution by the District Court following an acquittal on appeal from the Local Court. The question was whether an offence making provision in the *Children (Education and Care Services) National Law (NSW)* was one of absolute liability. Before the District Court, however, the prosecutor had contended the offence was one of strict liability which allowed for a defence of honest and reasonable mistake of fact. An initial question for the Court was whether the question was one "arising on the appeal", thereby engaging s 5B.

Ward P held that the question was one which did arise on the appeal. The status of the offence (whether it be strict or absolute, on the one hand, or neither strict or absolute, on the other), did arise on the appeal, although the contention that it was an absolute liability offence was not expressly articulated at that time.

BAIL

Powers of police to take action to enforce bail compliance

Section 77 of the *Bail Act 2013* provides in sub-s (1) a list of actions a police officer may take, unless s 77A applies (it did not in this case), if the officer believes on reasonable grounds that a person has failed, or is about to fail, to comply with bail. One of the actions is to arrest without warrant and take the person before a court or authorised justice. In s 77(3) there is a list of matters that "are to be considered" by an officer in deciding whether and what action to take: the relative seriousness or triviality of the breach; whether the person has a reasonable excuse; the personal attributes and circumstances of the person (to the extent known by the officer); and whether an alternative course of action is appropriate in the circumstances.

In ***Bugmy v Director of Public Prosecutions (NSW)*** **[2023] NSWSC 862** the appellant was in breach of her bail and she assaulted the officer who sought to arrest her. She contended that the officer had not considered *all* of the matters in s 77(3) before deciding to arrest her so the officer acted unlawfully. It followed that she was not guilty of resisting the officer in the execution of the officer's duty. Wilson J, however, held (at [54]) that s 77(1) was not expressly qualified by s 77(3). She said (at [56]) that s 77(3) "provides guidance as to the considerations by which the powers provided by the section are to be exercised. that is what the words 'are to be considered' refers to; the phrase does not establish a mandatory pre-consideration to the exercise of the power of arrest".

COMPLICITY

Knowledge of a circumstance render an act an offence is not required for proof of criminal complicity under Victorian legislation

The *Crimes Act 1958* (Vic) provides in ss 323-4 for "Complicity in commission of offences". It generally reflects the common law. ***The King v Rohan (a pseudonym)*** **[2024] HCA 3** was concerned with three aspects of the provisions that together provided that if an offence is committed, a person who entered into an agreement, arrangement or understanding with another person to commit that offence is taken to have committed that offence.

The respondent was convicted of supplying a drug of dependence to a child and sexual penetration of a child under 12. Three men had been involved in the joint commission of these offences against two children. Knowledge that the victims were of a certain age or were under a certain age was not an element of either offence but it was an essential fact that made the conduct an offence. The Victorian Court of Appeal set aside the convictions on the basis that the prosecution was required to prove the appellant knew when entering into the agreement, arrangement or understanding that the complainants were under 12 for the sexual penetration offences and under 18 for the drug supply offences. The Court acknowledged that this meant it may be necessary to prove that the person "involved" knew more about the facts constituting the offence than the principal offender.

It was unanimously held that the prosecution did not have to prove the essential facts that made the proposed conduct an offence where that knowledge or belief was not an element of the offence itself.

COSTS

Costs certificate available even if defence funded by Legal Aid

Rodden v R **[2023] NSWCCA 202** confirmed that an entirely legally aided applicant the subject of charge(s) being dismissed may still succeed in obtaining a certificate under the *Costs in Criminal Cases Act 1967*.

District Court has no power to award costs in favour of recipients of Crown subpoenas

The respondent in ***R v DK*** **[2023] NSWCCA 281** was prosecuted for engaging in conduct intending to pervert the course of justice. It was alleged he recruited acquaintances to provide false information to solicitors acting for him in relation to sexual assault charges. The DPP issued subpoenas to solicitors who had acted at various times for the respondent but on the basis of client legal privilege they each applied to the District Court to either set aside the subpoenas or to refuse the DPP access to the documents. A judge made orders that the DPP pay the costs incurred by the recipients of the subpoenas. The Crown appealed. Simpson AJA held (at [76]-[81]) that there was no power, either by statute or implication, for the District Court to order the Crown to pay such costs.

DEFENCES

Duress – elements of the common law defence

Ms Carr was convicted following a judge-alone trial of seven carjacking, firearm and assault with intent to rob in company offences committed over an 18-hour road trip. She was in a coercive relationship with her partner/co-offender. She gave evidence that when she told him that she did not want to leave Dubbo he threatened her with a firearm, saying if she did not leave with him he would shoot everyone in the house. There was no evidence of any other threatening words or conduct during the course of the journey. It was contended in ***Carr v R*** **[2023] NSWCCA 269** that the judge erred by concluding the Crown had negatived duress because there was no evidence of a specific demand made by the co-offender requiring Ms Carr to commit the various offences.

Davies J (Fagan J agreeing, Dhanji J dissenting) reviewed a number of cases before concluding (at [64]) that "the authorities are clear that a particular request or demand in relation to the specific offence charged is required even if, in some circumstances it can be inferred … The trial judge's conclusion … about what was required was correct". In the present case there were no demands or requests made of the appellant to involve herself in the individual offences and the Crown had negatived her claim to have acted under duress.

Consent no defence to infliction of grievous bodily harm

The offender in ***Russell v R*** **[2023] NSWCCA 272** was an "extreme body modification artist". He carried out "abdominoplasty" (a "tummy tuck") involving removing skin from a woman's abdominal area but she suffered adverse consequences and required emergency corrective surgery leaving significant scarring. An appeal against conviction for causing grievous bodily harm with intent to do so was brought against the trial judge's refusal to accept that consent is a defence to such a charge.

Bell P, Stern JA and N Adams J engaged in an extensive review of authorities on the subject and (at [87]-[92]) concluded that, subject to well-established exceptions, a person cannot consent to the infliction of grievous bodily harm. This was consistent with the approach of Lord Burnett CJ in *R v M(B)* [2018] EWCA 260 at [21]-[22]; [40]-[44]. The exceptions referred to included those productive of discernible social benefit such as sporting activities, tattooing and piercing and perhaps those with a religious hue, including ritual male circumcision.

Doli incapax – *evidence of mental illness or other disorder not relevant*

A 13-year-old boy was on trial for murder and there was an issue about whether the Crown could rebut the presumption of *doli incapax*. The defence tendered and the trial judge rule admissible psychiatric and psychological reports which included opinions about the accused suffering from certain mental conditions and that these adversely affected his ability to understand that his act of stabbing the deceased was seriously wrong. The Crown appealed pursuant to s 5F(3A) of the *Criminal Appeal Act 1912*. The appeal was allowed.

The Court held in ***R v IP*** **[2023] NSWCCA 314** at [26]:

> "A mental illness or other disorder may have an impact upon the child's ability actively to access the knowledge of serious moral wrongfulness at the moment the relevant act is performed, or to be restrained by it, but that is a separate question. Evidence of a disorder that has or may have that effect could be relevant to a defence of mental health impairment, or substantial impairment, or it may be relevant to the capacity to form the necessary intent; it is not relevant to *doli incapax* (unless the disorder of itself prevents the child from reaching a state of moral and intellectual development where the serious moral wrongfulness of the conduct can be understood)."

EVIDENCE

Tendency evidence – generally, no requirement for proof beyond reasonable doubt

Section 161A of the *Criminal Procedure Act* provides that a jury must not be directed that evidence needs to be proved beyond reasonable doubt to the extent that it is adduced as tendency or coincidence reasoning. (There are exceptions to this in s 161A(2) & (3).) In ***Gardiner v R*** **[2023] NSWCCA 89** a contention that a jury should have been directed as to proof at the criminal standard failed, Adamson JA noting that it was contrary to settled case law and the now existence of s 161A.

Cross-examination as to credit – academic record entry of "cheat fail"

There was no error in a trial judge refusing to allow cross-examination of a complainant in a sexual assault trial on a matter said to go to her credit, namely an entry in her academic record of "cheat fail": ***Xu v R*** **[2023] NSWCCA 93**. Section 103 of the *Evidence Act* provides that the prohibition in s 102 of evidence about the credibility of a witness (the "credibility rule") does not apply to evidence adduced in cross-examination of a witness if the evidence "could substantially affect the assessment of the credibility of the witness". In this case it was accepted that cheating in an academic setting could meet that test but here there was such a paucity of detail about the entry on the academic record that it could not.

Tendency evidence – jury directions did not involve circular reasoning

In ***Rassi v R*** **[2023] NSWCCA 119** the Crown contended that evidence of acts constituting the alleged offences and some uncharged acts established a tendency that could support proof of the charged offences. Game SC, however, contended on the appeal that the judge's directions to the jury invited circular reasoning. The judge should have directed the jury when considering one count to take into account such tendency as was established by acts underlying the other charged acts and the uncharged acts but *not* the act underlying the particular charge being considered. Beech-Jones CJ at CL put that a logical extension of this would be to direct the jury to also ignore acts underlying any other count in which the jury were satisfied the tendency was established if the jury had taken into account the tendency was established at least in part by the act underlying the particular charge being considered.

That is to say, the jury should have been directed: "If you consider in count 1, if you considered count 4, you can't consider your conclusion on count 1 because you considered it on count 4". Senior counsel agreed. This, of course, becomes nonsensical.

Beech-Jones CJ at CL considered the trial judge's directions were not erroneous. They conformed to the explanation of the reasoning process described by Basten AJA in ***JS v R* [2022] NSWCCA 145**:

> [43] It is the tendency that is relied on as circumstantial evidence in proof of the charge on the indictment. The proper approach is to have regard to all the evidence … relied on in proof of the tendency as evidence of the tendency alleged. To the extent that the jury is satisfied of the existence of the tendency, the tendency may be relied on in proof of the charge. Given this process, it is preferable not to direct a jury to make findings as to the conduct relied on in proof of a charge. Rather the jury should be directed with respect to finding the alleged tendency.

The Chief Judge said:

> [8] In this passage, Basten AJA refers to the jury being satisfied of the existence of the "tendency" and, if so, the "tendency" being relied on in proof of the charge. This reflects reasoning by which the existence of the tendency is treated as an intermediate fact in its own right in the reasoning process and not just some description of the evidence used to support it. The direction given by the trial judge in this case reflected this approach. Hence, her Honour told the jury that "[i]f you find the accused did have the state of mind and that he did act on it as nominated, then you can use that in considering whether it is more likely that he committed the specific offences with which he is charged" (see [87]). The reference to "that" in this direction is to the established tendency. In contrast, the applicant's proposed direction refers to the jury using the "tendency evidence" as opposed to the tendency itself.

Tendency evidence – statutory presumption of significant probative value for child sex offences

Section 97A of the *Evidence Act 1995* provides a presumption in child sex proceedings that tendency evidence has significant probative value. A court may determine that it does not if satisfied there are sufficient grounds to do so (sub-s (4)). A list of matters in sub-s (5) must *not* be taken into account unless there are exceptional circumstances in relation to those matters to warrant taking them into account. In ***R v Clarke* [2023] NSWCCA 123** the Crown appealed against a ruling that proffered tendency evidence did not have significant probative value. The appeal was upheld.

Davies, Fagan and Yehia JJ observed that the matters listed in s 97A(5) comprise substantially all of the criteria that under the pre-existing law were regarded as the basis in logic and common sense for comparing the sexual acts said to prove the tendency and the sexual acts charged (e.g. the acts are different; the circumstances in which they occurred are different). Their Honours observed that s 97A indicated a Parliamentary intention that an accused's tendency should be deemed probative of any child sexual offence with which the person is charged in a very broad field of circumstances. Further, that the courts should

be constrained not even to consider countervailing indicia tending against a conclusion of significant probative value in any but exceptional circumstances.

Tendency evidence – directions where the evidence supports the defence case

A woman was found guilty of wounding her ex-partner with intent to cause him grievous bodily harm. She claimed she acted in self-defence and relied upon evidence he had a tendency to be threatening, abusive and violent towards his ex-partners. However, the trial judge warned the jury they should not draw the inference the complainant had this tendency unless it was the only rational inference. She also directed that the tendency could be taken into account in considering whether it was "more likely than not" that the complainant acted in the way the defence alleged.

Unsurprisingly, in ***Waldron v R*** **[2023] NSWCCA 128** it was held that the directions were erroneous. There was no onus upon the accused; a warning to exercise caution before drawing the inference should not have been given; and there was no requirement that all other rational inferences be excluded. It was a matter for the Crown to prove beyond reasonable doubt that the complainant was not the aggressor; not for the accused to prove it was more likely than not that he was.

Tendency evidence — a methodical process for considering admissibility

In ***Burns-Dederer v R*** **[2023] NSWCCA 191** at [43]-[57], Simpson AJA with reference to relevant authority once again provided a methodical template for a consideration of the admissibility of tendency evidence. The case concerned allegations of child sex offences against an 11-year-old boy with evidence of similar conduct by the accused towards a friend of the complainant being admitted to establish a tendency to have a sexual interest in 11-year-old males and to sexually touch them.

On appeal it was argued that the evidence was general, lacked significance, and had a probative value that was outweighed by its prejudicial effect. One basis for this was that the evidence came from a single witness but her Honour held (at [66]) that the lack of evidence of the same or similar conduct from other witnesses did not diminish the probative value of evidence of the complainant's friend.

Doli incapax presumption – nature of evidence required to rebut it

There is a rebuttable presumption that a child aged 10-14 lacks the capacity to understand the wrongness of their conduct. It was held in *RP v The Queen* (2016) 259 CLR 641 at [11] that to rebut the presumption the prosecution must establish knowledge on the part of the child that an act is wrong according to the standards or principles of reasonable people. ***BDO v The Queen*** **[2023] HCA 16** concerned an appeal from Queensland where the presumption is provided in s 29 of the *Criminal Code (Qld)* but observations were made (at [13]) about the principles described in *RP v The Queen* that apply to common law applicable in NSW. The standard of "reasonable people" is a reference to adults. Knowledge of

wrongfulness is concerned with morality rather than being contrary to law. It must be knowledge of a "serious wrongness" as distinct from mere naughtiness.

The Court went on to observe (at [14]) that what suffices to rebut the presumption will vary according to the nature of the allegation and the particular child. Rebuttal cannot be by mere reference to the doing of the act(s). There needs to be evidence from which an inference can be drawn beyond reasonable doubt that the child's intellectual and moral development is such that they knew it was morally wrong in a serious sense to engage in the conduct.

It was also noted (at [22]) that it will often, but not necessarily, be the case that there is little distinction between the child's capacity to understand and their actual knowledge of moral wrongfulness.

Expert evidence under the common law

Queensland is a non-uniform evidence law jurisdiction out of which the appeal against conviction for murder in ***Lang v The King*** **[2023] HCA 29** arose. It concerned an unreasonable verdict ground but also a ground contending that a forensic pathologist's evidence that the deceased's wounds were more likely to have been inflicted by another person than self-inflicted (as the defence case suggested). The appellant accepted that the question whether the wounds were self-inflicted or not was something capable of being the subject of expert evidence if it was based on the witness's training, study, or experience. It was also accepted that the doctor was an expert in a recognised field of expertise, forensic pathology, by reason of which he could give evidence as to the manner in which the knife wounds were inflicted. He contended, however, that the evidence was inadmissible under common law principles as the doctor was giving an opinion as to the likelihood of the deceased acting in a particular way which was not an opinion based on expertise as a forensic pathologist.

Jagot J, Kiefel CJ and Gageler J agreeing, Gordon and Edelman JJ dissenting, dismissed the appeal, concluding (at [469]) that the doctor's "evidence was based on his specialist knowledge and reflected the combined effect of that knowledge brought to bear on multiple facts that he could ascertain only by reason of his specialist expertise".

Impropriety in obtaining admissions from indigenous, intellectually disabled suspect at a police station

Mann v R **[2023] NSWCCA 256** concerned the erroneous admission of evidence that the accused had made admissions in a recorded interview at a police station. He was an intellectually disabled indigenous man suspected of having committed child sex offences. As a "vulnerable person" he was entitled to the protections in Pt 3 Div 3 of the Law Enforcement (Powers and Responsibilities) Regulation 2016. He had received and accepted advice from an ALS solicitor by phone that he should not agree to be interviewed and should not enter an interview room. A detective who was aware of this took him to an interview room and conducted a recorded interview.

A judge accepted that the admissions were obtained "improperly" pursuant to s 138 of the *Evidence Act 1995* but held that the desirability of admitting the evidence outweighed the undesirability of admitting evidence obtained in the way it was. Section 138(3) lists mandatory considerations, one of which is "the difficulty (if any) of obtaining the evidence with impropriety …". In relation to this the judge referred to it being notoriously difficult "to get the full story from a young child in cases of suspected sexual assault" and "to the extent that the accused acknowledges the statements are true", the desirability of admitting the evidence was very high and would prevail. However, Kirk JA held that the judge should have regarded the difficulty in obtaining the admissions by legal means as weighing against admissibility rather than in favour of it. Any willingness to "cut corners" to obtain such evidence should be deterred.

Evidence Act, s 135 – co-accused is a "party" – evidence for accused can be used against a co-accused

Glen McNamara's defence was that it was Roger Rogerson and not himself who had shot and killed a man. He claimed he helped Rogerson dispose of the body because he was subjected to duress which included Rogerson telling him about murders he had previously committed. Rogerson objected, arguing that pursuant to s 135(a) of the *Evidence Act 1995* the court should refuse to admit the evidence because it's probative value was substantially outweighed by the danger it might be unfairly prejudicial "to a party", the party being McNamara's co-accused in the trial. The trial judge upheld the objection but on appeal McNamara contended that there was no power to exclude the evidence under s 135(a) because as a co-accused, he was not a "party" in Rogerson's trial. He claimed he had common law right to adduce evidence probative of his innocence without the evidence becoming evidence against a co-accused.

The contention failed in the Court of Criminal Appeal and again failed in the High Court: ***McNamara v The King*** **[2023] HCA 36; (2023) 98 ALJR 1**. The following emerges in the joint reasons of Gageler CJ, Gleeson and Jagot JJ.

There are strong reasons of principle and policy weighing in favour of a joint trial even though there may be some risk of forensic prejudice to an accused that would not be present in a separate trial (at [42]). Applying the terminology of the *Evidence Act* a joint trial is "a proceeding" to which the Crown ("the prosecutor") is "a party" and to which each co-accused ("a defendant") is also "a party" (at [62]). Sections 55(1) and 56(1) combine to produce the result that evidence probative of the existence of one fact in issue in a proceeding is admissible in the totality of the proceeding and this can be no different in a multi-party criminal proceeding (at [67], [69]). Sections 135, 136 and 137 use similar terminology to provide for a complementary set of exclusions and limitations. The danger of unfair prejudice to "a party" which is able to be considered by a court in determining whether to exclude or limit the use of evidence under s 135(a) or s 136(a) … is unfair prejudice to any co-accused (at [70]-[71]).

"Identification" and "recognition" evidence

A woman complained of being sexually assaulted by a man in a dark bedroom. There were four men in the house at the time: her boyfriend, with whom she had engaged in sexual activity and who had just left the room; the boyfriend's father and brother who were in other bedrooms in the house with their respective partners, unaware the complainant was in the house; and Mr Marco who was supposedly sleeping on the couch at the conclusion of a social gathering during the course of which victim perceived he had been flirting and making sexual advances. The trial judge gave the jury an "identification" warning but it was contended on the appeal in ***Marco v R*** **[2023] NSWCCA 307** that the jury should have been warned about the dangers of "recognition" evidence.

Ward P (at [62]-[64]) doubted that the evidence amounted to "recognition evidence". The complainant did not see here assailant and give evidence that she recognised him. She formed the opinion it was him from a number of features: his hair and arms did not feel like her boyfriend's; the earlier flirting and sexual advances; he was the only male known to her to be in the house when she went to bed; and her observation of him when she went out to the lounge to confront him after the assault. A recognition direction was not necessary. Fagan J agreed and in additional reasoning referred to these features as being the content of the circumstantial case by which the Crown established the assailant was the applicant.

Circumstantial cases – only indispensable facts require proof beyond reasonable doubt

It was contended in ***Carbone v R (No 2)*** **[2024] NSWCCA 7** that a trial judge erred in reaching important factual findings on the civil standard and not the criminal standard of proof even if the facts were not indispensable in accordance with *Shepherd v The Queen* (1990) 170 CLR 573. It was said that where findings were of high significance to the ultimate conclusion of guilt there should be satisfaction to the standard of beyond reasonable doubt.

Simpson AJA rejected this contention as being contrary to authority. She referred (at [75]) to the judgment of Dawson J in *Shepherd* who had emphasised (at [580]) that "the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately".

JUDGE-ALONE TRIALS

A judge should specify the elements of offences whether or not they are in issue

There was no dispute about the elements of the two offences for which Mr Schoffel was charged in a judge-alone trial. In fact, the judge was provided with an agreed "elements document" at the beginning of the trial. It was a fairly straight forward case concerning an alleged robbery with corporal violence and perverting the course of justice. The victim alleged that the applicant had taken his wallet with violent force and had subsequently offered money for the charge to be dropped. On appeal the only ground was that the judge had failed to comply with the requirement of s 133(2) of the *Criminal Procedure Act* that a judge must include the principles of law applied and the findings of fact relied upon.

It was held in ***Schoffel v R*** **[2033] NSWCCA 88** by a majority (Leeming JA and Wilson, Dhanji J dissenting) that it was unnecessary to determine the ground as there were reasons why that might not be desirable (e.g. a perceived lack of full argument). The proviso was applied and the appeal was dismissed. It was said (at [79]), however, to be preferable that judges sitting alone should always set out the essential elements of an offence, even if they are not in dispute, and even if by clear implication they have been proved.

A judge-alone trial does not necessarily provide a basis for a reduced sentence for facilitating the administration of justice

Mr Dukagjini sought and obtained a judge-alone trial on a charge of murder allegedly committed with particular savagery and in the context of a a housebreaking. The parties agreed that there was a risk of a jury misusing evidence that would be led of the accused's long history of burglary offences. The trial had an estimate of 3 weeks but concluded in 7 days with much of the evidence comprising witnesses' statements being tendered in lieu of them being called.

In ***Dukagjini v R*** **[2023] NSWCCA 210** the Court (Harrison and Wilson JJ, N Adams J dissenting) rejected a complaint that the sentencing judge erred in declining to award a discount for facilitation of the administration of justice pursuant to s 22A of the *Crimes (Sentencing Procedure) Act 1999* on the basis that the mode of trial was neutral and that it had benefited the defence to dispense with a jury. It was held that s 22A is a discretionary provision and there was no requirement to allow a discount on account of the mode of trial.

JURY ISSUES

Discharging entire jury when one juror became unavailable during deliberations – no miscarriage.

After a jury retired to deliberate on a Wednesday morning a trial judge was notified that a juror would be unavailable because of an interstate commitment the following Monday and Tuesday. The jury had been told the trial should conclude by the Friday. The judge discharged the juror before releasing the jury on the Friday afternoon, having refused an application to discharge the entire jury. This was the subject of a ground of appeal in ***BJ v R*** **[2023] NSWCCA 77** in which it was held that the decision of the trial judge did not cause a miscarriage of justice. There had been no indication of voting figures nor any suggestion that any inability of the jury to agree might mean that the discharge of one juror could deny the accused a fair trial or give rise to a miscarriage. The length of time the jury had been deliberating at the time of the judge's decision on the Friday afternoon was not indicative of dissent within the jury room. The nature of the charges (child sexual assault) did not give rise to an apprehension of prejudice, thus heightening a need for a jury of 12. The trial judge's exercise of discretion was considered, practical and fair.

Pressure of time as Christmas approached

A two-week trial lasted almost six weeks and verdicts were returned on 20 December. Notes were sent to the judge expressing jurors' concerns about the completion date and their pre-

existing commitments in the pre-Christmas period. The judge refused to deal with a discharge application made on 13 December on the basis of the jury being subjected to undue time pressure because he considered it premature. An application to reagitate it was made after the jury retired to deliberate but it had not been heard prior to the verdicts being returned two hours after the retirement.

It was held in ***Al-Salmani v R*** **[2023] NSWCCA 83** that the jury was not subject to undue time pressure. Nothing could be inferred from the fact the jury's deliberations had only lasted for two hours. Appropriate directions had been given and modestly extended sitting hours had been utilised in consultation with the jury. Although two jurors had already been discharged the remaining jurors had not been made aware that the foreshadowed discharge of a further juror at 3pm that day would be fatal to the trial continuing without consent.

Continuing with 11 jurors after discharging a single juror on Day 2 of a trial

On the morning of the 2nd day of a trial a juror claimed not to have understood that attendance on a daily basis was required and that this was not possible. The judge discharged the juror but over objection from one of the accused determined to proceed with a jury of 11. This was required by s 53C(1)(b) of the *Jury Act 1977* because the judge considered there was no risk of a substantial marriage of justice. It was contended in ***Haines v R; Brown v R*** **[2023] NSWCCA 108** that the decision to continue the trial with 11 jurors was erroneous. A major aspect of this was a submission that there was a "failure adequately to consider that the trial was in a very early stage thus enabling recognition and obedience to the statutory guarantee" in s 19 of a jury of 12. The argument was found to have no merit. Reference to a "statutory guarantee" to a jury of 12 failed to make allowance for the effect of s 22 specifically providing for a trial continuing with a reduced number of jurors.

Discharge power under s 53B of the Jury Act 1977

An expanded jury of 15 was empanelled during the COVID-19 era but on the morning of the second day the judge discharged three jurors because it was discovered the jury room was too small to enable 15 jurors to socially distance themselves pursuant to public health orders. The three jurors to discharge were selected by ballot in the same fashion as an expanded juror is reduced to 12 prior to the commencement of deliberations. It was subsequently contended that the judge erred by discharging 3 of the 15 jurors and by relying upon ss 53B(d) and 55G of the *Jury Act* to do so. The former empowers a discharge of individual jurors if "it appears … that, for any other reason affecting the juror's ability to perform the functions of a juror, the juror should not continue to act". The latter provides for the ballot at the end of a trial to reduce an expanded jury to 12.

In ***Sun v R*** **[2023] NSWCCA 147**, Button and Hamill JJ favoured upholding the ground but then applying the proviso that there was no substantial miscarriage of justice. Kirk JA dissented as to the former but agreed with the end result. The majority were of the view there was no power in s 53B(d) to discharge the three jurors. Section 53B(d) is concerned with something affecting a particular juror's ability to perform the functions of a juror

whereas here the discharge was in respect of something that equally affected all 15 members of the jury.

Majority verdicts – preferrable for evidence that jury unlikely to agree if given more time

It is a precondition in s 55F(2) for allowing a jury to return a majority verdict that (a) the jury has deliberated for a "reasonable time" (not less than 8 hours) having regard to the nature and complexity of the trial, and (b) that the court is satisfied, after examining one or more jurors, that it is unlikely the jurors will reach a unanimous verdict after further deliberation.

In ***AB v R* [2023] NSWCCA 165** the jury had retired at lunchtime on Wednesday and sent a note at 11am on Friday saying they could not unanimously agree. The judge gave a *Black* direction but at 3.40pm the jury sent another note saying they were still unable to agree. The foreperson gave evidence confirming they were still unable to agree. The judge then directed the jury that a majority verdict could be accepted. It was contended on appeal that there was error in doing so because there was an absence of evidence that the jury would be unlikely to reach a unanimous verdict after further deliberation. Beech-Jones CJ at CL said that it would be preferable if the foreperson had given such evidence but there was no express requirement to do so. In the circumstances of this case it was open to the judge to be satisfied of this criterion.

OFFENCES

Participate in criminal group – defined as people obtaining benefit from "a" serious indictable offence

Maroun sold drugs to Mohana and Mousselmani who on-sold them to others. Mohana contended on appeal that this did not constitute the three of them as a "criminal group" per s 93S(1) of the *Crimes Act* because they did not have a shared objective from conduct constituting "a" (i.e. a single) serious indictable offence. Accordingly, Mohana was not guilty of the offence in s 93T(1) of participating in a criminal group. In ***Mohana v R* [2023] NSWCCA 61**, Simpson AJA held that they did have a shared objective from the one serious indictable offence. Maroun sought to obtain (immediate) material benefits from the supply of drugs to the pair and the material benefits they obtained would be directly derived from the on-sale of those drugs, the first step for which was to acquire them from Maroun.

Break, enter and commit serious indictable offence requires a trespass

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 and the NSW Court of Criminal Appeal unanimously held that the trial judge had erred and ordered the quashing of the acquittal and that there be a retrial.

The High Court took a different view (Kiefel CJ, Gageler and Jabot JJ dissenting) in **BA v The King (2023) 97 ALJR 358; [2023] HCA 14** and ordered the appeal to the CCA be dismissed. BA did not commit a "break and enter". For that to occur there would need to be a trespass (i.e. entry to premises of another without lawful authority).

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

The current version of the offence of persistent sexual abuse of a child in s 66EA was inserted by the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* as part of a response to recommendations of the Royal Commission into Institutional Responses to Child Abuse. Its elements have been a subject of conflicting views expressed in the Court of Criminal Appeal: ***R v RB*** **[2022] NSWCCA 142**, ***Towse v R*** **[2022] NSWCCA 252**, and ***RW v R*** **[2023] NSWCCA 2**.

A five-judge bench was convened to definitively determine the issue: ***MK v R; RB v R*** **[2023] NSWCCA 180**. It was faced with three possible constructions as to the offence requiring proof of (1) the commission of two or more unlawful sexual acts; (2) the existence of a *relationship* in which two or more unlawful sexual acts were committed; or (3) the existence of a sexual relationship over and above the commission of two or more unlawful sexual acts. It held that the proper construction was the second of these. Per Beech-Jones CJ at CL (at [95]), a "relationship" becomes an "unlawful sexual relationship" by the commission of two or more unlawful sexual acts. Commonly the relationship might involve an established relationship such as parent/child, teacher/pupil, or coach/player. It was also allowed that there might be a "relationship" that arises from the facts and circumstances of the commission of the sexual acts themselves.

Sexual offences – inconsistencies in accounts by complainants

Arizabaleta v R **[2023] NSWCCA 217** concerned an unreasonable verdict ground of appeal where the applicant placed reliance upon the inconsistencies in the complainant's various accounts as to what had occurred. Rothman J, in agreeing with McNaughton J that the verdicts were not unreasonable, made an observation that implicit inconsistency by omission of important detail in sexual offence cases does not mean that such detail did not occur. He explained:

> [204] All criminal offences are, to the victim, traumatic. The trauma has different effects on different people. In sexual offence cases, in particular, where there is a misplaced sense of guilt from quite innocent victims, failure to detail all of the occurrences is common and a well-known aspect of the effect of sexual assault. There is also an embarrassment factor.

Leeming JA, in dissent, made observations (at [101]-[103]) about the plasticity of human memory.

Sexual offences – responses of sexual assault complainants

Adamson JA collated a number of observations of courts dealing with conviction appeals concerning the responses of sexual assault complainants that are relevant both to such appeals but also to the determination of guilt at first instance in ***Duncan v R*** **[2023] NSWCCA 223**:

> [94] The observations of courts (which can be expected to accord with the collective experience of juries), which do not constitute legal principles may also be relevant to the factual assessment whether a verdict is unreasonable. For example, courts have observed as follows:
>
> 1. it is not uncommon for victims to remember specific details about the assaults but not peripheral or tangential details: *Reed v R* [2006] NSWCCA 314 at [64] (Spigelman CJ, McClellan CJ at CL and Sully J agreeing) and *AS v R* [2022] NSWCCA 291 at [137];
>
> 2. it is not uncommon for children to be imprecise about time: *BCM v The Queen* [2013] HCA 48; (2013) 303 ALR 387 at [45]-[47];
>
> 3. variations in the terms in which a complainant discloses sexual assault or abuse may be explained by context: *Manojlovic v R; R v Manojlovic* [2020] NSWCCA 315 at [82]ff (Hoeben CJ at CL, Button and N Adams JJ agreeing); and
>
> 4. a complainant who bears no, or little, responsibility for something may apologise, either because of an instinctive reaction, insecurity or for some other reason: *Maughan* at [12] (Adamson J).

Accessory after the fact – the common law test

In ***Quinn v R*** **[2023] NSWCCA 229** an intruder to the home occupied by Ms Quinn and her boyfriend, Mr Davis, stole Ms Quinn's handbag and fled. They chased after him. She caught up with him first and struggled to recover her handbag as he threatened her with a gun. Mr Davis soon arrived and struck the deceased with a sword, killing him. Ms Quinn and Mr Davis then fled, staying in various hotels and paying cash for the needs, she being of considerable assistance to him in evading arrest. A jury found Mr Davis guilty of manslaughter on the basis of excessive self-defence and Ms Quinn guilty of being an accessory after the fact.

Ms Quinn's conviction was quashed on appeal. Bell CJ (at [103]ff) noted the absence of any statutory definition of the offence and referred to common law authorities by virtue of which the mental element of being an accessory after the fact is that "at the time of providing such assistance" the accused was "aware of the essential facts and circumstances that made up [the principal offender's] offence". The Crown had failed to exclude the reasonable possibility that Ms Quinn's belief after the fact when providing assistance to Mr Davis was that he had seen her being threatened with the handgun and his response was a reasonable one in the circumstances as she perceived them, namely that it was necessary to strike the intruder with the sword in order to defend her.

Cannabis leaf is not cannabis plant

The applicant for leave to appeal against sentence in ***Fear v R*** **[2023] NSWCCA 238** in respect of an aggregate sentence imposed for offences including supplying cannabis plant contrary to s 23(1)(b) of the *Drug Misuse and Trafficking Act 1985* must have been pleasantly surprised when the Crown drew attention to the fact that the charge should have been one of supplying cannabis leaf contrary to s 25(1) of the Act. He could not in law have been convicted of supplying cannabis plant and the Court accepted the Crown's concession that the conviction should be quashed.

Homicide – causation principles

The principles concerning causation in homicide cases were thoroughly reviewed and succinctly summarised by Beech-Jones CJ at CL in ***Baker v R*** **[2023] NSWCCA 262** at [54]-[59].

Female genital mutilation offence applies only to child victims

The offence of female genital mutilation in s 45(1) is not expressly confined to any age group of female victims. However, in ***Russell v R*** **[2023] NSWCCA 272** the Court was persuaded that it should be confined to child victims by reading down the statutory provision to conform with the seriously considered dicta in *The Queen v A2* (2019) 269 CLR 507. Accordingly an "extreme body modification artist" had his conviction quashed for having performed a labioplasty procedure upon an adult female at her request for cosmetic purposes, notwithstanding she suffered adverse consequences.

Larceny as a clerk or servant – meaning of "clerk or servant"

Day v R (No 2) **[2023] NSWCCA 312** was an appeal against convictions for 34 counts of embezzlement as a clerk or servant contrary to s 157 of the *Crimes Act 1900*. "Clerk or servant" is defined in s 155. Mr Day was the sole director and shareholder of a management company which managed the professional activities of Guy Sebastian, a performer and recording artist. The Crown contended he had misappropriated income received into his company's trust account which he was obliged to remit to Mr Sebastian. One of three grounds of appeal was that the Crown had not proved that he was a "clerk or servant" for three reasons. First, it was necessary that he was employed under a contract of service, not a contract for services. Second, and alternatively, the term did not apply to persons who received money in the course of business or commerce as here. Third, it was the management company, not the applicant, who had a contractual relationship with the complainant.

It was held by Dhanji J at (129] that the term "clerk of servant" did not require proof of a master and servant relationship or that the applicant was bound by a contract of service. The evidence could establish the applicant was a "collector of moneys" which brought him within the s 155 definition, deeming him to be a "clerk or servant".

(The appeal was allowed on another ground concerning inappropriate comments made in the prosecutor's closing address.)

Indecent assault on a male (repealed s 81)

It was held in ***Lam v R*** **[2024] NSWCCA 6** that the offence of indecent assault upon a male contrary to s 81 of the *Crimes Act 1900* (which was repealed in 1984) only applied to males indecently assault males. Upon Ms Lam's appeal pursuant to s 5F(3)(a) of the *Criminal Appeal Act 1912*, a demurrer was upheld and the indictment quashed.

Drive with prescribed illicit drug is an offence of absolute liability

Mr Narouz claimed that he had not consumed cocaine in the days or weeks prior to a positive oral fluid test but had taken a sip from a bottle of energy drink that had been left on the floor of a car he had borrowed from a friend. A magistrate had accepted the defence was available to a charge of driving whilst there was present in oral fluid a prescribed illicit drug but rejected the defence version of events. A judge of the District Court on appeal had held the defence was not available because the offence was one of absolute liability.

In ***R v Narouz*** **[2024] NSWCCA 14** there was an extensive review of various considerations which all led Chen J to conclude that the offence is one of absolute liability.

Maintain unlawful sexual relationship with child contrary to s 66EA – new offence created in 2018

The offence in s 66EA of the *Crimes Act 1900* was recast in 2018. It formerly required proof of the accused engaging in conduct constituting a sexual offence against a child on three or more separate occasions on separate days. It became an offence of maintaining an unlawful sexual relationship with a child constituted by two or more unlawful sexual acts over any period. There were other differences between the former and current version of the section including that the maximum penalty was increased from 25 years to life imprisonment.

In ***Xerri v The King*** **[2024] HCA 5** it was held that the 2018 iteration of the offence is new and accordingly s 19 of the *Crimes (Sentencing Procedure) Act 1999* did not preclude a sentencing court having regard to the increased penalty in respect of offences committed before the provision of the Act increasing the penalty commenced.

PRACTICE AND PROCEDURE

Alternative counts and whether they should be averred in the indictment

An indictment alleged in Counts 1 and 4 offences of aggravated sexual touching (s 61KD(1)(a)) and without averring them in the indictment (but referring to them as "Count 1A and Count 4A) it also argued for the basic offence of unaggravated sexual touching (s

61KC) if the jury had a doubt about the circumstance of aggravation. However, the indictment also averred as Count 2 and offence of aggravated sexual intercourse without consent (s 61J(1)) and Count 3, in the alternative, the basic offence of sexual intercourse without consent (s 61I). On the appeal in ***Park v R*** **[2023] NSWCCA 71** it was contended that this was productive of confusion. Although this ground of appeal was rejected, Kirk JA (at [45]) deprecated this inconsistent and potentially confusing approach taken by the Crown.

A state prosecutor must hold delegated authority to sign an indictment alleging a federal offence

Through a convoluted process a state prosecutor ended up signing an indictment alleging Commonwealth offences. While the NSW Director of Public Prosecutions and certain nominated employees held a delegation to sign Commonwealth indictments, the Crown Prosecutor in question did not have the requisite delegation. The Crown conceded that the trial was a nullity and the concession was accepted: ***Ihemeje v R*** **[2023] NSWCCA 72**.

Withdrawal of a plea of guilty – White v R *[2022] NSWCCA 241 not wrongly decided*

White v R [2022] NSWCCA 241 introduced bifurcated tests of "in the interests of justice" to determine an application to withdraw a plea of guilty pre-conviction and "miscarriage of justice" for an appeal against conviction following a plea of guilty. In ***Garcia-Godos v R; MH v R*** **[2023] NSWCCA 145** the Court heard two cases in which appellants contended that the primary judge had erred by applying a "miscarriage of justice" test but the Crown contended that *White v R* was wrongly decided.

The Court (Davies, Weinstein and Sweeney JJ) found that there was force in several criticisms levelled at the reasoning in *White v R* but there was not the necessary "strong conviction that the earlier judgment was erroneous". In any event, it was concluded that the outcome would be the same in each case regardless of which test was applied. Both appeals were dismissed.

Severance of counts principles

Although the circumstances giving rise to the issue were quite complicated in ***DS v R*** **[2023] NSWCCA 151**, the judgment of Yehia J is useful for the collection from decided cases of the steps to take when there arises an issue of severance of counts. Section 21(2) of the *Criminal Procedure Act 1986* provides that separate trials may be ordered where an accused might be "prejudiced" or "embarrassed" in their defence. (Prejudiced in the sense of a danger of the evidence being misused, such as by appealing to the jury's sympathies, arousing a sense of horror or provoking an instinct to punish.)

If so, the question is whether severance should be ordered having regard to factors including the likely degree of prejudice or embarrassment; the ability to mitigate by judicial direction and the extent complexity of them; the extent of severance required; the cross-admissibility of evidence; the impact on witnesses who may be required to give evidence multiple times; and the nature of the offence(s) to be severed.

Finally, it is for the accused in each case to demonstrate that there is a risk of impermissible prejudice by reason of a joint trial that is incapable of cure by directions.

Child complainant's evidence and whether in the "interests of justice" it not be given by JIRT interview

An accused charged with child sex offences argued it was "not in the interests of justice" that a complainant give evidence in chief at a pre-recorded evidence hearing by way of her JIRT interview. The complainant initially denied allegations of impropriety by the accused and subsequent disclosures were made following sustained and inappropriate questioning which created an environment in which she thought she could not leave until she had made some form of allegation. The Crown accepted there were some shortcomings in the how the interview was carried out but contended that these were for the jury to assess. And in any event, even if the evidence was given orally, the content of the interview and the manner in which it occurred would necessarily emerge in cross-examination. The trial judge rejected the application. The matter was raised as a ground of appeal against conviction in ***LF v R* [2023] NSWCCA 232** but rejected. Meagher JA held (at [68]) that it could not be in the "interests of justice" to require the child give her evidence orally at the pre-recorded evidence hearing and then be cross-examined by reference to the JIRT interview.

Obligations of the Crown to investigate matters raised by defence and to call witnesses at trial

In ***HO v R* [2023] NSWCCA 245** the Court rejected various assertions by an applicant for leave to appeal against conviction that there had been a miscarriage of justice because of the failure of the police to investigate matters he had raised when they interviewed him and the Crown had failed to call witnesses favourable to him. Wilson J (at [89]) helpfully set out principles drawn from relevant authorities on the obligations of the Crown with respect to leading evidence, calling witnesses, and treating an accused person fairly.

Error in failing to discharge a jury due to unresponsive but prejudicial statements by a witness

A witness in a bank robbery trial gave evidence unresponsively that one accused was known to have robbed a bank before and that a police officer had told her that this particular accused was "some bank robber". On both occasions she was stopped and told to say nothing further. The trial judge refused an application to discharge the jury and told the jury to disregard what the witness had said she had been told by police whose opinions were irrelevant, as were the unresponsive answers given by the witness. The judge also excised the evidence from transcript later provided to the jury.

Dhanji J, Lonergan J agreeing, Beech-Jones CJ at CL dissenting, allowed the appeal in ***Ilievski v R; Nolan v R (No 2)* [2023] NSWCCA 248**. Notwithstanding the actions taken by the trial judge, it is not a universal rule that directions will cure any irregularity. His Honour regarded the prejudice was compounded by the evidence of the police interest in the accused by their

use of tracking devices and telephone interception. For the co-accused, although the prejudicial evidence did not directly impugn his character, the evidence established a close connection between the pair. There was a miscarriage of justice in relation to both of them.

Dhanji J provided a summary of principles relating to a complaint as to the admission of unfairly prejudicial material (at [89]).

Prosecutors may sometimes impugn the credit of Crown witnesses without cross-examining them

Members of the complainant's family gave evidence for the Crown in a child sexual assault prosecution which included matters the defence relied upon as rendering some of the allegations of the complainant improbable. It was contended on appeal in ***ZL v R*** **[2023] NSWCCA 279** that because the Crown had not sought leave under s 38 of the *Evidence Act 1995* to cross-examine the witnesses, their evidence was unchallenged thereby leaving open a reasonable hypothesis consistent with innocence.

Adamson JA reviewed a number of cases in which a prosecutor had impugned the evidence of Crown witnesses where no leave to cross-examine had been sought under s 38. She concluded (at [136]) that they showed that whether a prosecutor can do so in such circumstances "depends on the basis upon which the credibility (in the sense which includes reliability) is sought to be impugned and the circumstances of the trial, including the other evidence". Her Honour discussed some guiding principles against which a prosecutor needs to consider whether to make an application under s 38: [137]-[147].

Prosecutor's address caused miscarriage by comment on failure of accused to give evidence

Mr Day's counsel put exculpatory propositions and used documents in the course of cross-examining the complainant in his client's embezzlement trial. He told the judge the documents would be tendered through other witnesses and undertook that if they were not they would be tendered through the accused. Ultimately the accused did not give evidence and the documents were not tendered. In his closing address the prosecutor made submissions about there being "no explanation" or "no evidence" with respect to propositions put to the complainant.

Simpson AJA upheld a ground of appeal in ***Day v R (No 2)*** **[2023] NSWCCA 312** that contended (in part) that the prosecutor impermissibly commented on the applicant's failure to give evidence contrary to s 20(2) of the *Evidence Act 1995*. She said (at [85]) the comments "were, in many cases, made in a context in which the only person who could have given evidence (or, at least, the obvious person to give that evidence) was the applicant". There was a substantial miscarriage of justice which require the convictions to be quashed and a new trial ordered.

Caution expressed about discharging juries unnecessarily

It was claimed in ***Khoury v R*** **[2024] NSWCCA 19** that there had been a miscarriage of justice as a result of a judge's refusal to discharge the jury after the jury had seen an interaction between a witness and the accused as the witness left the courtroom. Adamson JA held that the trial judge had dealt with the matter appropriately, including by the ameliorating directions given to the jury.

Her Honour (at [53]) cautioned about the negative potential effects upon the administration of justice that may follow the unnecessary discharge of a jury. They included the accused spending more time in custody on remand; jurors becoming disgruntled by being discharged for no apparent reason; counsel becoming unavailable; trials already listed having to be deferred; witnesses becoming reluctant to return; the jury in a new trial only having pre-recorded evidence of a complainant; and the general cost to the public.

Temporary stay of proceedings as a result of Crown misconduct

Witness C was a former solicitor and the principal Crown witness in a prosecution of two accused for perverting the course of justice. He made a statement annexing potentially privileged documents. Resolution of the privilege issue took about a month because of difficulties associated with obtaining legal representation for the client in relation whom the privilege may have pertained. On two occasions the trial judge asked the Crown to consider funding for the legal representation given the importance of Witness C to its case. The Director declined. Ultimately the judge ruled that no privilege attached to the documents.

One of the accused sought and obtained a temporary stay of proceedings until the Crown paid his costs thrown away by the delay. The Crown appealed pursuant to s 5F(2) of the *Criminal Appeal Act 1912*. It was held in ***R v Abu-Mahmoud*** **[2024] NSWCCA 21** that there was no error in the judge having regard to the Director's decision not to fund legal representation, the judge did not err in finding that the Crown was at fault in respect of the delay and that the accused had suffered unfairness as a result.

SENTENCING – GENERAL ISSUES

Intensive correction orders – consideration of Stanley v DPP (NSW)

It was held in ***Zheng v R*** **[2023] NSWCCA 64** that a sentence of imprisonment for reckless wounding was manifestly excessive having regard to the reasons for and circumstances of the offending, the role of general deterrence in the particular case and the offender's compelling subjective case. On re-sentence, Gleeson JA discussed the recent decision of the High Court in *Stanley v Director of Public Prosecutions (NSW)* [2023] HCA 3:

> [281] Five points emerge from the joint judgment in *Stanley*.
>
> [282] First, the power to make an ICO requires an evaluative exercise that treats community safety as the paramount consideration, with the benefit of the assessment mandated by s 66(2). The

> issue is not merely the offender's risk of reoffending, but the narrower risk of reoffending in a manner that may affect community safety: at [72], [75].
>
> [283] Second, s 66(2) is premised upon the view that an offender's risk of reoffending may be different depending upon how their sentence of imprisonment is served, and implicitly rejects any assumption that full-time detention of the offender will most effectively promote community safety: at [74].
>
> [284] Third, the nature and content of the conditions that might be imposed by an ICO will be important in measuring the risk of reoffending: at [75].
>
> [285] Fourth, the consideration of community safety required by s 66(2) is to be undertaken in a forward-looking manner having regard to the offender's risk of reoffending: at [74].
>
> [286] Fifth, while community safety is not the sole consideration in the decision to make, or refuse to make, an ICO, it will usually have a decisive effect unless the evidence is inconclusive: at [76].

In relation to the case at hand, his Honour concluded that the risk of reoffending in a manner that may affect community safety would be better reduced by an ICO than full-time imprisonment for reasons his Honour provided at [291]: the risk of reoffending was assessed as "medium-low"; the primary judge found the offender was not a violent or anti-social person by nature and her prospects of rehabilitation were good; she had complied with onerous bail conditions for over four years; and the standard supervision condition in s 72(2)(a) was more likely to promote rehabilitation given the offender's major depressive disorder.

No requirement to use the phrase "moral culpability"

The applicant in ***TA v R*** **[2023] NSWCCA 27** was 16½ 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 the principles in *Bugmy v The Queen* (2013) 249 CLR 571; [2013] HCA 37 and a mental condition relevant to 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 in NSW

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 requires.

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.

In dissent, Wilson J concluded that an assessment on objective gravity could not be made by comparison between the facts of different cases nor by the use of imprecise language as the sentencing judge had used.

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".

Ratio of all sentences to be considered when accumulating a new sentence upon an existing sentence

In ***Harris v R*** **[2023] NSWCCA** 44, the applicant has been sentenced to an aggregate term of 3 years with a non-parole period of 2 years which was accumulated by 2 years upon a pre-existing sentence of 4 years. The sentencing judge made a finding of special circumstances based on the applicant serving another sentence but the outcome involved a non-parole component that was 80% of the total effective sentence. Beech-Jones CJ at CL allowed the appeal on the basis of the judge's failure to take into account the ratio involved in the overall term of the existing and new sentences.

Common descriptions of the level of objective seriousness are imprecise

In **BM v R [2023] NSWCCA 68** it was reiterated that language used by a sentencing judge to describe the gravity of offences, i.e. describing a position on a notional range of seriousness such as "slightly below the mid-range", is imprecise. Caution is therefore required.

Similar remarks have been made in other cases including *Towse v R* [2022] NSWCCA 252 at [12]; *Bektasovski v R* [2022] NSWCCA 246 at [11]; *Spinks v Director of Public Prosecutions (Cth)* [2021] NSWCCA 308 at [25]; *R v Pearce* [2020] NSWCCA 61 at [58]; *Mohindra v R* [2020] NSWCCA 340 at [30]; and *Unity Pty Ltd v SafeWork NSW* [2018] NSWCCA 266 at [82].

Discount for a plea of guilty six months after having been found fit for trial

The offender in ***Stubbings v R*** **[2023] NSWCCA 69** was found fit to be tried 12 months after having been found unfit. He did not ask to be referred back to the Local Court to engage in case conferencing as he could have. His matter was set down for trial six months hence. He instructed his lawyers to try and negotiate a plea to a lesser charge three months before the trial. The DPP rejected the offer two months later at about which time a psychiatrist had advised as the unavailability of a mental health-based defence. He then entered the plea of guilty and received a 10% discount. He did not argue pursuant to s 25D(5)(a) of the *Crimes (Sentencing Procedure) Act 1999* that he was entitled to 25% for pleading "as soon as practicable" after being found fit to be tried but did contend for such an entitlement on appeal. It was held, per Gleeson JA, that additional evidence explaining what had occurred in the six months between the finding fitness and the entry of the plea did not adequately explain why no claim to a 25% discount was made in the District Court.

Gleeson JA (at [48]-[51]) analysed the terms "as soon as practicable" in s 25D(5)(a) and "reasonable opportunity" in s 25D(6). On the facts in this case the claim to a 25% discount was untenable.

Emotional harm to victim of multiple offences is relevant to all offences

A victim of multiple sexual offences committed over a period of months provided a victim impact statement on sentence describing the psychological trauma she had sustained as a result. There were offences of sexual assault and also offences of recording, distributing, and threatening to distribute intimate images. The latter concerned threats or actual distribution of images to the complainant's family in her home country where victims of sexual assault are rejected and sexually targeted. The sentencing judge declined to take substantial emotional harm into account as an aggravating factor under s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act 1999* because he could not be certain as to which of the counts it applied and was concerned there would be "double counting" if he applied it to all counts.

It was held in ***R v Packer*** **[2023] NSWCCA 87** by Davies J, Wilson J agreeing but Simpson AJA dissenting on this point, that the judge should have found that substantial emotional harm was sustained by the complainant in respect of the distribution offences as well as for the sexual assault offences.

Remorse – what is it?

Simpson J said in *Stojanovski v R* [2013] NSWCCA 334 at [41] that remorse is relevant to rehabilitation and the unlikelihood of further offending. A requirement for taking it into account as a mitigating factor pursuant to s 21A(3)(i) is that the offender has provided evidence of accepting responsibility and acknowledging any injury, loss or damage. However, in ***Brzozowski v R*** **[2023] NSWCCA 129** it was held that acceptance of responsibility is not enough. Simpson AJA referred to *Barbaro v The Queen* [2012] VSCA 288; (2012) 226 A Crim R 354 at [34]-[35] where it was said that acceptance of responsibility must entail something more than a plea of guilty. At [38] the Victorian Court of Appeal said that remorse is "genuine penitence and contrition and a desire to atone", the most compelling evidence of which will come from testimony by the offender. (And that a judge is not bound to accept second-hand evidence of what the offender said to the author of an expert report, what is said in testimonials, or from the Bar table.)

Imposing an intensive correction order is an "act of leniency"

A judge declined to impose an intensive correction order for a serious "road rage" offence of recklessly causing grievous bodily harm, describing it as "an act of leniency". It was held in ***Tonga v R*** **[2023] NSWCCA 120** by Basten AJA at [20]-[22] that this characterisation was not erroneous; otherwise there would not be any application for leave to appeal. And whether or not the proposed supervision plan amounts to "intensive correction", it would be vastly less intrusive than fulltime deprivation of liberty. Moreover, the significant degree of leniency involved in an ICO has been recognised in other cases.

Intensive correction order not available for a terrorism offence

The judges in ***Homewood v R*** **[2023] NSWCCA 159** gave separate reasons but agreed that an intensive correction order is not an available option for a Commonwealth terrorism offence: Beech-Jones CJ at CL at [2]-[6]; Ierace J at [69]-[70]; and Cavanagh J at [80]-[87].

Contemporaneous recording of discount for plea of guilty but not mentioned in remarks on sentence

A sentencing judge omitted to comply with the requirement in s 25F(7) of the *Crimes (Sentencing Procedure) Act 1999* by either saying he was allowing a discount for pleas of guilty or alternatively, that he was not allowing any or all of it. The judge confirmed that he had omitted to say this in response to a request by the legal representative of the offender for a copy of the audio recording of the sentencing remarks. However, the fact that he had allowed the full 25% discount to which the offender was entitled was recorded on JusticeLink on the day of sentencing. The offender filed an application for leave to appeal some 20 months later and it included grounds that the judge had failed to take the early pleas of guilty into account and had failed to comply with s 25F(7) in that he did not either state that a discount was being applied, or state that it was not and provide reasons for that. A short time after the filing, an addendum was made to the sentencing judgment on Caselaw to provide a link to the contemporaneous JusticeLink record showing that the discount had in fact been allowed.

The case, ***Borri v R*** **[2023] NSWCCA 166**, involved sentencing for 26 sexual abuse offences against four children. The judge expressly acknowledged at the sentence hearing that a 25% discount should apply (but then reserved judgment for over 2 months). In his remarks on sentence the judge referred to the pleas having been entered on a particular date in the Local Court. He also referred to the sentencing of a co-offender on count 23 by another judge, including the fact that the other judge allowed a 25% discount for the early plea. The sentencing judge assessed the same indicative sentence for count 23 as the other judge had. The Crown also relied upon the contemporaneous recording of the allowance of a 25% discount on JusticeLink entry dated the day sentence was imposed. The Crown relied upon all of these matters to support the inference that the discount had been allowed.

Hamill J found there to be alternative explanations for these matters that did not support the proposition. In relation to the last matter he said: “The way in which the JusticeLink record was incorporated into the judgment by an amendment, and the timing of that amendment by reference to the date of sentence and the date the appeal was lodged, is problematic”. He continued, “The timing of the amendment to the judgement did little to diminish any ‘scepticism’” as to whether the offender had been given the benefit of his early pleas of guilty. Why it was “problematic” and why there was scepticism when there was a contemporaneous secure computerised record of the discount having been allowed was not explained.

Parity does not apply to offenders who are not co-offenders in the same criminal enterprise

A ground of appeal in ***Kiraz v R*** **[2023] NSWCCA 177** was that there was disparity between the sentence imposed upon the applicant for drug supply and that which had been imposed by another judge upon another person. However, the other person was engaged in a drug dealing syndicate from which the applicant purchased his drugs. He then on sold those drugs to smaller scale suppliers. The applicant had no involvement in the sale of drugs by the upline supplier and was only a purchaser from it. Likewise, the upline syndicate had no involvement in what the applicant did with the drugs he purchased from it.

It was observed that there are many cases that confirm that the parity principle extends to co-offenders in the same enterprise, even if they are charged with different offences: e.g. *Green v The Queen; Quinn v The Queen* (2011) 244 CLR 462; [2011] HCA 49 at [30]; *Elias v The Queen; Issa v The Queen* (2013) 248 CLR 483; [2013] HCA 31 at [30]. However, there are also many cases which make clear that the principle is not applicable to sentences imposed upon persons who are not co-offenders in the same criminal enterprise: e.g. *R v Araya* [2005] NSWCCA 283; 155 A Crim R 5455 at [66]; *Baladjam v R* [2018] NSWCCA 304; 341 CLR 162 at [148]-[149].

Strong criticisms of Justice Health for "neglectful" and "inhumane" treatment of inmate

The Court (Stern JA, Fagan and Yehia JJ) in ***R v R E*** **[2023] NSWCCA 184** found no error on a Crown appeal against a deliberately lenient sentence imposed upon an offender who committed sex offences against two subjects of his professional photography sessions six years apart. The leniency was justified because of the respondent's strong subjective case and his ill health which had made, and would continue to make, custody significantly more onerous for him than for other prisoners. He had been diagnosed with throat cancer prior to being charged. He underwent chemotherapy and radiotherapy and was found to have developed gastric lymphoma. Evidence concerning these conditions and the treatment necessary for them was tendered in the sentence proceedings.

The evidence before the Court showed the respondent's medical care had been neglected. It could not take at face value a claim by Justice Health that its "Integrated Care Services" had an aim to "monitor chronic/complex including cancer patients from entry at reception through custody and post release into the community ensuring they receive seamless, timely, appropriate and effective health care". Material before the sentencing judge indicated a delay of more than 4 months without certain procedures being conducted or even an appointment made with an external service provider. This was "medically neglectful" and "inhumane". Even if it had concluded that the sentence was manifestly inadequate the Court would have exercised its discretion to decline intervention because of the continued failure to provide essential and urgent medical attention in the months since sentencing.

Youthful offenders and the assessment of their moral culpability

The offender in ***TM v R*** **[2023] NSWCCA 185** was sentenced for robbery inflicting grievous bodily harm to imprisonment for 3 years. He was 15 years, 3 months at the time of the

offence in which, as part of a large group of juveniles and young adult, he participated in attacking a man late at night and inflicting serious injuries. His involvement included kicking the victim who was lying on the ground as others stomped on his head. The sentencing judge noted how "a 15-year-old is sentenced very differently from an adult" whilst referring to the principles of s 6 of the *Children (Criminal Proceedings) Act 1987* (NSW). He determined that moral culpability of the offender was high and objective seriousness of the offence was in the mid-range. However, he found that the offender had a deprived background which warranted a reduction of moral culpability "to an extent". The judge's only reference to general deterrence was by stating that the sentence "has to be an example to others". On appeal, it was successfully argued that the judge failed to have regard to the offender's young age in assessing moral culpability and the emphasis to be given to general deterrence.

Assistance to authorities can be in relation to an unrelated offence

Section 23 of the *Crimes (Sentencing Procedure) Act 1999* provides for a lesser penalty being imposed where an offender has provided assistance to authorities in relation to "the offence concerned or any other offence". One of the mandatory considerations in determining whether to impose a lesser penalty is "whether the assistance or promised assistance concerns the offence for which the offender is being sentenced or an unrelated offence": s 21(2)(i).

In ***Owens v R*** **[2023] NSWCCA 198** it was held by Wright J (Fagan J agreeing, Wilson J dissenting) that a judge erred by saying, in effect, that the offender would receive a discount for assistance in respect of sentencing for a murder charge where he had given an undertaking to give evidence against a co-offender in relation to that offence but was "not entitled" to a discount for such assistance in relation to unrelated firearms offences.

Procedure for imposing an intensive correction order for a Federal offence

A pharmacist was sentenced for unlawfully obtaining pharmaceutical payments contrary to the *National Health Act 1953* (Cth). A submission was made that an intensive correction order be imposed. Section 20AB of the *Crimes Act 1914* (Cth) picks up the power to impose an ICO for federal offences and the procedural steps governing the operation of the State provision. The judge said because she was dealing with a Commonwealth offence she had regard to the matters listed in s 16A of the *Crimes Act 1914* (Cth) ("Matters to which court to have regard when passing sentence etc.--federal offences") but not to the matters in s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("Purposes of sentencing"). She assessed a term of imprisonment of 2 years but declined to order it be served by way of an ICO, ordering it to be served on a full-time basis with a recognizance release order.

The pharmacist appealed on grounds including that the judge erred in not considering s 3A when determining whether to impose an ICO. This ground was upheld in ***Chan v R*** **[2023] NSWCCA 206**. With separate but consistent reasoning, Kirk JA, Rothman and N Adams J described the process for considering an ICO for a Federal offence as involving a three step determination:

1. whether no penalty other than imprisonment is appropriate;

2. if so, the length of the sentence; and
3. if the sentence imposed is less than two years for a single offence or three years for an aggregate sentence, whether an ICO should be imposed.

The sentencing judge was required to have regard to s 16A of the *Crimes Act 1914* (Cth) for the purposes of the first two steps, but then have regard to the purposes of sentencing in s 3A of the *Crimes (Sentencing Procedure Act) 1999* (NSW) when considering whether to impose an ICO. On re-sentencing the Court imposed an sentence to be served by way of an ICO.

Immigration detention considered as pre-sentence custody

An offender awaiting sentence for a Federal offence had been granted bail but because his visa had been cancelled he was held in immigration detention. For the first part of the time in such detention he was an unlawful non-citizen liable to deportation, a person in respect of whom the Commonwealth DPP had made a request for a criminal justice stay certificate for the purpose of finalising the criminal proceedings but which had yet to be determined by the Department of Home Affairs, and a person who had an appeal to the Administrative Appeals Tribunal against the cancellation of his visa pending. In the latter part of the period in detention he was held pursuant to the granting of the criminal justice stay certificate. Submissions were made on sentence that the time spent in detention should be taken into account but the judge did not do so or provide reasons for not doing so. It was held in ***Marai v R*** **[2023] NSWCCA 224** that there was error in failing to provide reasons.

On re-sentencing, each member of the Court accepted that some credit by way of further backdating the sentence should be allowed. Sweeney J (Kirk JA agreeing) held that it should be for the entire period. Fagan J considered that only the period subsequent to the grant of the criminal justice stay certificate should be allowed.

Further backdating of a sentence to take into account onerous conditions experienced in that time

An offender spent 199 days in custody before he was sentenced. He asked the judge to take into account various ways in which that custody was more onerous, including COVID-19 restrictions and lockdowns. The judge took those factors into account by backdating the commencement of the sentence by a further 30 days, thus allowing a total backdate of 229 days. On appeal, the offender contended that he was disadvantaged by the judge taking this approach; the onerous nature of pre-sentence custody should have been taken into account in mitigation of the sentence overall.

Sections 24 and 47 of the *Crimes (Sentencing Procedure) Act 1999* require "any time" for which an offender has been held in custody in relation to an offence to be taken into account, including in considering whether to backdate a sentence. In dismissing the appeal in ***Kljaic v R*** **(2023] NSWCCA 225**, Wright J construed "any time" not to be limited to the actual period of pre-sentence custody. The ordinary English meaning of "time" includes what occurred or the conditions experienced during an event. For example, in the question, "did you enjoy your time at the beach?" the word "time" refers to what occurred or the

conditions experienced during the period when the person was at the beach. His Honour also held that the approach taken by the primary judge was within a permissible exception to the instinctive synthesis approach generally favoured: *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25 at [39]. This approach is also consistent with how quasi-custody is usually taken into account.

The care required in sentencing children

An offender was 16½ years of age when he did an act in preparation for a terrorist act. He pleaded guilty and a significant focus in the sentence proceedings was upon his youth and mental state. There was expert evidence he suffered from a major depressive disorder and there was link between it, his experience of bullying, withdrawal, low self-esteem, loss of identity and his susceptibility to extremist views. He appealed against his sentence on a number of grounds including that insufficient attention had been given to his subjective case and there had been a failure to make findings concerning certain features of it.

It was held in ***AH v R* [2023] NSWCCA 230** by Leeming JA, N Adams and Dhanji JJ (at [70], [76]) that the judge had failed to have explicit regard to mandatory considerations of the offender's prior good character and whether his moral culpability was reduced by his youth and mental illness. The Court referred generally to the need for a court in sentencing a juvenile offender for such an offence to have regard to s 16A(2)(m) of the *Crimes Act 1914* (Cth) (the need to take into account "the character, antecedents, age, means and physical or mental condition of the person"), s 6 of the *Children (Criminal Proceedings) Act 1987* (principles concerned with sentencing children), or general principles concerned with sentencing children such as set out in *KT v R* [2008] NSWCCA 51; (2008) 182 A Crim R 571 at [22]-[26].

Offender denied credit for time served previously for offences of which he was acquitted

In ***Dib v R* [2023] NSWCCA 243** there was an unsuccessful attempt to overturn a principle Simpson AJA described (at [52]) as "well – and consistently – established that, in this State, offenders will not be given quantified reductions in sentence to take account of periods spent in custody other than those referable to the offence or offences for which sentence is to be imposed and neither will sentences be backdated to achieve the same result". The NSW authority is sourced to *R v Niass* (unrep, 16/11/88, NSWCCA). Her Honour's survey of the approach taken in other States and Territories led her to conclude (at [81]-[82]) there was no established common law principle which the Court would be obliged, or should, follow.

A failure to take into account a submission on sentence is a failure to take into account a material consideration

A sentencing judge failed to deal with a submission made to the effect that a custodial sentence was likely to be more onerous for the offender than for the theoretical "average" inmate because of the offender's mental condition. It was accepted that he had the mental condition but the judge did not consider whether it had the mitigatory effect of making the

custodial experience more onerous. The appeal in ***Ney v R*** **[2023] NSWCCA 252** was upheld. Campbell J said (at [74]) that it was not to the point that if the judge had dealt with the issue he may have concluded that it was cancelled out by a concern for the sentence to provide for adequate specific deterrence and protection of the community.

Charge negotiation certificates under s 35A of the Sentencing Procedure Act

Section 35A of the *Crimes (Sentencing Procedure) Act 1999* prohibits a court taking offences listed on a Form 1 into account unless the prosecutor files a certificate verifying whether any consultation has occurred with victims and police officers and whether any statement of agreed facts arising from plea negotiations constitutes a fair and accurate account of the objective criminality of the offender. After an appeal against sentence had been dismissed in the Court of Criminal Appeal an offender unsuccessfully made an application to the District Court to reopen proceedings on the penalty was contrary to law because no s 35A certificate had been filed. He then sought review in the Court of Appeal.

In ***Corliss v Director of Public Prosecutions (NSW)*** **[2023] NSWCA 263** Adamson JA said the rationale for the s 35A certification requirement is to involve the victim and officer in charge of the investigation in the process of charge negotiations by consulting with them. Having regard to this statutory purpose, the conclusion was compelling that there was no legislative intention to invalidate a sentence imposed in breach of s 35A. The proceeding was dismissed.

Moral culpability for importation offence not reduced because of facilitation by undercover police

Mr Masri was involved in arranging the importation of molasses tobacco and cigarettes with intent to defraud the revenue. He and his syndicate unwittingly engaged with undercover operatives who assisted in significant ways in facilitating the importation. For example, he travelled to Dubai to meet a UCO and paid him $650,000 to arrangement the consignment of cigarettes by container and to have them released from the wharf in Sydney without payment of duty. The sentencing judge rejected an argument that his moral culpability was reduced because of the involvement of the authorities.

Fagan J dismissed the appeal in ***Masri v R*** **[2023] NSWCCA 266**. The judge's finding that the offender was an energetic and willing participant was open to him. It was highly likely that absent the UCOs assistance, other means would have been found to import the cigarettes without paying duty. He accepted the assistance of the UCOs without being urged to commit the offence. The role played by the UCO who took a significant part in arranging the consignment was "mechanical".

De Simoni error in sentencing child sex offender on basis he was in a "position of authority"

In ***HA v R*** **[2023] NSWCCA 274** it was erroneous for a judge to take into account as a circumstance of aggravation that the offender was in a "position of trust" when that was an element that would have elevated his offence against s 66A(1) of having sexual intercourse

with a child under the age of 10, which had a maximum penalty at the time of the offence of imprisonment for 25 years, to the then aggravated form of the offence in s 66A(2) which had a maximum penalty of imprisonment for life. The appeal was allowed and the sentence of 9 years reduced to one of 8 years 3 months. (All offences of sexual intercourse with a child aged under 10 have since been made the subject of a maximum penalty of life imprisonment.)

Calculation of pre-sentence custody should be simplified

Mattiussi v R **[2023] NSWCCA 289** involved confusion over the calculation of pre-sentence custody where the offender had been refused bail from the date of his arrest but had served the non-parole period of a sentence imposed by the Local Court part of the way through the remand period and had remained in custody bail refused for the index offences when he became entitled to statutory parole in respect of the Local Court sentence. Rather than advising the judge of the range of date between which it was open to him to backdate the sentence, the Crown advised the judge of pre-sentence custody in terms of years, months and days and persisted with this even on the appeal. The Director of Public Prosecutions subsequently indicated that the pro forma "Crown Sentence Summary" form would be amended in light of the Court's comments.

Intoxication cannot be taken into account to find facts mitigating objective seriousness

Section 21A(5AA) of the *Crimes (Sentencing Procedure) Act 1999* provides self-induced intoxication being taken into account as a mitigating factor. The offender in ***Pender v R*** **[2023] NSWCCA 291** contended that excluded that factor for sentencing purposes but did not extend to findings as to the knowledge of the lack of consent element of a sexual offence (formerly in s 61HE but now s 61HK of the *Crimes Act 1900*) for the purpose of determining objective seriousness on sentence. The sentencing judge considered he should make that finding on the same basis as the jury were directed; that pursuant to s 61HE(4)(b) (now s 61HK(5)(b) it was necessary to put aside self-induced intoxication. As a result he rejected a submission that the element was constituted by recklessness and found that the offender had actual knowledge.

Simpson AJA discussed the issue by reference to relevant authority at some length, concluding (at [54]) that there was no error in the approach of the sentencing judge. She then (at [55]) was critical of the applicant's proposition that it was less objectively serious and he was less morally culpable because the offences were committed on the basis of an honest, but unreasonably based and drug-induced, belief that the complainant consented, rather than with actual knowledge that she did not consent.

Standard non-parole periods do not apply to conspiracy to manufacture or supply a commercial quantity of drugs

It was clarified in ***Vu v R*** **[2023] NSWCCA 315** that a sentencing judge was mistaken in having regard to a standard non-parole period of 10 years for an offence of conspiracy to manufacture a commercial quantity of methylamphetamine. Basten AJA pointed out that

the offence of manufacturing a commercial quantity of a drug is provided for in s 24 of the *Drug Misuse and Trafficking Act 1985* with penalties for it and other offences in s 33. Section 26 provides that a person who conspires to commit an offence in the same Division of the Act is guilty of an offence and is liable to the same punishment etc.

His Honour concluded (at [18]-[20]) for a number of reasons that while there is a standard non-parole period for the offence in s 24(2) there is not for the separately created offence in s 26.

Court quashing or varying a sentence may varying commencement date of another sentence

An offender was subject to a 6 year sentence for dangerous driving offences and then received a 27 month sentence for an arson offence which was ordered to commence 7 months prior to the expiry of the non-parole period for the dangerous driving offences. On appeal the sentence for the dangerous driving offences was reduced to 5 years 6 months which had the effect there was now only 3 months concurrency with the arson sentence. Section 59 of the *Crimes (Sentencing Procedure) Act 1999* provides for a court when quashing or varying a sentence to vary the date of commencement of any other sentence that has been imposed upon the offender. No-one appeared to realise this as there was a lengthy delay before the offender brought an application to the Court for such a variation to be made and which the Crown opposed.

Ultimately, the Court in ***Zreika v R*** **[2023] NSWCCA 317** granted the application. In doing so it had regard to the totality principle, the separate nature of the offences, the different victims involved, and the implications of any variation of non-parole period ratios. Noting that there was no one approach that was necessarily preferable or correct it backdated the arson sentence a further 3 months to restore 6 months of concurrency with the non-parole period for the dangerous driving sentence.

Mental health impairment – question is whether it contributed to the commission of the offence in a material way

An 83-year-old man was sentenced for inciting his 57-year-old son to commit acts of bestiality with a dog and acts of incest with his sibling. A report of a clinical psychologist included an opinion that the man suffered multiple health problems and symptoms of major depression and anxiety, including suicidal ideation, sleep disturbance, appetite disturbance and weight loss. The sentencing judge did not accept these opinions as he was not persuaded there was any causal connection between mental health and the offending conduct. He made no other findings as to the role mental illness had in the determination of sentencing.

It was held in ***DB v R*** **[2023] NSWCCA 323** (by Lonergan J at [50]) that although the judge was not required to accept the expert opinion, there must be a good reason if it is to be rejected. Her Honour referred to *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1; [2010] NSWCCA 194 at [177] and *Aslan v R* [2014] NSWCCA 114 at [33]-[34] before stating (at [52]) that "the question was not whether there was a "causal link"

between the mental health condition and the offending, but whether the mental health condition *contributed to the commission of the offence in a material way*".

Assessment of prospects of rehabilitation is a question of fact; expert opinions are not binding

Dr Furst, forensic psychiatrist, provided a report in which, based upon a diagnostic risk assessment test as well as his clinical experience, he expressed an opinion that an offender's prospects of rehabilitation were average to below average. The sentencing judge found his prospects were moderate. It was submitted in ***Brown v R*** **[2023] NSWCCA 330** that the different was important and the judge was bound to provide some explanation for making a different finding to that suggested by the doctor.

Cavanagh J said (at [36]-[40]) that the issue involved a finding of fact. The judge was not bound by the doctor's opinion. She had regard to other evidence bearing on the subject in addition to the doctor's report. Her finding was open to her and she did not fail to adequately explain why her conclusion differed.

Bugmy Bar Book is not evidence concerning a particular offender

Simpson AJA (McNaughton J agreeing) gave detailed consideration to the "Bugmy Bar Book" in ***Baines v R*** **[2023] NSWCCA 302**. Portions of it had been handed up in a sentence hearing but it was contended on the appeal that the judge treated it as irrelevant to the task of a sentencing court which was inconsistent with the notion of individualised justice.

Her Honour (at [85]) described it as "a useful compilation of material relevant to an understanding of social disadvantage and deprivation" but that "does not necessarily make it a useful tool for sentencing purposes. Alone it says nothing about any individual offender (whether Aboriginal or non-Aboriginal)." She continued (in [86]), "General propositions drawn from research of the kind collated and analysed in the Bugmy Bar Book do not and cannot substitute for specific evidence with respect to those issues". Dhanji J dissented in relation to this ground of appeal, saying (at [151]) the material was capable of assisting in understanding the opinion of the author of a psychological report.

Intensive correction orders – attempt to circumvent approved sequence of considerations rejected

The applicant in ***DG v R (No 1)*** **[2023] NSWCCA 320** was sentenced to an aggregate term of imprisonment of 3 years, 6 months for drug supply and firearms offences. It was contended that the sentencing judge erred by backdating the sentence by 12 months to take into account pre-sentence custody rather than reducing the sentence by that period which would then have enabled her to consider whether to impose an ICO. (The maximum sentence for which an aggregate sentence may be served by way of an ICO is 3 years and for a single sentence is 2 years: s 68(3), *Crimes (Sentencing Procedure) Act 1999*.)

The Court (Wilson, Fagan and Sweeney JJ) concluded that the applicant was seeking to circumvent principles referred to in *R v Zamagias* [2002] NSWCCA 17, *Mandranis v R* [2021] NSWCCA 97; (2021) 289 A Crim R 260, *Stanley v Director of Public Prosecutions (NSW)* [2023] HCA 3, (2023) 97 ALJR 107, and *Zheng v R* [2023] NSWCCA 64 and was untenable. First it is settled practice that where a period on remand is referable to the offence for which sentence is to be passed, credit for the time served should be given by backdating, not shortening the term. Second, it would circumvent the 3-years-or-less prerequisite in s 68(3). To engage in such manipulation would have been an impermissible exercise of her Honour's discretion and would involve acting upon an irrelevant and impermissible consideration. The suggestion by Simpson AJA in *Mandranis v R* at [63] that such an approach might be available was, as she said, unnecessary to decide in that case.

Unlikelihood of reoffending is not concerned with certainty

A judge erred when sentencing in the Land and Environment Court by saying that the court was unable "to be certain that future inadvertent offending" would not occur. In ***ACE Demolition & Excavation Pty Ltd v Environment Protection Authority*** **[2024] NSWCCA 4**, Leeming J said (at 57]) that while this finding was open to the judge but he had neglected to address whether the company had established the *likelihood* which was sufficient to establish the mitigating factor in s 21A(3)(g) of the *Crimes (Sentencing Procedure) Act 1999*.

Disqualification orders and pre-sentencing licence suspension

The appellant in ***Wells v R*** **[2024] NSWCCA 8** was sentenced to imprisonment for an offence that require an order for disqualification for an automatic period of 3 years or some other period not less than 1 year. The judge said that the automatic period would apply and asked the licensing authority to take into account the period of time the appellant's licence had been suspended prior to sentencing. The *Road Transport Act 2013* provides in s 206B(2) that a court take into account the period of suspension in deciding on any period of disqualification to impose upon conviction.

It was held by Ward P that the judge had misapplied the provision and should have made an adjustment rather than asking the licensing authority to do so.

ICO – taking into account State purposes of sentencing in Commonwealth cases

It was held in *Chan v R* [2033] NSWCCA 205 that in considering the operation of s 66(3) of the *Crimes (Sentencing Procedure) Act 1999* it is necessary to have regard to s 16A of the *Crimes Act 1914* (Cth) when deciding whether to impose a sentence of imprisonment and, if so, its length but whether it may be served by way of an intensive correction order requires regard being paid to the purposes of sentencing in s 3A of the *Crimes (Sentencing Procedure) Act 1999*. In ***AM v R*** **[2024] NSWCCA 26** it was held that a judge erred by not considering the purposes of sentencing in s 3A in that her Honour mentioned those set out in Part IB of the Commonwealth Act but not those in the State Act.

Evidence in a trial may be taken into account on sentence

After there were "hung juries" in two trials the Crown accepted a plea of guilty to manslaughter. During the sentence hearing the judge expressed dissatisfaction about perceived inadequacies in a statement of agreed facts and made reference to evidence in the second trial. Counsel joined in making references to trial evidence. There had been no formal tender of that evidence in the sentence hearing which gave rise to a complaint on appeal that the judge had regard to evidence which was not before the court.

It was held in ***Lupton v R*** **[2024] NSWCCA 29** that the evidence at the second trial that had been referred to was part of the evidence on sentence given counsel had implicitly agreed to it being available by making submissions about it without qualification.

ICO – imposition of ICO not mandatory after favourable s 66(2) finding

When Mr Khanat was sentenced for possessing imported tobacco products with intent to defraud the revenue under Commonwealth legislation the sentencing judge found pursuant to s 66(2) of the *Crimes (Sentencing Procedure) Act 1999* that his risk of reoffending was best addressed if an intensive correction order were to be made. However the judge then found that general deterrence must be given significant weight because of the serious nature of the offending and its prevalence in the community. He concluded that a full-time sentence of imprisonment should be imposed. It was contended in ***Khanat v R (Cth)*****[2024] NSWCCA 41** that the judge erred.

The Court unanimously found that a positive finding that the risk of reoffending was best addressed if an offender served a sentence in the community does not mandate or require an intensive correction order to be made. The assessment remains discretionary in accordance with sentencing principles and s 66 of the Act. However, Cavanagh J, Ierace J agreeing and Wilson J dissenting, found that the judge erred in failing to give paramountcy to community safety. The appeal was upheld by the majority and a reduced sentence with a recognizance release order was imposed.

SENTENCING - SPECIFIC OFFENCES

Manslaughter – "vehicular" – another serious example

Following *Davidson v R* [2022] NSWCCA 153 and *R v Cook* [2023] NSWCCA 9, the CCA had occasion to consider another serious example of "vehicular" manslaughter in ***Chandler v R*** **[2023] NSWCCA 59**. In this case a 22-year old offender deliberately drove a stolen car through a fence into a suburban backyard to escape pursuing police and ran over and killed an 18-month old child. Taking into account offences of take and drive motor vehicle without consent of owner, drive whilst never having been licensed, and driving in a manner dangerous to the public in a police pursuit, he was sentenced to an aggregate term of 19 years with a non-parole period of 13 years. The Court (N Adams J with whom Hamill J agreed, Beech-Jones CJ at CL dissenting) upheld the ground of appeal that the sentence was manifestly excessive and imposed a term of 15 years and 8 months with a non-parole period of 10 years and 6 months.

Child sexual abuse – how to identify trauma in order to take it into account

Section 25AA(3) of the *Crimes (Sentencing Procedure) Act* requires a court to have regard to the trauma of sexual abuse on children as understood at the time of sentencing (which may include recent psychological research or the common experience of the courts). In ***Director of Public Prosecutions (NSW) v TH*** **[2023] NSWCCA 81** the Crown contended the sentence did not properly reflect this provision. In upholding the appeal, Beech-Jones CJ at CL said:

> [61] … [I]n a case where the form of trauma may not be self-evident from the facts of the offending or material referable to the specific case, it will be incumbent on the Crown to identify the trauma the sentencing judge is asked to consider and, if relied on, the "recent psychological research" or "common experience of the courts" sought to be invoked. One example of the latter is the observation of Spigelman CJ in *DBW v R* [2007] NSWCCA 236 at [40] to the effect that, where there is no positive evidence that a young victim of a sexual offence has suffered psychological harm by the time of sentencing, the Court can, and perhaps should, proceed on the basis that there is nevertheless a "substantial risk of emotional harm" arising in the future (see also *Grange v R* [2023] NSWCCA 6 at [11]).

Child sexual assault – the effect of delay in prosecuting such offences

It was said in *R v Obbens* [2022] NSWCCA 109 at [20] by Hamill and Dhanji JJ that an important aspect of the totality principle applies when there is a delay in the prosecution of multiple offences and a fragmentation of the sentencing proceedings. Sexual offending may remain undisclosed for many years and delay will not automatically be a mitigating factor. But where an offender faces a return to prison to serve a separate term of imprisonment because of such delay in disclosure of the offending, there is a "significantly greater punishment than would be the case had the first term of imprisonment been longer as a result of all the offences having been dealt with together".

The applicant in ***Richards v R*** **[2023] NSWCCA 107** sought to rely upon this. He had been dealt with for 24 offences against 16 different children at different schools over a 21-year period from 1966 to 1987; had been in custody for almost 10 years; and had been due for parole eligibility soon when further proceedings were instituted. The appeal was dismissed: Adamson J, Beech-Jones CJ at CL agreeing with additional reasons, Price J agreeing with both. What was said in *R v Obbens* was directed to the facts of the particular case and was not a statement of principle, or at least one that was not presently applicable. Beech-Jones CJ at CL pithily put it (at [4]): "perpetrators of sexual offences against children are not entitled to a discount because their victims do not all come forward at the same time".

Aggravated indecent assault – standard non-parole period under s 61M(2)

Despite a transitional provision suggesting a retrospective operation, the increase effective from 1 January 2008 of the standard non-parole period for an offence against s 61M(2) of aggravated indecent assault from 5 years to 8 years did not apply to an offence committed prior to the increase. The subsequent insertion of s 25AA(2) in the *Crimes (Sentencing Procedure) Act 1999* which unequivocally provides that the standard non-parole period is

that which was applicable at the time of the offence prevailed. Generally, see the case note above (at p **Error! Bookmark not defined.**) in relation to ***AC v R* [2033] NSWCCA 133**.

Serious domestic physical and sexual violence offences and the inappropriate use of s 10A

A Crown appeal against the manifestly inadequate aggregate sentence imposed in ***R v Sharrouf* [2023] NSWCCA 137** was upheld in respect of 24 offences of physical and sexual violence committed on 21 distinct occasions within an 18-month period as part of the offender's "perverse perception of his marital entitlement". Amongst all of this was a complaint about the judge having imposed a conviction with no further penalty for four of the offences under s 10A of the *Crimes (Sentencing Procedure) Act*. This complaint was upheld, as was an allied complaint that the judge had failed to give reasons as required by s 4A(2) of the Act for domestic violence offences for not imposing a sentence of full-time detention or a supervised order.

Price J said that where an offence is objectively serious and general deterrence, denunciation, and the protection of the community are of importance, the scope for use of s 10A must be substantially diminished. Further, while the legislation does not prohibit its use for domestic violence offences, the circumstances in which it will be appropriate for such offences must be rare.

Value of a commercial quantity of a drug, GBL specifically, is relevant on sentence

In ***Bott v R* [2023] NSWCCA 255** the offender was sentenced for attempting to possess a commercial quantity of a border-controlled drug, namely 755kg of gamma-butyrolactone (GBL). The prescribed commercial quantity for this drug is 1kg and the maximum penalty is imprisonment for life. He asserted on appeal that the sentence of 11 years 3 months was manifestly excessive. The Court accepted the argument and replaced the sentence with one of 7 years 6 months. In doing so it accepted that the High Court had been critical of an approach by which courts classified different drugs based on the court's perception of the level of harm they caused: *Adams v The Queen* (2008) 234 CLR 143; [2008] HCA 15. However, Dhanji J concluded that the court should follow *Director of Public Prosecutions (Cth) v Maxwell* (2013) [2013] VSCA 5; 228 A Crim R 218 in which an offender's anticipated financial return and, where known, the wholesale value of the drug, were treated as features of ongoing relevance.

Manslaughter – no range of sentence for any category of manslaughter

The offender in ***Baker v R* [2023] NSWCCA 262** argued that her sentence for manslaughter by criminal negligence was outside the available range for manslaughter of this type. The facts were somewhat unusual in that a significant cause of the death of her grievously ill former partner was her neglectful care of him whereby he experienced extreme weight loss, had developed pressure sores, and had been left in soiled bed linen. Beech-Jones CJ at CL held that there is no "range" of sentence for this or any other type of manslaughter. The offence had been found to be of "high seriousness" and against the maximum penalty of imprisonment for 25 years the sentence of 5 years was not manifestly excessive.

Sexual assault – objective seriousness where state of mind is recklessness

In ***Alenezi v R*** **[2023] NSWCCA 283** took a randomly encountered, highly intoxicated, woman away from a well-lit populated street to a dark laneway where he put her on the ground, removed her clothes and a tampon, and proceeded to have penile/oral and penile/vaginal intercourse. After half an hour he took her wallet and left her naked in the laneway, returning soon after and throwing the wallet at her. It was argued on appeal that it was not open for the sentencing judge to find the objective seriousness of the primary offence against s 61I of the *Crimes Act 1900* was above the mid-range. (The penile/oral intercourse offence was taken into account on a Form 1).

Basten AJA held (at [20]) that the Crown's response to this contention should be accepted, namely that the applicant's state of mind was only one factor in assessing objective seriousness and there is no reason in principle why recklessness could not support a finding of objective seriousness above the midrange.

Terrorism-related offences – taking into account unlikelihood of grant of parole

The applicant in ***Hatahet v R*** **[2023] NSWCCA 305** sought leave to appeal in respect of a sentence imposed for engaging in hostile activity in a foreign country against the government of that country, contrary to s 6(1)(b) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth). He had become eligible for release on parole but parole was refused by the Commonwealth Attorney General because there were no "exceptional circumstances" as required by s 19ALB of the *Crimes Act 1914* (Cth).

Basten AJA held (at [82]-[85]) that the unlikelihood of parole being granted to the applicant because of s 19ALB (together with the serving most of the sentence in the HRMCC) caused the incarceration of the applicant to be more onerous and warranted a reduction of the sentence imposed by the sentencing judge.

Child sex offences – relevance of having been sexually abused as a child

A psychologist's report which included the offender's account of having been sexually and physically abused by his brother when the offender was aged between 8 and 13 was tendered on sentencing for the offender having sexually abused two nephews when he was aged 17-18 and they were aged 6-7 between 1976 and 1986. He complained on appeal that the sentencing judge failed to assess how childhood sexual abuse reduced his moral culpability. The offender did not give evidence in the sentence hearing.

In ***WW v R*** **[2023] NSWCCA 311** Wilson J said (at [87]) that being subjected to childhood abuse may, but not will, be a feature relevant to the determination of sentence. She concluded (at [91]) there was a lack of satisfactory evidence that the events actually occurred; or that they had any adverse impact upon the offender; or that they had any causal role in his commission of the offenders.

Drug supply – financial gain limited to financing drug use or repaying a drug debt

In ***Robertson v R*** **[2024] NSWCCA 22** it was held that financial gain from drug dealing that is beyond obtaining the ability to fund an addiction or repay drug debts may elevate the objective seriousness of a drug supply offence. However, doing so for only those purposes without more is neither aggravating or mitigating.

Section 115 of the Crimes Act 1900 a historical anachronism

Section 115 of the *Crimes Act 1900* provides that anyone who has committed an indictable offence who then commits an offence against s 114 (e.g. being armed, or having face blackened, or entering a building with intent to commit an indictable offence or possessing housebreaking implements) is liable to imprisonment for 10 years. The appellant in ***Bazzi v R*** **[2024] NSWCCA 35**, was charged with a large number of property offences including one of entering a building with intent to commit the indictable offence of larceny. He was also charged under s 115. A judge sentenced him to an aggregate sentence of 3 years and 1 month. The indicative sentence for the s 115 offence was 9 months.

Simpson AJA (Weinstein J agreeing) referred (at [55]) to the fact that objective gravity of the s 115 offence needed to be assessed and that depended on is *actus reus*, but there is no *actus reus*. She proposed (at [57]) that if such an offence were to be dealt with separately it would be inappropriate to impose any penalty. It would be equally inappropriate to indicate any sentence in dealing with it as part of an aggregate sentence. Button J found the sentencing judge did not err but observed (at [98] that "a more fundamental solution" may be that upon obtaining a conviction for a s 114 offence it would be very difficult to envisage it would be appropriate in 2024 for the Crown to also seek a conviction under s 115.

SUMMING UP

Errors in giving a "Liberato" and complaint directions

Kirk JA held in ***Park v R*** **[2023] NSWCCA 71** that a trial judge had erred by only giving the 1st and 3rd limbs of a "Liberato" direction (as explained in *De Silva v The Queen* (2019) 268 CLR 57 at [12] about how the jury should approach the fact there were conflicting accounts by the complainant and the accused. The judge omitted to give the 2nd limb direction that even if the jury did not believe the accused's account but thought it *might* be true, they should acquit. This is between the two extremes on the spectrum of belief between positive belief in the accused's account (the 1st limb) and positive disbelief (the 3rd limb).

The judge had also erred in directing the jury at the request of the Crown that a delay in complaint is not relevant to the complainant's credibility. Pursuant to s 294(2)(c) a judge must not direct a jury that delay in complainant is relevant to the victim's credibility unless there is sufficient evidence to justify it. But that is not to say that delay is *not* relevant and directing the jury to that effect undercut a major aspect of the defence case at trial.

Third limb of "Liberato" direction not required in circumstances of this case

The direction referred to in *Liberato v The Queen* (1985) 159 CLR 507 and as further explained in *Da Silva v The Queen* (2019) 268 CLR 57; [2019] HCA 48 is designed for a case in which there is evidence relied upon by an accused person that conflicts with that relied upon by the Crown and there is a risk the jury might consider it necessary to choose between the two. The first two limbs of a *Liberato* direction are that the jury should acquit if (1) they believe the accused or (2) if they do not accept his account but think it might be true.

In ***JL v R* [2023] NSWCCA 99** it was contended that the trial judge should have given the third limb direction, that even if they reject the version upon which the accused relied, they should simply put it aside and address the question whether the Crown has proved guilt beyond reasonable doubt. However, Adamson JA held that this was a case in which the applicant had not given a version of events inconsistent with that of the complainant but had in substance had just denied the allegations. The third limb direction was not required.

Assault causing death while intoxicated as an alternative to murder and manslaughter

In ***Smith v R*** **[2023] NSWCCA 118** it was contended that a trial judge erred in leaving assault causing death while intoxicated (s 25A(2) of the *Crimes Act 1900*) as an alternative to murder and manslaughter because if the jury were not satisfied of guilt of either of those forms of homicide there was no work left to do for an offence against s 25A. The appeal, which was dismissed, turned on its particular facts. The Crown had argued that the offender had deliberately stabbed the deceased whereas the offender's case was that the deceased became impaled on the knife when attacking the offender. Beech-Jones CJ at CL held that there was a viable case for the s 25A offence because there was scope for the jury not be satisfied beyond reasonable doubt of the intent necessary for murder and of the element of dangerousness for manslaughter.

Lies direction even when the Crown eschews an inference of consciousness of guilty

In a child sexual assault trial the Crown contended that the accused had lied (that the complainant had pulled down the accused's pants when the accused was asleep) to the complainant's father who had just removed the complainant from the tent in which he had been with the accused. In closing address the prosecutor said they should reject the claim as a lie, "put it to one side" and focus on the complainant's account of events. However, when subsequently addressing whether the *doli incapax* presumption had been rebutted, the prosecutor said an indicator of the accused knowing his conduct was seriously wrong was that he had lied about it; it was a false story told in case the complainant told anyone about what happened in the tent.

In ***AB v R*** **[2023] NSWCCA 165** it was held that while the prosecutor had disavowed using the lie as evidence of consciousness of guilt, that is how it had been used, at least in relation to the *doli incapax* presumption. It had therefore been necessary for the judge to direct the jury in accordance with *Edwards v The Queen* (1993) 178 CLR 193 and *Zoneff v The Queen* (2000) 200 CLR 234.

Dispelling misconceptions about sexual assaults by giving directions not required by statute

Directions as to consent which are intended to disabuse a jury of certain misconceptions in ss 292-292E of the *Criminal Procedure Act 1986* took effect on 1 June 2022 and extended to proceedings for an offence alleged to have been committed before that date "but not if the hearing of the proceedings began before the commencement of the amendment". Such directions were given in a trial that commenced with empanelment of a jury on 5 July 2022. It was contended on appeal that there was no authority for the directions to have been given.

In ***Lee v R*** **[2023] NSWCCA 203**, Kirk JA (at [76]-[79]) accepted that the proceedings began when the accused was first arraigned in the trial court, rather that when the trial commenced. This has been the accepted construction of a standard transitional provision. However, his Honour went on (at [88]-[89]) to say that it would be surprising if directions directed to dispelling misconceptions were considered the cause of an injustice simply

because they were given without any legal requirement to do so. Consent was not the central issue before the jury but it had not been conceded.

Lies — consciousness of guilt — Edwards — Zoneff

It was contended in ***MM v R*** **[2023] NSWCCA 236** that a trial judge should have given a direction in accordance with *Zoneff v The Queen* (2000) 200 CLR 234; [2000] HCA 28. It concerned evidence that when the appellant's daughter told her mother that the appellant had been touching her, the mother turned to him and asked, "How could you" to which he replied calmly, "I don't know what you're talking about". The mother gave evidence that "it was bizarre" and it was "Like I was asking him what he wanted on his toast". The Crown Prosecutor argued that the jury "might think that his reaction might have been different. You might think that was the reaction of someone who had in fact committed that horrendous crime". The Crown subsequently disavowed reliance upon consciousness of guilt. Defence counsel did not seek an anti-consciousness of guilt direction and none was given. It was agreed that the trial judge would remind the jury that the accused had denied the allegation and tell them that "people do not always act predictably in certain situations".

Adamson JA held that no miscarriage of justice arose from the manner in which the trial judge dealt with the issue. The fact no request was made for a *Zoneff* direction indicated an acceptance by defence counsel that he considered the risk of the jury engaging in consciousness of guilt reasoning to be so low as to not warrant it.

Direction to acquit both accused if not satisfied of joint criminal enterprise was erroneous

Basten AJA upheld a complaint in ***Smith v R*** **[2023] NSWCCA 254** that at face value might appear surprising. Two accused were tried for causing grievous bodily harm with intent. The case against the co-accused was strong. He admitted having stabbed the victim but claimed he did so in self-defence. Ms Smith denied having also stabbed the victim and none of the witnesses present except for the victim said that she did. The trial judge was persuaded by the Crown to direct the jury that unless they were satisfied beyond reasonable doubt of the existence of a joint criminal enterprise they were obliged to acquit both accused. The appellant complained that this was unfair to her because the jury may have been reluctant to acquit the co-accused so they may have convicted her in order to convict him. Basten AJA found this to be plausible and so she had lost a real chance of acquittal.

Directing a jury on the real issues in dispute and not those which are not

Agnew v R **[2024] NSWCCA 5** was concerned with a trial for sexual intercourse without consent in which the defence case was that no sexual activity occurred. The trial judge told the jury that the parties' approach was simply that if the jury was satisfied beyond reasonable doubt about the honesty and accuracy of the complainant's account the Crown will have proved its case and if not then the accused must be acquitted. On appeal, however, it was contended the judge erred in deflecting the jury's consideration of the element of the offences referrable to the accused's knowledge the complainant was not consenting.

In dismissing this ground of appeal, citing *Hargraves v The Queen* (2011) 195 CLR 257; [2011] HCA 44 at [42], Price J held (at [45]) that a judge's responsibility is to decide "what are the real issues in the case", to "tell the jury what those issues are", and to "instruct the jury on so much of the law as the jury needs to know to decide those issues". That is what the trial judge in this case did.

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