SUPREME COURT OF NEW SOUTH WALES 2014 ANNUAL CONFERENCE

DEVELOPMENTS IN CRIMINAL LAW

The Honourable Justice R A Hulme

1 August 2014

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SCOPE OF PAPER

The purpose of this paper is to provide brief notes concerning the range of issues that have been considered in appellate criminal decisions in the past 12 months.

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 Alexander Edwards BA LLB (Hons) and Mr Nicholas Mabbitt BA (Hons) JD.

APPEALS

Misconduct of counsel sufficient to cause a miscarriage of justice

***Matthews v R* [2013] NSWCCA 187** concerned, relevantly, an appeal against conviction on the basis that defence counsel had been so negligent as to engender a miscarriage of justice. The ground of appeal was not upheld, the Court holding that the complaints were without substance. In so doing, the Court, at [63], noted the important features in an inquiry on appeal into asserted misconduct of counsel below:

1. Counsel for the accused is vested with responsibility for and control over the conduct of the case.
2. Unfairness is not established by a rational choice by counsel at trial leading to an adverse outcome for an accused.
3. The inquiry is objective search for a reasonable explanation for the impugned action.
4. But despite the above, evidence relevant to the subjective position of counsel, such as the accused's instructions, may in exceptional circumstances be relevant.

Whether the facts found by a trial court support the legal description given to them by the trial court is a question of law

A man was convicted in the Local Court of two offences of assault occasioning actual bodily harm. Prior to sentence he admitted to a Corrective Services Officer that he had been involved in the assault but that he acted in self-defence, which contradicted his case at trial that he was not involved. The Crown was granted leave to adduce this as fresh evidence on appeal to the District Court but the applicant asked the judge to state a case to the Court of Criminal Appeal pursuant to s 5B of the *Criminal Appeal Act 1912* (NSW). Blanch CJDC refused to state the case on the basis that the submissions did not raise any questions of law. In ***Landsman v Director of Public Prosecutions* [2013] NSWCCA 369**, Macfarlan JA found that, while the original, written submission put by the applicant did not raise a question of law, a subsequent formulation made during the District Court hearing did. The first submission was whether the trial judge erred in concluding that it was in the interests of justice to allow the prosecution to lead the evidence. The later formulation was whether the uncontested facts before the judge were capable of

supporting the judge's view that it was in the interests of justice that leave be given. This is supported by the plurality in *Vetter v Lake Macquarie City Council* [2001] HCA 12; 202 CLR 439 at [24]: "whether the facts found by the trial court can support the legal description given to them by the trial court is a question of law".

Refusal to listen to summing up where transcript is uncontested

A man was convicted of two sexual offences committed against his stepdaughter. In ***Versi v R* [2013] NSWCCA 206**, Basten JA (Latham J agreeing, Adams J differing on this point but agreeing with the result) held that it was not appropriate for the Court to listen to the summing up of the trial judge, either in whole or part, in order to assess whether the trial judge's directions with respect to coincidence and tendency evidence were confusing and misleading. The transcript was corrected by the solicitors for the applicant and was provided to the Court without objection from the respondent. Nor was it contended that any words noted as untranscribable were of critical importance. Furthermore, there is no way for an appellate court to be sure that the sound recording conveys an accurate impression of what the jury heard. In addition, there is a question as to the extent an appeal court should seek to place itself in the shoes of the jury, as well as time and resource considerations. Adams J agreed to listen to the portions of the summing up concerning coincidence and tendency evidence, accepting that there were some obscurities and misspeaking but not such as to lead to a risk that the jury would have been confused or misled.

Sufficiency of reasons by appellate court in unreasonable verdict appeal

BCM was charged, in Queensland, with three counts of indecent treatment of a child under 12. He was convicted of two of those counts, with the jury being unable to reach a verdict on the third. He appealed his conviction to the Court of Appeal of the Supreme Court of Queensland, arguing, inter alia, that the verdict was unsafe and unreasonable (referring to *SKA v The Queen* [2011] HCA 13; (2011) 243 CLR 400). The QCA succinctly dismissed the appeal in *R v BCM* [2012] QCA 333. The conclusion in relation to the unreasonable point was stated by Chief Justice de Jersey at [24]:

> Having reviewed the evidence as required, I am satisfied these convictions are not unsafe. This is a case where the jury, alive to the competing considerations, were entitled, reasonably, to accept the evidence for the prosecution and convict.

The High Court (Hayne, Crennan, Kiefel, Bell and Keane JJ) held in ***BCM v The Queen* [2013] HCA 48** (at [31]) that the obligation to provide sufficient reasons in such a case "was not discharged by observing that the jury was entitled to accept [the complainant's] evidence and act upon it". However, rather than remitting the matter, the Court then examined criticisms of the evidence that were advanced in support of the unreasonable verdict ground and held that "none of the criticisms of [the complainant's] evidence discloses inconsistencies of a kind that lead, on a review of the whole of the evidence, to a conclusion that it was not open to the jury to convict".

Post-conviction admissions may influence issue of retrial or acquittal

Mr P was convicted of multiple sex offences against his stepdaughter. Prior to sentence he admitted to having sexual relations with his step-daughter, which was inconsistent with his case at trial. In ***TDP v R; R v TDP* [2013] NSWCCA 303**, the Crown submitted that, in the event that the applicant succeeded in any of his grounds of appeal, the post-conviction admission was relevant to the application of the proviso under s 6(1) *Criminal Appeal Act 1912* (NSW) or in determining whether to order a new trial under s 8 rather than directing an acquittal. Hoeben CJ at CL expressed doubt as to whether the admission would have affected the application of the proviso; section 6(1) directs attention to the evidence that was before the jury at trial. However, his Honour concluded (at [128]) that it may have been significant if there was an issue as to whether the appropriate order was of acquittal or retrial. This is because of the tension between the public interest in the due prosecution and conviction of offenders, and the undesirability of allowing the prosecution to present a new case with fresh evidence at a retrial (referring to dicta of Johnson J in *Raumakita v R* [2011] NSWCCA 126 at [58]-[60]; 210 A Crim R 326).

Sentence varied following acceptance of erroneous concession by Crown

The appellant had been found guilty of a number of offences, including an offence under s 61M(2) of the *Crimes Act 1900*. For this offence DS was sentenced to a term of imprisonment of 8 years with a non-parole period of 6 years. At the time of the offence the standard non-parole period for the offence was five years, but by the time of conviction it had been increased to eight years. DS appealed on the basis that the sentencing judge erroneously applied the later, higher standard non-parole period. The Crown conceded the point and the Court of Criminal Appeal acted on the concession. After DS was re-sentenced, the Crown made an application for the order to be set aside or varied. The Court in ***DS v R (No 2)* [2013] NSWCCA 313** found that the later standard non-parole period should have been applied. The increase applied to all offences under s 61M(2) *Crimes Act* whenever committed unless the offender had already been sentenced or entered a plea of guilty, neither of which had occurred. Referring to the principles in *Muldrock*, the Court concluded that a different sentence was warranted.

Section 5F(3A) Criminal Appeal Act is not limited to evidence tendered by the prosecution

The respondent in ***R v Burton* [2013] NSWCCA 335** was charged with an offence of sexual assault. He and the complainant, as well as third man who was a mutual friend of theirs, had been celebrating on the night of the alleged assault. In a pre-trial ruling, the trial the judge granted an application that the complainant could be cross-examined about things she was alleged to have said during the night, concerning her expressed sexual interest in another man she met at a bar. The Crown sought to appeal against the ruling pursuant to s 5F(3A) *Criminal Appeal Act*. The issue was whether the ruling “substantially weakened the prosecution case”. Ordinarily the section applies to prosecution evidence that has been ruled inadmissible. In this case, however, the prosecution asserted that defence evidence had been erroneously admitted. Simpson J found that the section is not limited to evidence tendered by the prosecution. The erroneous admission of evidence of the complainant’s sexual interest in another person “would deflect the jury from a proper

consideration of the true issues in the trial" and thereby substantially weaken the prosecution case (at [216]). The appeal was allowed.

Manifest excess not made out by reference to small selection of cases

Mr Frahm pleaded guilty to an offence of larceny and an offence of knowingly dealing with the proceeds of crime. He took possession of proceeds that had been abandoned by robbers, with whom he was not associated, and spent some of the cash he took. He appealed his sentence on the basis of manifest excess. In so doing he referred to six cases, which he claimed involved more serious offences, but for which lesser sentences were imposed. Hoeben CJ at CL dismissed the appeal in ***Frahm v R*** **[2014] NSWCCA 10**. A small selection of cases "does not and cannot demonstrate that a particular sentence was manifestly excessive" (at [19]). Sentencing is a discretionary exercise and all that is required is that relevant considerations (and only relevant considerations) are taken into account. An appellate court cannot substitute its own opinion for that of the sentencing judge merely because it would have exercised its discretion differently. In addition, the offences in question may be committed by various means involving different criminality, and no sentencing trend can be discerned from the six cases presented.

Ex tempore reasons for judgment need not be "exceptionally eloquent"

Mr Newton pleaded guilty to an offence of break, enter and steal. His sentence was accumulated upon previous sentences that had been imposed for other offences. The remarks on sentence were delivered ex tempore, during which the appellant claimed the judge misapprehended a submission made on his behalf about the application of the totality principle. Adamson J in ***Newtown v R*** **[2014] NSWCCA 41** held that, with one minor exception, the criticisms were not soundly based. The timely administration of justice requires that judges often deliver oral judgments soon after hearings. Where this is necessary, it is not easy to "select the most apposite words or to construct sentences which not only reveal one's reasoning in a lucid way but which also withstand rigorous syntactic analysis" (at [41]). Parties are entitled to reasons but not to an "exceptionally eloquent" standard. The principle of interpretation that documents should be read as a whole applies to judgments, just as it does to contracts and legislation.

Double jeopardy does not apply to Crown appeals against sentence in respect of Commonwealth offences

Mr Northcote pleaded guilty to an offence of using his position as a director dishonestly and two offences of making a false and misleading statement in a document lodged with ASIC. He was sentenced to concurrent terms yielding a total of two years imprisonment to be served by way of an ICO. The Crown appealed against the leniency of the sentences. Garling J in ***Director of Public Prosecutions (Cth) v Northcote*** **[2014] NSWCCA 26** allowed the appeal and imposed a term of two years full time imprisonment. The Court held that the sentence they imposed would have been accumulated were it not for the principle of double jeopardy. However, in an addendum added on 7 April 2014, the Court noted that the High Court decision of *Bui v Director of Public Prosecutions (Cth)* [2012] HCA 1 established that double jeopardy does not apply to Crown appeals concerning

Commonwealth offences. Notwithstanding this, the Court concluded that no other sentence would have been imposed.

Post sentence remorse taken into account in re-sentencing for Muldrock error

Mr Ali was found guilty by a jury of two counts of indecent assault and one count of sexual intercourse without consent. His sentence appeal was subsequently dismissed by the Court of Criminal Appeal. The appellant then brought an appeal pursuant to s 79 of the *Crimes (Appeal and Review) Act 2001* claiming *Muldrock* error. It was conceded Mr Ali should be re-sentenced and the Court of Criminal Appeal did so on the basis that the appellant's post-sentence conduct warranted a lesser sentence in law. Leeming JA in ***Ali v R* [2014] NSWCCA 45** found that firstly, Mr Ali's time in custody had been more arduous than many offenders, given the nature of his offences, and secondly, he had acknowledged his wrongdoing. This was demonstrated through the offender having signed on to rehabilitation programs before he was advised that his sentence was being reviewed. The latter finding was held to be of vital importance, given that the offender had shown no remorse at sentence. When courts give new meaning to existing statutes, the effect is retrospective. This entails that courts will also be required to have regard to evidence not available to a sentencing judge when conducting a review of sentence.

Principles applicable to extension of time to appeal

In ***Abdul v R* [2013] NSWCCA 247**, the Court (Hoeben CJ at CL, Johnson and Bellew JJ) considered the principles to be applied in considering whether to grant an extension of time for an appeal based on a change of law. It was the first case brought by the Legal Aid team responsible for identifying apparent *Muldrock* error in cases previously refused assistance on the basis of low prospects of success.

The Crown opposed the granting of an extension of time. It relied primarily on the statements of principle of Campbell JA (Latham and Price JJ agreeing) in *Etchell v R* [2010] NSWCCA 262; 205 A Crim R 138 at [18]-[25]. Campbell JA held, at [24], that, "something beyond the presence of factors that would be sufficient to result in a sentence being varied" is required, and that it is proper to assess the appeal in a summary fashion. The Court also gave consideration to a series of "change of law" decisions in the United Kingdom regarding extensions of time, such as *Jawad v The Queen* [2013] EWCA Crim 644. In that case, the Court (Lord Justice Hughes, Mr Justice Foskett and Judge Radford) held, at [29] that an extension would only be granted, "if substantial injustice would otherwise be done to the defendant".

In *Abdul*, the Court adopted, at [52]-[53] an amalgamation of Campbell JA's conclusion in *Etchell* with the UK approach. The "something beyond the presence of factors that would be sufficient to result in a sentence being varied" required in Campbell JA's test is the occurrence of a substantial injustice if an extension of time is refused. In undertaking that test, it is proper to assess the proposed grounds of appeal in a summary fashion.

The Court ultimately concluded that notwithstanding the conceded error, no lesser sentence was warranted in law (s 6(3) *Criminal Appeal Act 1912*). No substantial injustice could occur if an extension was refused, and it accordingly was.

In ***Alpha v R* [2013] NSWCCA 292**, Leeming JA and Bellew J agreed that the approached described in Abdul was to be applied in *all* criminal appeals where an extension of time was required. Alpha was also notable for Leeming JA's useful encapsulation of the relevant principles at [1]-[2]. R S Hulme AJ agreed with the orders proposed but was (mildly) critical of the degree to which the merits of the case had been examined in the principal judgment; more in keeping with an appeal than an application for an extension of time.

An extension of time to apply for leave to appeal was also required in ***WA v R* [2014] NSWCCA 92**. The applicant had pleaded guilty and been sentenced for manslaughter on 26 October 2012 and filed a Notice of Intention to Appeal on 6 November 2012. There was a grant of legal aid on 10 December 2012 but a Notice of Application for Leave to Appeal was not filed until 17 January 2014. After the Court of Criminal Appeal reserved its decision in ***WA v R* [2014] NSWCCA 92**, the High Court granted special leave in *Kentwell v The Queen* and *O'Grady v The Queen* [2014] HCA Trans 113, leaving open the question of whether *Abdul* and *Alpha* were correctly decided. Notwithstanding this, the Court said that if and until the High Court revisits the principles in *Abdul* and *Alpha*, they represent the settled approach of the Court. They were not disputed in the parties' written submissions. The principle of finality also informs this approach and to ignore it would flout the time limits imposed by the legislature.

Finality principle does not preclude an application under s 78 Crimes (Appeal and Review) Act 2001

Mr Sinkovich's application for an inquiry into his sentence pursuant to s 78 of the *Crimes (Appeal and Review) Act 2001* (NSW) was rejected by Latham J in *Application by Frank Sinkovich pursuant to s 78 Crimes (Appeal and Review) Act 2001* [2013] NSWSC 1342. His application was made out of time, on the basis of *Muldrock* error made by both the sentencing judge and, on appeal, the Court of Criminal Appeal. He then invoked the supervisory jurisdiction of the Court pursuant to s 69 of the *Supreme Court Act 1970* (NSW). In the alternative, he sought declaratory relief under s 75 of the *Supreme Court Act*. In **Sinkovich v Attorney General of New South Wales [2013] NSWCA 383** Basten JA found that Latham J had made an error of law in rejecting the application. As a result, he granted a declaration that the *Muldrock* error made by the sentencing judge and the Court of Criminal Appeal may form the basis of a doubt or question as to the mitigating circumstances in the case (s 79(2) *Crimes(Appeal and Review) Act 2001* (NSW)). This provision acts as a 'gateway' to the direction of an inquiry (s 79(1)(a)) or a referral of the case to the Court of Criminal Appeal (s 79(1)(b)). While "appeals are, on one view, an affront to the principle of finality, rights of appeal are not narrowly confined. Nor is the supervisory power confined within strict limits: rather the contrary". Sections 78-79 are "inherently an exception to the principle of finality" [at 46].

Rule 4 applies where objection taken at trial but different issues argued on appeal

An objection was taken by the defence at trial to certain prosecution evidence on the basis that it was not relevant. On appeal however, notwithstanding it was conceded that the evidence was relevant, it was contended that the trial judge erred by failing to exclude it pursuant to s 137 of the *Evidence Act* 1995: ***Poniris v R* [2014] NSWCCA 100**. It was argued that r 4 of the Criminal Appeal Rules did not apply because there had been an objection at trial. Macfarlan JA concluded, first, that the trial judge was not obliged to consider exclusion under s 137 of his own motion. Secondly, after referring to authorities including *Vickers v R* [2006] NSWCCA 60; 160 A Crim R 195 and *Bin Sulaeman v R* [2013] NSWCCA 283, his Honour held that r 4 did apply: "To hold otherwise would be contrary to the purpose of r 4 and the discouragement of "armchair appeals" which that provision seeks to achieve". (Ultimately, leave under r 4 was refused; the appellant had not lost a real chance (or a chance fairly open) of being acquitted.)

BAIL

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

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

EVIDENCE

Admissibility of prior inconsistent statement as evidence in its own right

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

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

Admissions made during telephone conversation instigated by police wrongly excluded

The respondent in ***R v Burton* [2013] NSWCCA 335** was charged with having sexual intercourse with the complainant without consent. During the investigation and before he was charged, the complainant called the respondent at the instigation of the police. The conversation was recorded pursuant to a listening device. The Crown contended that admissions were made. The respondent sought to have the evidence excluded under, among other provisions, s 90 *Evidence Act*. The trial judge found that it should have been excluded under this section, primarily because the complainant elicited responses from the respondent whilst acting as an “agent of the state”. In deciding whether a person is acting as an “agent of the state” in this context, the question is whether the conversation would have taken place in the form and manner it did, but for the intervention of the police. The trial judge also found that: the conversation amounted to an unfair derogation of the respondent’s right to silence; the police were exploiting a special relationship; and the police conveyed the key questions they wanted the complainant to ask. Simpson J found that the evidence should not have been excluded and rejected all of these findings. It was wrong for the trial judge to have characterised the complainant as an “agent of the state”. Given the nature of the relationship between the complainant and the respondent, it was not the case that the conversation would not have taken place but for the involvement of the police. Nor did the complainant elicit responses from the respondent.

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

Exclusion of the evidence pursuant to s 137 of the *Evidence Act 1995* was also a matter considered in ***R v Burton***. The trial judge held that the probative value of the evidence concerning the telephone conversation was “extremely weak” on the basis that there was some ambiguity in what the respondent had said: were they admissions of criminal conduct or just of some moral wrongdoing? A jury might find such wrongdoing reprehensible and discreditable and so the danger of unfair prejudice was not outweighed by the probative value. The judge’s approach was found to be erroneous. There was a failure to identify the fact in issue (consent) to which the evidence related and there was an error in taking into account an alternative explanation for the respondent’s utterances. The existence of competing inferences does not have any part to play in the assessment of probative value under s 137. Only two of the five judges who sat in *R v XY* endorsed the relevance of competing inferences in relation to s 137; they are relevant in assessing the admissibility of coincidence evidence: *DJS v DPP (Cth); NS v DPP (Cth)* [2012] NSWCCA 9.

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

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

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

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

Tendency evidence wrongly admitted

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

Temporal nature of tendency evidence

RH pleaded guilty to five counts of aggravated indecent assault involving his foster daughter, L, committed between December 2005 and November 2006, when she was 11 years' old. This was led as tendency evidence in relation to offences committed against two other foster daughters, J and K, alleged to have occurred in 1989-93 and 2003 respectively. The appellant argued that since the acts in question did not occur within a confined time period and were subsequent to those that had been charged, the probative value was significantly reduced and the evidence should not have been admitted. There may have been an explanation for the later acts that did not apply to the earlier ones, such as RH's depression that developed in 2002-3. The principle argument was that the jury was invited to find a tendency at an earlier time based on the same facts that the tendency was led to prove. Ward JA in ***RH v R* [2014] NSWCCA 71** held that the evidence was admissible as tendency evidence. If the jury was satisfied beyond reasonable doubt of the appellant's tendency in 2005-6, there was nothing wrong with the conclusion that he had the same tendency 2 or 3 years earlier. In relation to K, the jury was also entitled to take into account the conduct against J, provided they were satisfied of it beyond reasonable doubt. The same applied to the conduct alleged against K in respect of J.

Significant probative value of tendency and coincidence evidence

***Saoud v R* [2014] NSWCCA 136** provided something of an opportunity for the New South Wales Court of Criminal Appeal to respond to the decision of the Victorian Court of Appeal in ***Velkoski v The Queen* [2014] VSCA 121**. In that case it was asserted that there had been

a divergence between the two States as to what is required to establish "significant probative value" for the purposes of tendency and coincidence evidence under ss 97 and 98 of Uniform Evidence Law. The Victorian approach was characterised as requiring "some degree of similarity in the acts or surrounding circumstances", whereas the Court of Appeal asserted that the NSW approach has "emphasised that tendency reasoning is not based on similarities and evidence of such a character need not be present". The NSW approach was regarded as having lowered the threshold to admissibility. (*Velkoski* at [163]-[164]).

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

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

MENTAL HEALTH

Power of Mental Health Review Tribunal to make directions contrary to conditions of release imposed by judge on a person found not guilty by reason of mental illness

In 2010, a young man, "X", attempted to hold-up a convenience store with a pair of scissors. He was charged with attempted armed robbery, but found not guilty by reason of mental illness in accordance with s 38 of the *Mental Health (Forensic Provisions) Act 1990*. After the special verdict was entered in 2011, the judge made orders, pursuant to s 39, that X be subject to supervised treatment for two years and then unconditionally released. X did not respond particularly well to treatment, and in 2013 the Mental Health Review Tribunal made directions that he reside in Macquarie Hospital beyond the two-year limit specified in the orders made in 2011. X challenged the validity of those conditions, and the Attorney General applied to the Supreme Court for declaratory relief.

***Attorney General of New South Wales v X* [2013] NSWSC 1392** was heard by Johnson J. Section 39(1) is in the following terms:

> If, on the trial of a person charged with an offence, the jury returns a special verdict that the accused person is not guilty by reason of mental illness, the Court may order that the person be detained in such place and in such manner as the

> Court thinks fit until released by due process of law or may make such other order (including an order releasing the person from custody, either unconditionally or subject to conditions) as the Court considers appropriate.

Johnson J doubted that these provisions empowered a judge to make any order with respect to time. But the Attorney General did not argue that point, and he expressed no concluded view. Regardless, proper construction of the statutory scheme made clear that a court was not able under s 39 to fix a legally binding period upon the Tribunal in the exercise of its functions under the Act. Johnson J granted declaratory relief in respect of the conditions imposed by the Tribunal.

OFFENCES

People smuggling - knowledge of destination as an element of the offence

***Taru Ali v R* [2013] NSWCCA 211** concerned an Indonesian national who was steering a vessel when it was intercepted by the Royal Australian Navy off Ashmore Reef. Fifty-two illegal immigrants were aboard. He was charged and convicted for an offence of aggravated people smuggling contrary to s 233C of the *Migration Act 1958* (Cth). His case at trial had been that he thought the passengers were going on a holiday to Bali, and that after it became clear that the boat was not going to Bali, he had no idea of the destination. He said he had not heard of Australia or Ashmore Reef. In addressing the mental element of the offence, the trial judge directed the jury that "the accused meant to do what he did if he knew that by steering the boat and taking the group to the place that he did he was helping to take the group to Australia". Mr Taru Ali appealed his conviction, arguing that the trial judge should have also directed the jury that the Crown had to prove he knew Ashmore Reef was part of Australia. On appeal, reliance for this proposition was placed upon decisions such as *Alomalu v R* [2012] NSWCCA 255 **and** *Sunanda v R; Jaru v R* [2012] NSWCCA 187.

R A Hulme J undertook an analysis of the evidence in the trial. Some passengers gave evidence that Mr Taru Ali indicated that their destination was Ashmore Reef; that they were entering Australian waters; and that the "Australian Navy will come and collect you guys" and that "when the Australian Navy [come] they will put us in jail and you guys will be free". *Alomalu* and *Sunanda* were cases where the evidence was only capable of establishing that the accused knew the immediate destination of the passengers. This was not so with respect to Mr Taru Ali. As he knew the ultimate destination of the passengers was Australia, and that bringing them to Ashmore Reef facilitated their arrival at their ultimate destination, it was not necessary to prove any intent with respect to whether he knew Ashmore Reef was part of Australia. R A Hulme J held that there had been no misdirection.

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

This appeal in ***Buckman v R* [2013] NSWCCA 258** was heard simultaneously with ***Ratcliff v R* [2013] NSWCCA 259**, which raised identical issues. The appellant contended that the

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

Bathurst CJ dismissed the appeal. He noted (at [78]) that s 300.4 of the *Criminal Code* "explicitly seeks to preserve concurrent operation even when the same act or omission is an offence under the *Criminal Code* and a State law and the penalty and fault element in the State law is different". This indicates that the Commonwealth did not intend to cover the field. All that the *Drug Act* does is treat possession with an intention to supply gratuitously to a third person as a more serious offence. Section 300.4 does not operate to eliminate direct inconsistency but allows for federal law to be read and construed as not disclosing a subject matter or purpose with which it deals exhaustively and exclusively (citing *Momcilovic v The Queen* [2011] HCA 34; (2011) 245 CLR 1 at [272]).

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

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

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

Mens rea for reckless wounding in company by joint criminal enterprise

The appellant in ***Prince v R* [2013] NSWCCA 274** was found guilty by a jury of offences of affray and wounding with intent to cause grievous bodily harm. The primary charge was brought under s 33(1)(a) *Crimes Act 1900*, and a statutory alternative was provided under s 35(3). Both charges were put on alternative bases, direct liability and joint criminal enterprise. It was conceded that the trial judged erred in his directions for the s 35(3) offence when put on the joint criminal enterprise basis. The jury was directed that the person inflicting the wound must have been reckless, and also that the appellant intended that the person would inflict the wound recklessly. Instead, what the Crown had to prove was that the wound was inflicted recklessly by one of the appellant's co-offenders; that the appellant had agreed to attack the victim; that he was acting in company with his co-offenders who he knew were armed; that he realised the victim might be harmed; and that he continued to act in furtherance of the enterprise. However, the trial judge directed the jury to consider the statutory alternative only in the event that the jury acquitted the appellant of the primary offence, which they did not. Furthermore, the misdirection favoured the appellant by overstating the mens rea requirement, and so no miscarriage of justice could have flowed.

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

Consent to surgery in a medical assault case

Former doctor Reeves was convicted of malicious infliction of grievous bodily harm with intent. He was sentenced on the basis that he did not have the complainant's consent to surgically remove her entire genitalia. The issue on appeal to the Court of Criminal Appeal was whether the trial judge provided erroneous directions to the jury on the issue of consent. The High Court in ***Reeves v R* [2013] HCA 57** found that the Court of Criminal Appeal formulated the correct test. The CCA was correct to find that the trial judge was wrong to direct that the practitioner had to explain the "possible major consequences of the operation" together with "options" and "alternative treatments" in order for there to be "informed consent". All that is needed in order to negative the offence of battery is consent to the nature of the procedure, in broad terms. (This is not necessarily enough to protect against liability in negligence, however). The appellant argued that Bathurst CJ formulated a more demanding test, by requiring consent to the "nature and extent of the procedure". The High Court ruled that this was irrelevant since neither formulation could be said to have been agreed to on the facts.

(18/12/13)

An unassembled crossbow is not a prohibited weapon

Mr Jacobs was found guilty of selling a prohibited weapon, a crossbow, on numerous occasions. What he actually sold were unassembled crossbows, packaged in boxes that

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

Reckless damage or destruction of property

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

PRACTICE AND PROCEDURE

Inadequately particularised charges of aggravated sexual assault

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

Johnson J rejected the first ground. The indictment disclosed "an imperfect formulation of a known offence" (at [95]). It was a case of incorrect particularisation. But a real consequence was the jury was given incomplete directions of law on the circumstance of aggravation relied upon. There was some very slight evidence of an implement having been used, but the jury was not directed to make a finding on that issue because of the way the indictment was framed. The appropriate course was for the court to substitute

verdicts for the non-aggravated form of the offence (s 61I) by means of s7(2) *Criminal Appeal Act 1912*.

Legislative change did not affect conviction

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

Probative value of protected confidence documents must be assessed individually

Mr Williams was charged with sexually assaulting a 14 year old girl. During the cross-examination of the complainant it was found that she was receiving antipsychotic medication. The jury was discharged. Mr Williams was then granted leave to issue a number of subpoenas relating to the complainant's medical history, which involved protected confidence documents. After the documents were produced, he sought access to them. The complainant opposed this. The trial judge subsequently granted access to most of the documents, some of which disclosed prior sexual history. Gleeson JA in ***PPC v Williams* [2013] NSWCCA 286** held that the trial judge erroneously assessed the probative value of the material by assessing the material as a whole, rather than each individual document. This approach was inconsistent with s 299D(1)(a) of the *Criminal Procedure Act 1986* (NSW), which sets out the restrictive approach to be adopted when considering whether to grant access to protected confidence documents. Furthermore, the trial judge failed to first determine whether the documents were admissible under s 293 of the *Act*.

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

While the applicant was an accused in criminal proceedings for sexual assault offences pending in the District Court, his solicitors issued a subpoena calling for various documents to be produced by the complainant. The trial judge set aside the subpoena at the request of the complainant's solicitors, and also ordered the applicant to pay costs. The ordering of costs was found by R A Hulme J in ***Stanizzo v Complainant* [2013] NSWCCA 295** to be

beyond the power of the District Court. There is no express conferral of power to do so, and nor does the District Court possess inherent jurisdiction in this respect. The question was whether there was an implied power, “by a strict test of necessity” (at [12]). R A Hulme J referred to *R v Mosley* (1992) 28 NSWLR 735 in which it was confirmed that there is neither express nor implied power for a District Court to order costs in its criminal jurisdiction. Reference was also made to *DPP v Deeks* (1994) 34 NSWLR 523 where Kirby P observed (at 534) that the power to award costs in criminal proceedings must be “very clearly conferred”. These two authorities take precedence over *Darcy v Pre-Term Foundation Clinic* [1983] 2 NSWLR 497 upon which the respondent had relied.

Undesirable for prosecutor to frame address as questions to be answered by defence

The appellant in ***Lane v R* [2013] NSWCCA 317** appealed, inter alia, against certain aspects of the Crown Prosecutor’s closing address in her trial for murder. The objectionable portion involved the Crown posing a series of questions to the jury, and asking that they be borne in mind during the defence address. The appellant argued that this had the effect of reversing the onus of proof, and that as a result the trial had been unfair.

The Court (Bathurst CJ, Simpson and Adamson JJ), referring to *Wood v R* [2012] NSWCCA 21, agreed that asking questions with a view to inviting the jury to consider if satisfactory questions were provided was highly undesirable. But a miscarriage of justice did not automatically flow. In this case, the issues raised as “questions” were factually relevant to the Crown onus of excluding a defence case. Had the questions been framed as issues, they would have been unobjectionable. (And no objection was taken at trial.) The Court felt bound to accept that the jury applied the directions of the trial judge assiduously.

Unlawful physical coercion by one juror upon another falls outside the exclusionary rule

A jury found Mr Smith guilty of two sexual offences. He appealed to the Western Australian Court of Appeal, arguing that the trial miscarried. A note had been found in the jury room after they had been discharged, alleging that the author had been coerced by a fellow juror to return a verdict of guilty. The appeal was dismissed because of the exclusionary rule that says that a juror’s evidence of what takes place in a jury room is inadmissible. The High Court in ***Smith v State of Western Australia* [2014] HCA 3** found that the evidence fell outside of the exclusionary rule and therefore should have been admitted. The rationale for the rule “lies in the preservation of the secrecy of a jury's deliberations to ensure that those deliberations are free and frank so that its verdict is a true one and to ensure the finality of that verdict” (at [31]). Unlawful physical coercion by one juror upon another cannot be regarded as part of the course of “free and frank” deliberation and to apply the rule in such a case would defeat the purpose of the rule. Furthermore, “the need to protect and preserve the finality of trial by jury as a justification for the exclusionary rule loses its force where the evidence in question does not go to the substance of the jury’s deliberations, but, rather, to demonstrate the disruption of the deliberative process” (at [43]).

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

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

Calculation of jury deliberation time for majority verdict purposes

The issue in ***BR v R* [2014] NSWCCA 46** was whether the jury had been deliberating for 8 hours or more so as to enable the trial judge to consider acceptance of a majority verdict (s 55F *Jury Act* 1977). A period of 1 hour 5 minutes had elapsed between the jury sending a note saying they could not agree unanimously and being brought back into court. (The jury had previously been given a *Black* direction). Trial counsel accepted that 8 hours had elapsed (including the 1 hour 5 minutes) but appeal counsel did not. It was held, per Emmett JA, that the onus was on the appellant to show that the trial miscarried because the jury were not actually deliberating. In the absence of evidence to the contrary, it should be inferred that the jury continued to deliberate during the 1 hour 5 minutes so the 8 hour minimum period was satisfied. But his Honour also sounded a cautionary note about acting immediately after the 8 hour period had been reached if there is any ambiguity about any component of the period.

The Court also expressed views about what periods do or do not count towards deliberation time.

<u>Time away from court</u> (e.g. retirement overnight): the judges were unanimous this did not count.
<u>Time in court listening to further directions</u>: such time did not count according to Emmett JA and RS Hulme AJ. Hall J agreed with Emmett JA but not with RS Hulme AJ.
<u>Lunchtime spent in the jury room</u>: Emmett JA said judges should be slow to assume the jury were deliberating if having lunch (but in this case there was no evidence they were not deliberating). RS Hulme AJ said that lunchtime should count. Hall J agreed with both Emmett JA and RS Hulme AJ on this point.

Movement time between courtroom and jury room: this time should not count according to Emmett JA, Hall J agreeing, but should count according to RS Hulme AJ.
Cigarette breaks: Emmett JA was silent on this point; RS Hulme AJ said this time should not count (and that more attention needs to be directed to recording when the full complement of the jury not together); and Hall J agreed with both Emmett JA and RS Hulme AJ.

Entitlement of an accused to attend a view

The appellant in ***Tongahai v R* [2014] NSWCCA 81** was on trial for a murder allegedly committed at a bar in Kingsford. There was a view of the crime scene and on appeal Mr Tongahai alleged that a remark made by the trial judge led him to believe that he was not entitled to attend. Basten JA found that, even if he did form the view that he was not entitled to attend, which was unlikely, no miscarriage of justice was occasioned. Since there is room for mistakes and misunderstandings if the accused is not present, an accused's right to be present during a view "should be accepted as a fundamental element of procedural fairness in a criminal trial" (at [24]). It is not an obligation, however, since an accused may be prejudiced by, for example, being present in shackles.
(Note: *Jamal v R* [2012] NSWCCA 198 was not referred to, where Hidden J held that s 53(2)(a) meant that an accused had a right to be present at a view).

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

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

SENTENCING – GENERAL ISSUES

Offending the De Simoni *principle*

Mr Nguyen was conducting a minor criminal enterprise from the garage of his unit complex. Two masked men attempted, unsuccessfully, to rob him. Mr Nguyen was able to scare them off unarmed, but later obtained a pistol to prevent further robberies. Two

weeks later, eight police officers executed a search of Mr Nguyen's unit and garage. When they entered the basement, Mr Nguyen confronted them. A brief exchange of fire ensued, in the course of which Mr Nguyen shot Constable Crews in the arm, and another police officer, in returning fire moments later, accidentally shot Const. Crews dead. Mr Nguyen claimed that he had mistaken the police officers for disguised robbers. He pleaded guilty to manslaughter on the basis of excessive self-defence (and also pleaded to wounding with intent). The Crown accepted his plea.

The sentencing judge expanding on the consequences of the plea:

> The plea of guilty to manslaughter also entails the Crown accepting the reasonable possibility that the offender genuinely believed that it was necessary to shoot at the person who proved to be Constable Crews in order to defend himself (based as it was on his mistaken belief that the officer was someone who was intent on robbing him and someone who might have posed a serious risk to his safety). It also entails acceptance by the offender that a reasonable person in his position would not have considered that it was necessary to shoot that person in defence of himself or his property.

Her Honour made a finding that the offence was not in the worst category of manslaughter, reasoning by comparison to a hypothetical scenario where the offender knew the victim was a police officer. The Crown appealed the sentence, arguing, inter alia, that if Mr Nguyen had *known* that Constable Crews was a police officer, he would have been guilty of murder: ***R v Nguyen* [2013] NSWCCA 195**.

The Court of Criminal Appeal agreed. The sentencing judge had erred by having regard to the absence of a factor that, if present, would have rendered Mr Nguyen criminally liable to the more serious offence of murder (see *The Queen v De Simoni* (1981) 147 CLR 383 at 389). As a result, the sentencing discretion miscarried by taking into account an extraneous consideration.

Whether an aggravating feature that offence was committed in premises offender entitled to be present in

The facts in ***Melbom v R* [2013] NSWCCA 210** involved an offender stabbing one of his housemates and threatening another. The sentencing judge referred to as an aggravating feature that the offence "was committed in the home of the offender". Section 21A(2)(eb) of the *Crimes (Sentencing Procedure) Act 1999* provides that it is an aggravating feature if, "the offence was committed in the home of the victim or any other person". It has been held to not apply where offences are committed in a home where the offender has a lawful right to reside, in accordance with pre- s 21A common law. Mr Melbom appealed his sentence, arguing, inter alia, that this interpretation had been transgressed.

On appeal, R A Hulme J found that the sentencing judge was not in error because she relied on other circumstances (domestic violence and the special vulnerability of housemates) in making her findings in relation to the offence occurring in the home. But he was, in passing, sceptical of the current state of the law on the scope of s 21A(2)(eb).

Simpson J took the point further, and remarked (Price J agreeing with her additional comments) at [1]-[2]:

> I have read in draft the judgment of R A Hulme J. I agree with his Honour's analysis and the orders he proposes. In relation to Ground 1, I note that the Crown initially sought to challenge the correctness of previous decisions of this Court that hold that the aggravating feature specified in s 21A(2)(eb) of the Crimes (Sentencing Procedure) Act 1999 (that the offence was committed in the home of the victim or any other person) does not extend to offences committed in the home of the victim if the offender lives in the same home. The Crown expressly abandoned that challenge. Why that course was taken is not apparent.
>
> I understand R A Hulme J to have expressed some reservations about the principle stated. I share those reservations. It is, perhaps, time for re-examination by this Court of those previous decisions.

A similar conclusion was reached in ***Montero v R* [2013] NSWCCA 214**, handed down days after *Melbom*. *Montero* involved a sexual assault in premises the offender was entitled to be in after a New Year's Party. Mr Montero climbed into a bed occupied by a guest after he had a fight with his girlfriend, and, in the morning, raped her. The sentencing judge referred to s 21A(2)(eb) as an aggravating factor. Mr Montero appealed, arguing that this finding was erroneous. Judgment on the appeal was again given by R A Hulme J, who found the ground was not made out. It was clear that the sentencing judge was occupied with the entitlement of the young victim to safety and security while a guest at a friend's home. (In the event that it was an erroneous finding, R A Hulme J found it was not material.)

Seriousness or aggravation: a distinction without difference

The appellant in ***Richardson v R* [2013] NSWCCA 218** killed his partner and dismembered her body with a power saw. The cadaver was placed in garbage bags and buried in the bush. The appellant was tried and convicted of murder. At the sentence hearing, his counsel conceded that his treatment of the body could be taken into account "in assessing the seriousness of the offence" (by reference to cases such as *Knight v R* [2006] NSWCCA 292; (2006) 164 A Crim R 126). The sentencing judge made findings of fact that the dismemberment was not done only to facilitate disposal of the body, but also to remove evidence of injuries and express the appellant's anger and hatred of the victim. He considered that the sentence should be increased on account of this feature. On appeal, the appellant sought to make a distinction between his concession that the dismemberment went to the seriousness of the offence and the finding that it was a matter of aggravation. Hoeben CJ at CL remarked that this was a distinction without difference, and that it was not open for the appellant to resile from the concession below. The relevant findings of fact were open and uncontradicted.

The relevance of entrenched disadvantage

Bugmy v The Queen **[2013] HCA 37** was an appeal against a decision of the Court of Criminal Appeal affirming a sentence below. The offender had assaulted a corrective services officer, blinding him in one eye. He came from a profoundly disadvantaged background in a variety of respects. The Court of Criminal Appeal found that the importance of these features must diminish over time where a person goes on to accumulate a significant criminal record. The High Court remitted the appeal on a technical matter, but also gave its considered view on this point. It held, at [43]-[44] below:

> ...The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.
>
> Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision. However, this is not to suggest, as the appellant's submissions were apt to do, that an offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment. Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult. An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.

The reasoning was based on the principle outlined by Brennan J in *Neal v The Queen* [1982] HCA 55; (1982) 149 CLR 305 at 326, reflected in particular in NSW in *Fernando* (1992) 76 A Crim R 58 at 63.

The appellant in ***Munda v Western Australia*** **[2013] HCA 38** argued a similar point, that "systemic deprivation and disadvantage, including an environment in which the abuse of alcohol is endemic in indigenous communities" should have been taken into account. The appellant had killed his spouse in an intoxicated assault. The High Court reached a similar conclusion as it had in *Bugmy*, but also mounted a strong argument in support of features of the criminal law that look beyond the offender, including the "obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence" (at [54]).

Hardship to third parties when sentencing for Commonwealth offences

R v Zerafa **[2013] NSWCCA 222** concerned an offender who was convicted of a number of tax offences. The proceedings had been attended by significant delay. Section 16A(2)(p) of the *Crimes Act 1914* (Cth) requires a sentencing court to have regard to "the probable

effect that any sentence or order under consideration would have on any of the person's family or dependants". Despite the obvious and uncontested hardships on Mr Zerafa's young family, the sentencing judge felt constrained by authority not to take this into account because it was not "exceptional". In response to a Crown appeal against leniency, Mr Zerafa raised a contention that the cases relied upon, primarily *R v Togias* [2001] NSWCCA 522 and *R v Hinton* [2002] NSWCCA 405; 143 A Crim R 286, were wrongly decided. Hoeben CJ at CL (Latham J agreeing, Beech-Jones J dissenting on this point) ruled that whatever the argument against the present interpretation of the legislation, the remarks of Spigelman CJ in *Togias* at [17] held true, "If there is to be any change in this position…only the High Court can effect it".

Form 1 offences not relevant to accumulation

Mr Sparos was sentenced for import and supply offences relating to a large quantity of cocaine. The sentencing judge was asked to take into account a Form 1 offence relating to Mr Sparos' dealings with the profits of his criminal enterprise. In his remarks, the sentencing judge said "the Form 1 matter requires an increase in the sentence for the principle offence *and* militates against complete concurrence for that offence with that to be imposed for the Commonwealth matter" (emphasis supplied). Mr Sparos appealed his sentence, arguing that the sentencing judge was not entitled to, in effect, take into account a Form 1 offence twice: ***Sparos v R* [2013] NSWCCA 223**.

Fullerton J (Beazley P agreeing, Beech-Jones J in disagreement on this point) considered whether such an approach was contrary to the principles laid down in *Abbas, Bodiotis, Taleb and Amoun v R* [2013] NSWCCA 115. In *Abbas*, Bathurst CJ held that s 33 *Crimes (Sentencing Procedure) Act 1999* was framed so as to allow a sentencing judge to take Form 1 offending into account when "dealing with the primary offence" ([22]-[23]). Applying this, Fullerton J held that having determined the appropriate sentence for the primary offence, it was not open to the judge in sentencing Mr Sparos to take the Form 1 offence into account for the subsequent consideration of the extent to which sentences should be accumulated. Authorities emphasising the role of totality in the sentencing process must be read as being applicable only to offending the subject of a criminal conviction.

General deterrence for vigilante offences

Four offenders assaulted, drugged and robbed Michael Venn at his home. The attack was carried out because the group believed Mr Venn, who was 42, was maintaining a sexual relationship with one of their number who was then aged 16: a fact they viewed as abhorrent and illegal. The group was arrested and charged shortly after the crime. ***Bonnet v R* [2013] NSWCCA 234** concerned an appeal brought by one of the group, Ms Bonnet, against her sentence for an offence of robbery with deprivation of liberty. She argued, inter alia, that the sentencing judge had erred by not giving ameliorating weight to her motivation for committing the offence. Ms Bonnet relied on the case of *R v Swan* [2006] NSWCCA 47, which concerned an assault by an intellectually disabled victim of a sexual offence against his attacker.

Adamson J dismissed the appeal. Unlike *R v Swan*, the offender in this case was not affected by any mental disorder or delusion. Vigilante offences are to be discouraged by general deterrence, and even more so where, as in this case, the perceived crime may be unsavoury to the attackers, but is no crime in law at all.

Principles of totality in sentencing an offender already serving another sentence

***R v DKL* [2013] NSWCCA 233** was a Crown appeal against sentences for offences of sexual intercourse with a child under 10 and using a weapon to intimidate. The sentence imposed for those offences amounted to, in total, a five-year non-parole period and an eight-year head sentence. The Crown did not cavil with that aspect. But the offender was already serving a substantial sentence of imprisonment for other sexual offences committed against a different complainant. The sentencing judge accumulated the new sentences on the existing sentences to such an extent that the effective additional non-parole period was reduced from five years to two years and three months. Adamson J, on the appeal, found that the degree of accumulation rendered the sentences so inadequate that it must have involved error. The new offences were different in time, character and victim to the other offences. The structural approach meant the new sentences did not sufficiently reflect the offender's criminality.

(The Court exercised its residual discretion to dismiss the Crown appeal because of the deterioration of the offender's health in custody.)

Suspended sentences do not reflect general deterrence

Mr Donald was sentenced for one offence of dishonestly using his position as an employee of a corporation with the intention of gaining an advantage. The offence covered a considerable number of activities and an illicit advantage of more than $1,700,000. Mr Donald was sentenced to two and a half years imprisonment, but released on a good behaviour bond. The Crown appealed the adequacy of the sentence, arguing that it failed to reflect the gravity of the crime: ***R v Donald* [2013] NSWCCA 238**.

Latham J, allowing the appeal, referred to the inherent leniency of a suspended sentence as an effective general deterrent to white-collar professionals. She remarked, at [86], that "the real bite of general deterrence takes hold only when a custodial sentence is imposed". A sentence of two years from judgment on the appeal was imposed, with only the last year to be served by way of recognisance release order.

Threatening harm not always less serious than causing harm

In ***Linney v R* [2013] NSWCCA 251** the applicant had pleaded guilty to threatening to cause injury to a judicial officer on account of something lawfully done contrary to s 326(1) of the *Crimes Act 1900* (NSW). There was an issue about the sentencing judge having assessed the seriousness of the offence by referring solely to threatening behaviour without acknowledging that an offence will be more serious if it involves the actual doing or causing of injury or detriment, all of which is contemplated by the offence-making provision. R A Hulme J held that the sentencing judge did not err in his assessment of the

seriousness of the offence. The sentencing judge did not merely compare various sorts of behaviour encompassed by the section, in which case the applicant's argument would have had force, but referred to a wide range of *threatening* behaviour. It was open to him to conclude that the offence fell above the mid-range, given that the threats encompassed the worst types of threatening behaviour (i.e. to kill the judge).

Sentencing for historical offences and whether to take into account the former availability of remissions

In ***Versi v R*** **[2013] NSWCCA 206**, the applicant had been found guilty of offences committed in 1985-1986 and a question arose whether there was a need to replicate sentencing practices that would have prevailed at that time, that is, prior to the "truth-in-sentencing" reforms. Basten JA (Latham J agreeing, Adams J contra) held that, since the offender would not have been sentenced until after the commencement of the *Sentencing Act 1989* (NSW), there was no need to take account of principles that may have operated prior to this. Accordingly, the Court should have regard to statutory guidelines, the range of conduct covered by the offence in each count and other sentencing principles that were applicable at the time.

The relevance of a victim's benevolent view towards offender

Efthimiadias v R **[2013] NSWCCA 276** illustrates a victim's potential influence on sentencing that was firmly rejected. In this case, the offender had attempted to solicit (from an undercover officer) the murder of his young partner. After the offender's arrest and imprisonment, the victim expressed a desire to at least maintain contact with him. This was said, on the sentence appeal, to be a relevant mitigating circumstance. Johnson J strongly disagreed. He stated, at [67]:

> The attitude of a victim cannot be allowed to interfere with a proper exercise of sentencing discretion. A serious crime such as this is a wrong committed against the community at large and the community itself is entitled to retribution. Matters of general public importance are at the heart of the policies and principles that direct the proper assessment of punishment, the purpose of which is to protect the public, not to mollify the victim: *R v Palu* [2002] NSWCCA 381; 134 A Crim R 174 at 183-184 [37]; *R v Burton* [2008] NSWCCA 128 at [102]ff. To adopt the words used in another solicit to murder case (*R v Qutami* [2001] NSWCCA 353; 127 A Crim R 369 at 374 [37]-[38]), the fact that the victim adopted a generous attitude to the Applicant was not something on which the Applicant can trade.

Discount for assistance incorrectly applied to single sentence

In **CM v R [2013] NSWCCA 341**, the applicant was allowed a discount on sentencing as a result of providing assistance to authorities. His appeal centred on the fact that the sentencing judge only applied the discount to one of five sentences. R A Hulme J held that, since the assistance did not relate to any of the offences for which the appellant was charged, there was no reason not to apply the discount to each of the sentences. Further, such discounts should not be eroded by a process of accumulation of sentences.

Onus of proof on a question of financial gain or lack thereof in fraud offences

In ***Hinchcliffe v R* [2013] NSWCCA 327**, the applicant had pleaded guilty to offences of defrauding a body corporate, as a director, contrary to (then) s 176A *Crimes Act 1900*. He asked that a further seven Form 1 offences be taken into account on sentence. He was sentenced to two years imprisonment to be served by way of an ICO. The Crown appealed against the leniency of the sentence, raising among other matters a finding by the sentencing judge that the Crown had not proved beyond reasonable doubt that the respondent had gained personally from a substantial number of the offences. Johnson J held that the sentencing judge misconstrued the facts and also the law relating to the onus of proof. Given the pleas of guilty and the agreed statement of facts, which quantified the sums obtained by the respondent, the onus was on the respondent to establish, on the balance of probabilities, that he had not gained personally from the offences. If the respondent had established this, it may have operated to reduce sentence, and in line with *The Queen v Olbrich* [1999] HCA 54, this meant it was an issue upon which the respondent bore the onus of proof to the civil standard.

Prosecution prohibited from making submissions as to sentencing range

Two offenders pleaded guilty to serious Commonwealth offences and each was sentenced to a very lengthy term of imprisonment. At the sentencing hearing, the judge did not seek and refused to receive submissions from the prosecution about the bounds of the available range of sentences. On appeal to the High Court, they submitted that the trial judge was wrong to do so for two reasons: first, plea agreements had been made and the prosecution had expressed its views about the available range of sentences; second, the applicants could have used the submissions to their advantage. The appeal was dismissed: ***Barbaro and Zirilli v The Queen* [2014] HCA 2**. The prosecution's view as to the bounds of available sentences is a statement of opinion. It advances no proposition of law or fact that a sentencing judge may properly take into account in finding the relevant facts, deciding the applicant principles of law or applying those principles to the facts to yield the sentence to be imposed. "That being so, the prosecution is not required, and should not be permitted, to make such a statement of bounds to a sentencing judge" (per French CJ, Hayne, Kiefel and Bell JJ at [7]).

Application of Munda – limited weight given to the deprived background of the offender

In ***R v Robinson* [2014] NSWCCA 12** the Crown appealed against the inadequacy of a sentence imposed for an offence contrary to s 112(3) of the *Crimes Act 1900*. Although it was acknowledged that the offender had a seriously disadvantaged background, Basten JA found that the sentence imposed was manifestly inadequate. He referred to *Munda v Western Australia* [2013] HCA 38 where the High Court emphasised that the importance of personal deterrence may in fact be elevated where an offender's deprived background has had a bearing upon his or her criminal tendencies. Furthermore, courts must be wary of treating offenders as victims since this can lead to a belief that they are not wholly responsible for their actions, thereby reducing community protection.

Utilitarian value of guilty plea depends on length of delay in entering it

The applicant in ***Morton v R* [2014] NSWCCA 8** pleaded guilty to an offence of knowingly taking part in the supply of cocaine, and asked that further Form 1 offences be taken into account on sentence. He was arrested in August 2010 and did not plead guilty until 4 June 2012. The trial judge allowed a discount of 15 per cent for the plea. Hoeben CJ at CL rejected the submission that this was an inadequate discount. The plea of guilty was entered after lengthy charge negotiations. The applicant argued that the offer that was eventually accepted was in the same terms as an earlier offer (made on 22 June 2011) and so he should have been awarded a 25 per cent discount. The Court referred to *R v Stambolis* [2006] NSWCCA 56 and *R v Borkowski* [2009] NSWCCA 102, both of which are authority for the proposition that delayed negotiated pleas reduce their utilitarian value. Furthermore, even if the earlier offer had been accepted, there was still a disputed factual matter to be resolved, thereby reducing the utilitarian value of the plea.

Necessary to have regard to effect of separation of mother from young baby

The applicant in ***HJ v R* [2014] NSWCCA 21** pleaded guilty to two offences of breaking and entering and committing a serious indictable offence. She was sentenced to a term of imprisonment of 2 years and 1 month, with a non-parole period of 12 months. She was a juvenile at the time of the offence, and at the time of sentence was mother to a four-week-old baby. Garling J found that the sentencing judge gave no attention to the effect of separation from the baby. There are facilities for mothers and babies to live together in the adult correctional environment but not in any juvenile detention facility. It was necessary for the judge to consider the effect the separation would have had on the applicant and the degree to which it would have impacted upon the hardship of her time in custody. No attention was given to these matters and accordingly the appeal was allowed, with HJ being released on parole forthwith.

Withholding a discount for the utilitarian value of a plea of guilty justified in exceptional circumstances

Mr Milat pleaded guilty to murder, described as being of “very great heinousness”. He did not receive a life sentence by virtue of his age at the time of the offence, being a few weeks short of his 18th birthday. The sentencing judge acknowledged that his plea of guilty would have ordinarily warranted a discount because of its utilitarian value, but she declined to allow a discount because of the “extreme gravity of the crime” and the “serious danger which he represents to the public”. One of the grounds of Milat’s sentence appeal was that he should have been awarded the full 25 per cent discount, given that the maximum penalty was not imposed. R A Hulme J in ***Milat v R; Klein v R* [2014] NSWCCA 29** dismissed the appeal. The decision whether or not to impose a lesser penalty after a plea of guilty has been entered is discretionary, and this holds where the maximum penalty is not imposed. There are “rare cases in which the policy of transparency in allowing quantified discounts on sentences so as to encourage early pleas of guilty need not be applied because of their exceptional circumstances” (at [84]), but there is not a closed category of cases to which this applies.

Correcting sentencing errors pursuant to s 43 of the Crimes (Sentencing Procedure) Act 1999

The High Court of Australia in ***Achurch v The Queen* [2014] HCA 10** held that a strict construction of s 43 should be adopted; with emphasis on the words "contrary to law". A penalty is not "contrary to law" only because it is reached by a process of erroneous reasoning or factual error (at [36]). Correction of legal or factual errors is available by way of appeal, it being said (at [35]) that obvious matters could be dealt with by way of consent orders. But there is also available inherent powers or the slip rule or statutory extensions thereof (e.g. r 50C Criminal Appeal Rules).

Special circumstances must be "special"

Mr Tuuta was found guilty of an offence of causing grievous bodily harm with intent. The maximum penalty for the offence is imprisonment for 25 years, and the standard non-parole period is 7 years. The offender received a sentence of 6 years with a non-parole period of 3 years 7 months and 6 days. The Crown appealed. Among other things, Bellew J in ***R v Tuuta* [2014] NSWCCA 40** concluded that "special circumstances" should not have been found and so the ratio between the non-parole period and the balance of the term should not have been altered. The non-parole period constituted 60% of the total sentence. The basis of the finding was that the offender needed a longer period of supervision in order to address issues of anger management, and that he had positively adapted to prison discipline. However, there must be "significant positive signs which show that if the offender is allowed a longer period on parole, rehabilitation is likely to be successful, and that this is not merely a possibility" for special circumstances to be made out: at [57] (citing *R v Carter* [2003] NSWCCA 243 at [20]. The evidence fell substantially short of satisfying that requirement.

Denial of procedural fairness does not arise where parties have opportunity to address sentencing judge on all matters

Mr Dang was sentenced for two offences involving the supply of a prohibited drug. He received a non-parole period of three years and five months, backdated for the eight months he had already spent in custody. Prior to this the sentencing judge had indicated that counsel would not need to be present when sentence was passed and that "another couple of years on the bottom is something that he can expect". On appeal Mr Dang argued that he had been denied natural justice because the actual sentence imposed was substantially longer than the sentence earlier foreshadowed. Adamson J in ***Dang v R* [2014] NSWCCA 47** dismissed the appeal. "The real question is whether there has been actual unfairness, not whether there has been a disappointment because an expectation engendered by the decision-maker has not been fulfilled: *Re Minister for Immigration & Multicultural and Indigenous Affairs; ex parte Lam* [2003] HCA 6; 214 CLR 1 at [34]". Unfairness will commonly arise where parties have not had a chance to make submissions or have not made submissions based on an assertion that turns out to be false, for example, that a custodial sentence will not be imposed. In the present case, both parties

were given the opportunity to address the sentencing judge on all matters and had availed themselves of that opportunity.

Mental condition should be considered in sentencing notwithstanding mental illness defence eschewed

Mr Elturk pleaded guilty to stealing a knife and wounding with intent to cause grievous bodily harm. The Crown applied to have his pleas set aside on the basis that a special verdict of not guilty by reason of mental illness would be more appropriate. That application was rejected. At sentence the sentencing judge did not take into account the appellant's mental condition when assessing the objective seriousness of the offence, because the appellant had not availed himself of the defence of mental illness. Beazley P in ***Elturk v R* [2014] NSWCCA 61** held that this was an erroneous determination. Beazley P quoted from the decision in *McLaren v R* [2012] NSWCCA 284 where McCallum J held that "the decision in *Muldrock* does not … derogate from the requirement on a sentencing judge to form an assessment as to the moral culpability of the offending in question … I do not understand the High Court to have suggested in *Muldrock* that a sentence judge cannot have regard to an offender's mental state when undertaking that task" (at [29]). Accordingly the sentencing judge erred in determining that the applicant had waived his right to have his mental illness considered as a causal factor in the commission of the crime: [35].

Whether providing a witness statement in relation to an unrelated matter amounts to assistance to authorities

On 20 November 2013 Mr Peiris was found guilty by a jury of two counts of indecent assault upon a child. On 10 April 2012 he made a witness statement to the effect that the victim's older brother had been sexually assaulted by the father of one of the victim's friends. The trial judge altered the ratio of parole to non-parole to 50% in recognition of the statement and the appellant's preparedness to give evidence in those proceedings. His Honour did not award a discount in sentence, however, and the appellant appealed this decision. In ***Peiris v R* [2014] NSWCCA 58** Leeming JA held that there was no error disclosed in the approach adopted by the sentencing judge. It is doubtful that s 23(1) *Crimes (Sentencing Procedure) Act* should be read literally, as this could lead to a scenario whereby, for example, a discount is awarded to a victim of a home burglary for reporting the crime to police years before offending him or herself (see *RJT v R* [2012] NSWCCA 280). There was no evidence as to the value of the statement, as this largely depended upon the testimonial and forensic evidence otherwise available to the Crown.

Relevance of bail conditions to sentence ultimately imposed

Mr Bland was on bail pending sentence, one of the conditions of which was that he not leave home unless in the company of one of several nominated family members. He argued on appeal that this condition should have resulted in a lower sentence, given that it was a form of custody. Johnson J in ***Bland v R* [2014] NSWCCA 82** dismissed the appeal. There was no curfew condition, nor was he required to reside in a treatment facility. The

sentencing judge was not required to take the condition into account in his favour on sentence.

Denial of procedural fairness at a sentence hearing

Mr Tran was sentenced for, among other offences, supplying a commercial quantity of methylamphetamine. The sentencing judge held that the objective seriousness of this offence was "well above the middle of the range of seriousness for such offences". However, in the course of the sentencing hearing, the judge indicated that the offence was in the middle range of objective seriousness. Hall J in ***Tran v R* [2014] NSWCCA 85** held that Mr Tran had been denied procedural fairness. Senior Counsel for the applicant should have been given the opportunity to make submissions against the finding of above mid-range objective seriousness.

Denial of procedural fairness not established where judge says "gun crimes are on the rise"

Mr Wootton was sentenced in the District Court for an offence of specially aggravated breaking and entering a dwelling and committing a serious indictable offence. In her remarks on sentence the judge said, among other things, that "gun crimes are on the increase". On appeal Mr Wootton argued there was no evidence for this and that he was denied procedural fairness. Campbell J in ***Wootton v R* [2014] NSWCCA 86** dismissed the appeal. The judge referred to the increase in gun crimes in the context of general deterrence and was not singling it out as a determinative factor in fixing the sentence. However, it was wrong to refer to "police expectations". Just as prosecutorial opinions are irrelevant as to the available range of sentences, so to are those of the police.

Removing the entire discount for assistance to authorities where the offender fails to provide promised assistance

Mr Shahrouk was sentenced in the District Court and was awarded a discount of 10% for providing assistance to authorities, 7% of which was for future assistance. Mr Shahrouk subsequently refused to give evidence against the person he had implicated and claimed that the portions of his statement that related to the other person were false. The Crown appealed pursuant to s 5DA *Criminal Appeal Act 1912*. A question arose as to whether the discount should be removed entirely or only in respect of the promise of future assistance. Davies J in ***R v Shahrouk* [2014] NSWCCA 87** held that since the assistance was of no value at all, the entire discount should be removed. The case against the person implicated by Mr Shahrouk was supported entirely by the evidence he had promised to give. The basis upon which the discount on sentence was awarded was therefore completely annulled and the respondent was re-sentencing accordingly.

General deterrence must be reflected in non-parole period as well as head sentence

Mr Wasson was found guilty by a jury of armed robbery. The sentencing judge found that special circumstances applied and that "the need for general deterrence in respect of the matter … will be dealt with in the head sentence". The Crown appealed on the basis that general deterrence should have been reflected in the non-parole period as well as the

head sentence. R A Hulme J in ***R v Wasson* [2014] NSWCCA 95** allowed the appeal. The decision was contrary to *R v Simpson* [2001] NSWCCA 534 where Spigelman CJ said that the non-parole period must reflect all of the circumstances of the offence and the offender, including the need for general deterrence.

Offender turning himself in to police is "assistance to authorities"

Mr Mencarious was found guilty by a jury of murdering his wife. They had been estranged and upon meeting at a hotel one night an argument occurred and he killed her. He left the hotel without being detected and after a delay of some hours he drove himself to a police station where he told an officer that he thought he had "done something horrible to my wife". The Court in ***Mencarious v R* [2014] NSWCCA 104** heard an appeal brought by way of referral under s 78 *Crimes (Appeal and Review) Act 2001*. The Crown conceded *Muldrock* error. One issue was whether a lesser sentence was warranted because of the appellant's attendance at the police station. Adams J held that it was capable of being regarded as "assistance to authorities" within the meaning of s 23 of the *Crimes (Sentencing Procedure) Act 1999*. However, in this case the appellant attended the station because he believed his identification was inevitable. Accordingly, no allowance was made on sentence. [Regarding an offender turning himself in to police as being within s 23 is novel.]

Relevance of offender's brain injury on sentence

In ***Aslan v R* [2014] NSWCCA 114**, the offender pleaded guilty to three counts of sexual intercourse without consent and one of assault occasioning actual bodily harm. He sexually assaulted the victim after approaching her on the street and taking her to the front of a church in the early hours of the morning. He struck her when she attempted to escape. The offender suffered from a degree of brain damage as the result of two motor traffic accidents he had been involved in some years earlier. Because of this the sentencing judge found that the effects of imprisonment would be more onerous and that general deterrence should be given marginally less weight. It was also found that he had less capacity to exercise care and judgment as to the use of drugs and alcohol, but it was not accepted that there was a direct link between injury and offending. On appeal Mr Aslan argued that the sentencing judge erred in the way he treated the injury. Simpson J disagreed. The principle issue was whether the injury had a causative role to play in the commission of the offences. Where this is the case, McClellan CJ at CL in *Director of Public Prosecutions (Cth) v De La Rosa* [2010] NSWCCA 194 emphasised that an offender's moral culpability and the need for general and specific deterrence *may* be reduced; that a custodial sentence *may* be more onerous; and an offender *may* pose more danger to the community. Simpson J noted that a comparison between the offender's pre- and post-injury record suggested that there was not a causal connection between the injury and the offences, and concluded that the sentencing judge had not erred.

Aggregate sentence not properly imposed

Mr Khawaja pleaded guilty to two offences of armed robbery committed nine days apart. The sentencing judge imposed an aggregate sentence. On appeal in ***Khawaja v R* [2014]**

NSWCCA 80 R S Hulme AJ held that there was error in the way in which the sentence was imposed. Instead of indicating what each sentence would have been with a plea discount, the judge arrived at a "hypothetical aggregate" and then applied the discount. Notwithstanding this, sentence was not invalidated.

Importance of assessment of objective seriousness on sentence

The offender in ***R v Campbell*** **[2014] NSWCCA 102** pleaded guilty to one offence of break and entering a dwelling house and committing a serious indictable offence in circumstances of special aggravation, and an offence of assault occasion actual bodily harm. Wholly concurrent sentences were imposed, with an effective sentence of 3 years and 11 months with a non-parole period of 1 year and 10 months. The Crown appealed. One of the issues was the importance of the assessment of the objective seriousness in formulating an appropriate sentence. Harrison J reached a different conclusion to Simpson J, with whom Hall J agreed. Harrison J wrote that he doubted the utility, for appellate purposes, of dissecting the extent to which a sentencing judge has referred to objective seriousness in passing sentence. "The nature of judicial discretion means that there is both a wide range of circumstances capable of supporting the same conclusion, and a narrow range of circumstances capable of supporting different conclusions" (at [86]). Therefore statements regarding objective seriousness must be approached with circumspection. Simpson J emphasised that the assessment of objective seriousness is a critical component of the sentencing process. Nothing in *Muldrock* derogates from that principle. The sentencing judge did no more state that offences under s 112(3) are serious and then enumerate the features of aggravation in this case. An assessment of the objective seriousness of this particular offence was called for. Had that been done, it would have been clear that a harsher sentence was warranted.

Seriousness of alcohol-fuelled, one-punch manslaughter offences and the utility of previous sentencing decisions

Kieran Loveridge pleaded guilty to offences of manslaughter, assault occasioning actual bodily harm and three offences of assault. The well-known facts are that he went to Kings Cross one evening after consuming a significant amount of alcohol and randomly assaulted passers-by. One of the victims hit his head on the ground after being punched and later died. Loveridge was sentenced to 7 years and 2 months with a non-parole period of 5 years and 2 months. It was held in ***Loveridge v R*** **[2014] NSWCCA 120** that the sentencing judge made a number of errors and that the sentences were manifestly inadequate. In referring to previous United Kingdom and Australian cases, the Court held that "it is not meaningful to speak of one-punch manslaughter cases as constituting a single class of offences" (at [215]). In addition, offences of this sort are of great concern to the community and "call for an emphatic sentencing response to give particular effect to the need for denunciation, punishment and general deterrence" (at [216]). The sentencing decisions provided to the sentencing judge "represented nothing more than sentencing decisions in cases depending upon their particular facts and the circumstances of the offender in question" (at [222]). They did not establish a range. "There is, in truth, no range of sentences for offences of manslaughter which may be said to have a single common component relating to the mechanism of death (such as the victim's head striking

the ground after a blow to the head) (at [226]). Loveridge was re-sentenced to 13 years and 8 months with a non-parole period of 10 years and 2 months.

SENTENCING - MULDROCK ISSUES

Reference to the mid-range of objective seriousness does not establish "Muldrock" error

Mr Kerrtai was sentenced for an offence of having sexual intercourse with a child under 10. He appealed his sentence, arguing that the sentencing judge had fallen into *Muldrock* error in expressing a finding that the objective seriousness of the offence was "slightly below mid-range": ***Kerrtai v R* [2013] NSWCCA 252**. Mr Kerrtai submitted that the degree of specificity in that finding was contrary to an instinctive synthesis approach. Hoeben CJ at CL disagreed. It is no error to express a finding of objective seriousness on a scale. And the judge did not engage in a two-step process. He had identified all factors relevant to sentence, evaluated their significance, and determined the appropriate sentence according. The application for an extension of time in which to appeal was refused.

Standard non-parole period and maximum penalty both relevant even where significant disparity is prescribed

The appellant in ***Duncombe v R* [2013] NSWCCA 271** was sentenced, pre-*Muldrock*, to an offence of inflicting grievous bodily harm. That offence carries a non-parole period of seven years, and a significantly higher maximum penalty of 25 years. The appellant argued that the sentencing judge had applied a two-stage process, and had also assigned determinative significance to the standard non-parole period.

In his remarks, the sentencing judge said:

> Taking all of these matters into consideration I would fix the objective criminality of this offence as being slightly below the mid range for offences of this nature. The prisoner's counsel Mr Priestley submitted that as against the standard non-parole period of seven years such an analysis as that which I have disclosed might be quantified at six years. I agree that represents a fair appraisal of the culpability of this offender. I stress however that this is to be viewed not simply against the standard non-parole period but against the overall maximum penalty of twenty five years. I have not been distracted from consideration of that penalty by over concentration on the standard non-parole period.

Johnson J agreed that the remarks revealed a two-stage approach. But he did not see that the sentencing judge assigned determinative significance to the standard non-parole period. Rather, the remarks showed appropriate regard to the statutory guideposts of both the standard non-parole period and the maximum penalty. His Honour remarked, at [53], that both standards are relevant even where there is such a significant gap in their prescribed lengths.

Finding that standard non-parole period "highly relevant" not erroneous in light of judgment as a whole

***Black v R* [2013] NSWCCA 265** concerned a finding by a sentencing judge that, for offences in the mid-range with no guilty pleas, the prescribed standard non-parole periods were "highly relevant". The offender argued that this demonstrated *Muldrock* error. Bellew J held that this ground did not succeed in the light of the judgment as a whole. The sentencing judge only made that remark after considering objective seriousness and the subjective case. It was also not possible to conclude that anything expressed as "relevant", to whatever degree, could be equated with a finding of determinative significance. The application for an extension of time in which to appeal was refused.

Muldrock does not prohibit consideration of objective criminality of offence

Mr Ramea appealed a sentence out of time which he claimed had been calculated on a two-stage basis contrary to *Muldrock* and *Markarian*. He claimed that the sentencing judge had given determinative weight to the standard non-parole period, in particular by referring to *R v Knight*; *R v Biuvanua* [2007] NSWCCA 283. In ***Ramea v R* [2013] NSWCCA 310** Latham J held (at [17]) that there is "nothing inherently objectionable, even post *Muldrock*, in the statement that there must be an appropriate relationship between the standard non-parole period and the objective criminality of the offence. In my view, that is saying no more than that the standard non-parole period operates as a benchmark." The appellant's claim that the sentencing judge had offended the approved approach to sentencing set out in *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 was also rejected. *Markarian* was not a standard non-parole period case, and indeed the plularity recognised that careful attention ought be paid to legislative yardsticks. Instead, the prohibited approach involves "determining a sentence referable to an offence, and then engaging in 'arithmetical deduction' from that sentence for mitigating and/or subjective factors" (Latham J at [21]).

SENTENCING - SPECIFIC OFFENCES

Firearms offences not a category of offence for which prior good character is of less weight

Mr Athos plead guilty firearms offences relating to a cache of guns, gun parts and ammunition he was transporting for his associates. It was his first criminal offence. The sentencing judge remarked that because the possession of illegal firearms by a person of prior good character was less likely to come to the attention of police, he would give the mitigating feature of good character less weight than he would otherwise. Mr Athos appealed his sentence: ***Athos v R* [2013] NSWCCA 205**. On the appeal, Price J held that firearms offences were not regarded as within the category of offences where less weight is afforded to prior good character (e.g. white-collar crime, child sex offences, drug couriering). It was erroneous, in the absence of evidence about how such crimes are typically committed, to extend the same reasoning as applies to drug couriers to firearms offences of this kind. His Honour also found that the facts of the individual case did not support a finding that the "good character" of the offender facilitated the crime. It would

have been permissible to find that good character was not, in general, a factor of great weight, but it was an error to base that finding in the category of offence.

Sentencing for firearms crimes where multiple offences arise from possession of single firearm

***Bejanov v R* [2013] NSWCCA 207** concerned a Mr Bejanov, who was sentenced for a number of firearms offences. Two offences related to a .22 calibre rifle with a box magazine and telescopic sight that was found at his house. The first offence arose from that weapon being unregistered and prohibited (s 36 *Firearms Act 1996*); the second from it being unauthorised and prohibited (s 7 *Firearms Act 1996*). On the sentence appeal, Button J held that the sentencing judge had erred in not affording a substantial degree of concurrency.

Proper approach to sentencing for historical child sex offences

***MPB v R* [2013] NSWCCA 213** was an appeal in respect of sentences imposed for a number of child sex offences committed by the appellant in the 1970s and late 1990s. Garling J (Basten JA agreeing with additional reasons, R A Hulme J agreeing) discussed the approach to be taken when sentencing for historical child sexual offences. He noted the difficulties in objectively ascertaining historical sentencing patterns, and the caution with which statistical tables should be approached. This is a pronounced difficulty when sentencing for child sex offences that historically encompassed a wider range of criminal conduct than their present analogues. Garling J warned that judicial recollection, which cannot be tested, should be applied with even greater care. His Honour stated, at [87], that the most reliable benchmarks were the maximum penalty and range of proscribed conduct:

> The guide which is entirely objective and is easily ascertainable, and therefore which is likely to be of most use to a sentencing court, when attempting to impose sentences which accord with an earlier practice or pattern, is the maximum penalty fixed by the law for the offence charged, together with the range of criminality encompassed by the offence charged. By having regard to these features, a sentencing judge will be able to readily assess where the particular offence charged falls along the spectrum of conduct encapsulated in the offence, and accordingly how the particular offence ought be viewed against the maximum penalty fixed by the legislation.

Drug supply - relevance of quantity

The appellant in ***Pham v R* [2013] NSWCCA 217** was convicted of supply offences relating to 30 kilograms of cocaine. In finding that the offence fell in the middle of the range of objective seriousness, the sentencing judge remarked that "no other finding is really open given the amount involved was thirty times the large commercial quantity for the offence". The appellant argued that this reasoning gave erroneous weight to the quantity.

McCallum J agreed that quantity was not the primary determinant of seriousness. Her Honour pointed to the ruling of the High Court in *Wong v R* [2001] HCA 64; (2001) CLR 584, and in particular to the observation of Gleeson CJ at [31] that, in certain cases, an offender's own state of mind about the amount of drug is far more important than the

bare fact of quantity. The appellant's role was that of a middleman and he did not expect to benefit directly from the proceeds of sale of the drug. He did not appear to have an awareness of the exact amount he would be entrusted with. But the amount was not irrelevant. And the sentencing judge took into account the appellant's apparent contemplation, as disclosed by the evidence, that whatever amount he would be receiving would not be insubstantial. Read in context, the sentencing remarks revealed no error.

Drugs manufactured to satisfy own addiction

Mr Dang was addicted to methamphetamine. He manufactured a quantity for his own use, and for his partner and friends. He was charged and sentenced for two offences of drug manufacture (and other offences). In ***Dang v R* [2013] NSWCCA 246**, he appealed his sentence, arguing under the umbrella of manifest excess that the sentencing judge had insufficient regard to the motive for the manufacture offences. Basten JA (Adams J agreeing, Latham J disagreeing) agreed. First, the manufacture of drugs for personal satisfaction is a less serious offence than the same manufacture conducted for profit (at [27]). And second, the circumstance of addiction is relevant to moral culpability (at [30]). Mr Deng was accordingly resentenced.

Insider trading offences in the nature of "tipping"

The applicant in ***Khoo v R* [2013] NSWCCA 323** pleaded guilty to four charges of insider trading and received an effective sentence of imprisonment for 1 year and 11 months. An appeal against the severity of the sentence failed. The offences were referred to as "tipping" (in effect, divulging inside information to a party who would be likely to acquire relevant financial products in the company in question). Leeming JA referred to *R v Glynatsis* [2013] NSWCCA 131 in which McCallum J said (at [79]) that the fact that people of otherwise good character and personal circumstances "are tempted to engage in [insider trading] emphasises the need for the clear deterrent that insider traders should expect to go to gaol". This was not obiter nor distinguishable from the "tipping" offences at hand. The primary contravention is the misuse of "inside information". "Tipping" may in fact be more serious than actual insider trading, given the potential for widespread dissemination of the information. Furthermore, the fact that the activities do not lead to variations in the price of securities does not detract from their seriousness. The injury derives from loss of public confidence in public securities. Bellew J set out the factors relevant to an assessment of objective seriousness of "tipping" offences, including the type of information disclosed; the extent of the disclosure; whether the offender knew that the information would be used for trading; the nature and extent of any breach of trust; the level of sophistication or subterfuge; whether it involved a course of conduct; and the extent of any profit made.

Sexual assault - form of intercourse is relevant to, but not determinative of, seriousness

The applicant in ***Simpson v R* [2014] NSWCCA 23** had been in an on/off domestic relationship with the victim. The offences involved him accusing her of sleeping with another man, physically assaulting her, threatening to kill and harm her, and forcing his fingers into her vagina and wiping his fingers on her face, claiming that he could smell the

other man's semen. The abuse lasted into the morning. Hoeben CJ at CL rejected the proposition that since the form of intercourse was digital and not penile, as well as short in duration, the judge had overestimated the seriousness of the offences. The Court found that the objective seriousness of sexual offences "is not confined to the nature of the act committed by the offender". The form of intercourse is important, but not the sole consideration. "Also important in assessing the objective seriousness are the degree of violence, the physical hurt inflicted, the form of the forced intercourse, any circumstances of humiliation and the duration of the offence" (at [30]). The surrounding circumstances of the case made the duration of the acts of intercourse largely irrelevant. Furthermore, the offender sought to degrade and humiliate the victim, and, looked at in context, the offences involved substantial violence.

Seriousness of Commonwealth money laundering offences

The respondent Ms Ly was found guilty by a jury of dealing with the proceeds of crime, believing it to be the proceeds of crime and exceeding a value of $100,000. The respondent committed a series of frauds on the Australian Taxation Office, accruing $357,568. She was sentenced to 3 years 6 months with a non-parole period of 2 years 4 months. The maximum penalty is 20 years imprisonment and/or 1200 penalty units. The Crown appealed the sentence. The Court in ***R v Ly* [2014] NSWCCA 78** allowed the appeal and increased the sentence to 8 years. A number of matters relevant to the assessment of money laundering offences were provided. The seriousness of the offences set out in the statutory scheme depends on the value of the proceeds and the state of mind of the offender. The number of transactions and the period over which they occur is also significant. For instance, a number of transactions of small amount will generally be more serious than a single transaction of a large amount. The use to which the money is put is also relevant, as well as knowledge of illegality of conduct.

SUMMING UP

Adverse Browne v Dunn *direction to be given with caution*

Mr Giourtalis was charged with fifty-seven tax offences. He gave evidence in his trial. Parts of his version of events, as it came out in cross-examination, had not been put to witnesses that preceded him. The trial judge gave a direction to the effect that the jury could assume that Mr Giourtalis had not told his lawyers of these matters, and that they could consider that a relevant factor in assessing his credibility. (Counsel at trial agreed to the judge giving a direction in general and did not object to the form it ultimately took.) Mr Giourtalis appealed, arguing, inter alia, that the direction should not have been given and the witnesses should have been recalled: ***Giourtalis v R* [2013] NSWCCA 216**. Bathurst CJ agreed that the direction was incorrect. True it was that *Browne v Dunn* applies in criminal trials. But it should be applied with circumspection. It was not correct to invite the inference in the context of this trial. There were many reasons why Mr Giourtalis might not have informed counsel of discrete matters, not least the sheer volume of charges in which he had to give instructions on. However, the appeal was dismissed on the proviso.

The giving of a Liberato *direction where relevant evidence is led to defend provocation case*

The appellant in ***Iskander v R* [2013] NSWCCA 256** was charged with murder. He pleaded guilty to manslaughter, raising provocation. The Crown did not accept his plea and he was convicted of murder after a trial. On appeal he argued that the trial judge should have given a direction based on *Liberato v The Queen* (1985) 159 CLR 507. The conventional form of that direction reminds the jury that evidence given for the defence may cast sufficient doubt on the Crown case even if not positively accepted in its own right. In this case, the appellant argued that the direction should have been given in relation to evidence led for the defence about what the deceased said that sought to resist the Crown's attempt to negative provocation.

Macfarlan JA considered the appellant's argument that the jury might have been led to erroneously believe that if they rejected the defence evidence in this regard provocation failed, rather than having to consider whether the Crown had in fact negatived it. His Honour noted that the trial judge had told the jury that the defence evidence need only be "possibly true". And the only evidence of provocation was from this defence evidence. So if the jury considered that the evidence was not "possibly true", the defence of provocation was bound to fail. A *Liberato* direction was not called for in the circumstances.

The two elements of an attempt

Mr Inegbedion and an associate attempted to intercept a parcel of heroin being delivered to a residential address. Unbeknown to them, the courier was an undercover officer of the Australia Federal Police. Mr Inegbedion was arrested and charged with an offence of attempting to possess a marketable quantity of heroin. He was convicted at trial. On his appeal, ***Inegbedion v R* [2013] NSWCCA 291**, he argued that the directions on attempt were erroneous.

Rothman J restated the two elements of an attempt: there must be an intention to commit the crime alleged; and the accused must have performed some act towards the commission of the offence that was more than merely preparatory and could not be regarded as being for any other purpose than the commission of the crime. In Mr Inegbedion's trial, the judge on no occasion expressly referred to these separate elements in adequate terms, instead using "intention" and "conduct". However, the trial judge directed the jury that intention was to be inferred from "conduct that was more than preparatory towards the commission of the offence". That is, while the directions were incorrect, they were favourable to the offender in restricting what could be considered in establishing intention. No miscarriage of justice was occasioned.

When manslaughter in the alternative should not be left to the jury

The notorious facts in ***Lane v R* [2013] NSWCCA 317** involved the disappearance of a newborn child while in the custody of her mother, Ms Lane. No body was ever found. After a substantial police investigation, Ms Lane was charged with, and ultimately convicted of,

murder. On the conviction appeal, it was argued, despite the lack of any suggestion to the effect at trial, that the judge had been in error in not leaving a manslaughter verdict open to the jury.

The Court (Bathurst CJ, Simpson and Adamson JJ) considered that the success of this ground hinged on whether there was sufficient evidence to support a verdict of manslaughter on either of the two bases put forward on appeal: by unlawful and dangerous act, or by criminal negligence. In relation to the first, the Court observed that since no body was found, there was no evidence of a cause of death. The jury could not perform a reasonable person test in relation to a purely hypothesised unlawful or dangerous act. A similar defect affected the proposed criminal negligence basis. Without an identified breach of duty, to leave the verdict open would invite the jury to engage in pure speculation. Manslaughter may only be left to the jury where it rests (on whatever basis) on an evidentiary foundation.

Self-defence should not be left where it does not arise on the evidence

The appellant in ***Flanagan v R* [2013] NSWCCA 320** was convicted of wounding with intent to cause grievous bodily harm. It was her case at trial she did not cause the relevant injury. No direction was sought on self-defence, but she appealed on the basis that it should have been left to the jury. The Court of Criminal Appeal held that even if a direction had been sought on self-defence, the trial judge would and should have refused to give it, given that the elements of self-defence could not be made out on the evidence. The appellant denied the conduct that was the subject of the charge and so there was no evidence to which the judge could have directed the jury.

Trial judges are not obliged to leave alternative verdicts in all cases

The appellant in ***James v The Queen* [2014] HCA 6** was charged with intentionally causing serious injury, alternatively recklessly causing serious injury. While the jury was deliberating, the prosecutor raised for the first time whether the jury should be instructed on the availability of another alternative, intentionally causing injury. The trial judge reasoned that to do so would be to deprive the accused the possibility of acquittal. Counsel for the accused remained silent on this point, which was taken as agreement. The Victorian Court of Appeal dismissed an appeal brought by Mr James, who argued that the trial judge occasioned a miscarriage of justice. Priest JA in dissent held that statements in *Gilbert v The Queen* [2000] HCA 15 and *Gillard v The Queen* [2003] HCA 64 with respect to the failure to leave manslaughter on an indictment of murder applied by parity of reasoning. The High Court (Gageler J dissenting) agreed with the majority of the Court of Appeal. *Gilbert* and *Gillard* are concerned with the wrongful neglect to leave manslaughter to the jury where it is open to do so, which is informed by history and the gravity of conviction for murder. They do not state any wider principle regarding the obligation to leave alternative verdicts. Whether a miscarriage of justice was occasioned involves an assessment of what justice to the accused required in the circumstances of the case, taking into account the issues in the trial and the forensic choices of counsel. Forensic choices of counsel are not determinative, however, and the ultimate assessment rests with the trial judge, which was correct in this case.

Error in judge unilaterally posing a question in the nature of "why would the complainant lie"

Mr Miles was found guilty by a jury of two counts of sexual intercourse without consent. The complainant alleged that he had assaulted her on two separate occasions but she did not complain on the first occasion. The defence case was that the appellant and the complainant had been in a consensual and romantic relationship. The judge gave a direction concerning the absence of complaint for the first incident and then, in relation to the defence case about the relationship, posed the question: "why did she go to complain on this occasion if it was just another act of consensual sexual intercourse". The appellant argued that this was analogous to the judge asking, "why would the complainant lie" (*Palmer v The Queen* [1998] HCA 2). Simpson J (Harrison J agreeing, Button J dissenting on this point) in ***Miles v R* [2014] NSWCCA 72** refused an extension of time in which to appeal. The question was closely allied with but did not contravene the principle in *Palmer* because it did not require that the applicant provide a motive for the fabrication of complainant's allegations. Button J found that it did contravene *Palmer* since it had the potential to reverse the onus of proof, but was also of the view that there was no substantial miscarriage of justice.

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