SUPREME COURT OF NSW ANNUAL CONFERENCE 2016

Developments in Criminal Law

The Honourable Justice R A Hulme

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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 of Ms Roisin McCarthy BA LLB and Mr Ryan Schmidt BCCJ LLB (Hons).

APPEALS

Trial judge not disqualified from sitting on Court of Criminal Appeal

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

Appropriateness of appeal judges viewing video recordings of complainant's evidence

CLC was convicted of four offences involving sexual assaults committed upon his step grand-daughter. Two video recorded interviews to police became the complainant's evidence in chief at the trial. Her cross-examination at trial was also recorded. It was contended on appeal that the verdicts were unreasonable and could not be supported by the evidence. There was reliance upon inconsistencies in the two interviews. At the hearing of the appeal there was a discussion about whether the Court should view the video recordings. Initially, counsel for CLC invited the Court to do so but withdrew from this position after the hearing. The Crown agreed that the appeal could be determined without the court viewing the recorded interviews. The appeal was dismissed, but the members of the Court took different views about the appropriateness of viewing the recordings: ***CLC v R*** **[2015] NSWCCA 248**. Basten JA viewed the recordings for the purpose of resolving uncertainties evident in the transcript of the interviews. His Honour did not consider that this approach would lead to potential unfairness to the applicant. Wilson J and RS Hulme AJ expressed reservations about the appropriateness of viewing the recordings. Wilson J was satisfied of CLC's guilt based on the transcript of the evidence and did not consider it "necessary or even desirable" to view the recordings. RS Hulme AJ also elected not to view the recordings coming to the view that it was unnecessary following his consideration of the transcripts.

Court of Criminal Appeal divided on how to review findings of fact

The divergent views expressed in *AB v R* [2014] NSWCCA 339 and *Clarke v R* [2015] NSWCCA 232 about appellate consideration of findings of fact were referred to in ***Turnbull v Chief Executive Officer of the Office of Environment and Heritage*** **[2015] NSWCCA 278**. Button J (Meagher JA agreeing; McCallum J refraining from expressing a view) held that the test of asking whether the finding of fact was open to the sentencing judge should be maintained for the following reasons: first, the test is long established and has been frequently applied by the Court of Criminal Appeal; second, Simpson J very recently affirmed the test as correct in *AB v R* and finally, the test is straightforward and appropriately balances the "autonomy and evaluative judgments of sentencing judgments" with "the role of this Court in ensuring that idiosyncratic or irrational findings do not go uncorrected" (at [35]).

Proposed jury direction on offence definition not an "interlocutory judgment or order" for purpose of s 5F(3) appeals

The applicants in ***A2 v R; KM v R; Vaziri v R*** **[2015] NSWCCA 244** were charged with female genital mutilation contrary to s 45(1)(a) of the *Crimes Act 1900* (NSW). The definition of "mutilates" in s 45 was raised by the parties as a pre-trial issue. The trial judge heard submissions before delivering a judgment as to his proposed jury direction. The applicants filed an application for leave to appeal against an interlocutory judgment or order pursuant to s 5F(3) of the *Criminal Appeal Act 1912* (NSW)**.** R A Hulme J found the application not to be competent because the judge's ruling was not an "interlocutory judgment or order". There is no clear test for discriminating between judgments and orders on the one hand, and rulings not constituting judgments or orders on the other. Distracting or irrelevant considerations in this case include: the length and level of detail of the submissions and subsequent judgment; the possible courses of action for the applicants following the ruling; the importance of the ruling to the trial; and the mere fact that the ruling was made prior to the trial. Ultimately, senior counsel's concession at the hearing of the application that the proposed direction was liable to modification was fatal as it demonstrated that the ruling lacked the requisite finality to be an interlocutory judgment or order.

Time served pending an appeal may not count

The applicant in ***Vai v R*** **[2015] NSWCCA 303** was convicted after trial of six offences relating to the violent robbery of a club with two co-offenders committed while he was on parole for an earlier similar robbery. The criminality involved planning, violence and the use of weapons against mature-aged patrons. Five of the six offences carried maximum penalties of 25 years imprisonment. The applicant had an unfavourable subjective case that did not call for any mitigation. He was sentenced to an aggregate term of imprisonment of 10 years with a non-parole period of 6 years 6 months. He sought leave to appeal against that sentence on the ground that it was manifestly excessive. R A Hulme J refused leave and found the proposed appeal so devoid of merit that it could be characterised as "unarguable or frivolous" in the context of s 18(3) of the *Criminal Appeal Act 1912* (NSW). That provision empowers a court to order that any time spent in custody pending the determination of an appeal does not count as part of any term of imprisonment under the appellant's sentence. While s 18 was not applied in this case

because the Court did not give prior warning of any such intention, future courts may be minded to do so.

Nature of appeals from the Local or Children's Court to the Supreme Court

In ***JP v DPP (NSW)*** **[2015] NSWSC 1669** there was an appeal to the Supreme Court against a conviction entered in the Children's Court for an offence of aggravated break and enter with intent to commit a serious indictable offence. The circumstances of the appeal prompted Beech-Jones J to provide a very useful review of the nature of appeals from the Local or Children's Court to the Supreme Court under the *Crimes (Appeal and Review) Act 2001* (NSW). His Honour paid particular attention to the circumstances in which an appeal involving a question of fact or a mixed question of fact and law, as opposed to a question of law alone, may be possible. In this case, leave was granted with respect to some grounds but the appeal was dismissed.

Leave for prosecutor to elect committal to District Court out of time not amenable to s 5F(3) appeal

In ***Hall v R*** **[2015] NSWCCA 298** it was held that a magistrate's decision to grant leave to the prosecutor to make an election out of time for proceedings (which were not strictly indictable) to be committed to the District Court was not an "interlocutory judgment or order" amenable to appeal pursuant to s 5F(3) of the *Criminal Appeal Act 1912*. A further hurdle was that s 5F(3) extends to committal proceedings" but such proceedings had not commenced at the time the leave was granted.

A verdict of guilty cannot be inconsistent with a failure to reach a verdict on another count

The applicant in ***PA v R*** **[2015] NSWCCA 18** (a judgment which became publicly available in March 2016) was charged with five sexual offences against his daughter. After trial the jury returned verdicts of not guilty on three counts, guilty on one and were unable to reach a verdict on the fifth. The applicant appealed against his sole conviction on the basis that the verdict was inconsistent with the inability of the jury to reach a verdict on the fifth count. This was supported by a submission that both counts arose from the same incident yet there was nothing in the evidence to distinguish the different jury outcomes. The Crown submitted that those circumstances could not support an argument of inconsistent verdicts. There was no prior authority on the issue in this state and interstate authorities were conflicting. Hoeben CJ at CL (Johnson J agreeing, Hamill J agreeing in the result but not expressing a final opinion on the issue) rejected the ground of appeal, holding that guilty verdicts are incapable of being "inconsistent" with a failure to reach a verdict. To suggest there is no difference between a verdict of acquittal or guilt on the one hand and a failure to reach a verdict on the other is contrary to law and common sense. In reaching this conclusion, his Honour rejected Victorian authorities and instead endorsed a line of authority from Queensland, Western Australia and South Australia.

Principles governing allegations on appeal of incompetence of counsel at trial

The applicant in ***Alkhair v R*** **[2016] NSWCCA 4** was convicted of aggravated break, enter and steal contrary to s 112(2) of the *Crimes Act 1900*. He appealed on a number of grounds alleging that the incompetence of his counsel denied him a fair trial including the

opportunity to give evidence and call certain witnesses. Macfarlan JA dismissed the appeal finding that it was not open to conclude that there was a miscarriage of justice whereby the applicant lost a chance of acquittal. A consideration of the objective features of the trial show counsel followed a reasonable course in an attempt to secure an acquittal for the applicant. His Honour considered a range of authorities concerning allegations of this nature and distilled four principles governing such appeals at [31]:

> (1) To the extent possible, an appellate court should determine an appeal involving complaints about a trial counsel's conduct of a case by examining the record of the trial to determine from the objective circumstances whether the accused has had a fair trial.
>
> (2) Ordinarily, an affirmative answer to this question is required where the impugned conduct is capable of being rationally explained as a step taken, or not taken, in the interests of the accused. This is so even if the accused alleges on appeal that he or she did not authorise the conduct because the nature of the adversarial system means that the client is bound by the manner in which the trial is conducted on his or her behalf.
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> (3) Only in exceptional circumstances will an appellate court find it necessary to resort to subjective evidence concerning the appellant's legal representatives' reasoning at trial or to evidence as to communications between the appellant and those representatives.
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> (4) The ultimate question for an appellate court is whether the appellant has established that what occurred at the trial gave rise to a miscarriage of justice in the sense that the appellant lost a chance of acquittal that was fairly open.

Abolished principle of double jeopardy is not to be applied upon successful Crown appeals

The respondent in ***R v Mulligan*** **[2016] NSWCCA 47** pleaded guilty to recklessly inflicting grievous bodily harm in contravention of s 35(2) of the *Crimes Act 1900* after he attacked a stranger when their dogs became entangled in a brief scuffle. He was given a suspended sentence of 15 months. The Crown successfully appealed against that sentence on a number of grounds including manifest inadequacy. Upon resentencing the respondent, Harrison J took occasion to consider the principle of double jeopardy. His Honour observed that the insertion in 2009 of s 68A into the *Crimes (Appeal and Review) Act 2001* provided for the abolition of the double jeopardy principle following a successful Crown appeal. So much was authoritatively held by a unanimous five judge bench in *R v JW* [2010] NSWCCA 49. That position has been reaffirmed in decisions since then and to the extent that any different view may appear to have been expressed, it should be disregarded. Those contrary views have generally been expressed in situations where the appellate Court was not drawn to the authority of *R v JW*.

Pre-trial ruling as to existence and availability of a common law defence is not an interlocutory judgment or order amenable to appeal under s 5F

The applicant in ***Gall v R*** **[2016] NSWCCA 82** was charged with dangerous driving causing death (x1) grievous bodily harm (x6). All counts arose from a single incident where he, in the course of an Army training exercise, allegedly drove in a dangerous manner and lost control of the vehicle. He sought a pre-trial ruling that a defence of superior orders existed at common law and that it was available on the facts. The trial judge ruled that such a

defence was known to law but that it was not available in the present circumstances. The applicant sought leave to appeal that ruling, purportedly pursuant to s 5F(3)(a) of the *Criminal Appeal Act 1912*. Simpson JA refused leave to appeal for want of jurisdiction, holding that the relevant ruling was not "an interlocutory judgment or order" as required by s 5F(3)(a). It is well established that a ruling on the admissibility of evidence does not come within that category, nor does a preliminary ruling of a judge given in advance of matters affecting the trial. The question submitted to the trial judge had two components. The first concerned rulings on evidence that her Honour would make during the course of the trial because whether or not a defence of superior orders was found to exist would impact the evidence that was relevant and admissible. The second component of the question was no more or less than an advance ruling on what the trial judge might put to the jury at the conclusion of the trial by way of summing up the defence case and was thereby excluded from the operation of s 5F(3)(a) by settled authority.

Appellate court's assessment of whether some other sentence is warranted in law is to be made on the evidence that was before the sentencing court

The appellant in ***Betts v The Queen*** **[2016] HCA 25; 90 ALJR 758** appealed to the NSW CCA against sentences imposed upon him for offences of wounding with intent to murder and aggravated kidnapping. At the commencement of the appeal hearing, he handed up material "on the usual basis" that it would be admissible in the event the Court came to resentence. The material included expert opinions regarding factors said to be causative of the offences. The CCA upheld two grounds of appeal but dismissed the appeal on the basis that no lesser sentence was warranted in law. In reaching that conclusion, the Court declined to take into account the expert opinions. The appellant appealed to the High Court against that approach submitting that once error below is demonstrated, there can be no justification for the exclusion of evidence that is capable of bearing on the appellate court's determination of the appropriate sentence for an offence.

French CJ, Kiefel, Bell, Gageler and Gordon JJ dismissed the appeal holding that, exceptional cases apart, the question of whether some other sentence is warranted in law is answered by consideration of the material that was before the sentencing court and any relevant evidence of post-sentence conduct. For example, evidence of an offender's rehabilitation progress since the time of sentence is routinely received by the CCA on the limited basis that it may be taken into account on resentence. The appellant's submission is contrary to the conclusion in *R v Deng* (2007) 176 A Crim R 1 and should be rejected.

Erroneous to refuse to stay an order discharging the jury over objection of one of the parties

The applicants in ***Barber v R; Zraika v R*** **[2016] NSWCCA 125** were jointly indicted with two others, Haile and Spiteri-Ahern. The jury were unable to reach a verdict in relation to Spiteri-Ahern. They were never invited to return a verdict with respect to the applicants. The judge discharged the jury with respect to Spiteri-Ahern as well as the applicants, their liability being derivative from that of Spiteri-Ahern. His Honour considered it inappropriate in the circumstances of the case for them to deliberate with respect to the applicants where the only outcomes available were verdicts of acquittal or an absence of agreement. Counsel for the first applicant applied to the trial judge to stay that order to facilitate an appeal but the application was refused and the jury dispersed. The following morning, the

CCA granted a stay and members of the jury were informed. Following a long weekend, the present appeal against the discharge pursuant to s 5G of the *Criminal Appeal Act 1912* was heard.

The Court (Bathurst CJ, Basten JA and Button J) held that it was erroneous for the trial judge to discharge the jury over the objection of two of the accused. In all but exceptional cases, a judge who is minded to discharge a juror or the jury, over the opposition of one party, should stay his or her decision to allow an application to be made to the CCA, if so requested. However, the jury having in fact been discharged in this case, it is not appropriate to intervene under s 5G. The jury were discharged and entitled to consider themselves free of the obligations imposed on them and applicable during the trial for a period of 24 hours. It was a matter that had received considerable media coverage and there was a very real prospect that the jury had considered extraneous material, discussed the case with others, and reassessed the material they had heard at the trial. The capacity of the trial judge to assess whether that was in fact the case raises additional difficulties including, among others, that the power to examine a juror on oath pursuant to s 55DA of the *Jury Act 1977* would be unavailable.

Appeal against discharge of jury following unintended encounter between an accused and two jurors

The respondents in ***R v Lamb; R v Mason; R v Hill*** **[2016] NSWCCA 135** were being tried jointly when, during his Honour's summing up, the judge received a note from the jury. It detailed an unintended encounter between two of the jurors and one of the accused outside the court building. The note conveyed that the two jurors were uncomfortable because they interpreted the encounter as an attempt to intimidate the jury. The judge examined the foreperson in the absence of the jury and was satisfied the concerns were held by two jurors only. The judge discharged those two jurors pursuant to s 53B(b) and (d) of the *Jury Act 1977*, as well as the remainder of the jury pursuant to s 53C(1)(a). Relevantly, the former provision allows for the discretionary discharge of an individual juror and the latter provides for the discharge of a jury if continuing a trial following the discretionary discharge of a juror(s) would give rise to the risk of a substantial miscarriage of justice. The Crown appealed pursuant to s 5G of the *Criminal Appeal Act 1912* against the decision to discharge the balance of the jury. The trial judge adjourned proceedings to facilitate that appeal.

The Court held that, despite the fact a different judge may have come to a contrary view in all of the circumstances, no *House v The King* error was established and the appeal should be dismissed. Factors arguing against the course adopted by his Honour included that the trial had proceeded for 11 days; it had been specially fixed in Sydney and witnesses had travelled lengthy distances; his Honour was part way through the summing up; and the balance of the jury were not unduly troubled by the encounter. Nonetheless, the decision was not unreasonable or plainly unjust and the trial judge was in an immeasurably better position to judge the atmosphere of the courtroom. Furthermore, the procedure adopted by the judge of adjourning proceedings following his Honour's decision was appropriate as it permitted the parties to exercise their appeal rights.

BAIL

CCA to take flexible approach to de novo bail hearings and can take into account judicial findings made on earlier applications

The applicant in ***Trinh v R*** **[2016] NSWCCA 110** was refused bail in the Local and Supreme Courts after being charged with a number of fraud offences. He then lodged a release application in the Court of Criminal Appeal pursuant to s 67(1)(e) of the *Bail Act 2013* ("the Act"). In determining the application, Basten JA considered the nature of the powers conferred on the CCA with respect to bail applications, including the application of s 75 of the Act headed "Fresh application to be dealt with as new hearing". His Honour observed that it is not entirely clear how broadly and in what circumstances that provision is intended to operate. There have been several statements by the CCA that an application is to be heard by the Court de novo. However, the form of "new hearing" is to be approached with a degree of flexibility, depending upon the circumstances presented in the particular case. At least in a case where oral evidence has been called at an earlier hearing, it seems inevitable that the CCA should be entitled to take account of findings, particularly as to the credibility of witnesses, made by the judge in the earlier proceedings. The other members of the bench agreed with these conclusions, but further observations by his Honour did not attract the agreement of McCallum J, and Davies J deferred expressing a view as the issues were not argued by the parties.

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

Expert 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 – general principles reviewed

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.

Tendency evidence - single event occurring years prior can be admitted

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.

Erroneous approach to determining admissibility of tendency evidence and the possibility of concoction or contamination

Complaints of historical sexual assaults were made by four sisters and an unrelated complainant against the respondent in ***R v ***** **[2016] NSWCCA 78** (restricted decision). An indictment containing six counts relating to three of the complainants was presented against him. The Crown sought to rely on as tendency evidence, not only evidence from the two remaining witnesses, but also evidence of each of the complainants named on the indictment in respect of all other counts on the indictment. The trial judge severed three counts from the other three and ordered that tendency evidence would not be admitted. The Crown appealed pursuant to s 5F of the *Criminal Appeal Act 1912* on the basis that the judge erred in applying ss 97 and 101 of the *Evidence Act 1995*.

Hoeben CJ at CL (Button J agreeing with additional remarks) allowed the appeal holding that there were a number of errors in the judge's approach to the admissibility of the evidence. Her Honour erred by not taking into account the possibility of concoction or contamination as a relevant consideration when determining whether the evidence had significant probative value under s 97. Her Honour also erred by determining the issue of concoction or contamination separately from the issue of whether the tendency evidence had significant probative value in an approach akin to that of the pre-*Evidence Act* decision of *Hoch v The Queen*. Her Honour also erred by applying the *Hoch v The Queen* test in her approach to s 101 and by applying a "no rational view" test when considering the possibility of concoction or contamination. Finally, her Honour erred in making assessments of credibility and reliability when determining the admissibility of the tendency evidence, thereby improperly engaging in a fact finding exercise to form a view whether the jury would in fact find the evidence to be of significant probative value.

Tests of credibility and reliability not to be applied in determining probative value of evidence

The appellant in ***IMM v The Queen*** **[2016] HCA 14** was convicted of two counts alleging sexual misconduct against his step-granddaughter. During the trial the judge admitted tendency evidence from the complainant and complaint evidence from her friend pursuant to ss 97 and 137 respectively of the *Evidence (National Uniform Legislation) Act* (NT) (those provisions are in identical terms to the NSW Act). In ruling the evidence admissible, the judge assessed its probative value on the assumption that the jury would accept it and in so doing, did not have regard to factors such as the credibility of the witness or the reliability of the evidence. The appellant unsuccessfully appealed against that approach in the NTCCA and then appealed to the High Court.

The Court (French CJ, Kiefel, Bell and Keane JJ in a joint judgment, Nettle and Gordon JJ agreeing in the result but for different reasons) allowed the appeal. The plurality held that the judge correctly approached the assessment of probative value of the evidence but ultimately reached the wrong decision with respect to the tendency evidence. The words "if it were accepted" in s 55 make it clear that the relevance of evidence is to be determined on the assumption that the jury will accept it; there is therefore no allowance for a judge to consider its credibility or reliability. Similarly, the *Evidence Act* contains no warrant for the application of tests of reliability or credibility in connection with ss 97(1)(b) and 137. It is the evident policy of the Act that, generally speaking, questions as to the reliability or otherwise of evidence are matters for a jury. The trial judge therefore took the correct approach.

However, the tendency evidence was wrongly admitted because it did not have significant probative value. Unsupported evidence from a complainant adduced to show an accused's sexual interest in him/her can generally have limited, if any, capacity to rationally affect the probability that the complainant's account of the charged offences is true (see [60]-[64]). The complaint evidence – which was tendered for the purpose of proving the acts charged – on the other hand was admissible. In the circumstances, it could not be said that its probative value was low.

The words "not admissible" in the Evidence Act 1995 mean "not admissible over objection"

The first named applicant ("Perish") in ***Perish, Anthony v R; Perish, Andrew v R; Lawton, Matthew v R*** **[2016] NSWCCA 89** was convicted of murder and of conspiracy to murder. Evidence was led in the trial that was second-hand hearsay not admissible under s 59 of the *Evidence Act 1995* ("the Act"). Counsel for Perish did not object because the evidence was crucial to his defence. Nonetheless, his conviction appeal contained a ground alleging that admission of the evidence occasioned a miscarriage of justice. The Court (Bathurst CJ, Hoeben CJ at CL and Bellew J) dismissed the appeal holding that, in accordance with a consistent line of authority, the words "not admissible" where they appear in the Act mean "not admissible over objection". These decisions have not been uncontroversial and there are a number of matters which it may be said suggest a contrary conclusion, most obvious of which is the fact that the words "not admissible" in s 59 are not expressly qualified by the words "over objection". Nonetheless, the Court is not satisfied that the construction is plainly wrong. The better view is that it is correct. The Court is fortified in its conclusion for two reasons. First, it is consistent with the adversarial nature of a trial; it

is for the parties to choose the evidence to which they will take objection. Second, such a construction does not relieve the trial judge of his or her overriding obligation to ensure a fair trial according to law. To the extent necessary, this obligation would extend to requiring the trial judge on his or her own motion to exclude inadmissible evidence, the effect of which would deny a fair trial, and in other circumstances to direct the jury not to take account of a particular piece of evidence which would have been rejected had objection been taken. In the present case, the admission of the evidence resulted from a rational forensic decision made by trial counsel.

Section 293 Criminal Procedure Act – cross-examination about prior sexual experience or activity

It was contended in ***GP v R*** **[2016] NSWCCA 150** that a trial judge erred by refusing to allow cross-examination of a 12 year-old complainant witness about prior sexual experience or activity involving her cousin. The trial concerned alleged sexual assaults committed by the complainant's uncle when she was aged 3 or 4. Her first disclosure was made tearfully to family members when she was aged 9. When she was interviewed by police a short time afterwards she first spoke of sexual interference by her cousin but also spoke of the assaults by GP. The evidence of the complainant's distress was left to the jury on the basis that, if other explanations could be excluded, it showed consistency of conduct. It was submitted that the proposed cross-examination came with an exception in s 293(4)(c) of the *Criminal Procedure Act* because it was evidence "relevant to whether … injury was attributable to the sexual intercourse alleged to have been had by the accused person". The "injury" was said to be "fear" and "anxiety" evident from the complainant's distress upon making her disclosure. Payne JA held that two cases said to support a "broad interpretation" of s 293(4)(c) (*R v Dimian* (1995) 83 A Crim R 358 and *JAD v R* [2012] NSWCCA 73) were factually very different and did not establish any principle which would have the effect that evidence of a complainant crying or exhibiting fear and anxiety when describing an alleged sexual assault years after the event is a relevant "injury". The judgment of Payne JA includes a discussion of the approach to construction of s 293.

OFFENCES

PCA - deeming provision not available to defendant

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.

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.

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.

Perverting the course of justice - commencement of the "course of justice"

The issue in ***The Queen v Beckett*** **[2015] HCA 38; 325 ALR 385** 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]).

Break enter and commit serious indictable offence - indictable offence committed outside dwelling-house does not qualify

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.

Misconduct in public office - elements of the offence are as formulated by the Victorian Court of Appeal

The appellant in ***Obeid v R*** **[2015] NSWCCA 309** was charged with wilfully misconducting himself in a public office. The trial judge refused an application to have the indictment set aside, stayed or quashed on a number of grounds. The appellant appealed against that refusal including on the ground that the judge took an erroneous approach to the elements of the offence. The Court (Bathurst CJ, Beazley P and Leeming JA) dismissed the appeal approving the five elements of the offence formulated by the Victorian Court of Appeal in *R v Quach* [2010] VSCA 106. The primary judge applied that decision as one of an intermediate court of appeal on a question of common law. The Court held this was the appropriate course of action and the Victorian decision was of sound precedential value. The Court rejected a submission the decision was internally inconsistent, noting that the

Victorian Court's conclusions could not have been clearer. The Court also rejected a submission that the decision was plainly wrong in light of different overseas appellate decisions. Finally, the Court rejected a submission that the *R v Quach* formulation rendered the elements of the offence uncertain.

Special leave to appeal to the High Court was sought as well as a stay pending the hearing of the application. The stay was refused by Gageler J who observed that neither of the contentions sought to be advanced was so obviously compelling as to warrant interference with the trial process: ***Obeid v R* [2016] HCA9; 329 ALR 372**.

Constructive murder and manslaughter where clandestine drug lab explodes: misapplication of principles of joint criminal enterprise

The Crown alleged that the respondent in ***R v IL* [2016] NSWCCA 51** was party to a joint criminal enterprise to the manufacture a large commercial quantity of methylamphetamine. As part of that enterprise, either the respondent or the deceased (her co-offender) ignited a ring burner, causing a fire that killed the deceased. The judge directed the jury to return verdicts of not guilty to murder and manslaughter. The Crown appealed against the acquittals submitting that the judge erred by not applying the correct test when determining there was no prima facie case of constructive murder or of involuntary manslaughter by unlawful and dangerous act. Simpson JA allowed the appeal, quashed the acquittals and ordered a retrial. The judge misapplied the principles of joint criminal enterprise. Those principles were applicable to the *foundational* crime for constructive murder (drug manufacture) as opposed to the offence of murder itself. Accordingly, the judge erred by holding that it was the injury or death of the deceased, rather than the ignition of the burner, that had to be within the scope of the criminal enterprise. Plainly, the lighting of the burner was an act within the scope of the joint criminal enterprise of drug manufacture, making whichever of the respondent and the deceased did it equally as liable as the other. If that is proven, the act causing death was done either in an attempt to commit, or during the commission, by the respondent or her accomplice, of a crime punishable by imprisonment for life. The judge similarly erroneously misapplied the principles of joint criminal enterprise with respect to manslaughter; liability for that offence was not derivative but co-extensive with that of the deceased.

Meaning of "malicious" in s 18(2)(a) of the Crimes Act 1900

In ***R v IL* [2016] NSWCCA 51** the Crown appealed against directed verdicts of acquittal for murder and manslaughter. The respondent argued that, if the Crown were to succeed, the Court should not order a retrial as the acquittals were otherwise correct because the acts alleged to constitute the homicide were not "malicious". This argument turned on a submission that the word "malicious" in s 18 of the *Crimes Act 1900* ("the Act") has a different meaning now to what it did prior to 2008 when s 5 (containing a definition of "malice") was repealed and the concept of malice removed from most of the Act. Simpson JA rejected this proposition, holding that the effect of Sch 11 cl 65 – a savings or transitional provision – is that s 18(2)(a) is to be read and interpreted as though s 5 had not been repealed. The operation of s 5 in relation to murder is confined to constructive murder, as the remaining categories are provable by evidence of the relevant state of mind, leaving no room for the concept of malice. Her Honour then considered the actual

meaning of s 5, noting that it included an element of recklessness. In the present case, it was open on the evidence for the jury to conclude that the act alleged to constitute the offence of murder was done recklessly and it was therefore necessary to order a retrial. At [98]ff, Simpson JA considered the meaning of s 5 in the event that she was wrong in her conclusion regarding the effect of cl 65. However, R A Hulme and Bellew JJ expressed that there was no doubt in her Honour's primary view.

*Intimidate police officer (*s 60 Crimes Act) - *meaning of "intimidates" – intimidatory conduct need not be in the presence of the police officer*

The defendant in ***DPP (NSW) v Best*** **[2016] NSWSC 261** was charged with intimidating a police officer in the execution of his duty contrary to s 60(1) of the *Crimes Act* in circumstances where he walked into a police station and said to a sergeant "Just tell [a named Detective] that if he doesn't back off I'm going to go and get a gun and kill him." The Magistrate dismissed the charge holding there was no case to answer as there was no evidence of "direct action" because the intimidatory conduct was communicated through a third party. R A Hulme J allowed the appeal and remitted the matter, holding that the magistrate erred in "reading down" s 60(1) to require the prosecution to establish that the conduct was carried out in the presence of the relevant police officer. The meaning of "intimidates" in s 60(1) is as explained in the clear authority of *Meller v Low* [2000] NSWSC 75. The commission of the offence of intimidating a police officer requires proof that a person deliberately engaged in conduct (be it by words, deeds or both) intending or designed to intimidate a police officer in execution of the officer's duty and that such conduct in fact had that effect. Whether that is done in the presence of the officer or communicated to the officer by some other means is a question of fact and not determinative in itself.

Importation of border controlled drugs under s 307.1(1) of the Criminal Code - fault element

The appellant in ***Smith, Maltimore v R*** **[2016] NSWCCA 93** was convicted of importing a commercial quantity of methamphetamine into Australia contrary to s 307.1(1) of the *Criminal Code* (Cth). The drugs were found secreted in his luggage. He told police he had agreed to deliver the luggage as "gifts" to someone in Australia upon being asked to do so in India; he had significant misgivings about the arrangement but had no intent to carry drugs. The offence under s 307.1(1) has three elements (*Rosenfeld v R* [2009] NSWCCA 74 at [23]). Relevantly to this appeal, the first element is the importation of a substance, in respect of which the fault element is intention. The jury were directed that when considering whether they were satisfied beyond reasonable doubt of that element, they "might also consider whether [the appellant] was aware of the likelihood that those packages were in the items in his suitcase… in the sense that he recognised there was a significant or real chance that [the luggage] contained those extra packages in which the substance was located."

The appellant appealed against his conviction on the basis that the extracted direction allowed for the jury to convict being satisfied of recklessness, rather than intention, with respect to the first element of the offence. The Court dismissed the appeal, holding that the directions in their entirety would not have left the jury with that misunderstanding. The observations in *Kural v R* [1987] HCA 16; 162 CLR 502 as to establishing intention for

the purposes of *mens rea* at common law are applicable to the statutory meaning of "intention" under ss 5.2 and 307.1(1) of the Criminal Code. It is permissible in a given case for a jury to draw an inference of the relevant intention from all the circumstances of the case, including a person's awareness of the likelihood that something was being imported, other than, the visible items of luggage. Her Honour's directions simply informed the jury that that process of reasoning was available to them. Her Honour continued, specifically directing the jury that if they were satisfied of that state of mind, that is, the awareness of that likelihood, they still had to determine whether that satisfied them, to the requisite standard, that the appellant had the relevant intention, that is, that he meant to import the packages.

Grievous bodily harm – injury did not amount to GBH – verdict unreasonable

The appellant in ***Swan v R*** **[2016] NSWCCA 79** was convicted of affray and recklessly causing grievous bodily harm contrary to s 35(1) of the *Crimes Act 1900*. He appealed against the second of those convictions submitting that the guilty verdict was unreasonable or cannot be supported by the evidence because the Court must entertain a reasonable doubt that the victim suffered grievous bodily harm. The relevant injury was a fracture to the traverse process of the L3 vertebra. The fracture was "stable" meaning it did not go into the part of the vertebra containing the spinal cord and the surrounding muscles prevented the bone fragment from moving. Garling J (R A Hulme J agreeing; Wilson J dissenting) allowed the appeal, quashed the conviction and substituted a verdict of guilty to the alternative offence on the Indictment, namely assault occasioning actual bodily harm. While the *type* of injury suffered by the victim is capable of amounting to grievous bodily harm, a number of features indicate that this specific injury in fact did not. These include that there was no displacement of the fracture; it did not require operative or other treatment; it was not permanent; the victim was hospitalised for only 48 hours; the treating doctor described it as "minor"; and the victim did not receive any treatment following his release from hospital. Beyond those factors, the victim's own subjective account failed to support a description of "serious bodily injury" let alone "really serious bodily injury".

Defence of superior orders at common law

The applicant in ***Gall v R*** **[2016] NSWCCA 82** was charged with dangerous driving causing death (x1) and grievous bodily harm (x6). All counts arose from a single incident where he, in the course of an Army training exercise, allegedly drove in a dangerous manner and lost control of the vehicle. He sought a pre-trial ruling that a defence of superior orders existed at common law and that it was available on the facts. The trial judge ruled that such a defence was known to law but that it was not available in the present circumstances. The applicant sought leave to appeal that ruling. Despite dismissing the appeal for want of jurisdiction, Simpson JA commented briefly upon its merits. Her Honour noted that it was unequivocally held in *A v Hayden (No 2)* [1984] HCA 67 that there is no place for a general defence of superior orders in Australian criminal law. The applicant, however, sought to distinguish that case on the basis that it concerned compliance with unlawful orders and therefore has no application to the "apparently lawful" order to drive the transport vehicle given in the present case. The applicant's case was that – because of his inadequate training and incompetence – he could only comply with the "apparently lawful" order by

driving in a dangerous and thereby unlawful manner. In those circumstances, it is difficult to see how the order could be anything other than unlawful and squarely within *Hayden*.

Manufacture prohibited drug - mental element for the offence not established by knowledge/belief the substance is a precursor

The appellant in ***Siafakas v R*** **[2016] NSWCCA 100** was charged with drug offences including a count of knowingly taking part in the manufacture of a prohibited drug contrary to s 24(2) of the *Drug Misuse and Trafficking Act 1985*. The drug was MDP2P, which is both a precursor and a prohibited drug. The appellant's case at trial was the he was knowingly involved in the manufacture of a precursor, without knowing which precursor it was and without knowing it was, in fact, a prohibited drug as well. The trial judge accepted the Crown's submission that the mental element of the offence was satisfied by knowledge that a precursor was being manufactured. The appellant appealed against his conviction of this offence on the basis that that finding was erroneous.

On appeal, the Crown propounded an even broader submission, which was that it was sufficient that a person knows that what he or she was doing was unlawful. In contrast, the appellant submitted that, given that the precursor (MDP2P) was itself a prohibited drug, there were only two possible ways for the Crown to prove the mental element: (1) by proving that the person knew he or she was manufacturing a prohibited drug (without knowing precisely which one); or (2) by proving that the person knew he or she was manufacturing MDP2P specifically (where a belief that it was only a precursor and not a prohibited drug would not stand in the way of satisfaction of this element of the offence). Leeming JA (Harrison J agreeing, Schmidt J dissenting) accepted the appellant's submission and held that the judge applied an erroneous test. A consideration of relevant statute and case law shows that the mental element of the offence created by s 24(2) requires knowledge or belief concerning a prohibited drug; knowledge or belief concerning a precursor is insufficient.

Supply prohibited drug – LSD – including cardboard and liquid in which drug impregnated and dissolved in weight of the drug

The appellant in ***Finch v R*** **[2016] NSWCCA 133** was convicted by a jury of two drug offences including the supply of a large commercial quantity of LSD contrary to s 25(2) of the *Drug Misuse and Trafficking Act 1985* ("the Act"). The LSD was found in two forms: in vials of liquid containing the drug as well as in cardboard tabs impregnated with it. The appellant appealed his conviction for the LSD offence, inter alia, on the ground that the judge erred by directing the jury that both the cardboard tabs and the liquid containing LSD were included in the overall weight of the LSD. He submitted that because the liquid is intended to be evaporated before the use of the LSD and because the cardboard is not intended to be swallowed, neither the cardboard nor the liquid should be considered as falling within s 4 of the Act. That provision states that "a reference in the Act to a prohibited drug includes a reference to any preparation, admixture, extract or other substance containing any proportion of the prohibited drug." Payne JA refused leave to appeal on this ground under r 4 of the Criminal Appeal Rules, as trial counsel for the appellant did not apply for any re-direction. With respect to the liquid, the appellant submitted that the liquid was not a "substance" containing LSD because a user would intend that the liquid would be dried or evaporated from the cardboard as part of the

process of impregnating the cardboard with LSD. Even if this procedure was correct, the text of s 4 makes clear that the liquid LSD is to be regarded as a “preparation”, an “admixture” or “other substance” and thus a prohibited drug. With respect to the tabs, in circumstances where the only relevant evidence at trial was to the effect that cardboard LSD is swallowed – and that evidence was admitted without objection – cardboard impregnated with LSD is clearly a “preparation” or an “other substance” within the meaning of s 4.

It should be noted that on appeal, submissions focused on the legal effect of s 4 if the evidence was different to the evidence in this case, namely that LSD is ingested by placing a tab under the tongue and then spitting the cardboard out. In those circumstances, it was submitted that the cardboard was analogous to a syringe or other delivery mechanism. Payne JA preferred not to express a view in the present case because it was not squarely raised on the evidence.

Conspiracy to defraud – elements of the offence

The applicant in ***Jeyavel Thangavelautham v R*** **[2106] NSWCCA 141** was convicted of several offences relating to his position as the ringleader in a conspiracy to use equipment including card skimming devices to obtain banking and other personal information. He appealed against his conviction for the common law offence of conspiracy to defraud on the basis that the verdict was unreasonable because the evidence left open the possibility that the object of the conspiracy was to on-sell the customers’ data once it had been harvested, rather than to use the data personally. Bathurst CJ dismissed the conviction appeal (although the applicant succeeded in appealing against his sentence). For the offence of conspiracy to defraud to be made out, it is necessary for the conspirators to have an intention to defraud; it is not enough that they have an expectation that the offence of fraud will be committed. Conspiracy to defraud involves an agreement to bring about a situation prejudicing or imperilling existing legal rights or interests of others. It is sufficient that the conspirators intend to take some advantage to themselves by putting another’s property at risk or depriving a person of a lawful opportunity to obtain or protect property. The taking of credit card information put at risk the underlying accounts to which the cards related by providing the means for unauthorised access to those accounts. Where this risk was produced either by selling the data or using it personally, and by means that were admittedly deceptive and dishonest, the offence of conspiracy to defraud was made out.

Kidnapping - recklessness as to the lack of consent

An essential element of kidnapping (s 86 *Crimes Act*) is that the accused must know that the victim is not consenting. In ***Castle v R*** **[2016] NSWCCA 148** the trial judge directed the jury that this could be established if the accused (1) failed to consider whether or not there was consent and went ahead, even if the risk of non-consent would have been obvious if he had turned his mind to it, or (2) realised that there was a risk of non-consent but went ahead regardless. It was contended on appeal that the first way in which recklessness could be established was erroneous. Bathurst CJ, Hall J agreeing, held that recklessness for an offence against s 86 could be made out (a) by a knowing disregard of an appreciated risk that the victim was not consenting, or (b) by the accused intending to detain the victim "willy-nilly", not caring whether there was consent or no (*Banditt v The*

Queen [2005] HCA 80; 224 CLR 262). Further, it was held (R A Hulme J dissenting) that recklessness for this offence was not satisfied where the accused simply failed to consider the issue in circumstances where lack of consent would have been obvious to a person with the accused's mental capacity if he or she had considered it. As a result, the concept of recklessness for kidnapping is now more confined than for sexual assault offences.

PRACTICE AND PROCEDURE

Failure to follow the procedure for hearing and determining a summary offence in the Local Court

After the defendant in ***DPP v Ridley*** **[2015] NSWSC 1478** returned a positive roadside blood alcohol reading, police observed him to be intoxicated. At the police station, he failed to provide a breath or blood sample. During those events, he revealed to police that he suffered from Asperger's. He was ultimately charged with driving a vehicle under the influence of alcohol. In the Local Court, the defence raised a number of objections to evidence in the police brief on the basis that it did not comply with the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) or the *Road Transport Act 2013*, under which the defendant was charged. The Magistrate conducted a *voir dire* to determine its admissibility. Following the decision to exclude *all* evidence, his Honour finalised the matter by dismissing the charge. The manner in which each of those decisions was reached was the subject of a number of grounds of appeal by the DPP. It was common ground that the appeal ought be allowed and the matter remitted to be dealt with according to law. Adamson J observed that in conducting the *voir dire* and in hearing and determining the matter, the Magistrate was required to undertake a number of steps in each regard (see [41] and [59] respectively). In both instances, his Honour failed to undertake any of the steps – including hearing submissions from the parties – prior to reaching a decision. The two processes were erroneously rolled up and dealt with as one. His Honour's reasons in relation to both rulings were insufficient and incomprehensible.

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.

Erroneous exclusion of evidence complying with the Criminal Procedure Act 1986 but not with court directions

A complete police brief was not served within the timeframe prescribed by a Magistrate's directions. As a result, her Honour considered herself bound by certain provisions of the *Criminal Procedure Act 1986* ("the Act") to exclude crucial parts of the brief and ultimately dismiss the charges. In ***DPP v Lazzam*** **[2016] NSWSC 145** Adamson J allowed an appeal against those rulings and orders. While service of the police brief did not comply with the Magistrate's directions, it did meet the requirements of s 183 of the Act. The prosecutor did not fail to comply with any other provision of Div 2 of Pt 4 of Ch 4 of the Act or any rules made under that Division, meaning that s 188 of the Act – which provides for the mandatory or discretionary exclusion of evidence in such circumstances – was not enlivened. In considering herself bound by s 188 to reject evidence when that provision did not in fact apply, the Magistrate erred. The error was caused by her Honour elevating her direction into a statutory requirement. In resolving the appeal, Adamson J offered a helpful outline of the proper operation of s 188 at [29]-[38].

Majority verdict erroneously accepted where there was noncompliance with statutory requirements

The appellant in ***T******* v R*** **[2016] NSWCCA 48** (presently restricted) pleaded not guilty to murder but guilty to manslaughter. His plea was not accepted by the Crown and following a trial the jury returned a majority verdict of ten to one of guilty to murder. The appellant appealed against his conviction challenging that verdict and the circumstances in which it was reached, specifically the manner in which the judge examined the foreperson about the likelihood of a unanimous verdict before directing the jury that he would accept a majority verdict. The Court (Hoeben CJ at CL, Harrison and Davies JJ) allowed the appeal, quashed the conviction and ordered a new trial. The trial judge at no stage indicated – as required by s 55F(2)(b) of the *Jury Act 1977* (NSW) – that he was satisfied it was unlikely that the jurors would reach a unanimous verdict. In fact, the evidence arising from the

examination of the foreperson could not have supported such a conclusion. The requirement for evidence to be taken from a juror(s) is not a mere procedural step and while other considerations may also be taken into account, it is the evidence of the juror(s) that must found the relevant level of satisfaction. Furthermore, the judge effectively delegated to the jury the requirement of being so satisfied, conferring on them a decision making process which should be carried out by the judge.

No abuse of process in filing second ex officio indictment after proceedings discontinued on the first

Proceedings against the appellant in ***D***** v R* **[2016] NSWCCA 60** (presently restricted) were disjointed largely due to an ongoing police investigation including the inconsistent cooperation of a key witness. He was charged with drug supply and knowingly dealing with proceeds of crime. The charges were dismissed by a magistrate following committal proceedings. The DPP then filed an ex officio indictment. The appellant submitted a number of "no bill" applications but the DPP advised him the matter would proceed to trial. Over a month later, the DPP directed that no further action was to be taken in relation to the indictment and a court order was made to that effect. The DPP later filed a second ex officio indictment and the appellant made an application for a permanent stay of proceedings. The judge refused the application, finding the proceedings were not an abuse of process.

The appellant sought leave to appeal against that decision pursuant to s 5F(3) of the *Criminal Appeal Act 1912*. One of the grounds of appeal was that the judge did not refer to the issues of whether the filing of the second ex officio indictment was a form of double jeopardy or analogous to issue estoppel. Payne JA rejected the ground and dismissed the appeal. The primary judge correctly found that in all the circumstances the termination of the first ex officio indictment did not mean that the filing of the second one gave rise to double jeopardy. The order of the court bringing to an end the proceedings on the first ex officio indictment did not imply a failure on the part of the prosecution to make out the charge or some ingredient therein. Nor did his discharge at committal afford him protection from subsequent prosecution on an ex officio indictment based on the same facts. Furthermore, there are manifest difficulties in the way of accepting the appellant's submission that the judge did not consider an "analogy" between this matter and issue estoppel. For one, the principle of issue estoppel does not apply in the criminal law.

Guilty verdict reached through pressure of time restraints rather than proper deliberation

The appellant in ***Villis v R*** **[2014] NSWCCA 74** [a judgment only made public in June 2016] was convicted of a drug supply offence. The jury retired to consider their verdict after lunch on the eighth day of an estimated five or six day trial. A juror was excused that day. They returned the following day – a Friday – and were told they would not be required to sit beyond 1pm as some of them had commitments. Others were unavailable the following Monday. At 12.30pm after 4 hours and 40 minutes of deliberation they were given a *Black* direction and continued to deliberate. They agreed to sit until 2pm. Shortly before then, the foreman was examined by his Honour. He indicated that the jurors who could not agree were quite fixed in their position but, at the judge's request, he undertook to enquire whether further assistance was required. His Honour said something (it was not clearly expressed) to the effect that if the other jurors indicated no further assistance was

required he would "discharge" or "release" them. He meant until the following Tuesday but this was far from clear. Without further response, a guilty verdict was returned moments later.

The appellant appealed against the verdict on the ground that it was reached through pressure of time restraints rather than proper deliberation. Fullerton J allowed the appeal, quashed the conviction and ordered a retrial. In this case there was the pressure of time with the jury in deliberation on a Friday afternoon on the ninth day of the trial when at least some of the jurors had competing commitments that afternoon and the following Monday. These matters alone had the potential to deflect the jury from their task. Further, the judge assumed the foreman both understood the role he was being asked to perform as a conduit for his Honour's further directions and that he was an able and reliable communicator of them. However, no further communication was conveyed from the foreman to the judge prior to the verdict being returned despite him being so directed. This case exemplifies the inherent danger of a trial judge examining the foreperson in the absence of the jury.

Trial on indictment for Commonwealth offences must be by jury

Federal jurisdiction to try a person for a Commonwealth crime is conferred on the Supreme and District Courts under s 68 of the *Judiciary Act 1903* (Cth). Section 68 is expressly stated to be subject to s 80 of the Constitution, which provides that the trial on indictment for any Commonwealth offence "shall be by jury". The applicant in ***Alqudsi v The Queen*** **[2016] HCA 24** was indicted on seven counts of a Commonwealth offence. He filed a notice of motion in the Supreme Court seeking a trial by judge alone order pursuant to s 132 of the *Criminal Procedure Act 1986* (NSW). The notice of motion was removed into the High Court to consider whether s 132(1)-(6) is incapable of being applied to the applicant's trial by s 68 of the *Judiciary Act* because their application would be inconsistent with s 80 of the Constitution. That question could only be answered favourably to the applicant by overruling *Brown v The Queen* (1986) 160 CLR 171. The Court held that s 132 was incapable of application to the applicant's trial. Kiefel, Bell and Keane JJ held that nothing in the decisions of the High Court since *Brown* supports the proposition that the plain words of s 80 may be read as subject to exception when a court assesses it to be in the interests of justice that the trial on indictment of a Commonwealth offence be by judge alone. The commands of s 80 are neither ambiguous nor qualified; they allow no mode of trial other than by jury. This is a sufficient reason for rejecting the invitation to re-open and to overrule *Brown*. Further, the contention that the *Brown* construction neglects consideration of constitutional context and purpose should be rejected.

No error in failing to leave alternative verdicts to the jury contrary to submissions of both parties

The appellant in ***Finch v R*** **[2016] NSWCCA 133** was convicted by a jury of two drug offences including the supply of a large commercial quantity of LSD contrary to s 25(2) of the *Drug Misuse and Trafficking Act 1985* ("the Act"). The appellant appealed against his conviction for that offence on the basis that the judge erred by not leaving alternative verdicts to the jury. The judge declined to do so because neither party raised that possibility in final address, and his Honour was of the opinion that to leave alternatives would be contrary to the interests of the accused. Payne JA dismissed the ground of

appeal holding that the judge's decision was in accordance with the test stated in *James v The Queen* [2014] HCA 6; 253 CLR 475. There was no evidentiary basis for the jury to find that the appellant possessed a commercial quantity rather than a large commercial quantity of LSD and therefore there was no error in refusing to leave that alternative to the jury. With respect to the alternative charge of supply simpliciter, the judge was correct not to leave the alternative charge to the jury – contrary to submissions of defence counsel and of the Crown – for the reasons identified by his Honour. Leaving that alternative could distract the jury from their task of deciding the real issue in the case of whether the appellant's *Carey* defence was made out, that is, whether they were satisfied that his possession of the drugs was merely momentary and that he intended to return them to their owner.

SENTENCING – GENERAL ISSUES

Aggregate sentencing - consideration of indicative sentences helps identify causes of manifestly inadequate aggregate

The respondent in ***R v Crowe*** **[2016] NSWCCA 39** pleaded guilty to offences committed against five young victims between 1989 and 1991. In relation to each victim there was a kidnapping offence and at least one sex offence. Further offences were taken into account on four Form 1 documents. He was sentenced to imprisonment for 12 years (7 years 6 months NPP). Hoeben CJ at CL allowed a Crown appeal finding the aggregate sentence to be manifestly inadequate. The respondent was resentenced to 15 years (10 years NPP). A consideration of the indicative sentences reveals the trial judge's reasoning to an extent. His Honour failed to give adequate weight to Form 1 documents and to have regard to the aggravating feature of the respondent being on bail at the time of some of the offences. His Honour focused on the offending in a general way, failing to fully appreciate the individual aspects of the offending against each victim. The aggregate sentence failed to reflect the objective criminality of the offences and the proper application of the totality principle. It was necessary for the notional level of accumulation to give proper regard to the fact that there were five young victims. There was also a requirement for some accumulation between the kidnapping counts and the sexual assault counts in relation to each victim as the criminality of one offence was not wholly subsumed by the other.

Aggregate sentencing - related summary offences may be included

The respondent in ***R v Price*** **[2016] NSWCCA 50** pleaded guilty to a number of offences. Three of them were committed to the District Court for sentence and three further offences were placed before the judge on a s 166 certificate. The judge imposed a single aggregate sentence for all six of those offences. On appeal the Crown challenged that approach as prohibited by s 168(3) of the *Criminal Procedure Act 1986*. In so doing, it was acknowledged that the question was an open one that had not previously been decided by the Court. Button J rejected the construction of s 168 advanced by the Crown and held that it does not prohibit the incorporation of Local Court offences within aggregate sentences imposed in the District or Supreme Court. First, reading the provision in light of others, specifically ss 53A and 49 of the *Crimes (Sentencing Procedure) Act 1999*, shows that there is nothing to suggest explicitly or implicitly that a s 166 offence cannot be picked up by an aggregate sentence. Second, the purpose of aggregate sentencing provisions is

facilitative, aimed at freeing the sentencing process of unnecessary technicality and fragmentation. Third, it would be a strange result if the Local Court could impose aggregate sentences for Local Court offences placed before it, but the District and Supreme Courts were prohibited from doing so with regard to the very same offences.

Discount for guilty plea - early plea to historical offences to attract full benefit of utilitarian value

The applicant in ***Henderson v R*** **[2016] NSWCCA 8** pleaded guilty to nine counts of indecent assault committed against four complainants between 1961 and 1979. The judge accepted that sentencing was to be in accordance with sentencing practices extant at the time of the offences. Her Honour noted that applying a discount of 25% was not the usual practice for an early plea at the relevant time. The applicant appealed against the judge's dealing with the plea, submitting that he was entitled to the benefit of a full discount. Hoeben CJ at CL (Bathurst CJ agreeing, RS Hulme AJ agreeing but dissenting as to re-sentence) upheld the ground, finding that there is a strong inference the judge erroneously failed to apply the discount. If a 25% discount was applied to the indicative sentences in this case, it is readily apparent that for some offences the starting point for the head sentence exceeded the maximum penalty or was otherwise very close to it.

Discount for guilty plea - to be applied to specific sentences and not to be averaged or combined

The applicant in ***Bao v R*** **[2016] NSWCCA 16** pleaded guilty to two sets of drug offences occurring 12 months apart. The plea to one set of offences was made in the Local Court while the plea for the other set was made just before trial. The sentencing judge acknowledged this before applying "a combined discount of 17.5%." The applicant appealed against that approach and the Crown conceded error. Hoeben CJ at CL held that the correct procedure was for the judge to independently apply the appropriate discount to each of the indicative sentences. In this case the error was of significance and likely affected the aggregate sentence to the detriment of the applicant making it necessary for the Court to exercise the sentencing discretion afresh.

Guilty plea entered shortly before trial date should receive full discount in the circumstances

The applicant in ***Haines v R*** **[2016] NSWCCA 90** was unfit to be tried but was found to have committed murder in a special hearing in 2004. A limiting term of 17 years was nominated. The Mental Health Review Tribunal formed the opinion that she was fit to be tried in 2013. An expert report expressed the opinion that a defence of mental illness was available. The applicant was found fit to be tried; she was arraigned and entered a plea of not guilty on the basis of a defence of mental illness. That defence was to be the sole issue at the judge alone trial. Shortly before the date fixed for trial, the expert provided a further report expressing the opinion that the defence was likely not available. The applicant was re-arraigned and pleaded guilty. She was sentenced to 17 years with a non-parole period of 12 years 9 months. She appealed against that sentence on the basis that the judge erred in assessing the discount arising from the guilty plea at 15%. The Court (Ward JA, Price and Adamson JJ) allowed the appeal and re-sentenced the applicant applying a 25% discount. The principles pertaining to the assessment of the utilitarian value of the plea have to be

applied by reference to the particular circumstances of a case. In this case it is not apparent how the reasons for delay in the guilty plea were taken into account, if at all, in his Honour's assessment of the discount. In all of the circumstances, including the applicant's long history of mental illness (during which time she could not have pleaded guilty) and the reliance she reasonably placed on the assessment of the expert, it must be concluded that his Honour erred in finding that she did not plead guilty at the first reasonable opportunity.

Guilty plea - 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].

In ***R v Harrington*** **[2016] ACTCA 10** the ACT Court of Appeal (Refshauge ACJ and Gilmour J; Murrell CJ dissenting) held that the conclusion reached in *DPP (Cth) v Gow* to the effect that *Cameron v The Queen* had nothing to say about the operation of Commonwealth law with respect to sentencing, was plainly wrong. The principle in *Cameron v The Queen* that a court should not allow a discount for the utilitarian value of a guilty plea when sentencing for a Commonwealth matter continues to apply. The value of a guilty plea is not limited to where there is a "willingness to facilitate the course of justice" and can be relevant to other subjective considerations such as remorse.

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; 325 ALR 400** 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.

Statistics – use of in Commonwealth cases

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; 325 ALR 400** 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.

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.

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.

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.

Criminal history erroneously considered in the assessment of objective seriousness

The applicant in ***McCabe v R*** **[2106] NSWCCA 7** pleaded guilty to an offence of break, enter and steal contrary to s 112(1)(a) of the *Crimes Act 1900*. He was sentenced to 4 years 6 months (2 years 6 months NPP). He appealed against that sentence on the basis that the judge erred in assessing the objective seriousness. Bellew J held that on a fair reading of the revised sentencing remarks, giving effect to the plain language used, his Honour clearly assessed the objective seriousness by taking into account the applicant's past criminal history and thereby fell into error. That conclusion is fortified by the unremarkable circumstances of the offending, which did not support the finding that the offence fell only "slightly" below the mid-range. Further support is found in the manner in which the case was conducted by the parties, both of whom submitted the offending was below the mid-range.

Procedurally unfair for sentencing judge to reject unchallenged evidence where that course is not indicated to the witness

The applicant in ***Heath v R*** **[2016] NSWCCA 24** pleaded guilty to two market misconduct offences, namely market manipulation and a matched trade offence contrary to ss 1041A(c) and 1041B(1)(b) respectively of the *Corporations Act 2001* (Cth). The fault element in each offence is recklessness. An affidavit sworn by the applicant to the effect that he was unaware that his conduct was criminal stood as unchallenged evidence before

the sentencing judge, who ultimately rejected it. The applicant appealed against that decision, submitting that he was denied procedural fairness by not being afforded the opportunity to address the proposed rejection. McCallum J held that while a sentencing court is not obliged to accept unchallenged evidence, in the circumstances of this case it was not open to the judge to reject the evidence without first raising the matter. The finding informed, and was informed by, his Honour's assessment of the objective seriousness; the rejection was informed by a misapprehension of the true nature of the offending.

No De Simoni error in setting out surrounding circumstances of sexual assault offence

The applicant in ***Wakeling v R*** **[2016] NSWCCA 33** was convicted of having sexual intercourse with a person above the age of 14 years and under the age of 16 in circumstances of aggravation, namely in company, contrary to s 66C(4) of the *Crimes Act 1900*. On appeal he alleged that the judge erred in his assessment of the objective seriousness of the offence. Supporting this challenge were submissions that the judge effectively sentenced him for the more serious offence against s 61J by taking into account a lack of consent (not an element of the s 66C offence) and for uncharged offences against s 61M. Davies J dismissed the appeal finding there was no violation of the principle in *The Queen v De Simoni* (1981) 147 CLR 383. His Honour was entitled and required to have regard to the details surrounding the offending, including the uncharged assaults, so that a proper assessment of the objective seriousness could be made. Whether the complainant was a willing participant, notwithstanding her age, was relevant. A fair reading of the sentencing remarks as a whole leaves no doubt the judge was aware the offence for which the applicant was to be sentenced was one against s 66C.

Whether delay in prosecution serves to mitigate sentence depends on the particular circumstances of the case

The applicant in ***Coles v R*** **[2016] NSWCCA 32** pleaded guilty to 15 counts laid variously under ss 117, 125, 178A and 178B of the *Crimes Act 1900* and a further 18 offences on two Forms 1 for his fraudulent dealings with artworks valuing millions of dollars. The sole ground of appeal alleged that the sentencing judge erred by failing to take into account by way of mitigation a three year delay between the execution of search warrants at his home and business and the laying of charges. Fullerton J dismissed the appeal. Her Honour noted that inordinate and unexpected delay in police investigations against an offender may result in mitigation of sentence and that each case depends upon its own particular circumstances. A preliminary question is whether the passage of time was a delay of the kind which might attract the considerations of fairness referred to in *Todd v R* [1982] 2 NSWLR 517. There was nothing in the evidence in this case to suggest that the delay was of that order. No evidence was called from the applicant or led on his behalf to the effect that he suffered any detriment. Further, the cause of the delay in this case was the complexity of the investigation, including the sheer number of paintings seized and the need to have them authenticated and have their ownership traced. Finally, it is noteworthy that the applicant's legal representative at sentence conceded that delay was not in issue.

Failure to take into account circumstances of social deprivation in upbringing

The applicant in ***Ingrey v R*** **[2016] NSWCCA 31** was convicted after trial of attempted armed robbery. He was sentenced to 10 years imprisonment (6 years NPP). He appealed against that sentence on the ground that the judge erred by not taking into account the social disadvantage he experienced in his home community of La Perouse. Hoeben CJ at CL allowed the appeal and re-sentenced the applicant to a term of imprisonment of 9 years (5 years NPP). The particular circumstances of disadvantage experienced by the applicant did not arise from within his family home but through his association with peers and extended family engaged in criminal activities. It is clear from his Honour's remarks that the sentencing judge fully reviewed the applicant's subjective case but nonetheless disregarded the social disadvantage aspect when exercising the sentencing discretion. The judge made no reference to the cases of *Bugmy v The Queen* (2013) 249 CLR 571 and *R v Fernando* (1992) 76 A Crim R 58 despite repeated reference to them in submissions by defence counsel. In so doing, the judge fell into error of the kind identified in *House v The King* (1936) 55 CLR 499.

Alcohol use from an early age does not provide a principled basis for leniency absent circumstances of deprivation

The applicant in ***Daniels v R*** **[2016] NSWCCA 35** pleaded guilty to recklessly causing grievous bodily harm contrary to s 35(2) of the *Crimes Act 1900*. He had been drinking at a hotel for some hours before being ejected. While leaving, in an unplanned and unprovoked attack, he delivered a single punch to a stranger that broke his jaw. The applicant appealed against his sentence alleging that the judge failed to have regard to his background including his exposure to alcohol from an early age. He submitted that his commencement of drinking at age 14 in his uncle's company adversely impacted him in his formative years, attracting application of the principles in *Bugmy v R* (2013) 249 CLR 571. Fullerton J rejected the ground of appeal. Apart from his unchecked abuse of alcohol through his adolescence and beyond, there was no evidence of any deprivation in his home or social circumstances serving to reduce moral culpability. In fact, his family life was stable and supportive. The applicant's teenage drinking was not exceptional in duration or degree and there is no principled basis upon which he could seek leniency because of it. The sentencing judge's appropriate consideration of the applicant's subjective case as a whole is evident from his Honour's reasons.

Interests of justice required sentence to be backdated because of presentence custody

The applicant in ***Hamilton v R*** **[2016] NSWCCA 59** was convicted of aggravated break, enter and commit serious indictable offence contrary to s 112(2) of the *Crimes Act 1900*. He was granted bail following his arrest for that offence. On 29 September 2014, he was arrested and bail refused on an unrelated robbery offence. On 21 October he pleaded guilty to the s 112 offence; he was committed for sentence and bail was refused for that offence. The sentencing judge ordered the sentence to commence from the date it was imposed in February 2015 in accordance with the parties' agreement. On appeal, the applicant submitted that was erroneous and that the sentence ought to have commenced on 21 October 2014. It was observed that the robbery offence was no billed in August 2015. The Crown conceded that the applicant ought to be resentenced and Schmidt J allowed the appeal. The usual and preferable course is that presentence custody is taken

into account in a sentencing exercise such as this. However, there is no mandatory requirement that sentences be backdated in every case where presentence custody is served, although reasons for not doing so should be clearly stated. The reasons in this case (the parties' agreement) were so stated. While parties are ordinarily bound by the way the case is presented at first instance, the rule is not absolute. Here, in the interests of justice, in circumstances where it could not be foreseen that the robbery offence would later be no billed, the applicant ought to be resentenced so that the sentence commences from 21 October.

Erroneous to compare an offence with a different one carrying a higher penalty in assessing objective seriousness

The appellant in ***Nguyen v The Queen*** **[2016] HCA 17; 90 ALJR 595** was convicted of wounding with intent to cause grievous bodily harm and manslaughter. He provoked a gun fight with police officers he believed to be "fake police" intending to rob him. An officer fatally shot another while shooting at the appellant. The appellant's liability for manslaughter was on the basis of excessive self-defence, where his firing of the pistol caused the death of the deceased because it substantially contributed to the exchange in which the fatal shot was fired and that consequence was reasonably foreseeable. The CCA allowed a Crown appeal on the ground that the judge erred by taking into account in the appellant's favour in the assessment of objective seriousness that he did not know the deceased was a police officer. Had that fact not been established, there would have been no basis for the appellant's invocation of the partial defence of excessive self-defence and he would have been guilty of murder. The CCA referred to the principle in *De Simoni* in reaching that conclusion.

With special leave, the appellant appealed to the High Court against that decision. The Court (Bell and Keane JJ, Gageler, Nettle and Gordon JJ) dismissed the appeal. Gageler, Nettle and Gordon JJ held that it is irrelevant in assessing the objective gravity of an offence of manslaughter to contrast it with what would be an offence of murder because it is likely to result in an assessment which ill-accords with its gravity relative to other instances of offences of that kind. The CCA was not correct, however, in characterising that error as one in contravention of the *De Simoni* principle. That principle has nothing to say about the impropriety of a judge taking into account the absence of a circumstance which, if present, would render the subject offence a different one. That approach is erroneous simply because it is irrelevant to, and likely to distort, the assessment of objective gravity.

References to unproven matters on custodial disciplinary record did not affect sentencing discretion

The applicant in ***Williams v R*** **[2016] NSWCCA 68** was convicted of larceny and two counts of supplying a commercial quantity of methylamphetamine. An aggregate sentence of 8 years and 6 months with a non-parole period of 5 years was imposed. On appeal he alleged that the sentencing judge erred by placing significant weight on unproven offences alleged to have been committed by the applicant whilst in custody. He relied on the following remarks of the sentencing judge after his Honour cited the allegations: "This impacts upon the assessment of his prospects for rehabilitation. I would note though that I know little more of those matters than appears in the custodial record and the weight that they deserve is limited." Harrison J dismissed the appeal, holding that while it was

reasonable for the applicant to raise a concern that he may have been sentenced upon the basis of matters that had not been proven, the Court would be slow to conclude that a judge with the considerable experience of his Honour would have given them any weight at all. It seems his Honour was at pains to record the Crown submission regarding the disciplinary record whilst simultaneously discounting its significance. It is not possible to assess how, if at all, it affected the sentencing discretion. Those matters appear in any event to be *de minimus*, so that if error were demonstrated, no lesser sentence would be warranted.

Proper approach to "Ellis discount" for voluntary disclosure of guilt

The appellant in ***Panetta v R*** **[2016] NSWCCA 85** pleaded guilty to murder. The victim's death and the appellant's involvement in it only came to light when he voluntarily attended a police station and disclosed the crime approximately two years after it occurred. He was sentenced to 17 years imprisonment with a non-parole period of 12 years. While that sentence expressly included an "*Ellis* discount" for assistance to authorities, the appellant challenged the sentence on the ground that the reduction was not quantified. Adams J (Ward JA and Bellew J agreeing with his Honour's reasons but not as to the appropriate sentence) allowed the appeal. Relevant to the appeal was s 23(4) of the *Crimes (Sentencing Procedure) Act 1999* ("the Act") which imposes on the Court a requirement to make explicit the nature and extent of any reduction in sentence from that which otherwise would have been imposed absent the provision of assistance to authorities.

Section 23(4) was generally understood to apply to the situation where a discount was given to one offender for future assistance in respect of offences committed by another, to facilitate a reconsideration of the reduced sentence should the Crown appeal in the event the respondent failed to fulfil the undertaking. It was not understood to apply to the *Ellis* discount. Accordingly, in this case, the judge followed what was the preponderant view. However, this matter requires reconsideration in light of the decision in *CMB v Attorney General for New South Wales* [2015] HCA 9; 89 ALJR 407, where members of the High Court indicated that the *Ellis* discount fell within s 23(1) of the Act. Once it is accepted that the *Ellis* discount falls within s 23(1), it necessarily falls within the other sub-sections, including s 23(4). The ground of appeal must be upheld. A failure to comply with s 23(4) is an error of law requiring the Court to consider the issue of resentencing. On resentence each member of the bench quantified the *Ellis* discount.

A differently constituted bench reached a contrary conclusion to that of *Panetta v R* in the matter of ***AG v R*** **[2016] NSWCCA 102**. Judgment in the latter was delivered soon after the former but made no reference to it. The applicant in *AG v R* committed sexual offences against his daughter. The offending came to light when the victim made complaints to her mother, who then confronted the applicant and urged him to report himself to authorities. He voluntarily attended a police station and disclosed the offending as a result. His disclosures founded more serious charges than the conduct described by the complainant. His appeal against sentence included a ground that the judge erred by failing to have proper regard to the voluntary disclosure. Davies J, citing CCA and High Court authority to this effect, held that a quantified discount is not to be given for an *Ellis* discount and dismissed the appeal. In this case, the remarks on sentence reveal that the sentencing judge clearly took into account the applicant's voluntary disclosures. In circumstances

where a quantified discount is not to be given, the ground of appeal necessarily becomes one suggesting that insufficient weight was given to the disclosures. However the extent of weight to be given to matters is a matter for the sentencing judge; no error of the *House v The King* type was established.

A non-parole period comprising 20% of the overall sentence will generally be manifestly inadequate

The respondent in ***R v Tuhakaraina*** **[2016] NSWCCA 81** was convicted of a single count of aggravated dangerous driving causing grievous bodily harm, the circumstance of aggravation being that the prescribed concentration of alcohol was in his breath or blood (0.187). He was sentenced to 2 years and 6 months imprisonment with a non-parole period of 6 months. The Crown appealed against the asserted manifest inadequacy of the non-parole period. Supporting that ground was a submission that the judge reduced the non-parole period to an impermissible extent because of the ill-health of the respondent's wife. Wilson J (R A Hulme J agreeing; Garling J agreeing in the result but for different reasons) found the judge's approach to be erroneous but dismissed the appeal in an exercise of the residual discretion. While there is no general rule or formula for the determination of a proper ratio of sentence following a finding of special circumstances, that being a discretionary matter, it should be very rare for a non-parole period to comprise only 20% of an overall sentence. That is because, absent some highly exceptional feature, it is difficult to see how such a non-parole period could perform the manifold functions of sentence specified by s 3A of the *Crimes (Sentencing Procedure) Act 1999*. While the ill-health of the respondent's wife was relevant to his subjective case (through its adverse impact on his psychological health), it was not something that could justify a departure of this magnitude from the statutory ratio.

A finding of midrange seriousness does not trigger the automatic imposition of the standard non-parole period

The applicant in ***Purtill v R*** **[2016] NSWCCA 80** was convicted of murder following a drug deal gone awry. He was sentenced to imprisonment for 28 years with a non-parole period of 21 years. In addition to the maximum penalty of life there was a standard non-parole period of 20 years. The applicant appealed against his sentence on the ground that it was excessive in light of the sentencing judge's finding of midrange seriousness, particularly when having regard to the prescribed standard non-parole period. Hoeben CJ at CL refused leave to appeal, holding that the approach contended for by the applicant would inevitably involve a two-stage process of sentencing that would be contrary to the approach in *Markarian v The Queen* [2005] HCA 25; 288 CLR 357 and *Muldrock v The Queen* [2011] HCA 39; 244 CLR 120. His Honour took into account the standard non-parole period as a legislative guidepost and did not give it determinative significance. The standard non-parole period does not represent the upper limit for a non-parole period for offences that are found to be in the middle range of seriousness. The middle range is, as the term implies, a range. A finding of midrange seriousness does not attract the automatic imposition of the standard non-parole period.

Parity principles have little or no application where co-offender sentenced in Drug Court

The applicant in ***Tobia v R*** **[2016] NSWCCA 99** pleaded guilty to aggravated (in company) break, enter and steal contrary to s 112(2) of the *Crimes Act 1900* and was sentenced to 3 years imprisonment with a non-parole period of 1 year and 3 months. The applicant was referred to the Drug Court on two occasions but was not selected in the ballot. The co-offender was sentenced for this and other offences to an aggregate sentence, which was suspended upon him entering the Drug Court program; the indicative sentence for the subject offence was 2 years and 3 months. The applicant appealed against his sentence, including on the ground that there was disparity between the sentences imposed upon him and his co-offender. Wilson J rejected the ground and dismissed the appeal. It must be accepted that sentences imposed by the Drug Court may incorporate what may be perceived to be a significant measure of leniency. That is a consequence of the importance of achieving an offender's rehabilitation. Due to the specific statutory objectives under which sentences are determined by the Drug Court, it is generally unproductive to attempt to make a direct comparison between a sentence imposed in that jurisdiction and a sentence imposed in another court. The parity principle in those circumstances could have little or no application. The comparison for the purposes of determining a parity ground is to be made with the initial indicated sentence. The applicant's sentence being nine months longer than that of the co-offender is explained by his greater criminal history and the fact that he was subject to a bond at the time of the offence.

Not erroneous for sentencing judge to fail to do that which he or she was not asked

The applicant in ***Hona v R*** **[2016] NSWCCA 119** was serving a control order in a juvenile detention facility when he was charged with recklessly causing grievous bodily harm, an offence having been committed prior to his incarceration. He was refused bail on that charge and was transferred from the juvenile facility to an adult remand facility where he served the balance of the control order while also on remand. He was later convicted of the offence and sentenced to imprisonment for 6 years and 9 months with a non-parole period of 4 years and 9 months. He appealed against sentence on the ground that the judge erred by failing to take into account four months spent in adult custody solely referable to this offence prior to the commencement date of the sentence. The applicant asserted that the transfer to adult prison constituted "additional punishment" that should have been taken into account and reflected by some diminution of sentence or concurrency with the control order. Wilson J dismissed the appeal. The sentencing judge was never asked to allow the applicant some specific benefit on sentence to reflect the changed conditions of custody, nor was any evidence concerning such differences advanced. A sentencing judge could rarely be found to be in error for not doing that which he or she was not asked to do. An appeal is not an opportunity for a second chance at presenting a case to a sentencing court. Furthermore, to impose the degree of concurrency now sought would result in a sentence contrary to the interests of justice.

Document authored by child-victim attempting to minimise the seriousness of the offending is not a "victim impact statement"

The applicant in ***AC v R*** **[2016] NSWCCA 107** pleaded guilty to persistent sexual abuse of a child contrary to s 66EA of the *Crimes Act 1900*. The acts constituting the offence occurred in the weeks following a ceremony that the applicant understood to result in his marriage

under Sharia Law to the 12 year old victim. The Crown tendered a document on sentence titled "victim impact statement" in which the victim expressed distress over the applicant's arrest and incarceration while maintaining that his crime "didn't hurt anybody in any way". The applicant appealed against his sentence, inter alia, on the ground that the sentencing judge failed to give weight to that document. Schmidt J dismissed the appeal holding that the document was not one that the judge was entitled to take into account under s 28 of the *Crimes (Sentencing Procedure) Act 1999* ("the Act"). By its terms it is apparent that it is not a victim impact statement as defined by the Act because it does not contain particulars of harm suffered by the victim. The applicant's further contention that the judge was obliged under s 21A(3)(a) of the Act to take into account the document as evidence of the harm being "not substantial" must also be rejected. Consistent with the victim's youth and immaturity, the document reveals a lack of real understanding of the seriousness of the assaults committed against her and the potential ongoing physical and psychological consequences of that abuse. Such risks have in fact already materialised. Compassion for her situation cannot result in a lesser sentence for the applicant.

Permissible to not have regard to the fact that a matter dealt with on indictment could have been disposed of summarily

The applicant in ***Baines v R*** **[2016] NSWCCA 132** pleaded guilty to 13 counts of indecent assault committed against 8 women in the course of his employment as a masseur. An aggregate sentence of 5 years imprisonment with a non-parole period of 3 years was imposed. Included in the applicant's appeal against sentence was a ground asserting that the judge failed to take into account the fact that the offences were capable of summary disposition. In separate judgments each member of the Court rejected that argument. Basten JA observed that it is unclear how that fact contributes to mitigation. The question is whether, and if so why, the offender should be entitled to a lower penalty than would otherwise have been appropriate. The best that can be said is that the offender has been exposed to a form of punishment by way of facing a potentially higher sentence. Whether that factor can significantly affect the sentence is by no means clear and unless it could have, the failure to consider it should not warrant a grant of leave to appeal. Rothman J observed that if the application of sentencing principles to achieve the purposes of sentencing results in the imposition of a sentence beyond the jurisdiction of the Local Court, then the matter is plainly appropriate for the District Court. A court may choose, for good reason, not to have regard to the fact that a matter dealt with on indictment could have been dealt with by way of summary disposal. The jurisdictional limit for a sentence, if the matter were to have been processed in the Local Court, is not a constraining element. Fagan J found the issue to be of no significance to the determination of the appropriate sentence in this case. It was within the discretionary judgment of the DPP to elect that these issues be tried by jury.

Doubt over the principle that it is not an aggravating factor for a victim to be assaulted in his/her home if the offender was lawfully present

The applicant in ***Erazo v R*** **[2016] NSWCCA 139** pleaded guilty to six counts of aggravated sexual intercourse without consent with a further six sex offences being taken into account on a Form 1. The offences were committed against the applicant's step-daughter over a number of years. He was sentenced to an aggregate sentence of 14 years imprisonment with a non-parole period of 10 years. Included in the appeal against sentence was a

ground alleging that the judge erred in finding it to be an aggravating factor that the offences were committed in the family home. Davies J upheld the ground of appeal but concluded that no lesser sentence was warranted. The principle in *Ingham v R* [2011] NSWCCA 88 states that it will be an aggravating circumstance when a victim is assaulted in her or her own home by an unauthorised intruder but it is otherwise when the offender is lawfully on the premises. That principle is the present state of the law and accordingly, the judge erred in the way alleged. However, some doubt has been cast on the principle in *Ingham* by recent decisions. Despite being a member of the bench in *Ingham*, Davies J now accepts the principle expressed therein may have been an unduly restrictive approach to s 21A(2)(eb) of the *Crimes (Sentencing Procedure) Act 1999* and the issue should be revisited. However, this was not an appropriate case in which to do so. Ward JA agreed with these conclusions but R S Hulme AJ deferred expressing an opinion on the matter.

Prior good character cannot be disregarded in sentencing for an ongoing course of offending conduct

The applicant in ***Erazo v R* [2016] NSWCCA 139** pleaded guilty to six counts of aggravated sexual intercourse without consent with a further six sex offences being taken into account on a Form 1. The offences were committed against the applicant's step-daughter over a number of years. He was sentenced to an aggregate sentence of 14 years imprisonment with a non-parole period of 10 years. Included in the appeal against sentence was a ground alleging that the judge failed to take into account the applicant's otherwise good character by finding that it was "totally dissipated by his continued offending over many years". Davies J upheld the ground of appeal but concluded that no lesser sentence was warranted. The proper approach to good character was discussed by the High Court in *Ryan v The Queen* [2001] HCA 21; 206 CLR 267. There it was stated that a court must first consider whether the prisoner is of otherwise good character, disregarding the offences for which he/she is being sentenced. Second, if established, the judge must take that fact into account. However, the weight given to it will vary according to the circumstances of the case. In the present case, the Crown submission that the judge acted in accordance with *Ryan* should be rejected. The applicant's otherwise good character prior to the initial offending should have been a mitigating factor at least to a small extent.

This issue considered above arose in the context of supplying prohibited drugs in the matter of ***Bidgood v R* [2016] NSWCCA 138**. The applicant pleaded guilty to three drug supply charges, including supply on an ongoing basis, with a further six offences taken into account on a Form 1. He received an aggregate sentence of imprisonment for 4 years with a non-parole period of 2 years. In sentencing him, the judge found that despite being of prior good character, the applicant disentitled himself to any leniency through his involvement in a course of ongoing serious criminal conduct. The applicant's appeal against sentence included a ground challenging that approach as contrary to the decision of *Ryan v The Queen* [2001] HCA 21; 206 CLR 267. Davies J upheld the ground but dismissed the appeal finding that no lesser sentence was warranted. The sentencing judge found that the applicant was otherwise of good character, but fell into error by holding that he was disentitled to the benefit of that by reference to the offending for which her Honour was sentencing him. The continuous nature of the offending is not a correct basis for disentitling the applicant to the benefit of good character; it is correct only as supporting the view that limited weight should be given to it. If the offending over 20 years in *Ryan* did not have the effect of negativing good character as a mitigating factor,

offending in the present case of no more than three months, a fortiori, did not have that effect.

General and specific deterrence important in sentencing for serious credit card fraud

The applicant in ***Jeyavel Thangavelautham v R*** **[2106] NSWCCA 141** was convicted of several offences relating to his position as the ringleader in a conspiracy to use equipment including card skimming devices to obtain banking and other personal information. He was sentenced to an aggregate sentence of 11 years imprisonment with a non-parole period of 8 years and 3 months. He appealed against that sentence on the ground that it was manifestly excessive. Bathurst CJ rejected this ground (but the appeal was allowed on another). The object of the conspiracy was to obtain the details of one thousand people. Although the attempt was foiled, it does not lessen the seriousness of what was intended. It certainly does not require that the applicant be sentenced by reference to a single offence under s 192E of the *Crimes Act 1900*. Where the offence is capable of causing financial hardship to a large number of consumers and undermining this country's financial system, it is imperative that any sentence reflects the need for general and specific deterrence. This has been recognised in past decisions in this state and others.

SENTENCING - SPECIFIC OFFENCES

Child pornography offences - assessment of objective seriousness does not require judge to view all 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.

Revenue fraud offences – importance of general deterrence

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.

Section 112 Crimes Act offences - difficulty in assessing where in the range of objective seriousness offences fall

The respondent in ***R v Meatuai*** **[2016] NSWCCA 42** pleaded guilty to two counts of aggravated break, enter and commit serious indictable offence (assault occasioning actual bodily harm) contrary to s 112(2) of the *Crimes Act 1900* in circumstances where he entered a home and attacked the two occupants. The sentencing judge assessed the offences as "well above the mid-range for offences of this kind." He was sentenced to a total term of imprisonment of 5 years with a non-parole period of 3 years 6 months. The Crown appealed against the sentences on the ground of manifest inadequacy, submitting they failed to reflect the assessment made of the objective gravity. The Court allowed the appeal (RS Hulme AJ, Fullerton J expressing different reasons and restructure of sentence, Hoeben CJ at CL agreeing with the orders proposed by Fullerton J). RS Hulme AJ considered s 112. That section makes it an offence to break, enter and commit *any* serious indictable offence. Despite being required to do so by legislation, it is practically impossible to make a sensible judgment as to where the middle range of seriousness falls for an offence contrary to s 112 because of the breadth of the serious offences that can constitute the offence. There are many and much more serious indictable offences than assault occasioning actual bodily harm. Nonetheless, in this case the assaults fell at or very close to the top of the range of offences of assaults occasioning actual bodily harm. The severity of those assaults combined with the fact that the property was the victims' home and that the offences were committed in company makes it impossible to regard the offences as anywhere near the bottom of the scale of offences under s 112(2). However, the respondent is not to be double punished for the one incident of breaking and entering being a feature of two offences.

Child sexual assault - errors in approach to assessment of objective gravity

The respondent in ***R v Nelson*** **[2016] NSWCCA 130** pleaded guilty to seven offences of having sexual intercourse with a person aged 10-14 and 14-16 contrary to s 66C(1) and (3) of the *Crimes Act 1900*. They were committed against three complainants. The sentencing judge afforded a significant degree of leniency on the following bases: the respondent's youth, being aged 18-19 years at the time of the offences; he had suffered physical abuse as a child from his father and step-father; and he had significant cognitive disabilities and mental health problems. The respondent was sentenced to a range of non-custodial sentences, against which the Crown appealed. Basten JA (Rothman J agreeing with additional reasons; Fagan J dissenting) allowed the appeal, holding that the judge erred in his approach to the assessment of the objective gravity of the offending. The respondent was resentenced to an aggregate term of 3 years imprisonment with a non-parole period of 2 years.

The first error was in the approach taken to the assessment of harm caused to the victim, where his Honour found there was no evidence to support any such harm. There is a presumptive position that offending of this type will cause significant harm to the victim; that position in this case was in fact supported by an unchallenged victim impact statement. This error was contributed to by the judge's misunderstanding of the nature of the offending, whereby he described it as "consensual" and treated that matter as a mitigating factor. Given the victim's legal inability to consent, the activity might be better

described as not being the subject of opposition. Second, the judge failed to properly take account of the consequences for each of the victims of the breach of security involved in the offences all taking place in their temporary home. Third, the judge's acceptance of the relationship in each case as being a romantic boyfriend/ girlfriend relationship is apt to be highly misleading. The fact that the sexual aspect of that relationship was unlawful was a critical factor not to be ignored.

SUMMING UP

Warning about potential unreliability of accused's evidence in joint trial erroneously given and inadequately withdrawn

The appellant in ***P**** v R (No 2)*** **[2016] NSWCCA 44** (presently restricted) was convicted of murder in a joint trial. During that trial in an exchange with counsel the judge indicated that he intended to give a s 165 warning concerning the potential unreliability of the appellant's evidence. It can be inferred from the transcript that nobody heard or noticed that expression. His Honour later gave that warning in his summing up. Trial counsel for the appellant objected on the bases that nobody requested the warning thereby rendering s 165 inoperative and that the Crown did not rely upon any part of the appellant's evidence. In response to the objection the judge – with assistance from counsel for the appellant and that of her co-accused – drafted a "clarification" of the warning. His Honour directed the jury that he was not expressing a personal view about the appellant's evidence but simply stating that it was the Crown case that it was in fact unreliable. The jury later returned a guilty verdict.

On an appeal against conviction the appellant alleged that the warning was erroneously given for the reasons identified by trial counsel, and that it was thereafter inadequately withdrawn. R A Hulme J upheld the ground, quashed the conviction and ordered a new trial. Given that the warning was not called for, the question is whether it had the capacity to deflect the jury from its task. It had that effect and the attempted clarification did not remove the damaging aspects of the earlier warning from the jury's consideration. Further, rather than relying upon the appellant's evidence, the Crown vigorously disputed it as it represented the essence of her defence to the incriminating aspects of the Crown case against her.

Written jury directions asking if there was "a reasonable possibility" reversed the onus of proof

The appellant in ***H******* v R*** **[2016] NSWCCA 63** (presently restricted**)** raised self-defence and provocation at his trial but the jury found him guilty of murder. He appealed against conviction on the ground that written directions given to the jury erroneously reversed the onus of proof. They contained a question trail asking "is there a reasonable possibility…?" without making any reference to the requirement that the Crown must exclude such possibilities. The Court (Leeming JA, Hall and Bellew JJ) allowed the appeal and remitted the matter for retrial. It was held that the questions posed wrongly equated beyond reasonable doubt with the existence of a reasonable possibility. The accused in this case discharged the evidentiary onus as to a reasonable possibility of self-defence. The central point is that the reasonable possibility was one that the Crown had to eliminate as

part of its onus of proof. It was important that the written directions made that clear. There is a critical difference between an instruction to the effect that the Crown must remove a reasonable possibility in order for a guilty verdict to be available and an instruction that turns on whether the jury has found there to be a reasonable possibility in order to avoid a guilty verdict. The oral summing up, correctly emphasising the Crown's obligation to prove beyond reasonable doubt, did not displace the force of the seven-page written direction. The latter will generally overpower the former because of (a) the power of the written word, (b) the fact that it is with the jury at the critical time, and (c) it is apt to be read repeatedly. While written directions can undoubtedly be useful, in the circumstances of this particular case, a series of questions such as those posed were not likely to assist the jury.