DISTRICT COURT OF NEW SOUTH WALES ANNUAL CONFERENCE 2013

Criminal Appeals Review

The Honourable Justice R A Hulme

2 April 2013

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 past 12 months aside from matters concerned with sentencing.

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

I am most grateful for the assistance in the compilation of this paper provided by Mr Eliot Olivier (LLB(Hons)/B Int S) and Mr Alexander Edwards (BA/LLB(Hons)).

APPEALS

Duty on District Court judge to submit question of law only exists where certain conditions fulfilled

The District Court dismissed an appeal by against conviction in the Local Court for two counts of making a false statement with intent to obtain financial advantage. The appellant sought judicial review of the decision pursuant to s 69 of the *Supreme Court Act* 1970, as well as requesting that the District Court submit a question of law to the Court of Criminal Appeal under s 5B of the *Criminal Appeal Act* 1912. The judge refused to submit the question of law, and the appellant amended the judicial review application to seek a review of the judge's refusal.

Basten JA in ***Elias v Director of Public Prosecutions (NSW)*** **[2012] NSWCA 302**, with Beazley JA agreeing, found that no duty to submit a question of law under s 5B had arisen and dismissed the summons. The appellant had placed reliance on the statement of Jordan CJ in *Ex parte McGavin; Re Berne* (1946) 46 SR(NSW) 58 that a District Court judge is to submit a question of law unless it is "obviously frivolous and baseless that its submission would be an abuse of process". Basten JA clarified (at [8]) that there is no duty, however, unless the power to submit a question of law has arisen. In this case the primary judge was not satisfied that there was a question of law and so was under no duty to submit the question to the Court of Criminal Appeal.

Procedure concerning stated cases from the District Court

In ***Lavorato v Regina*** **[2012] NSWCCA 61**, the secretary-manager of a registered club was convicted of three offences against the *Liquor Act* 2007. On 25 August 2010 he was unsuccessful in appealing to the District Court. He had sought dismissal without conviction pursuant to s 10 *Crimes (Sentencing Procedure) Act* 1999. He then requested the judge state a case pursuant to s 5B of the *Criminal Appeal Act* 1912, which requires that questions of law be submitted to the Court of Criminal Appeal within 28 days of the conclusion of the District Court proceedings. However, the stated case was not submitted until 2 June 2011 and it was necessary for an extension of time to be sought. Basten JA (at [20]) identified a number of factors to support an extension of time, including a lack of prejudice to the DPP, delay in receiving the transcript, that the District Court incorrectly required the parties submit objections and responses, the judge's decision to list the

request for a stated case, and the judge's decision to make a preliminary assessment of the legal issues. Against the making the order to extend time was the failure to act promptly by the applicant, the DPP and the Court itself, contrary to the requirements of s 5B culminating in an unjustifiable delay. However, as all parties were at fault the extension was granted.

Schmidt J noted (at [68]-[70]) that there are difficulties with the stated case procedure that led to the issues arising in *Lavorato*. While the process is well established, it is complicated to implement and creates difficulties for the parties and the courts dealing with a request. Under the Act, the Court of Criminal Appeal cannot consider matters beyond the stated case, making it a burdensome process for the court below to make an adequate stated case. Her Honour pointed out (at [73]) that when materials, in this case the transcript, are not available delay inevitably follows. Schmidt J identified (at [74]) the s 5B procedure as one that "could profitably receive the consideration of the legislature or perhaps the Law Reform Commission".

BAIL

Bail may be granted in order to allow an accused to prepare for trial

Although bail pending an appeal to the Court of Criminal Appeal was refused in ***Miles v R* [2012] NSWCCA 88**, the Court considered the difficulties faced by accused and appellants in custody when preparing for their appearance in Court and in obtaining legal advice. Both are matters to be taken into account under s 32 of the *Bail Act* 1978 when determining whether bail should be granted. RS Hulme J cast doubt on the ability of an accused person on remand or a convicted person in custody awaiting the determination of an appeal in NSW to adequately prepare their case. His Honour stated:

> [4] … what I have seen does tend to reinforce the impression I have derived in other cases that the Corrective Services Department do not provide what an outsider would regard as reasonable facilities for someone such as the applicant in the circumstances that he is in.
>
> [5] The Department must realise that if the only way that an accused person or appellant can prepare his case is by being granted liberty then that is the course which the Court might have to take.

EVIDENCE

Criticising psychiatric opinions without cross-examination

In ***Devaney v R* [2012] NSWCCA 285** the sentencing judge was sceptical of the concurring view of three psychiatrists that Mr Devaney was "floridly psychotic", and expressed the view that he had manipulated his diagnoses. Allsop P upheld the appeal, stating at [88]:

> It is one thing to discount admissible statements made to a psychiatrist or psychologist if the offender is not prepared to give evidence to the same effect…it is quite another to lessen the effect of the opinion of a professional psychiatrists, without crossexamination, when that opinion is based on history.

Protected confidence adduced without leave

In a trial for sexual assault, a social worker gave evidence for the Crown of a protected confidence within the meaning of s 296(1) of the *Criminal Procedure Act 1986*. The Crown had not sought leave of the court to adduce the confidence. The accused was convicted and appealed on this error, among other things. In ***KSC v R*** **[2012] NSWCCA 179**, McClellan CJ at CL pointed out, firstly, that defence counsel had not objected to the evidence and had, in fact, wanted it adduced. Secondly, the complainant had no objection to the evidence being given. In the context of the trial, it led to no substantial miscarriage of justice.

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

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

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

A man was found guilty by a jury of sexually assaulting the daughter of his partner. He had participated in a recorded police interview and the whole of the recording was admitted in evidence. It included him responding "no comment" to numerous questions. On appeal, it was argued that those sections if the interview should not have been admitted under s 89 of the *Evidence Act* 1995.

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

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

Requirement for an identification parade – s 114 of the Evidence Act

In ***Walford v Director of Public Prosecutions (NSW)*** **[2012] NSWCA 290**, the appellant was the subject of an apprehended violence order that prevented him from being in the

vicinity of the complainant. The complainant reported to police that she had seen Mr Walford approaching her apartment block and looking towards her apartment. Mr Walford was charged with breaching the order and at trial the Magistrate rejected the complainant's evidence on the basis that s 114 of the *Evidence Act* 1995 required an identification parade be conducted unless it was unreasonable to do so.

On appeal to the Supreme Court, Davies J in *Director of Public Prosecutions (NSW) v Walford* [2011] NSWSC 759 held that the critical time to determine whether it would have been reasonable to hold an identification parade was when the identification was made. In this case, that was when W had approached the complainant's home and it would not have been reasonable to hold the identification parade then. Davies J (at [36]) differentiated between "identification" and "identification evidence" in s 114. He said, "If the witness has made an out-of-court identification it is at that time at which the reasonableness of holding the identification parade is to be considered."

Beazley, Basten and Hoeben JJA (in separate judgments) dismissed an appeal against the judgement of Davies J. Hoeben JA held that Davies J's was correct, and concluded the following.

> [55] … the word "identification" as used in s 114(2)(a) does not refer to the giving of visual identification evidence in court but to "the act of identifying the defendant in some way as the person whom the witness could link in some way to the offence (that is making an assertion of the kind described in para (a) of the definition of 'identification evidence' in the dictionary to the Evidence Act)"…

Coincidence evidence – steps in determining admissibility

In ***R v Gale; R v Duckworth*** **[2012] NSWCCA 174** Simpson J set out the steps to be taken when determining whether evidence should be admitted as coincidence evidence in a criminal trial under s 98 of the *Evidence Act*.

A decision to admit such evidence requires consideration of; firstly, whether there is evidence capable of establishing the occurrence of two or more events; and secondly whether there is evidence capable of establishing similarities in those events, or in the circumstances in which they occurred. It may be that there is evidence capable of establishing similarity between both the events themselves and the circumstances of their occurrence.

Her Honour (at [31]) set out the six steps in determining whether to admit the evidence.

1. Identify the particular act or state of mind of a person that the tendering party seeks to prove.
2. Identify the two or more events from which the tendering party tendering seeks to prove that the person in question did the particular act or had the particular state of mind.
3. Identify the similarities, in the events or circumstances in which the events occurred, by reason of which the endering party asserts that it is improbable the events occurred coincidentally.

4. Determine whether "reasonable notice" has been given of the intention to adduce the evidence.
5. Evaluate whether the evidence, either by itself or in conjunction with other evidence, has significant probative value.
6. In a criminal proceeding, if it is found that the evidence would have significant probative value, determine whether the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant (s 101(2)).

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

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

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

Her Honour stated at [88]

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

Examining "relationship evidence" for relevance

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

evidence of their occurrence should not have been admitted. (The appeal was dismissed on the proviso.)

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

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

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

Discretion to admit unlawfully obtained evidence

The respondent in ***DPP v Langford*** **[2012] NSWSC 310** was a driver involved in a serious road accident. Despite her demonstrating heavy intoxication, alcohol was not registered by two roadside breath tests. She was taken for blood and urine sample tests by police, who (mistakenly) believed that they were acting pursuant to the *Road Transport (Safety and Traffic Management) Act* 1999, and she was subsequently charged with high range drink driving after testing positive to alcohol. However, a magistrate ruled that the Act did not authorise her detention and compulsory testing, and that the evidence from the tests was unlawfully obtained. The magistrate refused to admit the evidence and dismissed the charge.

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

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

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

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

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

OFFENCES

Traffic offences - evidence of reliability of speed cameras

Roads and Maritime Services v Addario **[2012] NSWCA 412** concerned the proper construction of provisions of the *Road Transport (Safety and Traffic Management) Act 1999* dealing with speeding offences captured on traffic cameras. Section 47 presumes a photograph taken by a traffic camera is taken on the specified day and the specified

location, and is prima facie evidence of the matters depicted, unless "evidence sufficient to raise doubt" is adduced. Section 73A applies to s 47, and states that only evidence given by a person possessing "specialised knowledge" is capable of "raising a doubt" that a speed camera is operating reliably and accurately.

Mr Addario was issued a court attendance notice for a speeding offence captured by a speed camera. Before the magistrate, he gave evidence that he was at a service station at the recorded time so could not have committed the offence. Mr Addario also produced receipts to that effect. The magistrate dismissed the charge, holding that s 73A did not apply to the measurement of time by traffic cameras, rather than speed. On that construction, Mr Addario's lack of specialised knowledge did not prevent him raising an unrebutted doubt about whether the offence had been committed, based on the reliability of the traffic camera. The Roads and Maritime Services appealed to the Supreme Court (unsuccessfully), and then to the Court of Appeal, in order to clarify the operation of s 73A.

Beazley JA (as her Honour was then) held that s 73A did apply, and that Mr Addario had not, in the terms of s 47, raised a doubt about the reliability of the traffic camera. But her Honour went on to say that it was not necessarily determinative of the question of whether the offence had been committed. At [40]-[41] she held:

> The effect of this construction is that in a prosecution such as occurred here, as there was no assertion given in evidence by a person with specialised knowledge as to the accuracy, reliability and operation of the devices, the prosecution was not required to call other evidence in respect of those matters.
>
> However, the prosecution evidence does not thereby constitute conclusive evidence of the commission of the offence. It is evidence that is to be weighed with all the evidence in the case. In this case, the magistrate was required to determine whether the prosecution had proved its case beyond a reasonable doubt, having regard both to the evidence that the camera recording device was accurate, reliable and operating properly at the relevant time, and the respondent's evidence.

Aggravated sexual assault and "under authority"

Certain charges against an accused alleged he had sexually assaulted his niece while she was under his authority. The trial judge explained to the jury that this meant "the person [was] in the care or under the supervision of authority of that other person." The accused was convicted and appealed. One of his grounds was the asserted inadequacy of this definition of "under authority". In ***KSC v R* [2012] NSWCCA 179**, McClellan CJ at CL held that despite some circularity in the trial judge's direction in referring to "authority", the definition was supplemented by the words "care" and "supervision"; both correct and needing no further exposition. There was no error.

Elements of offence of people smuggling

***Alomalu v R* [2012] NSWCCA 255** was an appeal from a people smuggling conviction following the decision of the Court of Criminal Appeal in *Sunanda v R; Jaru v R* [2012] NSWCCA 187. The decision is a reminder that the offence of people smuggling requires proof that the accused believed that the destination to which passengers were being smuggled was part of Australia.

Meaning and relevance of "consent" in medical assault cases

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

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

Meaning of "malicious intent" in context of surgical procedure

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

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

The appellant in ***Firbank v R*** **[2011] NSWCCA 171** had been convicted of breaking into a dwelling-place and committing a serious indictable offence (sub-s 112(1)(a)), being reckless wounding, in circumstances of special aggravation (sub-s 112(3)). The indictment specified the circumstances of aggravation as wounding (s 105A). One ground of appeal was that the indictment disclosed no offence known to law in that the purported circumstance of special aggravation was an essential element of the serious indictable offence of reckless wounding.

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

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

Manslaughter – whether supplier guilty where deceased voluntarily ingested fatal drug

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

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

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

In ***Elias v Director of Public Prosecution (NSW)*** **[2012] NSWCA 302** made loan applications with two banks in which he overstated his income and was convicted of two counts of obtaining financial advantage by deception in the Local Court. He had provided security above the value of the loans and had made all of his repayments on time. The District Court refused an appeal and Mr Elias sought judicial review of that decision under s 69 of the Supreme Court Act 1970. He argued that he had received no financial advantage.

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

Section 61J – meaning of "in company" in aggravated sexual assault

A woman was convicted on a number of counts, including three counts of aggravated sexual assault in company (s 61J of the *Crimes Act* 1900). It was alleged at trial that she had assisted or encouraged the principal offender, Mr Golossian, to commit the assaults against the complainant. The assaults occurred in a motel room with an adjoining bathroom. It was suggested that she was in the bathroom while the assaults occurred. There were also drugs administered to the complainant that were relevant to the issue of consent.

It was submitted on appeal in ***FP v R*** **[2012] NSWCCA 182** that the judge had erred in her directions on the meaning of in company. R A Hulme J dismissed the appeal against these convictions. After considering the authorities, his Honour stated (at [126]) that the trial judge was required to direct the jury it had to be satisfied of the following components.

1. Mr Golossian had sexual intercourse with the complainant without consent, knowing that she was not consenting.
2. The accused shared the common purpose that the assault would occur.
3. The accused was physically present when it occurred, and sufficiently proximate to either encourage Mr Golossian or intimidate the complainant.

The appellant submitted, in part, that the judge's direction had ignored the rationale of the offence that the complainant should be coerced by the physical proximity of the victim. However, RA Hulme J held (at [150]) that the thrust of her direction was that the physical presence could satisfy the "in company" element through the encouragement of G to commit the assaults. On the facts, it was open to the jury to find that even if the

appellant was in bathroom during the penetration, but present immediately before and after, her presence was sufficient for her to be "in company". Relevantly, the appellant also had been present during the critical acts of administering the drugs to the complainant prior to the assaults occurring.

Drugs substituted by authorities – impossible to aid and abet importation

Mr Simpson had arranged to import a quantity of drugs into Australia. Without his knowledge, Australian authorities intercepted the drugs at customs and substituted it with flour. Later, when Mr Simpson was expecting the drugs to be delivered, he engaged a Mr Nolan to conduct "counter-surveillance" at his house before driving him to collect what they believed were the drugs. They were subsequently arrested with the substituted flour. At trial the judge directed the jury to find Mr Nolan not guilty of aiding and abetting the importation on the basis that, by the time he became involved, the substitution of the drugs had already taken place. The DPP appealed against the acquittal.

McClellan CJ at CL (Davies J agreeing) dismissed the appeal in ***R v Nolan*** **[2012] NSWCCA 126**; it was impossible for the respondent to "aid, abet, counsel or procure" the commission of the offence because, by the time he became involved, there were no drugs (at [37]). His Honour considered the case of *R v Mai* (1992) 26 NSWLR 371 where the Court concluded that where it was physically impossible for an accused to commit an offence, for example where drugs had been substituted for an inert substance, an attempt to commit that crime may be available as an alternative charge. He noted that in this case the respondent may have been guilty of an attempt to commit an offence (most likely attempted possess). But this was not the offence for which he was indicted.

Meaning of "inflicting" grievous bodily harm

In ***R v Aubrey*** **[2012] NSWCCA 254**, the respondent had been accused of infecting a complainant with HIV through consensual sexual intercourse, without a condom, knowing that he had earlier been diagnosed with HIV. The indictment alleged that the respondent had maliciously caused another person to contract a grievous bodily disease, and in the alternative that that he had maliciously inflicted grievous bodily harm. The controversy on appeal was the meaning of "inflicted" in s 35(1)(b) of the *Crimes Act*. Marcfarlan JA, following *R v Salisbury* [1976] VR 452 and *R v Cameron* (1983) 2 NSWLR 66, found that the infliction of grievous bodily harm did not necessarily require a direct application of force to the body. That line of reasoning, followed logically, rejects the need for a direct and immediate connection. Thus the passing on of an infection, involving a period of incubation and uncertainty, could be an "infliction" of harm.

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

Section 50DB of the *Crimes Act* 1914 (Cth) (see now the *Criminal Code* (Cth)) made it an offence to encourage a person to commit an offence against Part 3A of the Act. Section 50BA made it an offence for a person, while outside Australia, to engage in sexual intercourse with a person under the age of 16 years. But s 50AD provided that a person was not to be charged with an offence against Part 3A unless that person was, relevantly:

(a) an Australian citizen; or

(b) a resident of Australia …

The appellant in **Cargnello v DPP (Cth) [2012] NSWCCA 162** was convicted of a number of offences against Part 3A, including encouraging a person to have sexual intercourse with someone under the age of 16, based on emails he had sent to unidentified persons. It was contended that he could not have contravened s 50DB as it had not been established that the person he had encouraged was an Australian citizen or resident. It was argued that the limitation provided by s 50AD on prosecution created at least a sufficient ambiguity about the operation of s 50DB that the appeal should be resolved in favour of the appellant: see *Beckwith v The Queen* [1976] HCA 55.

The appeal was dismissed. Basten JA held that is was not a requirement that the recipient of the encouragement envisioned by s 50DB must be an Australian citizen or resident who would be liable for prosecution if they committed the encouraged offences (at [29]). He reasoned (at [24]-[28]) first that liability for an offence against s 50DB did not depend on another person committing an offence, so it should not be read down on the basis that a particular person could not have been prosecuted for the encouraged offence, had it been committed. Secondly, the provision criminalised encouragement to a general audience and it would be perverse to restrict it merely because it was directed at individuals in this case. Thirdly, s 50AD does not lead to a conclusion that Australian citizenship or residency is an element of an offence against s 50BA. It merely limited the scope of those who may be prosecuted.

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

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

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

Following the decision in *JAD*, s 73 of the *Crimes Act* 1900 was amended to clarify that a person with "special care" of a child aged 16 or 17, for purposes of the section, includes a "de facto partner of a parent, guardian or foster parent" of the child. Kidnapping contrary to s 86 was amended to include an intention to commit a serious indictable offence.

Schedule 3 was amended to abolish any common law rule preventing a person from being found guilty of failing to disclose a crime committed by their spouse or de facto. The amendments took effect on 24 September 2012.

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

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

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

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

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

Reckless and negligent navigation offences against the Marine Safety Act 1998

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

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

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

Possession of a prohibited weapon – mental element

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

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

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

Using a postal service in a way reasonable persons would regard as offensive – constitutional validity of the offence

Letters were sent to the wives and relatives of military personnel killed in Afghanistan that were critical of the involvement of Australian troops in that country and referred to the deceased in a denigrating and derogatory fashion. Two men were charged with using a postal service in a way that reasonable persons would regard as offensive (one as a principal in the first degree and the other for aiding and abetting). It was contended that the offence infringed the implied constitutional freedom of political communication. The trial judge rejected this and refused to quash the indictments. The accused appealed pursuant to s 5F *Criminal Appeal Act* 1912: ***Monis v R; Droudis v R*** **[2011] NSWCCA 231**. Bathurst CJ, Allsop P and McClellan CJ at CL delivered separate judgments but each held that the offence in s 471.12 of the *Criminal Code* 1995 (Cth) was not constitutionally invalid.

Special leave to appeal was granted by the High Court on 22 June 2012. In *Monis v The Queen, Droudis v The Queen* [2013] HCA 4, the court agreed that s 471.12 infringed on the right of political communication, but was split 3-3 on whether it did so permissibly. Accordingly, under s 23(2)(a) *Judiciary Act 1903* (Cth), the decision of the Court of Criminal Appeal was affirmed.

POLICE POWERS

Whether power to arrest where no intention to charge

In ***Dowse v New South Wales*** **[2012] NSWCA 337** Basten JA held that where a police officer has no intention of charging a person with an offence, there is no power to arrest the person without a warrant. At [25], his Honour found that the officer had not attempted to arrest D on the basis of the offence for which he was suspected of committing, namely using offensive language. A warrantless arrest requires an honest suspicion in the mind of the arresting officer that the person has committed an offence and information that provides reasonable grounds for that suspicion. But Basten JA held at [27] that this state of mind will not be sufficient to support a warrantless arrest where the officer has no intention of charging the person with the offence which he suspects has been committed.

Reasonable grounds to suspect or believe

Hyder v Commonwealth **[2012] NSWCA 336** was an appeal concerning an action for wrongful arrest and false imprisonment. Mr Hyder was arrested by an AFP officer, without a warrant, in relation to a fraud. The primary issue at trial was whether the officer had had the power under s 3W(1)(a) of the *Crimes Act* 1914. The section provides a power to arrest without a warrant where the officer believes on "reasonable grounds" that a person had committed a federal offence. (This provision is similar to s 99(2) of the *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW).) The trial judge held that the officer had held an honest belief that Mr Hyder had committed the offence on reasonable grounds.

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

(1) "Reasonable grounds" for belief requires there to be sufficient facts to support that requisite belief.
(2) The arresting officer must form the belief or suspicion him or herself.
(3) Proposition (2) is to hold the arresting officer accountable.
(4) There must be a factual basis for the suspicion or belief. It may be material that would be inadmissible in court proceedings but must have some probative value.
(5) Circumstances supporting the belief must point towards it, but need not be evidence sufficient to prove the belief.
(6) Belief is "an inclination of the mind towards assenting to, rather than rejecting, a proposition" and the grounds for that inclination may still eave room for surmise or conjecture.

(7) Reasonable grounds should be assessed against what was, or could reasonably have been, know at the time.
(8) An officer can form the relevant state of mind on the basis of what they have been told, but it must be assessed in light of all the surrounding circumstances and what inference a reasonable person would draw from that information.
(9) "The identification of a particular source, who is reasonably likely to have knowledge of the relevant fact, will ordinarily be sufficient to permit the Court to assess the weight to be given to the basis of the expressed [state of mind] and, therefore, to determine that reasonable grounds for [it] exist": *New South Wales Crime Commission v Vu* [2009] NSWCA 349 at [46].
(10) The lawfulness of an arrest without warrant also depends on the effective exercise of the executive discretion to arrest alluded to by the word "may" in s 3W(1)(a).

Police "by chance discovery" of restricted substances during attendance at a home for a domestic violence incident

Mr Tamcelik lived with his grandfather. While Tamcelik was away from the house, the grandfather called police and invited them to enter the home to make a complaint of domestic violence against Tamcelik. After taking the statement on a rear balcony and while walking back through the house to leave the premises, police happened upon and seized what they believed to be illegal substances in Tamcelik's bedroom. He was subsequently charged with possessing steroids, but the magistrate held that the police had illegally obtained the evidence and dismissed the charges.

Garling J in ***Director of Public Prosecutions v Tamcelik*** **[2012] NSWSC 1008** dismissed an appeal against the decision. Part 6 of the *Law Enforcement (Powers and Responsibilities) Act* 2002 (LEPRA) governs the powers of police to enter premises in relation to incidents of domestic violence and his Honour referred specifically to s 82 (Entry by invitation) and s 85 (Powers that may be exercised on entry into premises). From the magistrate's judgment it was evident that the sole purpose for police attending under the Act was to investigate whether a domestic violence offence had been committed. Garling J held (at [98]) that the key question was therefore whether that investigation had concluded once they left the balcony. The magistrate found it had and that finding was open to him.

That being so, the police were not entitled to remain on the premises after taking the grandfather's statement. Nor were they entitled, after entering the house, to undertake any action not specified in s 85(1) of LEPRA (which provides only very limited powers in relation to an alleged domestic violence incident). Garling J held (at 100]) that LEPRA had abrogated the common law principle of chance discovery in the relevant circumstances and dismissed the appeal.

PRACTICE AND PROCEDURE

Accused absconding during trial

The case of ***Williams v R*** **[2012] NSWCCA 286** reaffirmed the discretionary power of a judicial officer, outlined in *Jamal v R* [2012] NSWCCA 198 from [35], to continue a trial

after the accused has absconded. Ms Williams was on trial for dangerous driving offences, and during the course of giving evidence suffered a "complete meltdown". After the following adjournment, it was discovered that she had absconded. She did not return after the weekend. The trial judge refused to discharge the jury and continued the trial. R A Hulme J held this was an acceptable exercise of the discretion, noting the voluntary absence of the accused, the continued presence of counsel, and the late stage of the trial.

Reasons in trial by judge alone

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

Inappropriate expression used in Crown closing address

At the conclusion of a trial for sexual assault, the Crown prosecutor's closing address included a characterisation of one part of the defence's case as a "scurrilous attack upon the complainant's credibility and character". Although no objection was taken at trial, the offender appealed on the basis that the comments were highly prejudicial: ***Geggo v R* [2013] NSWCCA 7**. Johnson J held that, in the context of the trial, the appellant had been perfectly entitled to test the evidence of the complainant and the particular expression "scurrilous attack" was inflammatory. However, noting in particular the absence of an objection at the time, the court dismissed the appeal on the proviso.

Accused to be permitted reasonable opportunity to be present at view

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

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

Importance of reasons when ordering trial to continue following the discharge of juror

Mr Le had been convicted at trial after a juror had been discharged and the judge had ordered the trial continue. Mr Le appealed, including on the basis of the adequacy of the trial judge's reasons for making those orders pursuant to ss 53B and 53C of the *Jury Act* 1977. In ***Le v R*** **[2012] NSWCCA 202,** R A Hulme J stated (at [67]) that although lengthy reasons will rarely be required when deciding such matters, it is important that sufficient reasons are disclosed. Parties need to understand the basis for the decision and an appeal court should not be left to "divine from the circumstances whether the decision was correct".

The determinative issue to be resolved in such cases is not whether there were insufficient reasons, but whether the continuation of the trial with a reduced number of jurors gave rise to a substantial risk of a miscarriage of justice: *Evans v The Queen* [2007] HCA 59, at [247] per Heydon J. However, R A Hulme J found that leaving an appeal court to redetermine the issue for itself was unsatisfactory. His Honour found that the reasons given by the trial judge in this case were "barely satisfactory" (at [71]). There were circumstances that limited the scope for extensive reasons and the judge would have been encouraged to take an economical approach by counsel for the appellant who did not oppose the order. But it was suggested the Court would benefit if brief reasons were given for making such orders in the future.

Decision to continue trial with jury of eleven

In ***BG v R*** **[2012] NSWCCA 139** it was contended that the discretion of a trial judge to discharge a juror and continue with a jury of eleven had miscarried. Early in their deliberations, the jury indicated that they could not reach a unanimous verdict. Shortly after, the judge discharged a juror after receiving a series of notes concerning the juror's business commitments. Later on, the jury indicated that it still could not reach a unanimous verdict. The judge told the jury that she would accept a verdict of 10 out of 11 and they subsequently returned a guilty verdict. Adamson J rejected (at [89]) the first ground of appeal that the trial judge had erred by not taking sworn evidence of the juror's

business commitments before she was discharged. It was conceded that is was open to judge to discharge a juror even when deliberations have begun, and there is no requirement that reasons for a request by a juror to be discharged must be verified by sworn evidence (at [87]).

It was also argued that the discretion to continue with a jury of less than twelve had miscarried. Section 53C of the *Jury Act* 1977 provides discretion to continue with a jury of less than twelve, depending on an assessment of whether there is a substantial risk of miscarriage. This is a distinct determination to be made separate from the decision to discharge a juror: *Wu v The Queen* [1999] HCA 52 at [6]. But in this case the judge failed to give specific consideration to the issue of whether the trial should continue after discharging the juror. Adamson J held (at [101]) that the lack of reasons was not determinative of whether a miscarriage had occurred. In *Evans v The Queen* [2007] HCA 59, Heydon J stated at [247] that while a failure to give reasons for a decision on a procedural matter may give rise to procedural unfairness, it will not necessarily lead to a miscarriage of justice has occurred. The issue for an appellate court to determine is not whether there were reasons for the decision of the court below, but whether the decision was the correct one.

Adamson J found there were three scenarios where an issue might arise about whether a trial should continue after a juror has been discharged (at [103]):

(1) Where there is no indication how the juror would have voted;

(2) Where there is evidence from which it can be inferred prospectively that the discharged juror would, if not discharged, have voted for an acquittal; and

(3) Where it can be inferred, but only with the benefit of hindsight, that the juror who was discharged would, if not discharged, have voted for an acquittal.

In the second and third scenarios, it would not be appropriate for the trial to continue. As opposed to the first scenario, there is information from which it can be inferred that there was miscarriage of justice. Although her Honour found that the present case fell into the first scenario and the decision to discharge was correct. However, it was also observed that it is preferable for a trial judge to give reasons for a decision of this nature (at [138]).

Credit of prosecution witnesses attacked in prosecutor's closing address

The appellant was convicted with having sexual intercourse without consent. The assault occurred in a bedroom while other people were present in the house, including Messrs Buckley and Duncan. They were friends with the appellant and gave evidence favourable to him at trial. In his closing address the prosecutor put to the jury that they should reject Buckley and Duncan's evidence as it was designed to help their friend. In ***Soames v R* [2012] NSWCCA 188** it was submitted for S that the prosecutor had unfairly failed put it to Buckley and Duncan that they were lying or exaggerating their evidence. The appeal was dismissed.

Latham J held that there was no unfairness in the prosecutor's closing address. Her Honour considered the authorities for the principle that a Crown Prosecutor should afford a witness the opportunity to address submissions critical of their witness' credit later made to the jury (at [104]-[106]). But she found that there was no unfairness in this case. In

relation to Duncan, cross-examination was sufficient notice of the prosecutor's intention to reject parts of his evidence. And Duncan had the opportunity to respond when he was questioned about the difference in his statements to police and his evidence at the committal. Whilst the prosecution did not make an application to cross-examine Buckley, the submission that he was unreliable in relation to a discreet aspect of his evidence was made on the basis that he was a "really close friend" of the appellant. Their friendship was in evidence and it was open to the jury to find that this loyalty might influence his testimony. Latham J stated (at [109]), "It has never been the law that a Crown prosecutor is prohibited from suggesting to a jury that there may be reasons why a witness in the Crown case is unreliable, where there is a basis in the evidence for such a submission."

Sufficient directions on prejudicial evidence

Podaras v R **[2012] NSWCCA 256** concerned jury directions on prejudicial evidence. CCTV footage of the appellant was led as identification evidence at his trial for two violent offences. Two witnesses gave evidence, in an incidental fashion, of there having been a fight involving the accused and his co-offenders around the time the CCTV footage was made, which was also on the same day as the alleged offences took place. The apparent assault and the circumstances surrounding it were not part of the Crown case, and the trial judge directed the jury in no uncertain terms that they were not to speculate upon or use that evidence. The Court of Criminal Appeal rejected an appeal against the decision of the trial judge not to discharge the jury, holding that the prejudicial evidence had been dealt with appropriately.

No requirement to re-arraign accused following empanelment

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

Public interest immunity from disclosing identity of police informer

Prior to sentencing for two offences of supplying a commercial quantity of prohibited drugs, an offender sought documents by way of subpoena from the Commissioner of Police that recorded conversations between police and an informer. The purpose was to determine whether there were records of the informer encouraging the offender to supply greater quantities of drugs that could assist in mitigation of sentence. The Attorney General appealed against an order of the District Court that the Commissioner provide the documents on grounds that they were protected by public interest immunity (*Evidence Act* 1995, ss 130, 131A): ***Attorney General (NSW) v Lipton*** **[2012] NSWCCA 156**. The Attorney General argued that the only available exception to the public interest immunity against disclosure of an informant's identity was where the immunity would prevent an accused from properly defending himself, and the exception would not apply to sentencing proceeding. Basten JA, rejecting the proposition, said,

> [39] Whatever may be the principle applicable under the general law, the test to be applied under s 130 is clearly a balancing exercise which requires the court to be satisfied that, relevant to the present circumstance, the public interest in preserving secrecy or confidentiality in relation to a category of documents outweighs the public interest in their production… That exercise is not to be constrained by unexpressed rules derived from the common law.

But it was held that the judge in this case had erred in considering the factors relevant to the balancing exercise and allowed the appeal.

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

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

Trial by judge alone

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

SUMMING UP

Describing allegations not subject to specific charges as "uncharged acts"

The Crown led evidence in a trial for sexual assault of certain acts, admitted as being relevant to context, allegedly committed by the accused that were not the subject of specific charges. In summing up, the trial judge referred to these acts, on only one occasion, as "uncharged acts". In ***KSC v R* [2012] NSWCCA 179** (23/8/12), McClellan CJ at CL expressed his view, referring also to the comments of Hayne and Kiefel JJ in *HML v The Queen* [2008] HCA 16; (2008) 235 CLR 334, that "uncharged acts" is generally an inappropriate expression. It presumes, for instance, that the acts, presented without the burden of criminal proof, constitute conduct sufficient to ground a charge. But the ground of appeal was dismissed: the jury were not diverted by it from their task. To place the trial judge's use of the term in context, the preferable term "other acts" was used 22 times in summing up.

Directions concerning complainant not giving evidence at retrial

PGM (No 2) v R **[2012] NSWCCA 261** (10/12/12) was an appeal from a retrial for a sexual assault. The complainant's recorded evidence from the first trial was played at the retrial, but she did not give evidence herself. The trial judge explained to the jury that procedural legislation (s 306C *Criminal Procedure Act 1986*) meant the complainant was not compellable to give evidence. The direction also contained a general, neutral description of the forensic disadvantage borne by each party as a result. The outline of the direction had been discussed and agreed with trial counsel. The direction became, in due course, a ground of appeal. McClellan CJ at CL held that there was no error in referring to the relevant legislation and the potential consequences for each party in a balanced and fair manner, as was done by the trial judge.

Failure to direct as provided by Bench Book does not constitute error

In ***Ith v R*** **[2012] NSWCCA 70**, McClellan CJ at CL (at [48]) held the fact that a trial judge gave directions that were not in the precise terms as those provided by the Bench Book is not indicative of error. The Court has previously commented that the Bench Book is not a complete and authoritative statement of the law, and the focus of any appeal should be the whether the actual directions given were appropriate.

Comments made to jury indicating a different verdict on different counts would be "perverse" did not amount to a miscarriage of justice

Bilal Ahmed was charged with two offences: possessing a firearm and discharging the same firearm in a public place. The trial judge observed to the jury, "[y]ou can't fire a weapon unless you possess it", and other statements of that nature to indicate that it would illogical to return different verdicts on both counts. Mr Ahmed appealed (***Ahmed v R*** **[2012] NSWCCA 260**) on the basis that those "directions" amounted to a substantial miscarriage of justice by purporting to prohibit the jury from coming to different verdicts on the different counts. Adamson J held that the relevant statements were observations, not directions. The statements were not only a legitimate observation on the facts before the jury, but also served to avoid a compromise verdict adverse to the appellant.

Confusing direction on extended joint criminal enterprise

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

For liability to arise on the basis of extended joint criminal enterprise there must be an agreement between the accused and another person to commit an offence (the

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

Simpson and Harrison JJ (Bathurst CJ dissenting) held that the verdict of guilty was unreasonable and unsupportable and a verdict of acquittal was substituted. An appeal by the Crown was refused special leave: *The Queen v May* [2012] HCATrans 358.

Failure to direct jury on matters relevant to a finding of dishonesty

In ***Krecichwost v* R [2012] NSWCCA** 101, the applicant was found guilty by a jury of dishonestly using his position as a director of a company to gain personal advantage. The trial judge directed the jury that dishonesty was to be judged according to "the standards of ordinary, decent people". In seeking leave to appeal it was contended that the judge had erred in failing to direct the jury to consider a number of factors relevant to the dishonesty of a company director. No such directions were sought at the trial. Macfarlan JA, refusing to grant leave, found that the applicant had been well represented at trial (at [64]-[65]). His Honour stated that it was too late argue that reference should have been made to further factors by the trial judge in her summing-up. Factors relevant to a finding of dishonesty vary according to the circumstances of the case and there are no prescribed matters that must be taken into account. Special leave to appeal to the High Court was refused: ***Krecichwost v The Queen* [2012] HCATrans 294.**

Directions to a jury concerning an accused's earlier acquittal

Jeffrey Gilham's parents and brother were stabbed to death in the family home: ***Gilham v R* [2012] NSWCCA 131**. He claimed that his brother killed their parents and he, under provocation, then killed his brother. He was charged with murder but the Crown accepted his plea of guilty to manslaughter, conceding that it could not disprove his explanation. Many years later he was charged with the murder of his parents, the Crown now contending that his explanation was false and that he was responsible for the three killings. One of the many issues at his trial, and on appeal, was whether he was given the full benefit of his earlier acquittal on the charge of murder in respect of his brother. The Court (McClellan CJ at CL, Fullerton and Garling JJ) found that the conduct of the Crown case had not involved impermissible controverting of the acquittal, it being a necessary step in the attempt to prove that Gilham murdered his parents to contend that he had also murdered his brother. However, it was held (at [150] – [155]) that in explaining the effect of the earlier acquittal to the jury the trial judge had erred by failing to tell them that it constituted a formal acknowledgement by the sentencing court that the Crown could not, as at the time of sentencing, negative the reasonable possibility that the brother had killed the parents and that, in doing so, he provoked Gilham to kill him. The trial judge had in fact told the jury that the reason the Crown accepted the plea to manslaughter was "neither here, nor there".

Dangerous driving causing death - the irrelevance of negligence

King v The Queen [2012] HCA 24 was concerned with the Victorian equivalent of the offence in s 52A of the *Crimes Act* 1900 of occasioning death by dangerous driving and a Victorian Court of Appeal decision concerning it (*R v De Montero* (2009) 25 VR 694). It was contended by King that the trial judge's directions to the jury at his trial, which occurred before *De Montero*, were deficient. It was held in the High Court (French CJ, Crennan and Kiefel JJ at [44] – [50]), that dangerous driving is not a species of the genus of criminal negligence and does not depend upon the degree to which the driving falls short of the standard of care owed to other road users. It was not necessary for the judge to direct the jury that it must be shown to be conduct that is deserving of criminal punishment

Being together does not constitute being "in company"

The appellant in ***Markou v R*** **[2012] NSWCCA 64** had been convicted at a judge alone trial of assault occasioning actual bodily harm in company. He and another man had approached the victim and others in a nightclub. He hit the victim while the other man punched someone standing next to victim. The trial judge found that the appellant was accompanied by the other man when he struck the accused and therefore held that the offence was "in company". The appeal was allowed and a verdict substituted for assault occasioning actual bodily harm. Referring to Kirby J in *R v Button; R v Griffen* [2002] NSWCCA 159 at [120], Macfarlan JA held (at [26]-[27]) that for an offence to be committed "in company" there must be some relevant common purpose. This could not exist without some express or implied arrangement or understanding between accused and the others accompanying him or her. The trial judge did not recognise that this element needed to be proved to establish the charged offence, and the evidence did not establish beyond reasonable doubt an agreement between the appellant and the other man.

Joint criminal enterprise manslaughter

The appellant in ***TWL v R*** **[2012] NSWCCA 57** was convicted of manslaughter. It was the Crown case that he had entered into a joint criminal enterprise with AC, and AC had subsequently punched the victim who fell and died when he hit his head. It had been agreed that the punch was an unlawful and dangerous act. In summing up, the trial judge said that the Crown alleged that there was a joint criminal enterprise "to visit physical violence" on the victim, or an arrangement to physically assault him. Macfarlan JA held that it was necessary for the Crown to establish that the agreement between the appellant and AC was that an act would be committed that would expose the victim to an appreciable risk of serious injury. A general agreement to "visit physical violence" would not necessarily have exposed the victim to this risk.

Intoxication – some evidence but no error in trial judge not leaving the issue to the jury

The offender in ***Sullivan v R*** **[2012] NSWCCA 41** was found guilty of murder. He said in his evidence that he had consumed illicit drugs on the day of the offence and that he was "cruising, just out of it, whacked". The trial judge directed the jury to take this into account on the issue of self-defence but did not direct that it was relevant to whether the Crown had proved the necessary intent. Blanch J (at [22] – [32]) reviewed authorities concerning intoxication and its relevance to specific intent. He referred to the obligation of a trial judge to alert the jury to all relevant legal considerations, even if the defence

does not rely upon them. However, he concluded that in this case there was such minimal and imprecise evidence on the issue that there was no error in the judge not having left it to the jury.

Unbalanced and unfair summing up

In ***Magoulias v R*** **[2012] NSWCCA 160 a** jury had found the appellant guilty of two offences, including committing an act of indecency. He had been working as a painter on the exterior of a unit building at the time of the offences. The complainant lived in one of the units and gave evidence that when she was in her bathroom, the appellant had entered the premises and moved towards her with his penis out of his trousers. He told her that he simply needed to use the bathroom, but he did not give evidence at trial. It was held that the trial judge's summing up had been unbalanced. Allsop P found that the trial judge had erred in directing the jury that the only evidence of intention came from the complaint. He had failed to direct the jury that a determination of intent was to be inferred from findings about the objective circumstances, including the appellant's location and the movement of his arm. Some of these objective circumstances were the subject of inconsistencies between the complainant's prior statements and her evidence at trial (at [11]). Allsop P found that the summing up must have left the jury with the impression that a finding about intention turned only on the complainant's truthfulness and the failure of the appellant to give a contrary version. Instead, the case depended on doubts about the complainant's accuracy based on past inconsistencies. This was not fairly put to the jury (at [13]).