DISTRICT COURT OF NEW SOUTH WALES ANNUAL CONFERENCE 2016

Court of Criminal Appeal Review

The Honourable Justice R A Hulme

29 March 2016

CONTENTS

SCOPE OF PAPER

The purpose of this paper is to provide brief notes concerning the range of issues that have been considered in appellate criminal decisions in the past 12 months. 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 Ms Roisin McCarthy BA LLB and Mr Ryan Schmidt.

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.

CONFISCATION

The correct approach to calculating drug proceeds orders and the proper construction of "benefit"

In ***DPP v Colakoglu and Ors*** **[2015] NSWCCA 301**, the DPP appealed pursuant to s 92(4) of the *Confiscation of Proceeds of Crime Act 1989* against drug proceeds orders concerning the four Respondents. The primary judge confined the value of the orders to profits made by each Respondent. The DPP appealed against that quantum, submitting that the "benefit" with which the Court is concerned under ss 29 and 30 when making an order is properly calculated with regard to the sale price of the drugs rather than profits made. Johnson J rejected this construction and dismissed the appeal. The term "benefit" in s 29(1) means the net gain when calculated by the means permitted in s 30. The term "expenses or outgoings" in s 30(6) is directed to a range of factors associated with a particular drug supply operation, such as payments made to persons to deliver drugs, but does not extend to costs anterior to the particular offence such as the purchase price of the drugs. The construction advocated for by the DPP would allow for a process of double-counting amongst co-offenders producing a sum that bore no relationship to what could be regarded as the proceeds of the crime or actual benefit derived by any one offender. The judge in this case approached the making of the orders in accordance with the three steps identified in *R v Hall* (2013) 227 A Crim R 544. Accordingly, no error is established; upon the proper construction of ss 29 and 30, it was open to his Honour to approach the statutory task in the manner in which he did.

EVIDENCE

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 were 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 such evidence suggesting 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].

Admissibility of expert evidence by detective concerning use of code words in illicit drug trade

It was the Crown case that a man participated in a criminal group which sold substantial quantities of heroin and cocaine. The Crown called a Detective Hamilton to give evidence regarding the use of slang, veiled speech and codes by those involved in the illicit drug trade. The admissibility of this evidence was challenged on appeal: ***Czako v R*** **[2015] NSWCCA 202**. It was held that the evidence was admissible because, rather than being evidence of an 'ad hoc expert' based on expertise acquired for the purpose of the particular proceedings (the admission of which requires great caution), Detective Hamilton gave evidence of veiled or coded speech generally. This evidence was based on his experience and observations as an undercover police officer in illicit drug deals.

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.

Proper approach to tendency evidence where joint concoction alleged

Mr Jones was charged with ten counts of aggravated sexual assault committed against three brothers. The trial judge ruled that evidence of each complainant could be used as tendency evidence in the cases involving the other complainants (and determined that all counts be heard together). Proceedings were brought under s 5F *Criminal Appeal Act*: ***Jones v R* [2014] NSWCCA 280**. The issues were whether the judge erred in concluding that there was no evidence of concoction or contamination; whether his Honour erred in applying *Hoch v The Queen* [1988] HCA 57; 165 CLR 292 and subsequent decisions; and whether his Honour erred by concluding that the effect of *R v Shamouil* [2006] NSWCCA 112; 66 NSWLR 228 is to prohibit consideration of the possibility of concoction in determining probative value.

The Court was satisfied that the judge did not err in finding that there was no evidence of concoction, but went on to consider the other two issues. It was observed that the principle in *Hoch* - that similar fact evidence is inadmissible if there is a possibility of concoction - does not apply to the test for admissibility of tendency evidence under the *Evidence Act.* In light of the decisions in *R v Ellis* [2003] NSWCCA 319; 58 NSWLR 700 and *Saoud v R* [2014] NSWCCA 136, the applicant's reliance on *Hoch* was described as "problematic". Finally, the Court found that the judge's conclusion that questions of concoction can never be relevant to the determination of probative value overstated the effect of *Shamouil.* The authorities support a restrictive approach to this question. Depending upon the evidence, it may be that an assessment of probative value will involve a consideration of questions of concoction or contamination in the context of competing inferences that might arise from the evidence.

Evidence of a single event occurring years prior can be admitted as tendency evidence

In ***Aravena v R* [2015] NSWCCA 288** the trial judge admitted evidence establishing a tendency of the appellant to *inter alia* indecently assault young women in certain circumstances. The evidence concerned a single event (for which he was convicted) arising seven years prior to the present incident. In the current proceedings, the appellant pleaded not guilty to a charge of recklessly inflicting actual bodily harm with intent to have sexual intercourse. On appeal the Court (Beazley P, Hall and Wilson JJ) held that there was no error in admitting the evidence. With respect to s 97 of the *Evidence Act 1995* (NSW), the fact that a single event was relied upon and that there was a lapse in time between that event and the current incident were relevant but not determinative to considerations of admissibility. The judge also applied s 101 in a principled way. In a trial where the appellant admitted the assault but denied that it was of a sexual nature, making the critical issues for determination the nature of the assault and the question of the appellant's intention at the time, the probative value of the tendency evidence was very high. This probative value substantially outweighed the clear prejudicial effect of the evidence.

Admissibility of evidence from fingerprint expert where reasons for opinion not explained

JP was convicted in the Children's Court of aggravated breaking and entering with intent to commit a serious indictable offence. The conviction was entirely dependent upon evidence given by an expert witness that a fingerprint at the crime scene identified JP. He appealed to the Supreme Court against his conviction on a number of grounds concerning that

evidence. In ***JP v DPP (NSW)*** **[2015] NSWSC 1669**, Beech-Jones J found that the expert's certificate did not provide any reasoning sufficient to support the admissibility of his opinion. It set out the methodology that was applied but did not state what the examination actually revealed; there was simply a statement of the ultimate opinion formed. A bare assertion that two fingerprints are identical does not satisfy the second condition of admissibility in s 79 of the *Evidence Act 1995* (NSW), namely that the relevant opinion must be "wholly or substantially based on that [specialised] knowledge." Some explanation of what an examination revealed at a level of detail below a conclusion that the fingerprints are identical must be provided for the evidence to be admissible. Despite the erroneous admission of the certificate, the subsequent oral evidence given by the expert rectified its deficiencies and the challenge to admissibility on appeal therefore failed.

Unsworn evidence

The Queen v GW **[2016] HCA 6** raised for consideration two aspects concerning a child giving unsworn evidence pursuant to s 13 of the *Evidence Act 2011* (ACT) which is in identical terms to s 13 of the *Evidence Act 1995* (NSW). A judge presiding when the 6 year-old complainant gave pre-trial evidence made an assessment that she was not competent to give sworn evidence (s 13(3) but competent to give unsworn evidence (s 13(4)-(5)). The (different) judge who presided at the trial refused to exclude the child's unsworn evidence and refused to warn the jury about the fact that it was unsworn.

The child conveyed to the first judge that she understood the difference between the truth and a lie. The High Court held that this did not necessarily mean that she had the capacity to understand that she would be "under an obligation to give truthful evidence" (s 13(3)). "Obligation" is to be understood as being morally or legally bound to give truthful evidence. In the circumstances of this case it was open to the pre-trial judge to be satisfied that the child was not competent to give sworn evidence.

There was no requirement at common law or under s 165 (if a request had been made) to warn the jury about the fact that the child's evidence may be unreliable because it was unsworn. (The Court put to one side the possibility that a warning may be required in the case of a witness other than a young child who does not have the capacity to under the obligation to give truthful evidence and who gives unsworn evidence.)

Tendency evidence

The Court (Beazley P, Schmidt and Button JJ) provided a summary of the case law and principles applying to the admissibility of tendency evidence under s 97 of the *Evidence Act 1995* in ***Hughes v R*** **[2015] NSWCCA 330** at [158]-[193]. It is too lengthy to summarise here but is commended for its usefulness.

OFFENCES

Deeming provision not available to defendant charged with low range PCA

In a roadside breath test at about 9.00am Mr Bignill returned a reading of 0.063. About half an hour later a breath analysis reading was 0.054. He agreed to go the hospital to undertake a blood test which returned a reading of 0.049 at 10.35am. At the hearing of a charge of low-range PCA a magistrate accepted Mr Bignill's argument that, pursuant to Sch 3 cl 31 of the *Road Transport Act 2013,* 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 a prosecution 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. It was a matter for a defendant to rebut the deemed reading by showing that his blood alcohol concentration was within the legal limit at the time of driving. In ***Bignill v DPP*** **[2016] NSWCA 13**, it was confirmed that the presumption that a test result establishes the blood alcohol level at the time of driving is available only to the prosecution. It is a matter for the defendant to rebut it. A second test result would be admissible for that purpose but it would only establish the blood alcohol level at the time of that test.

(Note: the reference in the judgment (at [27]) to "the concentration determined by a breath or blood analysis is taken to be the concentration in the person's breath or blood at the time the person is required to submit to a breath test" appears to have been slip.)

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.

Meaning of "anything" in s 135.1(3) Criminal Code (Cth)

It is an offence under s 135.1(3) to do "anything with the intention of dishonestly causing a loss to" a Commonwealth entity. Mr Masri was charged with an offence under that section on the basis that he was party to a joint criminal enterprise to import cigarettes into Australia in containers by falsely representing their contents. The Crown relied upon a variety of acts by Mr Masri to sustain the charge including facilitating and dealing with the

paperwork, providing funds and arranging the release of the container. In ***Masri v R* [2015] NSWCCA 243**, it was contended the Crown could not rely upon a course of conduct to sustain the charge. The Court held that the concept of "anything" in s 135.1(3) could encompass a variety of acts or a course of conduct. The decision in *Giam v R* [1999] NSWCCA 53; 104 A Crim R 416, a case which concerned the meaning of "any statement", was distinguished on the basis that the two concepts are materially different. The effect of the appellant's proposition was that a person could be charged with a separate offence for individual telephone calls, every dealing with documentation and every communication with a Customs agent. It was found that this was not the intended construction of the legislation.

Use of offensive instrument to prevent or hinder lawful apprehension

In ***Harkins v* R [2015] NSWCCA** 263 the appellant had been convicted of an offence under s 33B(1)(a) *Crimes Act* on the basis that he used an offensive instrument, a motor vehicle, with intent to prevent the lawful apprehension of himself. He had been identified to police as a possible suspect for an attempted break and enter. The police approached vehicle he was in as he was moving into the front seat and starting the engine. One officer grabbed the arm of Mr Harkins and attempted to turn off the engine. Mr Harkins revved the engine in an attempt to escape and the car bunny hopped about 10 metres with the police officer being dragged alongside the vehicle. As he had not actually driven the vehicle toward the officer with the intention of causing him harm, it was argued on appeal that it could not be established that the car had been used as an offensive instrument. The Court construed s 33B broadly, finding that it includes the use of an instrument with the intention of preventing or hindering lawful apprehension. The Court found that it was not necessary that there be a positive intent to injure or threaten someone to sustain a charge under s 33B.

The commencement of the "course of justice" for an offence of intending to pervert the course of justice

The issue in ***The Queen v Beckett* [2015] HCA 38** was whether an act done before the commencement of judicial proceedings could constitute an offence contrary to s 319. Ms Beckett was charged with an offence of doing an act with the intention of perverting the course of justice under s 319 *Crimes Act*. In the District Court, she sought a permanent stay on the basis that there were no existing proceedings on foot and thus no course of justice to pervert. The stay was refused in the District Court but granted by the Court of Criminal Appeal which held that liability for an offence against s 319 is confined to acts or omissions carried out with the intention of perverting an existing course of justice: *Beckett v The Queen* [2014] CCA 305; 315 ALR 295. The High Court held that the Court of Criminal Appeal erred in reasoning based on *R v Rogerson* (1992) 174 CLR 268 which concerned the common law offence of conspiring to pervert the course of justice. The High Court emphasised that the meaning of "perverting the course of justice" in s 319 includes "preventing … the course of justice" which, the High Court said was "eloquent of a legislative intention that liability extend to acts done with the proscribed intention in relation to contemplated proceedings" (at [35]).

Indictable offence committed outside dwelling-house does not satisfy Crimes Act 1900 (NSW) s 112(2)

The applicant in ***Nassr v R*** **[2015] NSWCCA 284** pleaded guilty to an offence of break, enter and commit serious indictable offence contrary to s 112(2) of the *Crimes Act 1900* (NSW). The agreed facts established that he entered the victim's home but was then interrupted, leading to a confrontation outside in which Mr Nassr assaulted the victim. He sought leave to appeal out of time against his conviction on the ground that he could not in law have been convicted of the offence on the admitted facts. The Court allowed the appeal and quashed the conviction because an essential element of the offence – that the applicant assaulted the victim inside the dwelling-house – was not established; "dwelling-house" as defined in s 4 does not include an adjoining yard.

Statutory interpretation of "drug analogue" in the Criminal Code (Cth)

The respondents in ***R v Peart; R v Sorokin*** **[2015] NSWCCA 321** were charged with jointly importing a drug analogue (MDMC) of a border controlled drug (Methcathinone) contrary to s 307.3(1) of the *Criminal Code* (Cth). Section 301.9(2) provides that "…a drug analogue does not include a substance that is itself a listed controlled drug or a listed border controlled drug." MDMC is a listed controlled drug but not a listed border controlled drug. After a pre-trial hearing, the judge relied on s 301.9(2) to quash the charges ruling that MDMC was not, as a listed controlled drug, capable of being a drug analogue of Methcathinone. The Crown appealed against that construction. Ward JA allowed the appeal holding that while there is no doubt that the judge's construction is correct if s 301.9(2) is read in isolation, when read in context with s 301.9(1) it is to be construed such that a drug analogue of a listed controlled drug does not include a substance that is itself a listed controlled drug and a drug analogue of a listed border controlled drug does not include a substance that is itself a listed border controlled drug. That is to say that the presence of a substance on one list has no bearing on its status as a drug analogue of a substance appearing on the other list. There are two textual reasons for this. First, the words "drug analogue" in s 301.9(2) import the meaning given to them in s 301.9(1), in which a clear distinction is drawn between a drug analogue of a listed controlled drug and that of a listed border controlled drug. Second, the repetition of the word "listed" in s 301.9(2) makes clear that the focus is on two separate lists of drugs. This construction is also supported contextually. Even if the trial judge's construction was textually correct, it would have produced a manifestly absurd result which would have been resolved by construing the subsection in this way.

Manslaughter by criminal negligence – establishing a duty of care in an employment context

The respondent was an experienced bricklayer and sole director of a company that hired the deceased. During the course of that employment the deceased constructed a freestanding brick wall that was not in any way braced, attached or supported. Four days later the wall collapsed on the deceased causing his death. The respondent was charged with manslaughter by criminal negligence. During the Crown opening address, the trial judge ruled that there was no duty owed by the respondent to the deceased that could form the basis of the charge and granted a permanent stay of proceedings. On appeal in ***R v Moore*** **[2015] NSWCCA 316**, the Crown proposed three alternative bases upon which the

respondent could be held to have been under a duty of care to the deceased: (1) a statutory duty imposed by s 20 of the *Occupational Health and Safety Act 2000* (NSW); (2) a common law duty by reason of his direct involvement in the construction of the wall; (3) a "novel duty of care". The Court (Bathurst CJ, Simpson JA and Bellew J) held that the trial judge's ruling was erroneous; Bathurst CJ and Bellew J (Simpson JA dissenting) allowed the appeal and quashed the order granting the stay. With respect to the first basis, Bathurst CJ and Bellew J (Simpson JA dissenting) held that the legislature did not intend for contraventions of s 20 to give rise to criminal liability for manslaughter. Secondly, all judges agreed that it would be open to conclude that a common law duty existed provided certain facts were established by the prosecution. Finally, Simpson JA and Bellew J rejected the novel duty of care basis.

Recklessness – foresight of possibility as opposed to probability

Mr Aubrey was convicted of maliciously inflicting grievous bodily harm contrary to s 35(1)(b) of the *Crimes Act 1900* in circumstances where he infected a homosexual partner with HIV. The offence was charged in the form that applied in 2004. Liability was established on the basis of recklessness by virtue of s 5 as it then stood. With respect to recklessness, the trial judge directed the jury in terms of the foresight of possibility of harm. While this was conceded to be the correct approach at trial, on appeal in ***Aubrey v R* [2015] NSWCCA 323** it was contended that this was erroneous and the correct approach was to direct in terms of foresight of probability. Supporting this ground was a challenge to the decision in *R v Coleman* (1990) 19 NSWLR 467 and the authority flowing from it as wrongly decided. Fagan J rejected this argument, holding that there is no reason to doubt the correctness of established authority. The Court has already considered and determined not to follow Victorian authority requiring foresight of probability. Further, there is no need for a direction requiring the jury to distinguish between a merely theoretical possibility on the one hand and a possibility as a matter of reality on the other; "possibility" is an ordinary English word of perfectly clear meaning.

PRACTICE AND PROCEDURE

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.

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.

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.

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.

Evidence can be given in confidence to assist judge in cases where the sexual assault communications privilege applies

Mr Khan pleaded not guilty to a number of sexual offences and issued subpoenas to the Commissioner of Police and the Department of Family and Community Services. The Commissioner and FACS applied to have the subpoenas set aside and sought an order preventing access on the basis that the subpoenaed documents were privileged. The judge refused to set aside the subpoenas and made rulings as to which documents were protected confidences and subject to the sexual assault communications privilege. In ***ER v Khan*** **[2015] NSWCCA 230** this ruling was appealed pursuant to s 5F *Criminal Appeal Act*. In dismissing the appeal, Hall J commented on the power of the court to make orders to facilitate the court's task of determining questions of sexual assault communications privilege. Section 299B(4) expressly provides that a court may make "any orders it thinks fit to facilitate its consideration of a document or evidence under this section". This would permit the making of an order allowing the evidence to be given in confidence. (This is an approach which has been taken in relation to client legal privilege.)

Judge's intervention in sentence proceedings may deprive person of the opportunity to present their case

In ***Ellis v R*** **[2015] NSWCCA 262** the Court concluded that a judge's intervention in sentencing proceedings was unwarranted and deprived the offender of the opportunity properly to present his case. Mr Ellis pleaded guilty to manufacturing a large commercial quantity of a drug and agreed to give evidence at his sentence proceedings. Shortly after he commenced giving evidence the sentencing judge asked him to identify a person in a photograph tendered by the Crown. He told the judge that he did not wish to do so because he was concerned for the safety of himself and his family. The judge told him that he could be in contempt of court for refusing to give evidence. The following day Mr Ellis was granted leave to withdraw his evidence. The judgment of Garling J at [67] – [72] sets out the reasons which led the Court to this conclusion. The court placed significant emphasis on the nature and timing of the questions asked (they were of doubtful relevance and were asked early on in examination in chief); the reaction of the sentencing judge after Mr Ellis declined to identify the person in the photograph; inadequate consideration of the reasons given for refusing to answer; and the threat of sanctions if the questions weren't answered. The matter was remitted to the District Court for re-sentencing.

Section 32 of the Mental Health (Forensic Provisions) Act - relevance of the operation and effect of the order and the need for general deterrence

Mr Quinn was fined and placed on a good behaviour bond following his plea of guilty to an offence of dishonestly obtaining a financial advantage by deception. He appealed to the District Court, seeking an order that he be discharged under s 32 of the *Mental Health Forensic Provisions Act 1990*. In declining to make the order, the judge referred to the fact that the order would only have six months to work and also referred to the need to balance the public interest in having Mr Quinn's mental health dealt with against the public interest in general and specific deterrence. Mr Quinn sought judicial review of the District Court decision in the Court of Appeal: ***Quinn v Director of Public Prosecutions*** **[2015] NSWCA 331**. The Court found no error, much less jurisdictional error, in the judge's approach. Adamson J held that in determining whether to make a s 32 order the judge was entitled to consider what would be achieved and what the operation and effect of such an order would be. Her Honour also found that general deterrence was a relevant consideration in the circumstances. She observed that the weight to be given to general deterrence is a matter for the primary decision-maker and not a matter generally giving rise to an error of law.

Co-accused's plea of guilty in front of the jury did not unfairly prejudice trial

The applicant in ***Humphries v R*** **[2015] NSWCCA 319** was jointly indicted with his brother. Following the close of the Crown's case, the brother was re-arraigned and pleaded guilty in front of the jury. The applicant applied to have the jury discharged submitting that the circumstances of his brother's plea were unfairly prejudicial towards his own trial. The judge refused the application and instead directed the jury not to take the guilty plea into account in the case against the applicant. He was later convicted and subsequently appealed against the judge's refusal. Bellew J noted that the application of s 157 of the *Criminal Procedure Act 1986* – providing for the discharge of the jury from giving a verdict

following a change of plea – meant that there was no requirement to invite, as her Honour did, the jury to return a verdict of guilty against the brother. The preferable course was to take the plea in the jury's absence. Nonetheless, the comprehensive direction given by the judge meant no miscarriage of justice occurred. Although counsel for the appellant at trial did not ask for the direction to be repeated, it is prudent for the direction to be given both when the plea is entered and again in the summing up.

No error in judge's refusal to discharge jury who mistakenly believed they were photographed during closing addresses

Mr Mikael was convicted of a number of charges relating to the supply of methylamphetamine. The jury sent a note expressing concern that two men entered the courtroom and appeared to photograph them using a phone during the defence closing address. The defence made an application to discharge the jury. The judge established that no photographs were taken after having the phone examined and hearing evidence from the two men before refusing the defence application. That decision was the subject of appeal in ***Mikael v R* [2015] NSWCCA 294**. Hall J dismissed the appeal finding that the exercise of the judge's discretion was not erroneous and that no miscarriage of justice occurred. The steps taken by the judge to deal with the jury note were appropriate and effective. There is nothing in the evidence to suggest the phone flashes occasioned anything more than a momentary distraction. Further, the jury were provided with transcript of the closing address of the Crown prosecutor and of the defence. They were also given a full explanation as to the circumstances surrounding the phone flashes, displacing the initial concern that they had been photographed. Despite being invited to do so, the jury did not make any further requests for information or expressions of concern.

No error in refusing to permanently stay proceedings despite prejudicial pre-trial publicity

The applicant in ***Hughes v R* [2015] NSWCCA 330**, the star of the 1980s and 1990s *Hey Dad!* television program, was convicted of a number of child sex offences. He appealed against those convictions on the ground that the judge erred by refusing to permanently stay the proceedings in light of prejudicial pre-trial publicity said to undermine his right to a fair trial. Beazley P, Schmidt and Button JJ dismissed the appeal, holding that the complaints advanced on appeal cannot be approached purely prospectively; they must be resolved with the assistance of what actually transpired at the trial. The judge in fact took a number of steps to ensure a fair trial. This included the provision of a detailed explanation to potential jurors of the role of a jury, the importance of the qualities they must bring to their task, and the importance of disregarding media reports. Once empaneled, the jury were appropriately addressed with respect to issues such as the onus of proof; the presumption of innocence; impartiality; their role as judges of the facts based on the evidence; and applying the law as directed by his Honour. The jury were given written directions concerning the exclusion of publicity from their minds. These issues were revisited during the trial, in the applicant's submissions and in his Honour's summing up. There continues an expectation that despite technological developments and the increased accessibility of media material, juries will approach their task correctly as directed. The jury in this case undoubtedly did so as evidenced by their notes and deliberation process. All evidence establishes that the applicant in fact received a fair trial.

Inappropriate remarks to jury about prospect of disagreement

A jury sent a note to a judge asking "what happens if we cannot agree"? The judge replied in part that "trials are very costly to run and very time consuming and if I had to discharge you it would mean we would all have to go through the whole process again". It was held in ***Isika v R*** **[2015] NSWCCA 304** that the answer was apt to impose inappropriate pressure on individual jurors to join in a verdict with which they were not in genuine agreement.

SENTENCING – GENERAL ISSUES

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 unrealistic 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.

Self-induced intoxication as an aggravating factor

Mr King was convicted of the murder of his girlfriend which occurred when he was under the influence of the drug known as "ice". Mr King gave evidence at trial and in the sentence proceedings that he knew that it was likely that he would act very aggressively if under the influence of ice. The sentencing judge found that his intoxication was an aggravating factor particularly having regard to Mr King's knowledge of the likely effect of the drug upon him. In ***King v R*** **[2015] NSWCCA 99** it was contended that the sentencing judge erred in finding that the offence was aggravated by his intoxication. The Court dismissed the appeal, being satisfied that the finding of aggravation was open. Expert

evidence established that one of the effects of ice is increased aggression and, despite Mr King's knowledge of that, he continued to use it, in combination with other drugs.

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.

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: Both the other members of the Court, 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 could represent what would otherwise be the 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 imposed.

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.

Discount for guilty plea where plea is entered after finding of fitness to be tried

In ***De Angelis v R*** **[2015] NSWCCA 197** a question was raised about the appellant's fitness to be tried prior to the commencement of his trial for fourteen counts of fraud as company director and two counts of obtaining money by deception. The trial date was vacated and at a fitness hearing held later, Mr De Angelis was found fit to be tried. He then pleaded guilty to all counts on the indictment. The sentencing judge allowed a 12.5% discount on sentence in recognition of the utilitarian value of the pleas. Mr De Angelis argued on appeal that "the full discount" should have been allowed because the pleas were entered a short time after he was found fit to be tried. The Court held that there was no basis for a finding that Mr De Angelis' capacity to enter a plea was "significantly impaired" by his mental health. Simpson JA noted that a discount for a guilty plea is a matter of discretion and observed that the timing of the plea is a fundamental consideration when quantifying the discount. No basis was established to justify intervention with the sentencing judge's exercise of discretion.

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]).

In **R v Saleh [2015] NSWCCA 299**, Beech-Jones J raised a question about the correctness of this decision, observing that the Court did not appear to have been taken to *Tyler v R* [2007] NSWCCA 247 (which he said "represents the applicable law in this Court") and the other cases that followed it, including *C v R* [2013] NSWCCA 81; 229 A Crim R 233 at [33] and *Isaac v R* [2012] NSWCCA 195 at [24] to [27].

Mere breach of trust does not increase objective seriousness of sexual offence

In ***Cowling v R*** **[2015] NSWCCA 213** the Court allowed the appeal on the basis that the seriousness of Mr Cowling's conduct was not increased because he and the complaint

were friends and trusted each other. The matter involved two sexual offences committed against the girlfriend of the offender's best friend.

Onus of proof – fact finding adverse to the offender

In ***Filippou v The Queen*** **[2015] HCA 29**, special leave to appeal to the High Court was allowed in respect of a sentence imposed for two counts of murder. It was argued that because the Crown had not proved beyond reasonable doubt that the appellant had brought the gun to the scene of the murders, he should have been sentenced on the basis that the gun was brought by one or other of the two deceased. It was held in that where an offender asserts a fact favourable to him/her which is contested, or not accepted by the Court, the onus is on the offender to establish the fact on the balance of probabilities. In this case, the fact that the trial judge was not satisfied beyond reasonable doubt that Mr Filippou had brought the gun to the scene does not obviate the need for him to prove, on the balance of probabilities that he did not. If this onus is not discharged, it is open to the court to sentence the offender on the basis that neither of the competing possibilities is known.

Sentencing statistics to be properly understood if they are to be relied upon

In ***Knight v R*** **[2015] NSWCCA 222**, it was contended that an aggregate sentence comprising a non-parole period of one year and nine months with a balance of one year and seven months imposed for four offences of drug supply and a related offence of allowing premises to be used as a drug premises, was manifestly excessive. To support the assertion of manifest excess, reference was made to sentencing statistics from the Judicial Commission of NSW. In dismissing the appeal, the Court made some observations about the use of statistics in severity appeals. R A Hulme J referred to the repeated comments that have been made regarding the limited use of sentencing statistics before going on to emphasise that, "if they are to be relied upon, it is necessary that counsel ensure that the limits of their utility are properly understood" (at [13]). This was echoed by Garling J who observed that the problem here was that "like is not being compared with like" (at [89]).

Need for sentencing judge to assess seriousness of criminal conduct and offender's culpability

Gal v R **[2015] NSWCCA 242** involved sentencing for two offences of breaking entering and stealing (one committed in circumstances of aggravation). The sentencing judge, in ex tempore reasons, gave no description of the facts of the offences. Mr Gal appealed against the severity of his sentence arguing that the sentencing judge erred in failing to assess the objective seriousness of the offending conduct or by failing to give reasons stating what that assessment was. The Court held that a sentencing judge is obliged to refer to the essential facts upon which an offender is sentenced and to provide some assessment, or reflection upon, the objective seriousness of the offending. While the Court acknowledged that some latitude is to be afforded when scrutinising ex tempore sentencing judgments given immediately after the conclusion of submissions, this factor does not obviate the fundamental need for a judge to assess the objective seriousness of the offence.

Essentially the same problem arose in ***R v Van Ryn*** **[2016] NSWCCA 1** where, although the sentencing judge recited the facts of the offences in detail, no indication was given as to there having been any assessment of their seriousness.

Assistance to authorities discount not mandatory

In ***Williamson v R*** **[2015] NSWCCA 250** the applicant pleaded guilty to a variety of fraud offences committed when he was General Secretary of the NSW Health Services Union. The judge allowed the maximum discount for the utilitarian value of his pleas of guilty but did not quantify a discount for assistance to authorities (s 23 *Crimes (Sentencing Procedure) Act*). On appeal against the severity of sentence it was contended that even though the judge found that the assistance was of "very limited significance" his Honour was required to quantify a discount. It was submitted that s 23(4) operated in mandatory terms. The Court held that there was no merit in this. Section 23 is not framed in mandatory terms. It provides that "… a court *may* impose a lesser penalty …". It was open to the sentencing judge to conclude that Mr Williamson's assistance did not warrant the imposition of a lesser penalty. R A Hulme J also noted that it was indicative of a lack of merit that this ground raised a matter which had not been raised in the District Court where Mr Williamson had been represented by very experienced senior counsel.

Sentencing for Commonwealth offenders to be consistent with current sentencing practices across Australia

Mr Pham was sentenced in the County Court of Victoria for an offence of importing a marketable quantity of heroin. His appeal to the Court of Appeal was upheld with the Court finding that he was entitled to be sentenced in accordance with current sentencing practices in Victoria, rather than those across Australia. This resulted in his sentence being reduced: *Pham v The Queen* [2014] VSCA 204. The High Court granted the prosecution special leave to appeal and held in ***The Queen v Pham*** **[2015] HCA 39** that it was an error for the Victorian Court of Appeal to disregard sentencing practices throughout Australia. In order to achieve sentencing consistency for federal offences, a court must ensure that regard is had to sentencing practices Australia-wide. To do otherwise is to "exacerbate inconsistency" and is ultimately unfair (at [27]). The High Court also clarified that in order to "follow" sentencing decisions of intermediate appellate courts, regard must be had to comparable cases as "yardsticks" which illustrate the possible range of sentences available. A compelling reason is required to not approach decisions of other intermediate appellate courts in this way.

Use of sentencing statistics

In re-sentencing Pham for the offence of importing a marketable quantity of heroin, Maxwell P in the Victorian Court of Appeal relied upon a table containing 32 sentencing decisions of Australian intermediate appellate courts for offences involving a marketable quantity of a border controlled drug where the accused was a "courier", had pleaded guilty and had no relevant prior convictions (see *Pham v The Queen* [2014] VSCA 204). In ***The Queen v Pham*** **[2015] HCA 39** the High Court was critical of this approach. As explained by French CJ, Keane and Nettle JJ this table of comparable cases gave uniform significance to Mr Pham's courier status and treated the weight of the drug as the only variable affecting the seriousness of the offence (at [37]). In doing so, the High Court

found that the Court of Appeal adopted an impermissible statistical analysis of comparable cases to determine the objective seriousness for the subject offence.

Relevance and weight to be given to mental illness

***Marrow v R* [2015] NSWCCA 282** involved an offender sentenced for an offence of armed robbery. A psychiatric report, tendered on his behalf at sentence, included a diagnosis of schizophrenia, substance use disorder and pathological gambling. It was submitted that his mental illness made him an inappropriate vehicle for general deterrence. It was argued on appeal that the judge erred in failing to consider the offender's mental illness and the psychiatrist's opinion. It was held that the relevance of, and weight to be given to, a person's mental illness are matters of discretionary judgment having regard to the circumstances of the case and the purposes of sentencing in s 3A *Crimes (Sentencing Procedure) Act 1999*. The Court concluded that the sentencing judge had adequate regard to the psychiatrist's diagnoses, in particular the evidence of the psychiatrist that Mr Marrow had some capacity to control himself and was aware that his actions were illegal, despite his psychotic condition.

Approach to uncharged criminal conduct did not breach De Simoni principle

Mr Lago was convicted by a jury of supplying methylamphetamine. Evidence of a similar prior transaction not the subject of any charge was led at trial as tendency evidence. Mr Lago did not give evidence at trial or during the proceedings on sentence. In the latter, the judge was satisfied beyond reasonable doubt of his involvement in the prior transaction. In ***Lago v R* [2015] NSWCCA 296**, Gleeson JA held that the sentencing judge's careful approach to the uncharged conduct did not violate the principle established in *The Queen v De Simoni* (1981) 147 CLR 383. The judge expressly acknowledged the limited use of the uncharged conduct. Rather than support a finding that it constituted a circumstance of aggravation of the charged offence, the uncharged conduct was permissibly used: to establish that the charged offence was not an isolated one; in her Honour's assessment of the applicant's reliability by supporting the rejection of his claim to a psychiatrist that his involvement in this offence was the first of its kind; and to assess the objective seriousness of the charged offence.

State sentencing legislation erroneously applied to Commonwealth offence

The applicant in ***Elshani v R* [2015] NSWCCA 254** was convicted of trafficking a marketable quantity of heroin contrary to s 302.3 of the *Criminal Code* (Cth). His appeal against sentence was on the ground that the judge erroneously applied State sentencing laws and principles to a Commonwealth offence. Allowing the appeal, Adams J held that the judge's finding of "special circumstances" and failure to explain the sentence in accordance with s 16F(1) of the *Crimes Act 1914* (Cth) were indicative of an erroneous approach. Her Honour's consistent working through the State statutory regime demonstrated error beyond a mere slip of language, which was of significance because of differences between the two regimes in the discretion concerning setting non-parole periods.

Failure to consider ceiling principle following successful conviction appeal

Paul Armstrong was convicted and sentenced for murder but then successfully appealed against that conviction. He was then convicted and sentenced in the District Court for unrelated sexual offences. Following re-trial for the murder offence, he was convicted of manslaughter and sentenced. The whole of the manslaughter sentence was accumulated on the non-parole period for the sexual offences, having the effect that the head sentence and non-parole period both expired at later dates than those of the original murder sentence.

In ***Armstrong v R*** **[2015] NSWCCA 273**, Bathurst CJ held that the judge fell into error by regarding the earlier sentences as irrelevant and failing to consider the principle that ordinarily sentences imposed in a first trial should be regarded as the upper limit of the sentence to be imposed following an appeal and second trial (the ceiling principle). The principle requires a consideration of all components of a sentence including its commencement date relative to others. The circumstances of this case are different to many other appeals on the same issue. First, conviction of a different, lesser offence followed the successful appeal. Second, both the head sentence and non-parole period of the manslaughter offence were less than those imposed for murder. Third, the sexual offences were entirely unrelated offences, meaning that apart from the ceiling principle, the only basis on which it could be concluded the sentences were to be served concurrently would be by application of the principle of totality. However, it was not contended there was an error in approach to totality. Price J added the observation that, "It is regrettable that neither the Crown nor counsel for the applicant drew the ceiling principle, nor the cases that supported it, to the attention of the sentencing judge".

Being on parole does not aggravate the objective seriousness of an offence

It was held in ***Boney v R*** **[2015] NSWCCA 291** that a judge erred by saying that "the offence is aggravated by the fact that at the time it was committed the offender was on parole". This was said to be erroneous on the basis that in *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120 at [27] that objective seriousness is to be assessed wholly by reference to the nature of the offending. (It may be noted that the judge did not specifically say that it was the "objective seriousness" of the offence that was aggravated; merely that "the offence" was.)

Error in taking into account that offences could have been dealt with in Local Court

In sentencing for a large number of child sexual assault offences a judge took into account that offences of indecent assault (s 61M(1) and (2)) could have been dealt with in the Local Court. It was held in ***R v Van Ryn*** **[2016] NSWCCA 1** that such an approach was erroneous because in the circumstances of the particular case it was inconceivable that such offences could have been subject to summary disposal when the offender was liable to be sentenced for them in conjunction with such a serious array of other child sex offences.

SENTENCING - SPECIFIC OFFENCES

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]**.**

Assessment of objective seriousness does not require judge to view all child pornographic material where it has been classified

The applicant in ***Fitzgerald v R*** **[2015] NSWCCA 266** was convicted of a number of offences relating to his possession of child abuse material (1,145 images including 390 videos) and access to child pornography (96 videos). The judge viewed a representative sample of the material only. On appeal it was asserted the judge erred in his assessment of the objective seriousness of the offending. In dismissing the appeal, Hoeben CJ at CL held that it was not necessary for the judge to view all or even most of the material subject of the offending as the nature and extent of the harm caused is readily discernible from the Child Exploitation Tracking System (CETS) classification. This is in contrast to the encouragement in other cases of sentencing judges viewing the material rather than placing too heavy an emphasis on classification systems in isolation: e.g. *R v Porte* [2015] NSWCCA 174 at [73] ff.

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]).

No breach of De Simoni to have regard to frequency of individual sales in sentencing for supply prohibited drug where charge based on multiple acts of supply

In ***Jardon v R*** **[2015] NSWCCA** 217 the applicant had been sentenced for a number of offences including supply methylamphetamine, contrary to s 25(1) of the *Drug Misuse and Trafficking Act*. The quantity, 157.9 grams, was calculated on the basis of individual sales over the six month period covered by the charge. It was contended that in sentencing him on the basis of multiple individual sales to make up the total supply, the judge breached the principle in De Simoni because that feature of the offence (that it involved multiple sales) could have sustained a charge for the more serious offence of ongoing supply under s 25A(1). The Court dismissed the appeal, finding that the frequency of the sales constituting the supply and the fact that they were for reward were merely particulars of the physical elements of the offence. These were not additional matters of aggravation and accordingly, there was no breach of the principle in De Simoni.

Failure to consider general deterrence for revenue fraud offences

A 20 month suspended sentence was imposed on the applicant in ***R v Saleh*** **[2015] NSWCCA 299** for aiding and abetting the importation of tobacco products with the intention of defrauding the revenue contrary to s 233BABAD of the *Customs Act 1901* (Cth). On appeal R S Hulme AJ held that the sentence was manifestly inadequate not only because of an erroneous assessment of objective seriousness but also because of a failure to consider general deterrence in the sentencing exercise. An actual custodial sentence as opposed to a suspended sentence is required for the purposes of general deterrence. The judge made no reference to the sentencing principle, a failure suffered in most decisions in this area. The introduction of s 233BABAD (which effectively increased the penalty fivefold) and the rationale advanced by the Attorney General strengthen the need for general deterrence in these matters.

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.

Accessory after the fact 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.

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.