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Criminal Law Update

The Honourable Justice R A Hulme

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SCOPE OF PAPER

The purpose of this paper is to provide brief notes concerning the range of issues that have been considered in appellate criminal decisions in the 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 Nicholas Mabbitt BA (Hons) JD and Ms Roisin McCarthy BA LLB.

APPEALS

Conduct of counsel at sentence hearing in taking no objection to agreed facts is binding on applicant

The applicant, a former police officer, pleaded guilty to and was sentenced for a range of corruption related offences. At the sentence hearing a statement of agreed facts was tendered by the Crown. Counsel for the applicant tendered a bundle of documents which included an incomplete statement of facts. It was, nonetheless, indicated by the applicant's counsel that the applicant consented to the tender of the agreed facts. On appeal, the applicant contended, inter alia, that the sentencing judge erred in fact-finding: ***CL v R* [2014] NSWCCA 196**. Adamson J rejected the contention, finding that the applicant was bound by the conduct of his counsel at the sentence hearing. Her Honour noted that exceptional circumstances must exist to permit an applicant on appeal to depart from the approach taken by counsel in a lower court.

Applicant for extension of time to appeal to Court of Criminal Appeal does not need to demonstrate substantial injustice

Mr Kentwell applied to the Court of Criminal Appeal for an extension of time to apply for leave to appeal against sentence because of Muldrock error. The CCA applied the test in *Abdul v R* [2013] NSWCCA 247 and refused the application on the basis that substantial injustice was not made out. The High Court in ***Kentwell v The Queen* [2014] HCA 37** set aside the decision of the CCA and remitted the matter for determination. The Court in *Abdul* drew on a line of English decisions that were concerned with re-opening a conviction because of a correction of law by a superior court. Reviews of old convictions may raise issues surrounding availably of witnesses and stress to victims. This is distinct from reviewing a sentence that has been imposed upon wrong sentencing principle. "The wide discretion conferred on the Court of Criminal Appeal under the Act and Rules is to be exercised by consideration of what the interests of justice require in the particular case": [30]. At least in the case of an out-of-time challenge to a sentence, the principle of finality does not provide a discrete reason for refusing to exercise the power.

The High Court also considered the discretion conferred by s 6(3) *Criminal Appeal Act 1912*. When patent error is disclosed in a sentencing decision, it is the duty of the CCA to exercise the discretion afresh taking into account the purposes of sentencing and any other factors required or permitted by law. This is not to say that the Court is required to

re-sentence. Furthermore, not all errors in sentencing vitiate the exercise of discretion, for example, setting a term of imprisonment before the non-parole period.

Part 7 Crimes (Appeal and Review) Act *referral of a sentence imposed by the Court of Criminal Appeal*

Louizos v R **[2014] NSWCCA 242** was a case in which the Court of Criminal Appeal in 2008 allowed a Crown appeal and imposed a higher sentence. Years later an application was made under Part 7 of the *Crimes (Appeal and Review) Act* 2001 for the case to be referred to the Court because there was *Muldrock*-error in the resentencing exercise. A question arose as to the nature of the Court's jurisdiction in such a case. Leeming JA, R A Hulme J agreeing, held that the correct approach for the Court to take if error was established was to deal with the question posed by s 6(3) of the *Criminal Appeal Act* 1912 (whether some other sentence whether more or less severe is warranted). Fullerton J, on the other hand, considered that the Court should decide the merits of the Crown appeal afresh. Another issue was whether leave was required for the appellant to advance a ground that was not the subject of the referral. This has been the subject of some controversy in previous cases. It was held, unanimously, that leave is not required.

Admissibility of affidavit of trial counsel on conviction appeal where incompetence alleged

Mr Ahmu was convicted of a number of sexual assaults. At trial, in the course of cross-examination of the complainant, prejudicial evidence was adduced and made available before the jury. Mr Ahmu appealed against conviction arguing that his trial counsel was incompetent in adducing such evidence. In ***Ahmu v R; DPP v Ahmu*** **[2014] NSWCCA 312** , a question arose as to the relevance of an affidavit of trial counsel, adduced by the prosecution as evidence of how the prejudicial material came to be before the jury. The appeal was ultimately dismissed, but there was a divergence of opinion regarding the relevance of the affidavit. Basten JA held that the affidavit was inadmissible finding that "it took the matter of miscarriage no further than the inferences available from the course of the trial" (at [31]). Adams J disagreed, finding that the affidavit revealed the reasons for trial counsel's approach to the cross examination of the complainant and was therefore admissible. Fullerton J did not find it necessary to decide on the admissibility of the affidavit.

Failure to comply with an undertaking to give evidence for the Crown must be proved beyond reasonable doubt in a s 5DA appeal

Mr James was sentenced for the offence of accessory after the fact to an aggravated robbery. He received a 25% discount which reflected, in part, an undertaking to give evidence for the prosecution in a future trial. The Crown appealed pursuant to s 5DA *Criminal Appeal Act 1912* arguing that Mr James failed to fulfill his undertaking (the circumstances surrounding his failure were disputed): ***R v James*** **[2014] NSWCCA 311**. The circumstances surrounding the asserted failure to give evidence were disputed and it became necessary for the Court to consider, inter alia, the standard of proof for the purposes of a s 5DA appeal. In dismissing the Crown appeal, McCallum J held that it was necessary for the prosecution to prove Mr James' failure to comply with the undertaking beyond reasonable doubt.

Admissibility on appeal of post-conviction admissions

In an appeal to the District Court against a conviction entered in the Local Court the prosecution sought leave to adduce evidence of an admission made by the appellant during the course of a intensive correction order assessment. He had contested the prosecution case on the basis that he was not involved in an assault but then admitted to a community corrections officer that he was. The judge granted leave for the evidence to be given but also agreed to state a case to the Court of Criminal Appeal. It was held in ***Landsman v R* [2014] NSWCCA 328** that leave to adduce the evidence should not have been granted because it was not in the interests of justice for such fresh evidence to given (that being the precondition for fresh evidence in s 18 of the *Crimes (Appeal and Review) Act* 2001). Beazley P held that the admission was obtained during a court-ordered process of obtaining an ICO assessment and that, "In a real and practical sense, the [appellant] was denied his common law right of silence."

Confirmation that the Court of Criminal Appeal is a "court of error"

In what was described by Simpson J as a "bold and novel proposition" it was contended in ***AB v R* [2014] NSWCCA 339** that a century of jurisprudence should be overturned and that the Court should adopt a position of making its own assessment of the facts of a case regardless of findings made by a judge at first instance. In short, it was submitted that the Court should adopt the approach applied in civil appeals of applying *Warren v Coombes* [1979] HCA 9; 142 CLR 531 and *Fox v Percy* [2003] HCA 22; 214 CLR 118. After a detailed review of the jurisprudence (in the absence of other than "pithy" argument in support of the proposition but is of interest nonetheless as to the Court's jurisdiction) it was held that no proper basis had been advanced to warrant a major departure from established authority and practice.

Trial judge's comments not to be taken into account in assessing the unreasonableness of a guilty verdict

Mr Mansaray was accused of entering the bedroom of a young female child, his niece, and having sexual intercourse with her. He was convicted by a jury of an offence of sexual intercourse with a person under the age of 16 without consent (s 61J(1) *Crimes Act 1900*). During the course of an exchange with the Crown prosecutor, the trial judge commented that, "this case is one of the weakest I've ever seen presented in these courts". Mr Mansaray appealed his conviction arguing that the verdict was unreasonable and not supported by the evidence. In ***Mansaray v R* [2015] NSWCCA 40**, the Court dismissed the appeal finding that the comments of the trial judge should not be taken into account. Hoeben CJ at CL held that the Court of Criminal Appeal should assess the evidence for itself and draw its conclusions independent of the opinion expressed by the trial judge.

Subsequent application for leave to appeal not barred by initial refusal of leave

Mr Lowe was refused leave to appeal against sentences imposed in the District Court in 2009. A co-offender successfully appealed his sentence and had it reduced: *Sinkovich v R* [2014] NSWCCA 97. Mr Lowe then filed another application for leave to appeal. In ***Lowe v R* [2015] NSWCCA 46** the Court considered whether it had jurisdiction to hear and determine Mr Lowe's second application. The appeal was allowed, the Court concluding

that the refusal of an application for leave to appeal is not a jurisdictional bar to a subsequent application. The reasoning of Davies J was based on the distinction which has consistently been drawn in the caselaw between an order refusing leave to appeal and an order dismissing an appeal. His Honour observed that there is no authority precluding a second application following the refusal of leave. Simpson J considered the issue as one of statutory construction. Her Honour found that the *Criminal Appeal Act* does not equate refusal of an application for leave with the dismissal of an appeal. Where a subsequent application for leave raises issues that have been determined on their merits in a previous application, there may be a discretionary bar, but, her Honour was satisfied that there is no jurisdictional bar to a subsequent application for leave.

Twin hurdles in a Crown appeal against sentence

In ***CMB v Attorney General for New South Wales*** **[2015] HCA 9**, the offender had his sentenced increased by the CCA for a variety of child sexual assault offences. The Court determined the matter by regarding there being an onus on him to establish that the discretion not to intervene should be exercised in his favour. An appeal to the High Court was upheld unanimously. In the words of French CJ and Gageler J, "to enliven the 'residual' discretion, it is incumbent on the appellant … to demonstrate that the sentence pronounced by the court of trial turned on one or more specific errors of law or of fact, or, in the totality of the circumstances, was unreasonable or plainly unjust". Further, "once the discretion is enlivened, it remains incumbent on the appellant … to demonstrate that the discretion should be exercised".

Order that cognitively impaired person give evidence by way of pre-recorded interview not an interlocutory judgment or order capable of appeal under s 5F

The complainant in a sexual assault trial was declared a "vulnerable person" under s 306M *Criminal Procedure Act* by reason of her cognitive impairment. The trial judge granted the Crown's application to permit the complainant's evidence to be given by playing her pre-recorded interview with police, the judge being satisfied that the facts of the case could be better ascertained if her evidence was given in such a manner: s 306P. AF sought leave to appeal this determination pursuant to s 5F *Criminal Appeal Act.* The critical issue in ***AF v R*** **[2015] NSWCCA 35** was whether the trial judge's decision could be properly characterised as an interlocutory judgment or order within the meaning of s 5F(3). The Court refused leave to appeal, R A Hulme J concluding that the ruling of the trial judge was not an interlocutory judgment or order. The decision was concerned with the manner in which evidence may be given and therefore could be likened to "a procedural matter which does not finally dispose of any discrete part of the proceedings" (at [32]). While it was accepted that the recording could not be unplayed if it was determined that the evidence should not have been given in that manner, the Court held that there were other remedies available to a trial judge. Accordingly, the decision lacked the requisite degree of finality to be properly characterised as an interlocutory judgment or order.

Rule 50C Application to re-open appeal dismissed

Bruce Gall was convicted of being an accessory after the fact to murder in 2012. He was tried with his son Kevin who was convicted of murder. The Court of Criminal Appeal dismissed their appeals against conviction and sentence in 2015: *Gall v R; Gall v R* [2015]

NSWCCA 69. Bruce Gall brought an application under s 50C of the Criminal Appeal Rules to re-open his appeal on the basis that a transcript from a listening device was inaccurate. He contended that the new version of the transcript significantly undermined the reasoning adopted by the Court in dismissing his conviction appeal. In ***Gall v R (No 2)*** **[2015] NSWCCA 152** the Court dismissed the application, failing to be satisfied that there was a misapprehension of fact enlivening Rule 50C. The accuracy of the transcript of the listening device was never disputed at trial or on appeal and was in fact accepted as accurate by all parties. In those circumstances, the Court characterised this application as an attempt by Bruce Gall to re-argue the appeal on a different basis to that adopted in the earlier proceedings. Any challenge to the accuracy of the transcript should have been raised at trial and/or on appeal. Even if there was a misapprehension of fact, it was solely attributable to the neglect or default of the applicant in running his case in the manner in which he did.

Power to re-open a concluded appeal

Rule 50C of the *Criminal Appeal Rules* has become a popular means of seeking to re-agitate issues after the dismissal of an appeal, particularly by persons who are not legally represented. In ***Miller v R*** **[2015] NSWCCA 205**, the applicant sought to raise a significant number of issues which went well beyond any complaint that there had been a misapprehension of fact or law in the determination of his appeal. Adams J had occasion to thoroughly review the Court's inherent power to re-open as well as pursuant to r 50C. His conclusions are summarised at [39]-[41]. They included that "the unsuccessful appellant cannot … have a backdoor appeal" and that "any application before the orders are perfected which requires more than a summary consideration and determination of the impugned judgment or order is likely to be outside the scope of the rule".

Trial judge not disqualified from sitting on Court of Criminal Appeal

The Commissioner of Police applied to the Court to set aside an order to produce in relation to documents pertaining to a reward that was thought to have been paid to a significant prosecution witness. The application was upheld by a single judge of the Court but it was then sought to have the issue determined by the full Court (see s 22 of the *Criminal Appeal Act 1912*). At the outset of the hearing in ***Perish v R; Lawton v R*** **[2015] NSWCCA 237** an application was made that one member of the Court should recuse himself on the basis that he had been the trial judge. Price J said that the issues before the Court had nothing to do with issues raised during the trial and noted that the verdicts had been returned by a jury, not by himself as trial judge. Accordingly, there was no basis to conclude that a fair-minded lay observer might reasonably apprehend that he might not bring an impartial and unprejudiced mind in determining the issues for decision on the application.

BAIL

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

In ***Director of Public Prosecutions (NSW) v Tikomaimaleya*** **[2015] NSWCA 83** an offender had been found guilty after a trial of an offence listed in s 16B of the *Bail Act 2013* as a "show cause" offence. Bail was granted pending sentence but the DPP made a detention

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

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

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

Mr El-Hilli and Ms Melville were convicted of offences of dishonestly obtaining a financial advantage by deception and were refused Supreme Court bail. They filed a notice of appeal and submissions in the Court of Criminal Appeal and then made a release application in that Court. In ***El Hilli & Melville v R*** **[2015] NSWCCA 146** the Court considered the operation of s 22 of the *Bail Act* which is concerned with the power of the Court to grant bail in circumstances where, inter alia, an appeal is pending in the Court of Criminal Appeal: s 22(1)(a). Hamill J explained that where s 22 is engaged, the applicant must demonstrate that there are "special and exceptional circumstances" to justify the grant of bail before the Court considers the unacceptable risk test. It was observed that he same factors may be relevant at both stages (as they would be if the Court was applying the 'show cause' test: *DPP (NSW) v Tikomaimaleya* [2015] NSWCA 83 at [24]). The merit of the appeal will often be relevant to the special and exceptional circumstances requirement. However, it is not necessary that an applicant establish that their appeal will either "inevitably succeed" or that success is "virtually inevitable" (at [24]). It is sufficient to demonstrate that the proposed appeal has reasonable prospects of success. In this case, the Court was not satisfied that either Mr El-Hilli or Ms Melville had demonstrated "special and exceptional circumstances" and their release applications were refused.

Relevance of "police views" to determination of bail applications

Director of Public Prosecutions (NSW) v Tony Mawad **[2015] NSWCCA 227** concerned a bail detention application. An objection was made to the prosecutor's tender of a letter under the hand of a police officer setting out certain information about the respondent and also the officer's views as to the outcome of the application. Hamill J in the Supreme Court had disregarded the latter on the basis that it was irrelevant. Beech-Jones J, with the concurrence of the other members of the Court, agreed that it was a matter that could not be considered. As to other information provided by the officer, for example that the

respondent had contacts with known criminals who had access to firearms, Beech-Jones J noted that the rules of evidence did not apply and that the court could take into account any information it considered credible or trustworthy (s 31 of the *Bail Act*), but concluded that it must be put aside as the officer had not provided any basis for the assertions.

EVIDENCE

Assessing competence of a child witness to give unsworn evidence

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

Evidence given by a cognitively impaired person

A cognitively impaired person may give evidence by way of pre-recorded police interview and from a remote room via CCTV in the same way a child may give evidence: Ch 6 Pt 6 of the *Criminal Procedure Act* 1986. In ***Panchal v R; R v Panchal*** **[2014] NSWCCA 275** it was contended that in a judge-alone trial there was error in the judge not having expressed satisfaction of the requirement in s 306P(2) that the provisions apply "only if the court is satisfied that the facts of the case may be better ascertained if the person's evidence is given in" the manner provided for in Ch 6 Pt 6. Although there was no dispute about it, on appeal it was asserted to have been a "fundamental defect" requiring the verdict to be quashed. It was held by the Court (Leeming JA, Fullerton and Bellew JJ) that there was no requirement for the judge to have expressly recorded satisfaction of this matter. But the appeal was dismissed on the basis of another section within Ch 6 Pt 6, namely s 306ZJ, which provides that "the failure of a vulnerable person to give evidence in accordance with this Part does not affect the validity of any proceeding or any decision made in connection with that proceeding". (Query whether a "failure of a vulnerable person to give evidence in accordance with this Part" encompasses a vulnerable person giving evidence in accordance with the Part as the complainant did in this case.)

Admissibility of hearsay evidence if maker is unavailable – s 65

Mr Sio was convicted of aggravated robbery in company, having been acquitted of the primary charge of murder. Mr Filihia pleaded guilty to murder and agreed to give evidence for the prosecution at the trial of Mr Sio (he had participated in a number of police interviews). However, when called at the trial Mr Filihia refused to give evidence, refused to make an oath or affirmation and maintained his refusal when threatened with contempt. The trial judge ruled that the police recordings of interviews with Mr Filihia

were admissible as an exception to the hearsay rule pursuant to s 65 *Evidence Act* on the basis that the statements were evidence of previous representations made against Mr Filihia's interests and were made in circumstances that made it likely the representations were reliable. In an appeal against conviction, Mr Sio contended the statements were inadmissible. The primary issue in ***Sio v R*** **[2015] NSWCCA 42** was whether the statements were made in circumstances that made it likely that they were reliable: s 65(2)(d)(ii).

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

> The assessment of reliability in s 65(2)(d)(ii) adds an additional hurdle to the prima facie admissibility of firsthand hearsay evidence of a representation against interest whose maker is unavailable.
>
> The test in subs (d)(ii), "make it likely" is less onerous than the "make it highly probable" threshold in subs (c).
>
> Subsections (b), (c) and (d) are directed to the reliability of the representation as a whole and the circumstances of the making of the representation extend to later statements or conduct.
>
> While subsections (b) and (d) contain examples of circumstances which may increase the likely reliability of a representation (contemporaneity and against interest), they should not be read as exhausting the circumstances to which regard might be had.
>
> Even if s 65(2) is satisfied, it is open to a judge to exclude the evidence under ss 135 and 137. Additionally, it may be that a direction to the jury will be sufficient to address any prejudice arising from the admissibility of the evidence.
>
> Appellate review of a ruling on evidence made pursuant to s 65(2)(d)(ii) requires the court to determine for itself whether the circumstances are such as to make the representation reliable. It is a binary question.

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

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

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

(as the evidence was per the hearsay rule in s 59 of the *Evidence Act 1995*) meant, "not admissible over objection".

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

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

> The reference to "sexual intercourse alleged" in s 293(4)(c)(i) refers to the physical act of intercourse, the issue of consent having no relevance. Mr Taleb conceded that that act took place and could therefore not rely on s 293(4)(c)(i) which provides an exception where the sexual intercourse so alleged is not conceded.
>
> Section 293(4)(a) provides for an exception in circumstances where there is other sexual activity that took place "at or about the time of the commission" of the offence charged and that the evidence of such activity formed part of a "connected set of circumstances" in which the offence charged was committed. Mr Taleb relied upon DNA evidence and the text messages to suggest the complainant was involved in other sexual activity. However, in respect of the temporal requirement, the evidence was purely speculative, and it was not established that there was any connection between other sexual activity and the events associated with the assault.
>
> There is a further exception in s 293(6) where it can be shown that the prosecution case disclosed or implied that the complainant had or had not taken part in sexual activity and that the accused might be unfairly prejudiced if the complainant could not be cross-examined in relation to that disclosure. When questioned by a doctor, the complainant had said that she had not had sexual intercourse within 7 days of the examination. The Crown said that it would not be relying upon that statement. This is distinct from the Crown disclosing that the material would be led in court, and thus s 293(6) was not engaged.

Voice identification evidence - admissibility

Part of the prosecution case against Mr Damon Miller in respect of fraud-related offences was based upon voice identification evidence. A recording of him speaking in a prior court case was played to witnesses who had spoken with the perpetrator of the fraud. They also listened to 7 other voices reading a transcript of what he had said in court. 7 out of 10

witnesses selected his voice. It was contended on appeal that the voice identification was inadmissible either on the basis that it was not relevant or that it should have been excluded pursuant to s 137 of the *Evidence Act 1995*. It was held in ***Miller v R*** **[2015] NSWCCA 206** that since the *Evidence Act* came into force the only precondition to the admissibility of voice identification evidence was the requirement in s 55(1) that it be relevant. Here it was clearly relevant as it went to the assessment of the probability that Mr Miller was the offender. After a detailed review of the evidence, the Court concluded that no unfair prejudice warranting exclusion of the evidence had been established. A general discussion about admissibility of such evidence may be found at [44]-[60].

Doli incapax

RP v R **[2015] NSWCCA 215** concerned sexual assault offences alleged to have been committed by a person when aged between 11 years 6 months and 12 years 3 months against his much younger half-brother. The case is notable for the survey of the law relating to *doli incapax* (incapable of crime) in the judgments of Davies J (at [34]-[38]) and Hamill J at (at [123]-[137]). This was the only issue in the judge-alone trial. It was conceded on the appellant's behalf at the trial that if the judge was satisfied that the prosecution had rebutted the presumption beyond reasonable doubt in respect of the earliest offence, he would make the same finding in relation to the two later offences. This concession was held to be erroneous and the judge should not have acted upon it (as he did). The analysis of Davies J led him to conclude that the presumption was not rebutted in respect of the third offence. Johnson J agreed. Hamill J concluded that it was not rebutted in respect of the second and third offences.

OFFENCES

Riot – the meaning of the element "present together"

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

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

Mr Yousef Jidah was convicted of an offence of possession of a precursor and an offence of supplying a prohibited drug under ss 24A and 25(2) *Drugs Misuse and Trafficking Act*

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

"Import" – meaning of in s 300.2 of the Criminal Code (Cth)

A new meaning for the concept of "import" was introduced into the *Criminal Code* after the decision of the Court of Criminal Appeal in *R v Campbell* [2008] NSWCCA 214. That case held that the importation ceased when the consignment cleared customs and was delivered to the consignee's warehouse. The new definition provides that "import" means import the substance into Australia and includes (a) bring the substance into Australia and (b) deal with the substance in connection with its importation.

In ***El-Haddad v R*** **[2015] NSWCCA 10** the trial judge adopted too broad an approach by regarding "any dealing in a substance once it has reached this country" including re-exporting it or distributing it. Leeming JA held that paragraph (b) of the definition could include physical processes and legal processes such as a sale by payment and physical delivery or a merely sale by deed. In this case, involvement of the appellant in the freight forwarder being directed to hold the goods for another entity was sufficient in that it caused there to be a change in the character of the actual possession such that a different entity had the right to delivery of the goods. An inquiry about what was required to release a package from a bond warehouse was not sufficient.

Deeming provision not available to defendant charged with low range PCA

Mr Bignill was arrested and taken to the police station after returning a roadside breath test of 0.063 at around 9.00am. About half an hour later a breath analysis revealed a blood alcohol concentration of 0.054. He agreed to go the hospital to undertake a blood test which returned a reading of 0.049 at 10.35am. Mr Bignill was charged with a low range PCA offence. The Local Court Magistrate accepted his argument that, pursuant to Sch 3 cl 31 of the *Road Transport Act,* his blood alcohol concentration at the time of driving should be deemed to be 0.049. In ***DPP v Bignill*** **[2015] NSWSC 668** Adamson J allowed the Director's appeal finding that the deeming provision in the *Road Transport Act* did not entitle Mr Bignill to have his blood alcohol concentration revealed by the blood test at the hospital, deemed to be his blood alcohol level at the time he was driving. Her Honour construed the provision to require the defendant to establish that his blood alcohol concentration was within the legal limit at the time of driving. It would "positively undermin[e]" the purpose of the provision to permit a defendant to rely upon a competing test taken within a two hour time period which was within the legal limit, rather than

requiring the defendant to prove a lesser blood alcohol concentration at the time of driving.

Offence of money laundering – s 400.9 Criminal Code (Cth)

Mr Lin was charged with 5 offences of dealing with money which, it was reasonable to suspect, was the proceeds of crime and was of a value of $100,000 or more, contrary to s 400.9 of the *Criminal Code (Cth)*. Mr Lin sought a stay or quashing of the indictment in the District Court, arguing that the prosecution had failed to particularise the indictable offence(s) from which the proceeds were derived. The District Court refused the application. Mr Lin appealed pursuant to s 5F(3) *Criminal Appeal Act*. In ***Lin v R*** **[2015] NSWCCA 204** the appeal was dismissed, the Court finding that proof of a s 400.9 offence does not require the prosecution to provide particulars of a class of indictable offence(s) from which the money or property is said to have been derived. An offence against s 400.9 can be distinguished from offences against ss 400.3 – 400.8. Pursuant to s 400.9(2) the Director may establish that it is reasonable to suspect that the money or property is proceeds of crime based on proof of various kinds of conduct, not limited to proof of an indictable offence. Thus, s 400.9(2) proves an alternative route to proof of the 'reasonable to suspect' element of the offence.

PRACTICE AND PROCEDURE

Change in law during period alleged in indictment

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

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

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

relevant reports made to the Director-General. It was held that as a matter of construction, the principle of legality operates to protect an accused person's right to a fair trial. This right includes the right to require third parties to produce relevant documents on subpoena.

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

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

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

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

In ***KH v R* [2014] NSWCCA 294** a trial judge granted leave to the prosecutor to cross-examine a prosecution witness who gave evidence favourable to the defence. In the presence of the jury the witness was informed that he could object to answering questions if he believed his answer might render him liable to prosecution. Included in what the judge said was that if the witness did make an objection "there are some things that I can say and do which might protect you to enable the truth to be properly told by you". (His Honour was obviously alluding to s 128 and was complying with s 132 of the *Evidence Act* 1995). As it turned out, the witness said nothing to incriminate himself but on appeal it was contended that there was a miscarriage of justice because the advice to the witness was given in the presence of the jury. It was argued that if the witness did not take any objection, the jury might infer that the truth could not "be properly told". It was held, per Leeming JA, that there was no error in the judge's approach (and it had not been the subject of objection at trial), although it would usually be preferable for such things to happen in the absence of the jury.

Sleeping accused not unfit to be tried

A large number of detainees at the Villawood Immigration Detention Centre, including Taleb Feili, were jointly tried for offences of riot and affray alleged to have occurred in April 2011. Well after the commencement of the trial in February 2013, Mr Feili's counsel raised a question as to Mr Feili's fitness to be tried on the basis that he was asleep at times

during the trial. Psychiatric reports were obtained by both parties and after an inquiry into Mr Feili's fitness the trial judge concluded that he was not unfit to be tried. The trial resumed and Mr Feili was convicted. He subsequently appealed his conviction arguing that the trial judge erred in finding him fit to be tried; in the alterative that the trial judge failed to take into account that for a period of nine weeks Mr Feili was asleep and unable to participate in his trial and further in the alternative that the trial judge erred in identifying ameliorative measures that might be taken to ensure Mr Feili was awake for the duration of the trial. In ***Feili v R*** **[2015] NSWCCA 43** the Court dismissed the appeal, finding that the trial judge took the correct approach in determining the issue of fitness. The Court (Hoeben CJ at CL, Johnson and Davies JJ) described the approach of the trial judge as a "practical, reasonable and commonsense approach to the issues posed at the fitness inquiry" ([at 53]).

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

A financial analyst from the ATO was seconded to the ACC and was present during the examinations of Messrs Seller and McCarthy prior to them having been charged in relation to an alleged tax minimisation scheme. After they were charged the examination evidence and related documents were disseminated to the Commonwealth DPP. It was held in *R v Seller; R v McCarthy* [2013] NSWCCA 42 that such dissemination should not have taken place. However, in that case a permanent stay of proceedings that had been granted was quashed and the matter was remitted for trial. The accused then sought various orders including that the financial analyst be prohibited from giving evidence in the proceedings and the application in that respect was upheld. The Crown appealed. In ***R v Seller; R v McCarthy*** **[2015] NSWCCA 76** it was held that if the analyst was to give evidence after having become aware of the compulsorily acquired material there would be an alteration of the accusatorial process inherent in a criminal trial in the fundamental sense described in *X7 v Australian Crime Commission* [2013] HCA 29; 248 CLR 92 and *Lee v R* [2014] HCA 20; 88 ALJR 65.

No error in judge indicating possible sentence and inviting submissions on that sentence

Mr Browning pleaded guilty to an offence of throwing petrol, an explosive substance, on his estranged wife with intent to burn her. During the sentence hearing, the judge indicated a possible sentence and invited submissions from counsel. The Crown submitted that it would be an appealable error for the postulated sentence to be imposed. Further submissions were sought from Mr Browning's counsel before the judge imposed a sentence that was longer than the indicated sentence. Mr Browning appealed his sentence arguing that the judge erred in inviting the Crown to comment on the appropriateness of the indicated sentence. In ***Browning v R*** **[2015] NSWCCA 147,** the Court held that there was no error in this approach. The Court reviewed recent pronouncements of the High Court concerning this issue. In *Barbaro v The Queen; Zirilli v The Queen* [2014] HCA 2; 253 CLR 58 it was held that the practice in Victoria of prosecution counsel specifying an appropriate range for a head sentence in numerical terms impermissibly blurred the distinction between the role of the judge and the role of the prosecution. In *CMB v Attorney General for New South Wales* [2015] HCA 9; 89 ALJR 407 the Court acknowledged, however, that the prosecutor has a duty to assist the sentencing judge to avoid appealable error. This was not a case where the prosecutor had suggested

in a numerical sense, or at all, an appropriate range of sentences. The prosecutor directed the Court to the facts and the relevant aggravating circumstances. So long as the offender's lawyer is given an opportunity to be heard, Garling J concluded that there is no error in a sentencing judge inviting submissions on a proposed sentence and then reconsidering what the sentence should be.

"Prasad direction" in a summary trial

Mr Mikhael pleaded not guilty to two offences of intentionally causing fire and being reckless as to its spread (s 203E(1) of the *Crimes Act*). The matter was heard before a magistrate in the Local Court where the police brief was tendered and submissions were made in respect of "prima facie case". The magistrate ruled that there was a prima facie case but immediately directed herself in accordance with *R v Prasad* (1979) 23 SAR 16; 2 A Crim R 45 and dismissed the charges. The Director of Public Prosecutions took over the proceedings and appealed to the Supreme Court on the basis that the prosecutor was denied procedural fairness. In ***Director of Public Prosecutions (NSW) v Mikhael & Ors*** **[2015] NSWSC 819**, Rothman J found that the failure of the magistrate to invite the prosecutor to make submissions opposing a *Prasad* direction amounted to a denial of procedural fairness. His Honour described the opportunity of the Crown to be heard before a *Prasad* direction is given as "axiomatic" (at [21]) and "fundamental to the precepts of procedural fairness" (at [23]). In ruling successively on the prima facie case issue and on whether to give a Prasad direction, it was held that the magistrate conflated the two concepts.

No error in failing to discharge jury where newspaper clippings of the trial found in jury room

Following a jury trial with two co-accused, Mr Carr was convicted on multiple counts of armed robbery and a related offence. Well into the trial, copies of four newspaper articles concerning the trial were found in the jury room. The judge made enquiries of the foreperson, who indicated he had brought the reports into the jury room. The judge raised the issue with the entire jury and asked them to send him a note if any of the jurors were aware of enquiries being made outside the jury room. No such note was received. Counsel for Mr Carr sought a discharge of the jury but this was refused. Mr Carr appealed. He argued in ***Carr v R*** **[2015] NSWCCA 186** that the judge erred in failing to discharge the jury because the "collation and apparent dissemination" of the newspaper articles amounted to "making an inquiry". It was argued in the alternative that bringing the articles into the jury room constituted "misconduct". The Court was not satisfied that misconduct was established. The reading of the newspaper and the bringing of the articles into the jury room is not the type of conduct intended to be prohibited by the *Jury Act 1977* (NSW). The focus of the prohibition on making enquiries is directed at preventing any extraneous information, information not the subject of evidence in the trial, being obtained by any member of the jury. There was no basis upon which it could be reasonably inferred that one or more jurors had done anything beyond reading the newspaper articles, such as conducting an internet search.

Failure of trial judge to disclose jury's interim votes and voting patterns to counsel not a denial of procedural fairness

Mr Smith was tried in Queensland for an offence of sexual assault. The judge gave the jury a Black direction and then received a note from the jury indicating they had not reached unanimous verdicts and disclosing their voting figures on the two counts. The judge told counsel that the note contained the jury's voting patterns which he did not intend to disclose. The judge then gave a majority verdict direction and a short time later a verdict of guilty was returned. Mr Smith unsuccessfully appealed to the Queensland Court of Appeal but obtained special leave to appeal to the High Court. It was contended that procedural fairness required the judge to disclose the interim voting patterns of the jury and the failure to do so denied Mr Smith a fair trial. The appeal was dismissed: ***Smith v The Queen*** **[2015] HCA 27**. There was no denial of procedural fairness. There is a general principle that interim votes and interim voting patterns of a jury should not be disclosed to counsel. The Court found that this principle was not displaced by the *Jury Act 1995* (Qld) (which imposes restrictions on the disclosure of jury information) or by principles of procedural fairness, encompassing an accused's right to a fair trial. Information regarding the jury's voting patterns prior to their verdict is not a relevant consideration, especially in light of the fluidity of the jury process. The High Court held that under no circumstances should the interim voting patterns of a jury be disclosed to counsel.

Principles relating to the discharge of a jury exposed to prejudicial material

One of the grounds of appeal in ***Miller v R*** **[2015] NSWCCA 206** was that the trial judge erred by not discharging the jury when material asserted to be prejudicial was briefly placed before it and then withdrawn. A useful summary of principles relating to an application for the discharge of a jury, and appellate review thereof, may be found at [126] of the judgment of Beazley P, Fullerton and Hamill JJ.

Compulsory examination material may be made available to prosecutors in ASIC Act prosecution

In ***Regina v OC*** **[2015] NSWCCA 212** the Court was called upon to decide whether material derived from a compulsory examination carried out pursuant to s 19 of the *Australian Securities and Investment Commission Act* 2001 (Cth) could be made available to prosecutors: cf *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Lee v R* [2014] HCA 20; 308 ALR 252. After a detailed examination of the provisions of the ASIC Act, Bathurst CJ held that the ASIC Act disclosed, by necessary intendment, that prosecutors may be given access to the transcript of compulsory s 19 examinations, not only to formulate charges but to prosecute them.

SENTENCING – GENERAL ISSUES

Fine may be imposed despite paucity of material regarding offender's financial circumstances

Mr Jahandideh pleaded guilty to an offence of importing a marketable quantity of opium. A component of his sentence was a fine of $100,000. Brief submissions were made on

sentence but no evidence was adduced relating to the offender's financial circumstances. On appeal it was argued that the judge was in error by imposing the fine without first establishing that the offender had the means to pay the fine. Rothman J in ***Mahdi Jahandideh*** **[2014] NSWCCA 178** refused leave to appeal on the basis that a fine may still be imposed where financial circumstances cannot be ascertained. Financial circumstances are mandatory to consider but not determinative. A sentencing court is not in a position to investigate financial circumstances or to call evidence, and no evidence was provided by trial counsel to that end. In the absence of complaint about procedural fairness, lack of reasons or prejudice, Rothman J held that it was inappropriate for the Court to intervene.

Violence towards the elderly will not be tolerated

In ***R v Wood*** **[2014] NSWCCA 184** the Court allowed a Crown appeal against the inadequacy of the sentence imposed for the manslaughter of a 71 year old woman. Mr Wood pleaded guilty to the offence, which involved him pushing the deceased to the ground after riding past her on his bicycle. She struck her head on the ground and died shortly after. In re-sentencing, the Court emphasised the need for general deterrence in these types of offences, particularly given the increase in the number of aged and vulnerable persons in the community, and also the need for the specific deterrence of Mr Wood, given his poor subjective case.

Erroneous regard to a "comparable case" in determining sentence

RCW pleaded guilty to drug offences. The prosecutor provided 3 comparable cases at the sentencing proceedings and the judge engaged in a discussion with the prosecutor about the similarity of one in particular where there had been a starting point of 12 years. The judge thought the criminality in the case at hand was more serious so that meant it warranted 13 years. He then "knocked off" 2 years for RCW having come forward to the police, thereby arriving at a starting point of 11 years which was then reduced for the plea and assistance. R A Hulme J held that the judge placed too much emphasis on the so-called comparable case: ***RCW v R (No 2)*** **[2014] NSWCCA 190**. It was wrong to compare the objective criminality of the offences to the comparable case, and then indicate what the starting point would be and apply the discount. Instead, the judge was required to instinctively synthesise all the relevant material and then treat the outcomes of the other cases as a check or yardstick.

Relevance of victim impact statements in establishing substantial emotional harm in child sex offences

MJB was convicted of various child sex offences and the Crown appealed the sentence on the basis that there was inadequate accumulation. Victim impact statements were provided but the sentencing judge rejected the Crown's contention that substantial emotional harm had been established, referring to *R v Slack* [2004] NSWCCA 128. Adamson J allowed the appeal in ***R v MJB*** **[2014] NSWCCA 195** and remarked that it was "difficult to understand why her Honour was not prepared to infer, on the basis of the statements, that the victims suffered substantial emotional harm as a result of the offending conduct". Although there are limits to which victim impact statements can be put, it is important to have regards to the content and purpose of the relevant statutory provisions e.g. s 21A(2)(g) *Crimes (Sentencing Procedure) Act 1999*.

(NOTE: *R v Slack* was disapproved of in *R v Aguirre* [2010] NSWCCA 115.)

Motive does not bear on moral culpability or objective seriousness in offence of make explosive device with intent to injure

Mr Carr constructed a parcel bomb and caused it to be delivered to his victim, who opened it and received minor injuries. The trial judge held that the objective seriousness of the offence would be "significantly elevated" if he accepted that Mr Carr was motivated to send the bomb to punish the victim for what he perceived were inappropriate advances on his daughter. In ***Carr v R* [2014] NSWCCA 202** Fullerton J dismissed the appeal but held that Mr Carr's motives did not elevate his moral culpability nor increase the objective seriousness of the offence. Objective seriousness is arrived at through an assessment of the nature of the offending and its consequences as well as the offender's appreciation of those consequences. An assessment of moral culpability is relevant but care must be taken that this does not overwhelm considerations of the offending conduct itself.

Sentencing judge not bound by findings made by another judge in different sentencing proceedings

Mr Baquiran was part of a drug supply syndicate and was sentenced by Knox DCJ. Jeffreys DCJ sentenced one of the other offenders and Knox DCJ was provided with material regarding that sentence, which he took as binding. Macfarlan JA in ***Baquiran v R* [2012] NSWCCA 221** held that Knox DCJ erred and that the role of Mr Baquiran had to be determined by reference to the facts found based on the evidence in the case at hand. Jeffreys DCJ found that the offender he sentenced acted on behalf of Baquiran and at his instruction and direction. The sentencing remarks were part of the factual matrix that Knox DC had to take into account, but Baquiran's role had to be determined by the facts in evidence before his Honour.

Parity - no justifiable sense of grievance where different approach taken by prosecution regarding offender and co-offender

Mr Gaggioli pleaded guilty to three counts of aggravated robbery. After he was sentenced, a co-offender pleaded guilty to offences with a lower maximum penalty, because the classification of the weapon was less serious. Fullerton J dismissed the appeal in ***Gaggioli v R* [2014] NSWCCA 246** that was brought based on parity. Prosecutorial discretion is unreviewable and furthermore, the decision to accept pleas to less serious charges could not be criticised in this case.

Judge manipulates legislation to achieve a desired result

In ***R v West* [2014] NSWCCA 250** a judge wanted to impose an intensive corrections order but to do so needed to impose a sentence of imprisonment of 2 years or less. To achieve this he unilaterally remanded the offender, who had been on bail, in custody for 3 months. He did so on the basis that on the resumed hearing date he would assess a sentence of 3 years, reduce it by 25 per cent because of the early plea of guilty, then take off 3 months for presentence custody, thereby being within the jurisdictional ceiling for the imposition of his desired sentencing option. Such an approach was censured. Hoeben CJ at CL said

"there is no place in the sentencing process for idiosyncratic manipulation" of legislation and sentencing principles. Adamson J described the approach as subverting the need to comply with the legislation.

Lawyer's delay in entering guilty plea relevant where applicant believed plea was entered early

A man was charged with a range of firearm offences. He instructed his legal representative to enter guilty pleas. The pleas were not entered until arraignment in the District Court and he received a reduced discount, less than 25%. There had been the distraction of another more serious charge in respect of which he was ultimately acquitted. In ***Atkinson v R* [2014] NSWCCA 262**, Simpson, Adams and McCallum JJ (in separate judgments) were each of the view that the reason for the late pleas was, in the circumstances, relevant in determining the sentence discount to be allowed. It was accepted that the delay was not the fault of Mr Atkinson who believed that his plea had been entered earlier than it was in fact done. Their Honours agreed that the utilitarian value of the pleas was not undermined by the delay.

Aggregate sentencing

The Court was prompted to review the correct approach to aggregate sentencing because of some unnecessary steps taken by the sentencing judge in ***JM v R* [2014] NSWCCA 297**. In the judgment of R A Hulme J at [34]-[40] there is an exhaustive review of the legislation and the case law to date. Some of the points made included the following.

> It remains necessary to comply with the requirements of *Pearce v The Queen* [1998] HCA 57; 194 CLR 610.
>
> The criminality of each offence needs to be assessed individually. And each indicative sentence must be assessed by taking into account such matters in Part 3 or elsewhere in the *Crimes (Sentencing Procedure) Act* as are relevant: s 53A(2)(b). Commonly encountered ones in Part 3 include aggravating, mitigating and other factors (s 21A); reductions for guilty pleas, facilitation of the administration of justice and assistance to law enforcement authorities (ss 22, 22A and 23); and offences on a Form1 taken into account (Pt 3 Div 3). Commonly encountered matters elsewhere in the Act are the purposes of sentencing in s 3A, and the requirements of s 5 as to not imposing a sentence of imprisonment unless a court is satisfied that there is no alternative and giving a further explanation for the imposition of any sentence of 6 months or less.
>
> Non-parole periods need not be specified in relation to indicative sentences except if they relate to an offence for which a standard non-parole period is prescribed: ss 44(2C) and s 54B(4).
>
> Specification of commencement dates for indicative sentences is unnecessary and is contrary to the benefits conferred by the aggregate sentencing provisions.
>
> If a non-custodial sentence is appropriate for an offence that is the subject of the multiple offence sentencing task, it should be separately imposed.

Being "in company" does not aggravate an aid and abet offence

The sentencing judge in ***Kukovec v R*** **[2014] NSWCCA 308** was found to have erred by taking into account that an offence was committed in company when the offence was one of aiding and abetting an aggravated (corporal violence) robbery. It was an element of the offence when the offender was a principal in the second degree that it was committed "in company".

Failure to warn of a disagreement with Crown concession is not a denial of procedural fairness

The offenders pleaded guilty to offences of drug supply and dealing with the proceeds of crime. The Crown conceded, in written submissions, that concurrent sentences could be imposed. The offenders' counsel indicated agreement with the Crown submissions. The sentencing judge, however, imposed partially accumulated sentences. In ***Toole, Kurt v R; Toole, Joshua v R*** **[2014] NSWCCA 318** Joshua Toole argued that the trial judge's failure to warn his counsel that she intended to accumulate the sentences was procedurally unfair. In dismissing the appeal, R S Hulme AJ held that in light of the demands on District Court judges, it would be "an intolerable burden" to require judges, when reserving, to be well acquainted with every detail of a matter so as to identify any concessions and raise any disagreement with defence counsel. An obligation would only arise in circumstances where the judge has given a positive indication that a particular approach or argument will be adopted and then has a change of view.

Failure to plead guilty does not limit amount of discount for assistance to authorities

The applicant was sentenced for three offences relating to the manufacture and supply of drugs. He pleaded guilty to one offence (supply cannabis) and, following a trial, was convicted of two charges of manufacturing. The applicant provided assistance to the police of "the highest quality and usefulness". He received a total discount of 37.5% for the supply charge (25% for assistance and 12.5% for a late guilty plea) and 25% for each manufacturing charge, that discount being solely referable to assistance. The applicant appealed, arguing that the sentencing judge failed to adequately discount his sentence in light of the level of assistance provided. In ***Z v R*** **[2014] NSWCCA 323** McCallum J allowed the appeal, finding that the sentencing judge was wrongly constrained by the view that a discount for assistance can never exceed 25%. "To construe the [Crimes (Sentencing Procedure)] Act with that level of mathematical rigidity would come close to punishing some offenders who offer assistance for not pleading guilty" (at [34]). Her Honour observed that the only constraint in the Act is the s 23(3) imperative that the resulting sentence be not unreasonably disproportionate to the nature and circumstances of the offence.

Re-opening sentence proceedings to correct error is not an opportunity to present fresh evidence

A judge imposed aggregate sentences upon two offenders but it was later realised when an appeal in the Court of Criminal Appeal was pending that there was no power to do so. The Crown went back to the District Court with an applicantion pursuant to s 43 of the

Crimes (Sentencing Procedure) Act 1999 to re-open the proceedings and impose sentences according to law. The offenders sought to present additional material relevant to sentence but the judge rejected it. The appeal was continued with an additional complaint about the judge's refusal. It was held in ***Bungie, Scott v R; Bungie, Robert v R*** **[2015] NSWCCA 9** that s 43 does not afford an opportunity to re-litigate what has already been litigated, or to seek a different outcome on different evidence. Section 43 was held by the High Court in *Achurch v The Queen* [2014] HCA 10; 306 ALR 566 to have very narrow scope.

Aggregate sentencing – no power to suspend and no power to impose a single bond for multiple offences

RM v R **[2015] NSWCCA 4** was a Crown appeal against sentence in respect of various child sexual assault offences. It was common ground that the sentencing judge had erred in two respects. For the more serious offences the judge had imposed an aggregate sentence but then suspended it pursuant to s 12 of the *Crimes (Sentencing Procedure) Act* 1999. There is no power to do this as the imposition of an aggregate sentence is enabled by s 53A which is with Pt 4 of the Act which by virtue of s 12(3) does not apply when a sentence is suspended. The judge also erred in imposing a single s 9 good behaviour bond for five less serious offences

Approach to consideration of Victim Impact Statements

Mr Tuala was sentenced for a number of shooting and firearm possession offences. The shooting offences occurred in circumstances where the victim was indebted to Mr Tuala and repeated demands for payment had not been fulfilled. The victim was shot several times and sustained significant injury. At the sentence hearing, a victim impact statement was tendered which complained of substantial physical and emotional harm. ***R v Tuala*** **[2015] NSWCCA 8** was a Crown appeal against the asserted inadequacy of the sentence. It was contended that the shooting offence was aggravated by the level of physical and emotional harm suffered by the victim. Simpson J, in dismissing the appeal, considered the extent to which victim impact statements may be used to prove an aggravating factor in s 21A(2) of the *Crimes (Sentencing Procedure) Act*. Her Honour considered that in circumstances where the victim impact statement is not objected to; there is no question about the weight to be attributed to it; no attempt is made to limit its use; it is confirmatory of other evidence; or it attests to the kind of harm to be expected, the statement may be more readily accepted as evidence of substantial harm. However, she noted that "considerable caution" should be exercised in using the victim impact statement to establish an aggravating factor if: the statement attests to facts that are in question; the victim's credibility is in question; the harm asserted in the statement exceeds what might be expected in the circumstances; or the statement itself provides the only evidence of harm. Her Honour was not satisfied that injury, loss or damage beyond what is encompassed in offences of this kind was proven beyond reasonable doubt by the contents of the victim impact statement.

Sentencing following revocation of a s 12 bond

The applicant in ***Lambert v R*** **[2015] NSWCCA 22** was sentenced to a 2 year suspended sentence for a drug supply offence. She breached the good behaviour bond, was called up, and the suspension was revoked. Section 99(2) enables a court in such circumstances

to impose an intensive correction order or home detention instead of full-time imprisonment but the judge gave no apparent consideration to those options. It was held that the sentence proceedings miscarried. Despite nothing being placed before the judge concerning the making of an intensive correction order, it was a realistic potential sentencing outcome in the circumstances. Insufficient material was before the Court to consider resentencing for itself so the matter was remitted to the District Court for reconsideration.

Error in giving too much weight to victim impact statement

In ***EG v R*** **[2015] NSWCCA 21** it was held that a child sexual assault offence was at the bottom of the range of seriousness for offences of its kind but the consequences described in a victim impact statement, in relation to their effect on the complainant and the family, went beyond that which would normally be expected. For full weight to be given to the matters described there needed to be more than just uncritical acceptance of the victim impact statement. Some additional support of the kind discussed in *RP v R* [2013] NSWCCA 192 and *R v Tuala* [2015] NSWCCA 8 was required.

Errors in imposing an aggregate sentence

R v Cahill **[2015] NSWCCA 53** highlights a range of errors that are encountered with District Court judges imposing aggregate sentences. The principles applicable to aggregate sentencing were summarised in *JM v R* [2014] NSWCCA 297. In this case the errors included not specifying a non-parole period for an indicative sentence where the offence carried a standard non-parole period; discounting the aggregate sentence for the offender's plea of guilty (discounts should be applied to indicative sentences); and one indicative sentences exceeding and two indicative sentences equally the aggregate sentence. Finally, it was held that the aggregate sentence did not reflect the totality of the criminality involved.

No requirement for a judge to foreshadow that he will reject unchallenged evidence of remorse

In ***Tweedie v R*** **[2015] NSWCCA 71** a sentencing judge received oral evidence from an offender that he was ashamed of himself and other expressions of purported remorse. There was also tendered a letter from the offender's partner in which she conveyed that he had expressed remorse. The Crown did not in direct terms challenge such evidence. In his reserved sentencing judgment the judge rejected that the offender was remorseful. It was complained on appeal that there was a denial of procedural fairness. It was held by R A Hulme J that it was unreal to expect a judge to consider and reflect upon all that was placed before him or her during a sentence hearing and indicate before delivering or reserving judgment any possibility of disagreement or non-acceptance of such matters even where they were not challenged by the opposing party. The judge did not do anything to foreclose or discourage any evidence or submission on the subject of remorse.

Judge should have disqualified himself after stating that offender was guilty in respect of another offence for which he had been acquitted

The sentencing judge in ***Murray v R*** **[2015] NSWCCA 75** had presided over an earlier trial at which the appellant was acquitted. However during the course of the sentencing proceedings, in considering issues of whether appellant had been on conditional liberty at the time of the offence in question and whether there was an issue of future dangerousness, the judge made statements to the effect that despite the jury's verdict he was satisfied beyond reasonable doubt of the appellant's guilt in the other matter. He also made statements to the effect that it was appropriate that he put such a matter out of his mind. Mr Murray however made an application for the judge to disqualify himself which the judge refused. On appeal it was held that he should have stepped aside on the basis that there was a reasonable apprehension of bias.

Problems with aggregate sentencing

In ***Miller v R*** **[2015] NSWCCA 86** the Court allowed an appeal against the asserted severity of an aggregate sentence imposed for offences of aggravated break enter and steal and specially aggravated break enter and steal. It was held that the aggregate sentence was manifestly excessive. The sentencing judge had applied a discount for the offender's pleas of guilty to the aggregate term, not to the indicative sentences. In an analysis of the indicative terms, Simpson J compared them to the standard non-parole periods prescribed and found them to be excessive given a finding of less than mid-range seriousness. In doing so she took into account a discount for the pleas.

Note: it is unfortunate that the Court made no comment about the correct approach to aggregate sentencing, particularly in light of the observations in *JM v R* [2014] NSWCCA 297 at [39](3). It was wrong of the judge not to apply the discount for pleas of guilty to the indicative sentences. Section 53A(2)(b) of the *Crimes (Sentencing Procedure) Act* requires that indicative sentences must take into account "such matters as are relevant under Part 3 or any other provision of" the *Crimes (Sentencing Procedure) Act*. Part 3 includes s 22 (taking guilty pleas into account). Had the sentencing judge complied with this requirement, the excessiveness of the indicative terms might have been apparent to him.

Relevance of the act causing harm/death not being the sole cause of such harm/death

The murder victim in ***Davis v R*** **[2015] NSWCCA 90** was a 73 year-old man with undiagnosed chronic heart disease. The offender stabbed him a number of times causing serious injury. The victim was hospitalised where he underwent surgery and thereafter was making "a fantastic recovery". Three days later he suffered cardiac arrest and died. The jury's verdict of guilty meant that the stabbing materially contributed to death occurring. A question arose as to whether it was a mitigating feature that the stabbing was not the sole cause of death. It was held by Simpson J that the focus must be on the objective criminality of the act of the offender; the fact that some other circumstance contributed to the death was not a mitigating factor. Basten JA said that the moral culpability of the offender is properly assessed by reference to the severity of the attack, amongst other factors. Here it was less than it otherwise might have been, given that the attack was not so violent as necessarily to cause death in a healthy individual.

A range of errors at first instance and in re-sentencing on appeal

The applicant was sentenced for seven counts involving child sexual assault offences relating to three victims between 1981 and 1986. On appeal against sentence in ***RL v R* [2015] NSWCCA 106**, three errors were alleged to have infected the sentencing process: a finding that the offences were aggravated by planning; sentencing the applicant as if he were an adult for offences committed when he was 14 to 16 and finally, having regard to matters improperly included in a victim impact statement. The appeal was allowed, the Court finding that each of the alleged errors were made out. It was held that in order for planning to constitute a circumstance of aggravation, the offence must be "part of a more extensive criminal undertaking" (see *Williams v R* [2010] NSWCCA 15 at [20]) and not a spontaneous or opportunistic exercise as was evident in this case. The sentencing judge erroneously imposed lengthy sentences notwithstanding his own observations that the applicant' s age was particularly relevant and that he might have been dealt with under legislation relating to juveniles. In relation to the victim impact statement, the court was satisfied that it included matters "which went beyond the limits of legitimate content" (at [54]). The sentencing judge erroneously used the statement as a basis for finding that the impact of the offending extended beyond the victim and extended to the victim's family.

The approach taken by the Court in re-sentencing the applicant was problematic. The Court precisely specified the extent of notional accumulation of indicative sentences (at [69]) which is tantamount to expressing commencement dates for each sentence: Cf *JM v R* [2014] NSWCCA 297 at [39](8). The Court said that the outcome was "an overall period of six years" but, in fact, the accumulation specified yielded only 5 years 6 months. It also led to the final indicative sentence being entirely subsumed within longer indicative sentences upon which it was partially accumulated. Further, in dealing with Form 1 offences, the observations of the court, at [59], are likely to be interpreted in a way that suggests that a sentencing court can exercise discretion as to which primary offence it might assign Form 1 offences to. This is impermissible under Pt 3 Div 3 *Crimes (Sentencing Procedure) Act 1999* and is contrary to the signed request of an offender which nominates a primary offence in respect of which offences on the form are to be taken into account.

That offence committed in home of victim still an aggravating circumstance even if offender initially a guest of victim

Mr Aktar was sentenced for sexual assault offences against a woman who was regarded as his cousin. The offences were committed in the victim's home in circumstances where Mr Aktar had gone to visit the victim and after they had chatted for a while he began to make sexual advances upon her. She clearly indicated she was not interested but Mr Aktar continued, committing a number of sexual assaults upon her. The sentencing judge regarded the fact that the offences occurred in the victim's home as an aggravating circumstance pursuant to s 21A(2)(eb). Mr Aktar challenged this finding in ***Aktar v R* [2015] NSWCCA 123** on the basis that he had the right to be in the victim's home. In dismissing the appeal, Wilson J reviewed the authorities regarding the proper construction of s 21A(2)(eb). Her Honour rejected an interpretation in which s 21A(2)(eb) was enlivened only in circumstances where the offender was an intruder in the victim's home. Such a narrow construction was not intended by the Legislature. In any event, the Court was satisfied that while Mr Aktar was initially a guest of the victim, his status changed

once she asked him to leave. He then committed the offences in what should have been the safety of her home. Accordingly, there was no error by the sentencing judge in treating Mr Aktar's presence in the victim's home as an aggravating factor.

NB: Hoeben CJ at CL and R A Hulme J reserved their position regarding the proper construction of s 21A(2)(eb) as the point was not fully argued.

Assessment of culpability of offender in joint criminal enterprise when offender's particular conduct unknown

Mr Beale was sentenced for three offences, including two serious home invasions committed with two co-offenders. There was no evidence of the particular conduct engaged in by Mr Beale. As a result, Mr Beale was sentenced on the basis that he was criminally culpable for the full range of criminal activity. On appeal in ***Beale v R*** **[2015] NSWCCA 120,** it was contended that the sentencing judge erred in attributing to Mr Beale moral culpability for the acts of all three offenders. In dismissing the appeal, the Court was satisfied that Mr Beale was properly sentenced on the basis that he was criminally responsible for every act of the three offenders. The Court rejected Mr Beale's submission that the sentencing judge's reference to "criminally culpable" should be interpreted as a reference to his moral culpability for the entire criminal activity. An assessment of moral culpability as distinct from criminal responsibility cannot be undertaken in circumstances where the evidence does not differentiate between the acts of each of the offenders.
Rejection of psychological opinion that goes beyond expertise

Mr Lam was sentenced for an offence of importing a commercial quantity of heroin. It was agreed that three consignments of heroin were imported from Hong Kong into Australia, but there was an issue as to Mr Lam's involvement. The offences were committed after he travelled to Australia from Hong Kong and he claimed that he decided to come to Australia after breaking up with his girlfriend, because he wanted a holiday and to visit an old school friend. This account was rejected by the sentencing judge. A psychological report, finding that Mr Lam suffered from a major depressive disorder, causally related to his offending, was also rejected. In ***Lam v R*** **[2015] NSWCCA 143** the Court dismissed Mr Lam's appeal against sentence finding that the psychological opinion was based on an account which the sentencing judge had rejected. This is a legitimate basis for a court to reject the conclusions in an expert report. Hoeben CJ at CL took the opportunity to make some remarks about psychological opinions in sentence proceedings and the approach to be taken to opinions that go beyond the parameters of the author's expertise (at [74]-[77]). In this case, it was appropriate for the sentencing judge to reject the opinion that Mr Lam's impairment resulted from the breakdown of his relationship with his girlfriend. This was an opinion which was not based on the psychologist's specialised opinion.

Error in judge's failure to allow Ellis discount to an offender who voluntarily disclosed guilt

Mr Herbert was sentenced for three offences of aggravated sexual assault committed against a 55 year old woman. Two days after the offence he voluntarily attended a police station, having become aware of the assault through media reports. While he could not remember committing the offences (he had consumed alcohol, codeine and ice on the day of the offences) he told police that he thought he had done it. The sentencing judge refused to allow an "Ellis discount" finding that Mr Herbert would have been detected by

police anyway. Mr Herbert contended on appeal that he should have been awarded a discount for assistance to authorities: ***Herbert v R*** **[2015] NSWCCA 172**. The ground was upheld, it being found that the denial of an Ellis discount in these circumstances was "contrary to the public interest of encouraging offenders to come forward" (at [46] per R A Hulme J). While Mr Herbert received a discount for his guilty plea, further leniency was required to recognise his voluntary disclosure of guilt. Mr Herbert had gone to the police station before he was considered to be a suspect and it was not clear on the evidence how long a police investigation would have taken to identify Mr Herbert as the perpetrator.

Appropriateness of imposing an intensive correction order

In re-sentencing for child pornography offences in ***R v Porte*** **[2015] NSWCCA 174** (see below) the Court held that it was inappropriate in the circumstances of this case to impose an intensive correction order ("ICO") having regard to the need for general deterrence and denunciation. Johnson J said that for cases of serious child pornography offences, an appropriate level of punishment will generally take the form of immediate incarceration.

Findings of guilt in Children's Court inadmissible in subsequent sentencing proceedings

The applicant in ***Siddiqi v Regina (Commonwealth)*** **[2015] NSWCCA 169** was sentenced for an offence of importing a marketable quantity of cocaine. The sentencing judge took into account findings of guilt in the Children's Court for offences of armed robbery and entering enclosed lands, observing that "his record does not permit much leniency". On appeal the Court found that the sentencing judge erred in having regard to those matters on the basis that s 15(1) *Children (Criminal Proceedings) Act 1987* renders guilt for a matter determined in the Children's Court inadmissible in subsequent criminal proceedings in circumstances where, inter alia, a conviction is not recorded. The Court was satisfied that the applicant was denied the leniency which might be afforded to an offender with no relevant criminal history.

Specifying fixed terms in aggregate sentencing

An aggregate sentence was imposed on Mr McIntosh for 42 historical child sexual assault offences concerning 4 victims. He argued on appeal that the sentencing process was infected with a variety of errors and the overall sentence was manifestly excessive. In ***McIntosh v R*** **[2015] NSWCCA 184** the Court allowed the appeal. In the judgment of Basten JA (see [135]-[142] and [165]-[169]) it was suggested that when imposing an aggregate sentence it may be appropriate for the court to specify a fixed term for each individual indicative sentence. The fixed term would represent what would otherwise be the standard non-parole period or the minimum period of mandatory custody.

Comment: This approach has not been suggested before. There are issues about its utility and whether it is consistent with the rationale of aggregate sentencing to simplify the sentencing task for multiple offences.

Error in applying discount for guilty plea to aggregate sentence

In imposing an aggregate sentence on Mr Sparkes for offences of aggravated break and enter and commit serious indictable offence and take and drive conveyance, the

sentencing judge applied a 25 per cent discount for a guilty plea to the aggregate sentence. In ***Sparkes v R*** **[2015] NSWCCA 203** the Court dismissed the appeal, not being satisfied the sentence was manifestly excessive. However, the Court emphasised that the sentencing judge should have applied the discount to the indicative sentences, not to the aggregate sentence: s 53A(2)(b) *Crimes (Sentencing Procedure) Act 1999; JM v R* [2014] NSWCCA 297 at [39](3).

Error in awarding greater discount for guilty plea to co-offender

In this case, the applicant received an aggregate sentence for three drug supply offences following her pleas of guilty. The sentencing judge awarded a 12.5% discount for the guilty pleas. A co-offender, Tran, had been earlier sentenced for essentially the same offences plus two prohibited weapons offences. Tran received a 17.5% discount in recognition of his guilty pleas. In ***Nguyen, Kathy v R*** **[2015] NSWCCA 209** the applicant argued that she had a justifiable sense of grievance because of a marked disparity between her sentence and the sentence imposed on Tran. In allowing the appeal, the Court found that the sentencing judge erred in allowing a lesser discount for the pleas of in the applicant's case. Hall J examined the procedural history of the matters and concluded that there was no justifiable basis for the applicant receiving a lesser discount. No explanation or justification was given for the difference. In those circumstances, the principle of parity could be applied. Accordingly, the applicant was re-sentenced with the court applying a discount of 17.5%.

Comment: This is yet another example of a sentencing judge applying a discount for a guilty plea to an aggregate sentence.

Failure to allow an Ellis discount

The applicant was sentenced for 11 child sexual assault offences committed over a decade against two stepchildren and his biological daughter. The overall sentence imposed was 20 years with a non-parole period of 12 years, there being partial accumulation of the sentences by a year or two. The applicant appealed against the severity of his sentence arguing that, inter alia, there was a failure to allow him an Ellis discount for two of the counts and that the individual and overall sentences were manifestly excessive. It was held in ***MRM v R*** **[2015] NSWCCA 195** that there was a failure to allow a discount for the applicant's voluntary disclosure of guilt in respect of two of the counts and that the degree of partial accumulation was too great resulting in an overall sentence that was manifestly excessive. In relation to the Ellis discount issue, Simpson JA found that the sentences imposed for the two counts in relation to which the applicant voluntarily disclosed his guilt was the same as the sentence imposed for two identical offences. In addition, the remarks on sentence contained no reference to the Ellis principles or to the fact that the applicant himself provided the only information about the offences. Accordingly, Simpson JA was satisfied that there was a failure to allow an Ellis discount. Schmidt J dissented, finding that the applicant received a substantial benefit in having the sentences imposed for the two counts in question wholly subsumed within the sentences imposed for other offences.

Plea of guilty – relevance in sentencing for Commonwealth offences

Director of Public Prosecutions (Cth) v Gow **[2015] NSWCCA 208** was a Crown appeal against the asserted inadequacy of a sentence imposed for a commercial drug importation offence. The parties relied upon so-called comparable cases to support their respective arguments. Basten JA engaged in a detailed consideration of the manner in which a plea of guilty is taken into account in sentencing for Commonwealth offences, leading him to conclude (at [35]) that where sentences in the other cases had been the subject of a quantified discount because of a plea of guilty, the comparative exercise is of limited value. (Why this is so when the starting point is readily identifiable is not clear.) In the course of this, his Honour examined in detail what was said in *Cameron v The Queen* (2002) 209 CLR 339. It was said in *Lee v R* [2012] NSWCCA 123 at [58] that in accordance with the principles stated in *Cameron* "the plea of guilty is taken into account as recognition of an offender's willingness to facilitate the course of justice but not on the basis that the plea has saved the community the expense of a contested hearing". Basten JA (Hamill J agreeing; Garling J not engaging with the issue) said (at [27]) that "*Cameron* is not authority for that principle". A detailed analysis of *Cameron* led his Honour to conclude that it stood for the proposition that a plea of guilty may operate in mitigation as evidence of remorse; sparing the community the expense of a contested trial; acceptance of responsibility; and a willingness to facilitate the course of justice" (see [28] and [35]).

SENTENCING - SPECIFIC OFFENCES

Dangerous driving occasioning death - calculation of length of journey

Mr Aitken was sentenced for an offence of driving under the influence of intoxicating liquor occasioning death. He was the driver of a car with 2 passengers. Their trip began in Wellington and was broken by a three-hour stop in Gulgong, during which the offender refuelled. The final destination was Mudgee. In ***Aitken v R*** **[2014] NSWCCA 201** R A Hulme J held that it was not wrong to regard the two legs of the trip as part of the one journey. Mudgee was always the intended destination and the stop at Gulgong was only initiated by a need to re-fuel. They continued drinking throughout the entire period and the offender's risk to others increased accordingly.

Break enter and commit serious indictable offence may be aggravated if offence occurs in home of victim

Mr Bennett was charged with an offence under s 112(2) *Crimes Act*, break enter and commit serious indictable offence in circumstances of aggravation. The circumstance of aggravation was that he knew there were persons in the house. An aggravating factor on sentence under s 21A *Crimes (Sentencing Procedure) Act 1999* is that the offence was committed in the home of the victim. The trial judge found that this did not apply because it was an element of the offence. Simpson J, with whom Harrison J agreed, Hall disagreeing on this point, held in ***R v Bennett*** **[2014] NSWCCA 197** that this was incorrect. That the building the subject of the break and enter was the home of the victim is not an element of the offence.

Manslaughter by way of substantial impairment by abnormality of mind – significance of mental condition on sentence

Mr Catley pleaded not guilty on the grounds of mental illness to killing his mother (and her two cats). He was found guilty of manslaughter and this was accepted to be on the basis of the partial defence of substantial impairment having been made out. A complaint raised on appeal against the asserted severity of the sentence imposed was that the judge had erred by failing to hold that the offender's moral culpability was reduced because of his mental condition: ***Catley v R* [2014] NSWCCA 249**. The judge said that he did not think that any psychosis the offender suffered played a very great part in the commission of the offence. To the extent that it did, the concomitant reduction in his culpability had already been taken into account because he had been found guilty of manslaughter rather than murder. It was held that there was no error in this approach. It had been open to the judge to find that the mental condition was not significantly beyond that which warranted liability for murder being reduced to manslaughter.

De Simoni error in relation to money laundering offences under the Commonwealth Criminal Code

The Commonwealth Criminal Code provides for various money laundering offences on a scale of seriousness in terms of maximum penalty. The offences in s 400.3 to s 400.8 are differentiated by an offender's mental state ranging from actual belief, recklessness or negligence as to whether the money or property is the proceeds of crime. Then there is the offence in s 400.9 in which the only requirement is that it may be reasonable to suspect that the money or property is the proceeds of crime, something to which absolute liability applies. In ***Shi v R* [2014] NSWCCA 276** a judge was found to have committed a *De Simoni* error in taking into account in sentencing for a s 400.9 offence that the offender had known that the money was the proceeds of crime.

Clarification of principle in R v Clark – substantial involvement in supply of drugs

In ***Youssef v R* [2014] NSWCCA 285** the Court of Criminal Appeal was given the opportunity to clarify the principle espoused in *R v Clark* that in drug trafficking offences the judge must find exceptional circumstances before non-custodial sentences may be considered. Mr Youssef pleaded guilty to an offence of supplying cocaine. 29.86 grams of the drug were found in his car after a stop and search by police. The sentencing judge rejected Mr Youssef's explanation that he had purchased the cocaine for use at his birthday party. Rather, he found Mr Youssef to be a person "substantially involved in supply". There was no finding of exceptional circumstances so Mr Youssef was sentenced to imprisonment. McCallum J held that it was not open to the sentencing judge to be satisfied beyond reasonable doubt that the applicant was "substantially involved in supply". Noting the constraint that *Clark* imposes on the sentencing discretion of judges, her Honour observed that the decision "may warrant reconsideration in light of the remarks of the High Court (in a different context) in *Hili v R; Jones v R* [2010] HCA 45 at [36]-[38]" (at [32]).

Judge errs in failing to consider alternatives to full-time custody for drug trafficking offences

The applicant in ***EF v R*** **[2015] NSWCCA 36** was sentenced for an offence of supply methylamphetamine. His car was searched following a random breath test and an amount of ice and other drug paraphernalia was found. Despite a powerful subjective case being advanced on his behalf at the sentence hearing, his lawyer conceded that a full-time custodial sentence would be imposed. Counsel for the applicant, appearing on appeal at short notice, argued that the judge should have considered imposing an intensive correction order (ICO). The Court allowed the appeal finding that the sentencing judge erred in failing to consider an ICO for the applicant. Schmidt J observed that while no submissions were made in the court below regarding the applicant's suitability for an ICO, "considerations of justice require that this important oversight be addressed on appeal" (at [60]). Simpson J held that the need for legal representatives to consider alternatives to full-time custody is not obviated by the authorities which indicate that full-time custodial sentences must be imposed for supply offences unless there is a finding of exceptional circumstances (see, eg. *R v Gu* [2006] NSWCCA 104).

It should be noted that it is unclear from the judgment whether exceptional circumstances were found to exist. But, a finding by the Court that the imposition of an alternative to full-time custody may be considered regardless whether exceptional circumstances exist would be contrary to a long line of authority.

Good character in sentencing for child sexual assault offences

It was held in ***AH v R*** **[2015] NSWCCA 51** that there was error in a judge rejecting as a mitigating factor an offender's good character on the basis that it was a factor which had assisted him in the commission of child sexual assault offences (s 21A(5A) Crimes (Sentencing Procedure) Act 1999). The victim of the offences was the daughter of the offender's de facto partner. It was submitted on appeal that the applicant's good character played no part in his obtaining access to the victim and was not exercising a role in the community (such as a teacher, sports coach or pastor) which might have afforded him access to children. The submission was accepted but the appeal was dismissed on the basis that no lessor sentence was warranted.

Error in imposing less than full-time custodial sentence for drug trafficking when no exceptional circumstances identified

In ***R v Cahill*** **[2015] NSWCCA 53**, a judge was held to have erred by imposing a sentence of 2 years to be served by way of intensive correction order for 3 offences of supplying commercial quantities of prohibited drugs and 13 offences of supplying prohibited drugs, with 4 further offences on a Form 1. In observations, with which the other judges of the Court agreed, Leeming JA said that any sentencing judge will be attuned to the possibility that a particular case is wholly exceptional, as well as to the possibility that it is merely claimed to be, but is not in fact exceptional. In such a case it will be essential for the judge to make appropriate findings of fact which will involve more than a mere recitation of undisputed facts and the parties' submissions. It will ordinarily require an express acknowledgement that the case is exceptional and an explanation of why what would

otherwise be a distortion of the ordinary principles of sentencing is in fact an expression of their flexibility.

No error in taking into account a risk of pregnancy in an offence involving sexual intercourse

In ***KAB v R*** **[2015] NSWCCA 55** it was held by Wilson J, Ward JA agreeing, Simpson J contra, that there was no denial of procedural fairness for a judge to take into account that there was a "high risk of pregnancy" when the agreed facts included that the offender had had penile/vaginal intercourse with his stepdaughter and had ejaculated into her vagina. Neither party had raised the issue and it was an inference unilaterally drawn by the sentencing judge when she came to sentence. The offender complained on appeal that if he had known the judge was going to take it into account he would have brought forward evidence that he had undergone a vasectomy. In dissent on this issue, Simpson J considered that the risk of pregnancy was not an agreed fact and so it was wrong for the judge to have taken it into account as a matter elevating the seriousness of the offence. However, she also considered that the impact of the error was almost non-existent given the sentence for the offence in question was ordered to be served entirely concurrently with other sentences.

De Simoni error in sentencing for arson

The appellants in ***Ruge and Cormack v R*** **[2015] NSWCCA 153** were sentenced for arson offences. The case concerned the setting fire to a house that R was renting and her car that was on the property. She arranged for this to be done by another man, Mr Buckman, and Mr Cormack was present and a participant in a joint criminal enterprise when it occurred. It was included in a statement of agreed facts that Cormack was aware that Ruge was motivated to commit "an insurance job". The sentencing judge took this into account when sentencing Cormack, inferring that he must have appreciated that Ruge would gain substantially. However, although Ruge was sentenced for an offence against s 197(1)(b) (dishonestly, with a view to making a gain, damaging or destroying property by means of fire) which carries a maximum penalty of 14 years, Cormack was only charged with an offence against s 195(1A)(b) (damaging or destroying property by means of fire in company) which carries a maximum penalty of 11 years. It was held by Hamill J that there was an infringement of the principles in *R v De Simoni* (1981) 147 CLR 383 in that the judge took into account a circumstance of aggravation with which Cormack was not charged but would have rendered him liable to a more severe penalty.

Approach to sentencing for child pornography offences

Mr Porte pleaded guilty for offences of using a carriage service to access child pornography material (s 474.19(1)(a)(i) of the *Criminal Code* (Cth)); possessing child abuse material (s 91H(2) of the *Crimes Act 1900* (NSW)); and possession of a prohibited weapon (s 7(1) of the *Weapons Prohibition Act 1988* (NSW)). He was sentenced to concurrent sentences of 18 months imprisonment to be served by way of an intensive correction order. In ***R v Porte*** **[2015] NSWCCA 174,** the Court allowed a Crown appeal and Mr Porte was re-sentenced to a period of full time custody. The Court found a range of patent errors in the sentencing process and concluded that the ultimate sentence for the first two offences was manifestly inadequate. A number of principles regarding the approach to

sentencing for child pornography offences under NSW and Commonwealth law can be found in the detailed judgment of Johnson J at [51] – [81].

Further canvassing of the principles of sentencing for this type of offence can be found in Johnson J's judgment in ***R v De Leeuw*** **[2015] NSWCCA 183** at [70] – [72]**.**

Sentencing for manslaughter on the basis of excessive self defence

Mr Smith was tried for murder and convicted of manslaughter. In the trial, the sole issue was whether the Crown could negative that Mr Smith was acting in self defence. He had arranged to meet his victim on the day in question for what was thought to be a fist fight. Mr Smith armed himself with a loaded rifle and the victim had a pair of knuckle dusters in his jeans. Mr Smith argued that he thought the victim had a gun and was about to shoot him so he responded by firing a shot at the victim's head which caused the victim's death. In finding Mr Smith guilty of manslaughter on the basis of excessive self defence the jury first must have found that it was a reasonable possibility that Mr Smith believed that the conduct was necessary in the circumstances and second must have been satisfied beyond reasonable doubt that the conduct was not a reasonable response in the circumstances as perceived by Mr Smith. Mr Smith appealed against the severity of his sentence, arguing that he was not sentenced on the basis that he perceived the victim had a gun and was about to shoot him. In ***Smith v R*** **[2015] NSWCCA 193,** the appeal was allowed with the Court finding that the sentencing judge's failure to make an explicit finding as to what the circumstances were as perceived by the applicant was inconsistent with the jury's verdict. Simpson JA held that the failure to make such a finding "had repercussions in the evaluation of the degree of unreasonableness (excessiveness) of the applicant's response" (at [61]).

SUMMING UP

Directions on joint criminal enterprise

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

In a circumstantial evidence case, should a judge alert a jury to a rational hypothesis inconsistent with guilt that is not relied upon by the defence?

In ***Nguyen v R*** **[2015] NSWCCA 78** the Crown case was that the appellant was involved in a drug transaction when her former husband received for the purpose of supply a quantity of heroin from another person. She had been present at a meeting between the two men but there was no evidence of her having participated in discussions. There were intercepted telephone calls but none involving her. She was present when the drug was handed over by the supplier and she was in a car with her former husband when he was arrested. The drugs were found in a bag at her feet on the passenger side of the car. She gave an account to police that involved lies and inconsistencies.

It was held that the verdict of guilty was unreasonable and not supported by the evidence. The Court made observations as to the obligation of a trial judge to draw a jury's attention to a potential further rational hypothesis inconsistent with guilt not relied upon by the defence. In this case the hypotheses presented to the jury by the parties were either she was knowingly involved or she was completely ignorant. An alternative hypothesis was that she was aware of, but not involved in, what her former partner was doing. The Court indicated that a judge should be alive to a situation as presented by this case but did not suggest that in every circumstantial evidence case there was a requirement of the judge to draw the jury's attention the existence of another rational hypothesis not relied upon by the defence; it very much depended upon the circumstances of the case at hand. Attention was invited to the discussion in *R v Sung Eun Park* [2003] NSWCCA 203 at [43] ff.

Defences of sudden and extraordinary emergency and self-defence not left to jury

The appellant in ***B v R*** **[2015] NSWCCA 103** was convicted of an offence against s 65Y *Family Law Act* when she removed her child from Australia at a time when she knew that a supervised contact order of the Family Court required the child to spend time with the child's father. At trial the appellant contended that her son was suffering ongoing harm as a result of the Family Court order. She believed that a further order permitting the father to have unsupervised access was imminent and she felt it was necessary to flee the country in order to protect her son. In the Court of Criminal Appeal she submitted that the trial judge erred in refusing to leave the defences of sudden and extraordinary emergency and self defence to the jury. The central issue in the appeal was whether the evidence was capable of supporting as a reasonable possibility, that the belief by the appellant that her response was the only reasonable response, was objectively reasonable. The Court was satisfied that it was not. There were lawful channels available to the appellant to protect herself and her son from any harm. The Court cannot and should not condone unlawful action arising out of a distrust of the Family Court processes.

No error in standard direction as to timing of co-conspirator joining a conspiracy

Mr Damoun was convicted of conspiring dishonestly to cause a loss to a Commonwealth entity. The Crown case was that the conspiracy commenced on 20 December following a meeting with Mr Damoun and others. In directing the jury, the judge said that it is not necessary for the Crown to prove that each co-conspirator joined the agreement at the same time. It is sufficient to prove that a person who enters an existing agreement enters it for the purpose of that agreement. In ***Damoun v R*** **[2015] NSWCCA 109** Mr Damoun

appealed his conviction, arguing that the direction was given in error because the Crown did not contend that Mr Damoun joined the conspiracy at a later stage. The Court dismissed the appeal, holding that the direction given was a standard direction and did not result in any unfairness to Mr Damoun. It remained open to the jury to find that Mr Damoun's participation in the conspiracy was established by any one or more of the "overt" acts alleged against him.

Murray direction not to be given in sexual assault trial

Mr Ewen was found guilty of two counts of sexual intercourse without consent in a judge alone trial. On appeal in ***Ewen v R*** **[2015] NSWCCA 117** it was argued that the trial judge erred in failing to give himself a Murray direction. A Murray direction is given in circumstances where the guilt of an accused is sought to be established based on the evidence of a single witness and accordingly directs that the evidence be scrutinised with great care. The Court found that s 294AA(2) *Criminal Procedure Act* prohibits a Murray direction being given in a sexual assault trial. Pursuant to s 294AA(2), a warning to the jury of the danger of convicting on the uncorroborated evidence of any complainant is prohibited. Thus, it was held that a Murray direction, based only on the absence of corroboration, is tantamount to a direction that it would be dangerous to convict on the uncorroborated evidence of the complainant.

Note: This decision does not obviate the need for a Murray direction in cases not involving prescribed sexual offences.

Directed verdict of acquittal in manslaughter by unlawful and dangerous act trial

CLD was involved in the manufacture of pseudoephedrine which took place in a small shed and involved the evaporation of a highly flammable substance, toluene. He was charged with manslaughter by unlawful and dangerous act after an explosion in the shed resulted in the death of one person. The trial judge directed a verdict of acquittal because the Crown could not identify the source of the ignition which caused the explosion and had not negated other sources of ignition consistent with innocence. A Crown appeal was upheld in ***R v CLD*** **[2015] NSWCCA 114,** the Court finding that it was not necessary that the precise cause of ignition be foreseeable. In assessing whether an appreciable risk of serious injury was objectively foreseeable, it was sufficient for the Crown to establish that ignition, whatever the precipitating cause, was foreseeable. Before directing a verdict of acquittal, the Court is required to assess the evidence of the Crown at is highest and determine whether it is open to the jury to be satisfied of the accused's guilt beyond reasonable doubt. In circumstances where there was evidence of several possible sources of ignition it was appropriate for the jury to determine whether a reasonable doubt existed as to the respondent's guilt.

Accessory after the fact to murder directions

Kevin Gall shot and killed a man in the presence of his father, Bruce Gall. Bruce later hosed away blood from the crime scene. Kevin Gall was found guilty of murder and his father was found guilty of being an accessory after the fact. It was not raised at trial, but only on appeal, that the directions given to the jury concerning accessory after the fact were erroneous. It was held in ***Gall v R; Gall v R*** **[2015] NSWCCA 69** that the jury should

have been directed that Bruce must have known that at the time Kevin shot the deceased, Kevin had one of the mental states necessary to establish murder. Further, it was an error to direct the jury, in effect, that they could only consider a verdict for accessory after manslaughter for Bruce if they acquitted Kevin of murder. The judgment of Hoeben CJ at CL (at [163]-[171]) includes observations about the paucity of authority on the subject. The judgment of R A Hulme J [[249]-[257]) includes observations about the unsatisfactory state of the law, in part referring to a Law Reform Commission recommendation in 2010 that has not been taken up by government.

When a consciousness of guilt direction is not required

After Kevin Gall shot and killed the deceased, he disposed of the body; removed the hard-drive from a CCTV camera at the crime scene; destroyed the fired cartridge cases; destroyed a van he had used to transport the body of the deceased to a location where it was hidden; and altered the appearance of a car the deceased had driven to the scene of the crime. The trial judge did not give a consciousness of guilt direction. She was not asked to, but on appeal it was contended that she should have: ***Gall v R; Gall v R*** **[2015] NSWCCA 69**. Hoeben CJ at CL held that having regard to the issues in the trial, a consciousness of guilt direction was not required. Such a direction is necessary if there is a possible explanation for post-offence conduct that is inconsistent with guilt of the offence charged. But in this case, Kevin Gall's case was that he had acted in self-defence. The post-offence conduct was only relevant to the Crown's attempt to rebut that claim; there was no other possible explanation for it.