Supreme Court of New South Wales 2017 Annual Conference

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 in the compilation of this paper provided by Mr Ryan Schmidt BCCJ LLB (Hons) and Ms Christina White BA (Hons) LLB (Hons).

APPEALS

Whether the Court is required to nominate the sentence it would have imposed when a conclusion is reached that no lesser sentence is warranted in law

The applicant in ***Abdulrahman v R*** **[2016] NSWCCA 192** appealed against a 3 year 6 month sentence with a non-parole period of 2 years imposed upon him for an offence of aggravated break, enter and steal contrary to s 112(2) of the *Crimes Act 1900*. He successfully established a number of grounds so Price J (Hoeben CJ at CL agreeing) moved to resentence. Through an exercise of the Court's independent discretion Price J reached the conclusion that a starting point of 5 years was appropriate. That was greater than the starting point of the sentence at first instance so his Honour granted leave but dismissed the appeal. Bathurst CJ generally agreed with Price J's reasons but expressed the opinion that *Kentwell v The Queen* (2014) 252 CLR 601 allows for the Court to simply state the view that no lesser sentence is warranted and does not require the Court to nominate the hypothetical sentence which would have been imposed. The Chief Justice concluded that leave to appeal ought to be refused.

Erroneous acceptance of a reasonable hypothesis inconsistent with guilt of murder when accused gave evidence that excluded it

The respondent in ***The Queen v Baden-Clay*** **[2016] HCA 35; 258 CLR 308** was convicted of murder. At trial he denied any involvement in his wife's death and the disposal of her body. He appealed to the Queensland Court of Appeal on the basis that the verdict was unreasonable. The QCA substituted a verdict of not guilty of murder but guilty of manslaughter, finding that there was a reasonable hypothesis that he did not have the requisite intention for murder. The hypothesis was that there was a physical confrontation in which the respondent delivered a blow which killed the deceased without intending to cause serious harm. The Crown appealed to the High Court. French CJ, Kiefel, Bell, Keane and Gordon JJ allowed the appeal and restored the murder conviction. The QCA's conclusion was not based on evidence; it was mere speculation or conjecture. The only evidence which actually related to the hypothesis (which was evidence given by the respondent) was inconsistent with it. It is unacceptable to contend for a hypothesis on appeal which was not put to the jury for tactical reasons, which is directly contrary to the evidence of the respondent at trial, which is directly contrary to the way in which the respondent's counsel conducted the defence and which, in response to direct questions from the trial judge, was expressly rejected by the respondent's counsel. The hypothesis

identified by the QCA was not open and once it is rejected, no other hypothesis consistent with guilt of manslaughter, but innocence of murder, has ever been identified at trial or on appeal. None of the hypotheses to account for his wife's death raised by the respondent at trial involved him playing any part in her death. The case was one of murder or nothing.

An appeal under s5F(3A) of the Criminal Appeal Act 1912 *is not an occasion for the Court to consider collateral challenges to a prosecution case*

The respondents in ***R (Cth) v Rapolti; R (Cth) v Russell; R (Cth) v Speedy Corporation Pty Limited*** **[2016] NSWCCA 264** were alleged to have imported wheels from China, whilst holding out to Customs that the wheels were manufactured from Malaysia to avoid the dumping duty applicable to such imports from China. Under s 5F(3A) of the Criminal Appeal Act 1912, the Crown appealed against the trial judge's ruling to exclude material seized pursuant to a search warrant. The seized material included emails discussing strategies for avoiding the dumping duty. The Crown case was entirely circumstantial. The threshold issue for the NSWCCA was whether the trial judge's ruling to exclude the material seized pursuant to the warrant "eliminates or substantially weakens the prosecution's case". The respondents contended that a ruling cannot eliminate or substantially weaken a prosecution case that is doomed to fail. In part, that contention was based on a collateral issue; that there was a defect in the administrative notices imposing the relevant duty which may have rendered the notices invalid. N Adams J held that, for the purposes of s 5F(3A), the Crown case should be taken at its highest. Her Honour held that the concluding words of s 5F(3A) are not a backdoor means for a cross appeal; the Court assumes that the evidence will be accepted by the jury and that administrative decisions or instruments upon which the prosecutions depend are valid. There was no jurisdictional question other than the trial judge's exclusion of the seized evidence. The Court therefore had jurisdiction to hear the appeal.

Principles relevant to the review of a decision on an application to discharge a jury

The appellant in ***Younan v R*** **[2016] NSWCCA 248** was convicted of one count of dealing with the proceeds of crime. During his trial a Crown witness referred to the appellant kidnapping his ex-partner. Counsel for the appellant made an application to discharge the jury on the basis that the statement was prejudicial. The trial judge refused the application, and another earlier in the trial based on similar circumstances. The appellant appealed in relation to the refusal of this second discharge application. Beazley P dismissed the appeal, finding that the trial judge did not err in refusing to discharge the jury. Her Honour reviewed the principles governing the exercise of a trial judge's discretion in determining a discharge application. Her Honour also set out principles guiding the review of such decisions by appellate courts. The test for the appellate court to apply is whether it can be satisfied that the irregularity has not affected the verdict, and that the jury would have returned the same verdicts if the irregularity had not occurred (*R v Marsland* (NSWCCA, 17 July 1991, unreported) and *Miller v R* [2015] NSWCCA 206, citing *Maric v R* (1978) 52 ALJR 631 at 635. The appellate court is not confined to examining reasons given for the order, but must decide for itself whether the result of the refusal occasioned the risk of a substantial miscarriage of justice (*Crofts v The Queen* (1996) 186 CLR 427 at 441). Beazley P noted three themes receiving emphasis in NSWCCA decisions:

the discretionary nature of the decision, whether the irregularity affected the verdict, and the adequacy of any direction given to the jury.

Kentwell v The Queen - *if the error in the exercise of the sentencing discretion was a discrete error, the entire discretion should still be re-exercised (other than for a small subset of arithmetical or calculation errors)*

The applicant in ***Lehn v R*** **[2016] NSWCCA 255** entered a plea of guilty at the earliest opportunity to aggravated dangerous driving causing death and stealing a motor vehicle. The Crown did not submit that less than the full 25% discount should apply. Without raising the issue at the hearing, the sentencing judge applied a discount of 20% on the basis that the full discount would result in a sentence unreasonably disproportionate to the nature and circumstances of the offence. It was common ground between the parties that this was a denial of procedural fairness. The Court (a bench of five judges) considered the issue of whether, if the error affected only a discrete component of the sentencing discretion (rather than the entire sentencing discretion), the CCA must re-exercise the sentencing discretion generally, or only in respect of that discrete component. The Court held that in such cases the entire sentencing discretion should be re-exercised.

Bathurst CJ held that, as a matter of language, s 6(3) of the *Criminal Appeal Act 1912* does not provide that if discrete error is found, the sentence can be adjusted to take into account of that error. Rather, it provides that if there is an error affecting the exercise of the sentencing discretion, the Court is to form its own view of an appropriate sentence. His Honour also noted difficulties with the alternative approach, including that a separate adjustment of a particular component of a sentence infected by error is inconsistent with the instinctive synthesis approach explained by McHugh J in *Markarian v The Queen* (2005) 228 CLR 357; HCA 25 at [51].

There will still be occasions where, notwithstanding error, it is unnecessary to re-exercise the sentencing discretion, including cases of arithmetical error in calculating relevant dates, or an error in the calculation of the effect of a discount where that discount was reached in accordance with proper principles. The Chief Justice discussed two cases where the CCA took a contrary approach and how the correct principle would have applied: *Daniels v R* [2016] NSWCCA 35 (where the relevant error was the imposition of an invalid parole condition) and *O'Connell v R* [2016] NSWCCA 43 (where the sentencing judge found special circumstances but erred in failing to adjust the non-parole period).

Delayed appeals against sentence can present major difficulties for the CCA and should not be tolerated

The sentence under appeal in ***Potts v R*** **[2017] NSWCCA 10** was imposed in December 2014. The application for leave to appeal was not filed until September 2016. It was unclear why the application for leave to appeal was not filed earlier. Error was established which required the CCA to re-sentence the applicant. Counsel for the applicant invited the Court to find special circumstances and reduce the non-parole period but the delay of 1 year 9 months caused difficulties. If the non-parole period was to be reduced, the applicant would have already outlasted that period in custody. Button J (Basten JA

agreeing) held that post-discount, a sentence of 3 years 4 months should be imposed, commencing 24 April 2014. Basten JA observed that, with an unadjusted ratio, the non-parole period (30 months) would expire on 23 October 2016 and that date had passed before the appeal hearing took place on 2 February 2017. Basten JA (Button J agreeing) held that it would be inappropriate to find special circumstances as it would have no practical effect. The purpose of finding special circumstances is to give the offender the benefit of an extended period of conditional release on parole. That purpose would not be served in the present case because specifying an even earlier date of eligibility for release on parole would not change the applicant's period of time on supervised release.

The Court held that delay in bringing appeals is unacceptable. Basten JA said that such delay is not tolerated in civil proceedings and no such delay should be tolerated in criminal proceedings where an individual's liberty is at stake. Johnson J observed that such a delay has a significant impact upon the discharge of the Court's functions on a sentence appeal; difficulties can arise with the Court hearing the appeal at a point so late in the sentence being served.

Whether a determination allowing/refusing a Basha inquiry is an interlocutory judgment or order for the purposes of s 5F(3) of the Criminal Appeal Act 1912

The applicant in ***Nicholson v R*** **[2017] NSWCCA 38** was charged with child sexual assault offences. The complainant had seen a counselor about the assaults but would not give their name. The applicant sought to question the complainant as to the identity of the counsellor through a *Basha* inquiry so as to then issue a subpoena on the counsellor. The trial judge refused the applicant's request. Her Honour said she was of the view that she could not force the complainant to disclose that information. The applicant sought leave to appeal that decision pursuant to s 5F(3)(a) of the *Criminal Appeal Act 1912*.

Garling J discussed the nature of a decision to permit a *Basha* inquiry, but held that the application did not need to be decided in the abstract. Dismissing the appeal, his Honour held that there was no interlocutory judgment or order for the purposes of s 5(3) because of the procedure undertaken by counsel for the accused. Counsel only asked the trial judge to permit questioning of the complainant; there was no request for an order or subpoena requiring her to give evidence. The only order the trial judge was asked to make was that proffered by a Notice of Motion (that leave be granted to subpoena the unknown counsellor's records) which had not been formally filed, attached no form of subpoena or wording of a schedule, and was not pressed by counsel. Garling J held that the request lacked formality; was unsupported by evidence demonstrating the utility of the procedure; and was not the subject of any demonstrated power in the Court.

In additional reasons, Beech-Jones J stated that given the variety of circumstances in which a *Basha* inquiry may be undertaken and the various steps involved in conducting such an inquiry, there is no single answer to whether the decision amounts to an "order" sufficient to ground an appeal under s 5F(2) or (3). His Honour discussed how in some situations (eg. with a new witness and the jury only being asked to leave the courtroom, where the matter could be re-agitated at a later time) the decision would not have the character and effect of an interlocutory order, whilst in other circumstances (eg. where the court needs to grant or refuse leave for the issue of a subpoena or an order under s 36(1) of the

Evidence Act 1995) the trial judge's decision may have the "character and effect" of a determination capable of grounding an appeal.

Rule 4 of the Criminal Appeal Rules

Four grounds of appeal were raised in ***Greenhalgh v R*** **[2017] NSWCCA 94**, each concerning criticisms of the trial judge's summing up. Rule 4 of the Criminal Appeal Rules applied to each ground. Basten JA analysed the application of r 4. Button J agreed without qualification. N Adams J agreed generally but added a comment.

As to the application of r 4, Basten JA (at [8]-[9]) was doubtful (at least) of reliance by the Crown upon what was said by McHugh J in *Papakosmas v The Queen* (1999) 196 CLR 297 at 319 [72] (the Court must be satisfied that the asserted error or failure caused a miscarriage of justice). Basten JA noted that Gaudron and Kirby JJ (at 311 [44]) expressly disassociated themselves from that statement. (The other two members of the court (Gleeson CJ and Hayne J) said nothing about it.) Basten JA (at [10]-[11]) was also negative in his treatment of two other often cited authorities on r 4: *R v Tripodina* (1988) 35 A Crim R 183 and *R v Abusafiah* (1991) 24 NSWLR 531. His Honour (at [14]) made a number of points in relation to the purpose and effect of r 4 but added that it was not possible to be prescriptive. He continued:

> "It must, in some sense, be in the interests of justice that leave be granted; otherwise leave should be refused."

Basten JA went on to discuss "the importance of not limiting the scope and operation of a discretionary power, particularly in relation to the fairness of a criminal trial". He referred to *Nudd v The Queen* (2006) 80 ALJR 614 where (at [7]) Gleeson CJ said (at [9]), in part, "It is the fairness of the process that is in question; not the wisdom of counsel. As a general rule, counsel's decisions bind the client." Reference was also made to Gleeson CJ having said that there was a need to assess unfairness "by reference to an objective standard without an investigation of the subjective reasons for that conduct". Basten JA noted (at [19]) that an objective assessment may be inconclusive and cited as examples the possibility that the failure of counsel to raise the matter in question was attributable to tactical reasons, instructions, or inadvertence. He commented (at [20]) that inadvertence will often not be decisive and attempts to adduce evidence from counsel to that effect should not be readily acceded to. Finally, he said that where the complaint is the failure of a judge to give a direction, "it will usually be a precondition to a grant of leave under r 4 that the omitted direction should be expressly formulated".

N Adams J added the comment that the "correct test", in her view, was as stated by Bathurst CJ in *ARS v R* [2011] NSWCCA 266 (citing the observations of McHugh J in *Papakosmas v The Queen* at [72] and drawing from *Picken v R* [2007] NSWCCA 319 at [20]-[21]):

> "The applicant must establish that he or she has lost a real chance (or a chance fairly open) of being acquitted."

Sentence appeal – focus upon the starting point of a sentence before discounting is appropriate (or not?)

In ***Xue v R*** **[2017] NSWCCA 137** divergence between members of the Court as to whether focusing upon a hypothetical starting point for a sentence before discounting deflects attention from whether the sentence actually imposed was unreasonable. Hoeben CJ at CL maintained that view and referred to what he had previous said in *Adzioski v R* [2013] NSWCCA 69 at [72] (Slattery and Bellew JJ agreeing) and *Graham v R* [2009] NSWCCA 212 at [40] (Macfarlan JA and Grove J agreeing) and to what R A Hulme J had said in *Yang v R* [2012] NSWCCA 49 at [63] (Macfarlan JA and RS Hulme J agreeing).

(In *Yang v R* it was said that the focus should be on the sentence actually imposed because the argument on appeal involved an attempt to compare the starting point with statistics for sentences which had all been the product of discounting for pleas of guilty.)

Bathurst CJ (McCallum J agreeing) referred to the reasoning of Simpson J (as her Honour then was) in *TYN v R* [2009] NSWCCA 146; 195 A Crim R 345 at [33]-[34] and of Leeming JA in *McGeown v R* [2014] NSWCCA 314; 247 A Crim R 206 at [13]-[14] to the effect that where there was no dispute about the extent of discounting, the focus should be on the starting point. As Leeming JA put it, "it is necessary to have regard to the starting point lest the discounts be used to conceal and thereby sustain what might otherwise be a manifestly excessive sentence".

Five days after this judgment was handed down, in ***Tassis v R*** **[2017] NSWCCA 143** at [28], reference was again made to *Adzioski v R* for the "deflects attention" proposition. Reference was also made to *Hayek v R* [2016] NSWCCA 126 where Wilson J (Bathurst CJ and Schmidt J agreeing) said (at [90]), "It is generally neither appropriate nor helpful to take an assumed starting point of sentence as a basis upon which to argue that a sentence is manifestly excessive".

In relation to a different issue, parity, the Court recently accepted an analysis of the sentence imposed upon an appellant with that imposed upon a co-offender by reference to the notional starting points: ***AMZ v R*** **[2017] NSWCCA 184** (Hoeben CJ at CL, Price and Schmidt JJ agreeing). Curiously, however, in ***PG v R*** **[2017] NSWCCA 179** (Basten JA, Button and N Adams JJ agreeing on this point) considered a parity ground by comparing the notional starting point sentences for two offenders (that is, without their 25% discounts for pleas of guilty) but while taking into account a further 25% discount awarded the applicant for his assistance to authorities.

BAIL

No "principle of restraint" to be applied in CCA determination of Crown detention applications

The respondent in ***R v Marcus*** **[2016] NSWCCA 237** was granted bail by the Supreme Court in respect of charges of shoot with intent to murder, discharge firearm with intent to cause grievous bodily harm and knowingly direct activities of a criminal group. The Crown filed a detention application following that decision. Hoeben CJ at CL granted the

application and refused bail. In so doing, his Honour held that there is no "principle of restraint" to be applied by the Court of Criminal Appeal in hearing a Crown detention application following a successful release application before a single judge of the Supreme Court. Nothing in the *Bail Act 2013* supports the application of such a principle; the Court is required to determine applications on a de novo basis. Cases relied upon by the respondent in making a submission to the contrary are of historical interest only. The respondent's reliance upon the now abolished "double jeopardy" principle that formerly applied to the determination of Crown appeals against sentence was also rejected.

Bail decisions of the Supreme Court rarely of any precedential value

The respondent in ***Director of Public Prosecutions (NSW) v Zaiter*** **[2016] NSWCCA 247** was charged with serious drug supply and proceeds of crime offences. He was granted bail by the Supreme Court and the Crown filed a detention application shortly thereafter. R A Hulme J granted the application and bail was refused. His Honour paused to make the following observations concerning the commonplace reliance of parties on previous bail decisions. Judgments of single judges of the Supreme Court presiding in the Bails List do not often lay down anything of precedential value for bail authorities. Bail decisions involve a discretionary evaluative judgment on factors about which reasonable minds may differ and each judgment is very specifically directed to the facts and circumstances of the case at hand. Judgments published on the Caselaw website are no more authoritative than others that are not.

Show cause (s 16A of the Bail *Act) principles*

The applicant in ***Moukhallaletti v Director of Public Prosecutions (NSW)*** **[2016] NSWCCA 314** was charged with fabricating false evidence and dealing with the proceeds of crime whilst on bail for offences relating to interfering with the administration of justice. Her release application was refused and the NSWCCA considered her further application. Button J found that the applicant failed to show cause why her detention was not justified, pursuant to s 16A of the *Bail Act 2013* (NSW), and refused bail. His Honour set out six principles applying to the show cause requirement:

> (1) The question is separate from the question of whether there would be unacceptable risks of certain things occurring if the applicant were granted bail (*Director of Public Prosecutions (NSW) v Tikomaimaleya* [2015] NSWCA 83 at [25]).
>
> (2) Unlike factors relevant to the assessment of unacceptable risks, Parliament has not enumerated the facts that may show cause.
>
> (3) There will often be a substantial overlap between the factors going to the show cause requirement and determination of unacceptable risks (*Tikomaimaleya* at [24]).
>
> (4) Cause may be shown by a single powerful factor, or a powerful combination of factors (*R v S* [2016] NSWCCA 189 at [63]).

(5) One should refrain from placing a gloss on the words of the *Bail Act* (*Director of Public Prosecutions (NSW) v Mawad* [2015] NSWCCA 227 at [42]). It is not incumbent upon an applicant to show special or exceptional circumstances in order to show cause (cf s 22 of the *Bail Act*).

(6) There is little or no precedential value in decisions of a single judge of the Supreme Court finding that an applicant has shown cause or not, unless they contain a discussion of legal principles (*Director of Public Prosecutions (NSW) v Zaiter* [2016] NSWCCA 247 at [30]-[33]). Many such judgments concern the interplay of a multitude of factors and are not determinations of legal questions.

COSTS

An applicant can be "discharged as to the indictment" under s 2(1)(b)(i) of the Costs in Criminal Cases Act 1967 *where the accused was acquitted on some counts on the indictment, but not others*

The applicant in ***DAO v R (No 3)*** **[2016] NSWCCA 282** was arraigned on an indictment containing 23 counts (two of which were alternatives), which related to four complainants. A jury convicted the applicant of the 21 primary counts. On appeal the CCA quashed all the convictions and entered verdicts of acquittal for the counts relating to two complainants, but ordered a new trial for those relating to the other two complainants. The applicant applied for a certificate under the *Costs in Criminal Cases Act 1967* (the Act) in respect of the prosecution of counts for which he was acquitted on appeal. The CCA granted the certificate. Meagher JA rejected the Crown's argument that the applicant was not "discharged as to the indictment upon which he… was convicted" because a new trial was ordered for some of the charges. His Honour held that the only relevant sense in which a defendant may be "discharged" on appeal from a conviction on indictment is with respect to the offence which the successful appeal related to. When an indictment contains more than one count, each count is regarded as if charged by a separate indictment. It is not necessary that a defendant be discharged in relation to all counts on the indictment before s 2(1)(b)(i) of the Act is satisfied. The contrary interpretation would be inconsistent with the scheme of the Act, which permits an application for a certificate in proceedings relating to "any offence" of which the defendant is discharged or acquitted, whether at first instance or appeal.

An applicant is "discharged in relation to the offence concerned" for s 2(1)(a) of the Costs in Criminal Cases Act 1967 *when the indictment is quashed*

The applicant in ***Woods v R*** **[2017] NSWCCA 5** was charged with knowingly taking part in supplying dextromethorphan, a substance not specifically listed as a prohibited drug in Schedule 1 of the *Drug Misuse and Trafficking Act 1985* (DMTA). Prior to jury empanelment, the applicant asked the primary judge to quash the indictment on the basis that dextromethorphan was not a prohibited drug. The primary judge rejected this submission. The applicant appealed the interlocutory judgment. On appeal the Crown conceded that dextromethorphan was not a prohibited drug under the DMTA. The CCA vacated the judgment and quashed the indictment. The applicant then applied for a

certificate under the *Costs in Criminal Cases Act 1967* (CCCA). The Crown argued that s 2(1)(a) of the CCCA was not satisfied as the applicant had not been "discharged in relation to the offence concerned". The Crown submitted that this was so because the applicant had not been acquitted and the Director of Public Prosecutions had not directed that no further proceedings be taken. The Court rejected those submissions, finding that it was sufficient that the applicant's indictment was quashed because the proceedings were finally disposed of in the applicant's favour. The Court applied *DAO v R (No 3)* [2016] NSWCCA 282, noting in particular Meagher JA's comments on the importance of the character of finality in the disposition of the proceedings. In the present case, the effect of the appeal was that the applicant had been charged with an offence unknown to the law. No further proceedings under the DMTA could be brought against him in relation to dextromethorphan. The Court granted a certificate under the CCA.

DEFENCES

Erroneous withholding of the defence of duress from the jury's consideration

The applicant in ***Mirzazadeh v R*** **[2016] NSWCCA 65** was convicted of an offence of attempting to possess a commercial quantity of unlawfully imported methamphetamine contrary to s 307.5 of the *Criminal Code* (Cth). The sole issue in the trial was duress; the applicant gave evidence that he became involved in the offending because of threats made to his family living in Iran. At the conclusion of the defence case, the judge ruled that he would not leave duress to the jury because no jury could otherwise than conclude that there was a reasonable way to effectively nullify the threat without the applicant carrying out the crime (namely, by notifying the police). The applicant then pleaded guilty. He subsequently appealed against his conviction on the basis that the judge applied the wrong test or otherwise erred in failing to leave duress to the jury.

Relevant to the appeal was s 13.3 of the Code, which details the application and definition of an evidential burden. The applicant submitted that the question, when one applies that provision, is not whether there is a reasonable possibility that a matter exists or whether there is a reasonable possibility that a jury could accept that a matter exists. Rather, the word "suggests" in s 13.3(6) indicates that all the applicant had to do was to *suggest* the reasonable possibility of the existence of duress. Hoeben CJ at CL accepted those submissions and allowed the appeal. The trial judge was not made aware of s 13.3 nor of the decision in *The Queen v Khazaal* [2012] HCA 26. His Honour consequently failed to apply s 13.3 and thereby applied too stringent a test. Further, by challenging the evidence of the applicant as to his process of reasoning, the judge went beyond what was required by s 10.2 (the duress provision) and trespassed on the function of the jury. The applicant's evidence, taken at its most favourable to him, was sufficient to discharge his slender evidentiary burden. It then became a matter for the jury to assess that evidence.

"Defence" of lawful correction – defendant bears the onus of proof on the balance of probabilities

The respondent in ***Director of Public Prosecutions v FD*** **[2017] NSWSC 679** was charged with assault occasioning actual bodily harm against his son. He did not deny striking his

son on the legs and abdomen with a belt, but claimed he was lawfully reprimanding his son. He raised the statutory defence of lawful correction: s 61AA of the *Crimes Act 1900.* The magistrate dismissed proceedings on the basis that she was "not satisfied beyond reasonable doubt that lawful chastisement and correction was not intended by the defendant". The DPP appealed to the Supreme Court, contending that the magistrate failed to apply the correct onus of proof on the question of whether the s 61AA defence had been established.

Lonergan J held that the magistrate did err. Rather than determining whether the defendant had established the statutory defence on the balance of probabilities (s 141(2) *Evidence Act*), the magistrate found that the prosecution had not shown it was not lawful correction beyond reasonable doubt. Her Honour noted that there has been debate as to whether s 61AA is sufficiently clear regarding the allocation of the onus of proof. Whilst in the past the common law position may have suggested that the burden of proof was placed on the prosecution to rebut the defence, that was prior to the enactment of s 61AA. The proceedings were remitted to the Local Court to be redetermined.

EVIDENCE

Ad hoc expert voice identification evidence inadmissible under s 79 of the Evidence Act 1995 *where jury could make the same comparisons*

The appellant in ***Nasrallah v R; R v Nasrallah*** **[2015] NSWCCA 188** (a judgment not publicly available until the end of 2016) appealed his conviction of four counts of importing a border controlled drug. There were 21 recordings of telephone calls made to DHL inquiring as to the progress of three packages (two were the subject of counts on the indictment, and one was a related consignment delivered to the appellant). The content of those calls implicated the caller in the importation of the three packages. The trial judge admitted evidence from a Federal Agent to the effect that the appellant's voice was the voice of the caller of the DHL calls. The agent's evidence was admitted as ad hoc expert voice identification evidence under s 79 of the *Evidence Act 1995* (NSW). The agent had listened to the appellant's voice in recordings of the appellant's phone calls from prison and in two direct conversations between the agent and the appellant.

McCallum J distinguished the present case from *R v Leung & Wong* [1999] NSWCCA 287; 47 NSWLR 405 and *Irani v R* [2008] NSWCCA 217, both cases allowing the admission of ad hoc expert evidence. Her Honour noted an important qualification to the admissibility of such evidence in *Leung* at [44]-[45]. Her Honour held that the Federal Agent's evidence was irrelevant and should not have been admitted, applying *Smith v The Queen* [2001] HCA 50; 206 CLR 650 at [10]-[12]. The Crown acknowledged that the jury could make the same comparison between the DHL calls and the prison calls themselves. Other than the agent's asserted knowledge of "Arabic persons speaking English", his opinion was based on material no different to that available to the jury. McCallum J found that his asserted specialised knowledge went little further in identifying particular features of the voice than noting the use of the word "youse" and, if anything, his knowledge would have only qualified him to give evidence on whether the voice was speaking with a Lebanese accent. Her Honour allowed the appellant's appeal, quashed the conviction and ordered a new trial. It was therefore not necessary to determine the Crown's appeal.

Compellability of spouses and others – s 18 of the Evidence *Act – spouse's evidence not inadmissible due to an asserted failure to comply with s 18*

The appellant in ***Mulvihill v R*** **[2016] NSWCCA 259** was convicted of murder. At the trial his estranged wife gave evidence for the prosecution. At trial there was no reference made to s 18 of the *Evidence Act 1995* (NSW). Ms Mulvihill never objected to giving evidence. On appeal, it was contended that her evidence was inadmissible because the procedure in s 18 was not followed. It was submitted for the appellant that, despite Ms Mulvihill's apparent willingness to assist the Crown, s 18(4) required the trial judge to satisfy herself that Ms Mulvihill was aware of her right to object to giving evidence. It was asserted that the trial judge did not do so as there was nothing to that effect in the transcript. The Court (Ward JA, Beech-Jones and Fagan JJ) refused leave to raise this ground. It cannot be inferred from the fact that the trial judge did not expressly refer to s 18(4) that her Honour was not so satisfied. The Court said it was doubtful whether the failure of a trial judge to form the opinion in s 18(4) renders evidence inadmissible. The Court differentiated the present case from *Demirok v The Queen* (1977) 137 CLR 20; HCA 21, which involved a spouse reticent to give evidence and s 400(2) of the *Crimes Act 1958* (Vic). It could not be said that Ms Mulvihill's evidence would not have been adduced if s 18 was complied with. There was no basis to conclude either that she would have objected once informed of her right to do so, or that the process in s 18(6) would have led to her being excused. Leave to raise this ground was refused.

Section 293 Criminal Procedure *Act - disclosure in the Crown case that the complainant was a prostitute – cross-examination as to alleged prior false accusations of sexual assault not permissible*

The applicant in ***Allan v R*** **[2017] NSWCCA 6** was convicted of sexual intercourse without consent, an attempt at same, and arming himself with a knife intending to commit assault. The complainant was a prostitute who had agreed to engage in limited sexual acts, but the applicant was said to have continued with other acts against her will. At trial, the applicant sought to rely on s 293(6) of the *Criminal Procedure Act 1986* for permission to cross-examine the complainant on previous false allegations she was said to have made of sexual assault. It was asserted that the Crown's disclosure that the complainant was a prostitute triggered the operation of subs (6). The trial judge did not permit cross-examination on the alleged prior false allegations. On appeal it was contended that the jury was unable to make a realistic or informed assessment of the complainant's credibility as a result.

The contention was rejected. Whilst Harrison J did find that the material related to previous complaints was capable of substantially affecting the complainant's credibility, and thus the applicant was likely to be unfairly prejudiced without cross-examination on the subject, his Honour held that the precondition in s 293(6)(b) was not met. The unfair prejudice must arise from the inability to cross-examine "in relation to the disclosure or implication". The only relevant disclosure in the Crown case was that the complainant was a prostitute. The evidence sought to be raised in cross-examination was not about the complainant's work, but rather a tendency to make false allegations. The making of false complaints of sexual assault does not arise in relation to the disclosure that the

complainant was a prostitute or even by implication from it. Indeed, as the trial judge found, they were "far removed". The appeal was dismissed.

Identification – voice - ad hoc expert – admissible under s 79 of the Evidence Act 1995 *where police officer repeatedly listened to recordings*

The applicant in ***Nguyen v R*** **[2017] NSWCCA 4** was convicted of supplying methylamphetamine. The Crown relied on a number of intercepted phone calls involving a female voice which the Crown claimed was the applicant's. At trial, a police officer who had listened to the recorded conversations and the applicant's record of interview gave evidence that it was indeed the applicant's voice. He had spent a significant amount of time listening to the recordings; including two weeks replaying certain calls and five days reviewing the calls alongside transcripts to ensure accuracy for Court. He gave evidence on common voice characteristics (a loud female voice, speaking English with a Vietnamese accent but sometimes lapsing into Vietnamese, and a distinct high-rising inflection) and use of common references like "down west".

The applicant appealed against her convictions with one ground being that the police officer's evidence was inadmissible. It was submitted that s 79 of the *Evidence Act 1995* was not engaged because the officer was in no better position than the jury to compare the voices in the intercept material with the applicant's police interview. Basten JA, R A Hulme and Schmidt JJ all held it was relevant and admissible. R A Hulme J (Schmidt J agreeing) held that it was admissible under s 79. Whilst jurors could have made their own assessment of two of the three bases for the identification (common voice characteristics and common references), the officer also relied on the overall sound of the voice and the amount of time the officer had invested in listening to the two sources would have been impractical for the jury to replicate. Therefore the evidence was relevant and admissible.

Coincidence evidence – s 98 Evidence Act - *dissimilarities only detract from the probative value if they undercut the improbability of the two events being a coincidence*

The applicant in ***Selby v R*** **[2017] NSWCCA 40** was convicted by a jury of demanding money with menaces. This arose from the first of two events, where the same victim was threatened in the same location by a man with a gun who demanded money. The applicant pleaded guilty to one count of intimidation in relation to the second event. The trial judge ruled that evidence of the second event was admissible as coincidence evidence. The applicant appealed against his conviction. Unusually, the admissibility of the coincidence evidence was not challenged. Rather, the applicant submitted that the trial judge erred in directing the jury that they could use coincidence evidence reasoning when it was not open on the evidence for s 98 of the *Evidence Act* to be engaged. This was based upon dissimilarities of the two events (eg. the assailant having a goatee in one, but clean shaven in the other).

The Court (Leeming JA, Schmidt and Wilson JJ) held that it was open to the trial judge to find that coincidence reasoning was open to the jury. The applicant's submission that the similarities were outweighed by dissimilarities was rejected. Not all dissimilarities have a bearing on the process of inferential reasoning permitted by s 98. The question is whether

the dissimilarities are relevant, i.e. whether they detract from the strength of the inferential mode of reasoning permitted for coincidence evidence: *El-Haddad v The Queen* (2015) 88 NSWLR 93; NSWCCA 10 at [74]-[75]. See also *Page v The Queen* [2015] VSCA 357 at [59]. If certain similarities raise the improbability of coincidence, thus giving the evidence its probative value, the existence of dissimilarities will not necessarily alter that position. Unlike some differences (eg the perpetrator being an amputee/able-bodied) the dissimilarities identified regarding the assailant's voice and the hand in which he held the gun did not undercut the improbability that the same victim was targeted in such similar circumstances by different people.

Admissions – discretion to exclude – s 90 Evidence Act – whilst *some covertly recorded conversations between the complainant and accused may need to be excluded due to unfairness, such a circumstance alone is unlikely to give rise to unfairness for the purposes of s 90*

The respondent in ***R v DRF*** **[2015] NSWCCA 181** (a judgment which only became publicly available in 2017) was charged with several sexual offences committed against his step-son, relating to sexual abuse over three years (1979-1982) when the complainant was 9-12 years old. In 2011 the complainant reported the abuse to police. The respondent declined to be interviewed by police. Pursuant to a warrant issued under the *Surveillance Devices Act 2007* (the Act), the police fitted the complainant with listening devices and took him to the respondent's home. In a recorded conversation that ensued between the complainant and the respondent, the respondent made statements said to amount to admissions. The trial judge excluded that evidence and the Crown appealed pursuant to s 5F(3A) of the *Criminal Appeal Act 1912*. Simpson JA allowed the appeal, finding that the decision to exclude the evidence had to be set aside because the trial judge's interpretation of the Act was erroneous.

The Court also considered whether the evidence should be excluded under s 90 of the *Evidence Act 1995.* Simpson JA held that the evidence was admissible; the circumstances in which the evidence was obtained did not render it unfair for the Crown to use the evidence at the respondent's trial. Her Honour held that police arranging for a complainant to secretly record a conversation with an alleged offender does not alone cause unfairness, even if the offender has refused to be interviewed by police: *Em v The Queen* [2007] HCA 46; 232 CLR 67. Her Honour found that calling evidence such as this (ie. obtained lawfully and on the express authorisation of a judge fully informed of the relevant facts) as "unfair" would subvert the "statutory scheme involving judicially sanctioned covert surveillance as an aid to the detection of crime" adopted by the legislature and endorsed by the High Court in *Em.* She clarified that she was not suggesting that evidence obtained in these circumstances could never be excluded under s 90.

Leeming JA preferred not to decide the question of whether these tactics amounted to unfairness. First he said this was not an ideal test case because the Crown conceded the complainant was an "agent of the state". Next, he observed that there is always an element of deception because the complainant knows about the recording but the accused does not. He raised several scenarios where it would be unfair to admit evidence obtained by a complainant recording a conversation with the perpetrator (eg. when the

conversation took place at a time when the accused was vulnerable or when the complainant used words that had a special meaning or were deliberately ambiguous).

Good character rebuttal – s 110 Evidence *Act – excluded tendency evidence may still be used*

The appellant in ***Clegg v R*** **[2017] NSWCCA 125** was charged with sexual offences against 4 boarders at the school where he was a teacher. The judge allowed a joint trial on the basis of admissible tendency evidence in relation to 3 of the complainants but excluded the 4th on a s 101 *Evidence Act* basis (probative value did not substantially outweigh prejudicial effect). Mr Clegg then sought an advance ruling on evidence the judge would allow if he raised character. The judge said she would allow the Crown to call evidence from the 4th complainant in rebuttal. In the end, Mr Clegg did not raise his character but argued on an appeal against his convictions that the judge's ruling was wrong because she had already held that the 4th complainant's evidence was inadmissible as tendency evidence.

Payne JA rejected the argument. Section 110(2) and (3) provide, inter alia, that the tendency rule does not apply to evidence rebutting a claim of good character. Further, if s 101 applied the evidence would have been admissible under s 101(3) as it would contradict evidence led by Mr Clegg that raised his good character via tendency reasoning (the character evidence was to the effect that the appellant did not have a tendency to act inappropriately towards young boys in his care). But generally, evidence excluded as tendency evidence is capable of being adduced to rebut evidence of good character, unless a relevant rule of exclusion or a discretion under the *Evidence Act* applies. It is not the case that once evidence is excluded as tendency evidence, that evidence is necessarily inadmissible to rebut evidence of good character.

Identification in court – an unusual case in which there was no error

A witness was asked how he could identify the accused and replied, "I know he is one of the boys of the next door family. I can recognise him. I am positive it is that man there". On appeal it was contended that the jury should have been discharged because of the in court identification of the appellant: ***Fadel v R*** **[2017] NSWCCA 134**.

Simpson JA rejected the argument. She referred to the general recognition in the common law of dangers in relation to identification evidence, and of in-court identification in particular: for example, *Alexander v The* Queen (1981) 145 CLR 395; *Festa v The* Queen (2001) 208 CLR 593. But in this case, before the evidence in question was given, the witness had already said that the man (the appellant) who he later saw being arrested had carried out certain acts of violence in the course of a neighbourhood melee and he knew he was one of "the boys of the family living in number 94". This was not a case in which the identification was made by a witness previously unacquainted or unfamiliar with the person identified. It was given by a person who had frequented the premises next door to those of the appellant, who knew and recognised, although not by name, the appellant and members of his family, and who had witnessed at close range the events in question and their immediate aftermath, including the appellant's arrest. If it was in-court

identification, it was of an unusual and special kind that was not subject to all of the same weaknesses often associated with such evidence.

Tendency evidence – s 97 Evidence Act – *no need for have similar features to the act in issue for there to be "significant probative value"*

The appellant in ***Hughes v The Queen*** **[2017] HCA 20** was charged with 11 counts of sexual offences against young girls. There were five complainants aged between 6 and 15 at the time of the offending. The acts giving rise to the charges varied, as did the circumstances in which they were committed. At trial, the Crown sought to adduce the evidence of each complainant and six other witnesses (three from the appellant's workplace and three who had been at the appellant's home as young girls; all described sexual touching or indecent exposure) as tendency evidence in the trial of each count. The identified tendencies were (i) having a sexual interest in female children under 16, and (ii) using his social and familial relationships to obtain access to underage girls so he could engage in sexual activities with them. The tendency notice particularised conduct occurring within the vicinity of another adult. The trial judge allowed the tendency evidence in part (the evidence of the workplace witnesses only admissible in relation to one count which also occurred at the appellant's workplace). The jury convicted on 10 counts. On appeal to the CCA the appellant contended that the breadth of the asserted tendency deprived the tendency evidence of significant probative value, relying on the statement in *Velkoski v The Queen* [2014] VSCA 121; 45 VR 680 at 682 [3] that tendency evidence must possess "sufficient common or similar features with the conduct in the charge in issue so as to demonstrate a pattern that cogently increases the likelihood of the occurrence of that conduct". The CCA declined to follow *Velkoski* and dismissed the appeal.

The appellant appealed to the High Court. The crux of the two grounds of appeal was one issue: is tendency evidence required to display features of similarity with the facts in issue before it can be said to have "significant probative value"? A majority of the High Court (Kiefel CJ, Bell, Keane and Edelman JJ) held that there is no such requirement.

One ground asserted error in the CCA's refusal to follow the approach in *Velkoski* to the assessment of significant probative value. The majority rejected this ground, holding that *Velkoski* evinces an unduly restrictive approach to the admission of tendency evidence. The Victorian Court of Appeal's decision, couched in common law language, is inconsistent with Part 3.6 of the *Evidence Act.* Section 97(1) does not condition the admissibility of tendency evidence on the court's assessment of operative features of similarity with the conduct in issue. An "underlying unity" or "pattern of conduct" need not be established before tendency evidence can be said to have significant probative value. The majority noted that tendency evidence does not have to make the establishment of the relevant fact more likely by itself; that effect can be assessed together with other evidence. The assessment of whether evidence has significant probative value involves two interrelated but separate matters: (i) the extent to which the evidence supports the tendency, and (ii) the extent to which the tendency makes more likely the facts making up the charged offence.

The other ground of appeal asserted error in the conclusion that the tendency evidence possessed "significant probative value". The appellant's submissions focussed on

dissimilarity in the facts and circumstances of each event relied upon, noting particularly age of the child, location, and type of sexual conduct. The majority held that such a view ignored the tendency which the evidence was adduced to prove. In this case, the evidence as a whole was capable of proving that the appellant was a person with a tendency to engage in sexually predatory conduct with underage girls as and when an opportunity presented itself in order to obtain fleeting gratification, notwithstanding a high risk of detection. Whilst significant probative value is often established by a "modus operandi" or a "pattern of behaviour", it can be otherwise demonstrated. The separate acts in this case had in common a high degree of opportunism and a level of disinhibited regard of the risk of discovery; the alleged interactions courted a substantial risk of discovery by friends, family members, workmates, or casual passers-by. The significant probative value of the tendency evidence is not diminished by the fact that the acts were opportunistic (and for precisely that reason could not be said to be a pattern of behaviour) or the fact that the appellant expressed his interest in underage girls in different ways. On the second question for assessing probative value, whether the established tendency makes the elements of the offence charged more likely, the majority observed that whilst a tendency expressed at a high level of generality might mean that all the tendency evidence supports that tendency, it will also mean that the tendency cannot establish anything more than relevance. The majority held that the CCA did not err and the appeal was dismissed.

Flight – consciousness of guilt – of "the offence charged"?

Jason Grogan entered the home of a 72 year old man and punched him, causing him to fall to the floor unconscious. He then stole some property and left the house. A short time later he was seen by a patrolling police officer but decamped. The victim died some three months later. Mr Grogan was tried for murder (the conviction for which was held on appeal to be unreasonable and a retrial for manslaughter directed). The Crown relied upon flight as a basis for inferring a consciousness of guilt. A ground of appeal asserted that the trial judge should not have admitted the evidence of flight as one of the conditions for admissibility was that it was capable of supporting an inference that the flight was occasioned by consciousness of guilt of the offence charged, namely murder. Relying upon *R v* Cook [2004] NSWCCA 52 it was submitted that because homicide was not complete until the victim died three months later, the evidence was incapable of supporting that inference. It was only capable of supporting an inference of consciousness of guilt of a serious assault and theft of property.

Ward JA, Davies J and RS Hulme AJ held in ***Grogan v R* [2016] NSWCCA 168** (a judgment restricted from publication until recently) that there was no error. The requirement that the post-offence conduct was indicative of consciousness of guilt of the offence charged was appropriate in the circumstances in *R v Cook* [2004] NSWCCA 52 but all that was required according to *Edwards v The Queen* (1993) 178 CLR 193 at 209 was that the conduct *related to a material issue* and could *implicate* the accused in the offence charged. See also *Penza and Di Maria v R* [2013] NSWCCA 21 at [191].

Expert evidence – admissibility not dependent upon proof of the truth of assumptions upon which the opinion is based

A forensic chemist gave evidence in a drug manufacturing trial that items found in a clandestine laboratory contained waste product of separate instances of manufacturing of methylamphetamine and that, based on the quantity of the waste product, more than 1 kg of the drug had been produced. (The prescribed large commercial quantity for methylamphetamine at the time was 1 kg.) The grounds of appeal in ***Taub v R*** **[2017] NSWCCA 198** included that the trial judge erred in admitting the expert evidence because *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 required that the assumptions upon which the opinion was based had to be proved.

Simpson JA analysed the principles in *Makita* and in *Dasreef Pty Ltd v Hawchar* [2011] HCA 21; 243 CLR 588 and held that it is not a condition of admissibility of expert evidence that the tendering party prove the truth of the assumptions on which the opinion is based and so the evidence was correctly admitted. (However, a concession made in the evidence of the expert that the quantity manufactured could have been less than 1 kg meant that the conviction should be quashed and a verdict of manufacturing not less than the commercial quantity be substituted.)

MENTAL HEALTH

Section 33(1)(b) Mental Health (Forensic Provisions) Act – *making an order does not extinguish the Local Court's jurisdiction with respect to pending charges*

In ***Director of Public Prosecutions (NSW) v Sheen and The Local Court of NSW*** **[2017] NSWSC 591**, the respondent was charged with intimidation and two offences of damaging property. He was arrested and taken before a magistrate, who made an order under s 33(1)(b) of the *Mental Health (Forensic Provisions) Act 1990* (the Act) that Mr Sheen be taken to hospital by police for assessment. He was found to be a mentally ill person and detained for 8 days, after which he was released into police custody. When he re-appeared in the Local Court, the magistrate held that because a s 33 order had been made and Mr Sheen had been assessed as being mentally ill, the court had no further jurisdiction in relation to the charges. The DPP sought review of the magistrate's decision, requiring the Supreme Court to consider the proper construction of s 33(1)(b).

Bellew J found that the magistrate was in error. There is nothing in s 33 limiting or extinguishing the Local Court's powers when an order under that section is made. His Honour noted several aspects of the section which indicated to the contrary, including first, that s 33(1) confers the power to make an order "without derogating from any other [power to] order the Magistrate may make in relation to the defendant […]": *State of NSW v Roberson (by his tutor Roberson)* [2016] NSWCA 151 at [29]. Second, sections 33(1)(b) and 33(2) both expressly contemplate someone being brought back before a magistrate after the making of a s 33(1)(b) order. Third, when charges are regarded as dismissed is dealt with in s 33(2) and nowhere else. His Honour found that the magistrate's conclusion was at odds with the plain meaning of s 33(1)(b) and would have consequences which could not have been intended by Parliament. Bellew J concluded that the Local Court retained jurisdiction to deal with the charges against Mr Sheen, a conclusion his Honour

noted was consistent with Fagan J's decision in *Director of Public Prosecutions v Wallman* [2017] NSWSC 40 at [39]-[41] with respect of a s 33(1)(a) order. The proceedings were remitted to the magistrate for determination

Section 32 (3)(b) Mental Health (Forensic Provisions) Act – *order must name a particular place at which, or a particular person upon whom, the defendant is required to attend*

In ***Director of Public Prosecutions (NSW) v Saunders*** **[2017] NSWSC 760**, the respondent was charged with assault after he spat in the face of a three month old child. When the matter came before the Local Court, a magistrate dismissed the charge and made an order under s 32(3)(b) of the *Mental Health (Forensic Provisions) Act 1990* with conditions requiring Mr Saunders to attend "a psychiatrist" but did not name any specific person or place. The DPP appealed to the Supreme Court and contended that the magistrate erred in the formulation of the conditions.

R A Hulme J allowed the appeal and held that s 32(3)(b) does require a magistrate to nominate a particular person upon whom, or a particular place at which, the defendant is to attend for assessment of the defendant's mental condition and/or treatment. His Honour found that the contrary interpretation contended for by the defendant would not promote the underlying purpose or object of Part 3 of the *Mental Health (Forensic Provisions) Act*, which is primarily concerned with diversion of certain persons from the criminal justice system. Where discharge is conditional, as under s 32(3)(b), there are enforcement provisions which would be rendered ineffectual if there was no particular person or place named. The matter was remitted to the Local Court to be dealt with according to law.

OFFENCES

Assault causing death while intoxicated an offence known to law; unnecessary to determine constitutional challenge to s 25B of the Crimes Act prescribing mandatory minimum sentence

By an indictment presented at the District Court, the applicant in ***Garth v R*** **[2016] NSWCCA 203** was charged with an offence of assault causing death while intoxicated contrary to s 25A(2) of the *Crimes Act 1900*. He sought an order in that Court that the charge be quashed on the ground that it did not disclose an offence known to law. He submitted that s 25B – which prescribes a mandatory minimum sentence, and non-parole period, of 8 years for an offence under s 25A(2) – was constitutionally invalid because it was repugnant to the judicial process to a fundamental degree. The primary judge dismissed the motion and the applicant appealed.

Bathurst CJ held that the primary judge was correct in concluding that the charge disclosed an offence known to law. The essence of the applicant's argument was that, as s 25B was constitutionally invalid, the offence charged was not one punishable by law. The difficulty with this argument was that the offence is punishable by s 25A(2) itself, which provides for a maximum penalty of 25 years. Section 25B does not impose a punishment. Rather, it operates to impose a constraint on the sentence which can be imposed. Even if the

constraint is constitutionally invalid, an offence under s 25A(2) remains an offence punishable by law. The applicant sought to overcome this difficulty by submitting that s 25B was inextricably intertwined with s 25A(2) and with the creation of the offence. The difficulty with this argument was that it did not reflect the structure of the legislation; the legislature deliberately separated the offence-creating provision from the constraint. Having reached the conclusion that s 25A(2) discloses an offence known to law, it was unnecessary to resolve the constitutional challenge to s 25B in accordance with the well-established practice of declining to deal with a constitutional issue unless it is necessary to do so in order to determine the rights of the parties.

Fraud - there is no deception if a bank allows a person to overdraw their account

The appellant in ***Moore v R*** **[2016] NSWCCA 260** was found guilty of dishonestly obtaining a financial advantage by deception, contrary to s 192E(1)(b) of the *Crimes Act 1900* (NSW). The appellant had opened and account (ironically called a "Complete Freedom" account) with St George Bank. He made numerous withdrawals and debits such that by the time the account was closed there was a negative balance exceeding $2.1 million. The appellant's case, at trial and on appeal, was that he was authorised, albeit by an oversight, to act on the account as he did. The appellant made no false representations to the bank inducing the bank to continue to lend him money. The Crown relied on an expanded statutory definition of deception. Under s 192B(1)(b) of the *Crimes Act,* "deception" includes "conduct by a person that causes a computer, a machine or any electronic device to make a response that the person is not authorised to cause it to make". The Crown submitted that s 192B(1)(b) involved no element of deception; it stood alone and amounted to a deemed deception.

Leeming JA found that the appeal could be resolved by assuming, but not deciding, that no element of deception need be involved. To resolve the appeal the Court asked whether the appellant was "authorised" to make the withdrawals and debits, which turned on the terms and conditions of the relevant account. Those terms and conditions expressly permitted the bank to allow withdrawals in excess of the available balance and set out obligations regarding fees, interest and repayment. Leeming JA thus found the ongoing withdrawals and debits to be the requests for further loans and the bank acceding to those requests. The Court concluded that the transactions were authorised and allowed the appeal.

Drug manufacture - extracting cocaine from paper falls within the definition of "manufacture" in the Drug Misuse and Trafficking Act 1985 *(NSW)*

In ***R v Bucic*** **[2016] NSWCCA 297** the respondent allegedly took steps to separate cocaine from A4 sheets of paper which were impregnated with the drug. Cocaine hydrochloride (the common form of cocaine) is soluble in water or alcohol, and according to expert evidence at trial it goes in and out of paper in exactly the same form. The respondent was charged with knowingly taking part in the manufacture of cocaine, contrary to s 24(1) of the *Drug Misuse and Trafficking Act 1985* (the DMTA). At trial, defence counsel relied on *Beqiri v R* (2013) 37 VR 219; VSCA 39 which found that extracting cocaine from towels through evaporation was not "manufacture" in s 305.1 of the *Criminal Code 1995* (Cth).

The primary judge noted that it dealt with different legislation but had "remarkably similar" facts, and found the decision "highly persuasive". The trial judge directed the jury to return a verdict of not guilty on the basis that separating cocaine from paper is not "manufacture". Her Honour referred to the ordinary English meaning of "manufacture" as making something different. Her Honour did not refer to the definition of "manufacture" in s 3 of the DMTA*,* which includes "the process of extracting or refining the prohibited drug".

The CCA allowed the Crown appeal and ordered a new trial. Campbell J held that separating cocaine from paper it is contained in is a process of extraction for the purpose of the DMTA*.* The ordinary English meaning of "manufacture" is not definitive. Campbell J noted High Court authority to the effect that it would be impermissible (and circular) to construe the words of a definition by reference to the term defined. Further, the use of "includes" in the definition indicates a more expansive definition than would otherwise be included in the notion of manufacture. Campbell J found that *Beqiri* has no application to the interpretation of the DMTA; the definitions of manufacture in the Commonwealth Code and the DMTA are different.

Intimidation with intent to cause fear of physical harm under s 13 of the Crimes (Domestic and Personal Violence) Act 2007 *is an offence of specific intent*

The applicant in ***McIlwraith v R*** **[2017] NSWCCA 13** was intoxicated at the time of the offending, which required the trial judge to determine whether the offence of intimidation under s 13 of the *Crimes (Domestic and Personal Violence) Act 2007* was an offence of specific intent. The trial judge held it was not, but found in the alternative that even if intoxication was taken into account the applicant still formed the requisite intent. On appeal, Basten JA held that it is an offence of specific intent. His Honour discussed the relationship between s 13(1) (which, if read in isolation, would clearly constitute an offence of specific intent) and s 13(3) (which uses language associated with reckless indifferences). His Honour concluded that the language of subs (3) is closely analogous to the particular state of mind necessary for specific intent. Whilst it is not a form of intention per se, it is a state of mind with a specific or particular focus, and thus distinguishable from general intent. Given the trial judge's alternative finding of fact, the appeal was dismissed.

Consorting - for the purposes of s 93X of the Crimes Act 1900 *"consorts" means intentionally seeking something in the nature of companionship; it does not include a casual conversation on the street*

The plaintiff in ***Forster v Director of Public Prosecutions*** **[2017] NSWSC 458** was convicted in the Local Court of habitual consorting contrary to s 93X of the *Crimes Act 1900.* He appealed against his conviction, contending that the magistrate construed the term "consorts" in s 93X too broadly. McCallum J allowed the appeal. From *Tajjour v New South Wales* (2014) 254 CLR 508; HCA 35 it is clear that a casual conversation on the street with an acquaintance cannot itself amount to consorting. *Tajjour* supports the proposition that the essence of consorting is the intentional seeking of something in the nature of companionship, not mere conversation. Such a view is also supported by the fact that the maximum penalty for the offence is 3 years. Her Honour found that the magistrate

erroneously construed the section. Whilst the magistrate's language appeared to follow *Tajjour*, his consideration of the facts indicated an extremely narrow view as to what constitutes a casual encounter. The decision reflects a view that whilst a casual encounter not involving conversation (eg. a smile/nod) is not consorting, by embarking on a conversation of any kind the person evinces an unequivocal "intentional seeking out" of the kind of companionship proscribed in the section.

Next, McCallum J addressed the requirement that the consorting be habitual. The section plainly requires magistrates to separately consider whether individual acts of consorting amount to habitual consorting. Her Honour held that the bare proof of a number of conversations meeting the minimum requirements in s 93X(2) does not necessarily establish the offence in s 93X; the Court must make an evaluative judgment about the conduct. In the present case, the number of encounters relied upon by the prosecution scarcely established a habit. The first three encounters occurred within 24 hours and the fourth was almost a month later. The conviction was quashed.

Grievous bodily harm - infliction of HIV

The appellant in ***Aubrey v R*** **[2017] HCA 18** knew he was HIV positive and had unprotected sexual intercourse with the complainant, who was then infected with HIV. The appellant was charged with two offences, the alternative count was maliciously inflicting grievous bodily harm contrary to s 35(1)(b) of the *Crimes Act 1900* (as the provision then was). One issue on appeal was whether having sexual intercourse with another person and thereby causing the other person to contract a grievous bodily disease was capable of amounting to the infliction of grievous bodily harm within the meaning of s 35(1)(b).

The majority (Kiefel CJ, Keane, Nettle and Edelman JJ) held that the question should be answered in the affirmative. *R v Clarence* (1888) 22 QBD 23 held that inflicting grievous bodily harm required proof of the direct causing of injury and the uncertain and delayed effect of infection from sexual intercourse was insufficient. *Clarence* has long been regarded as doubtful. The majority listed several reasons why *Clarence* should not be followed, including the fact it was based on a rudimentary understanding of infectious diseases; as well as the contemporaneous presumption of a married woman's consent to intercourse with her husband, and some judge's failure to distinguish between consent to intercourse and consent to infection. The majority of the High Court saw no sufficient reason to disagree with later authority contrary to *Clarence*.

The appellant contended that the NSW Parliament should be taken to have intended for s 35 to operate in accordance with *Clarence* by virtue of the fact that s 36 (a separate provision on causing grievous bodily disease) was added separately, rather than amending s 35. This submission was rejected. Section 36 was enacted because *Clarence* was seen to have caused some doubt as to whether contracting a disease constituted bodily harm. This doubt does not suggest Parliament intended that s 35 be restricted in the way suggested by *Clarence*. The majority found that the principle of construing statute in favour of the subject in the face of doubt was a rule of last resort. The language of s 35 has a level of generality that attracts the operation of the "always speaking" approach, so it therefore includes the reckless infliction of a sexual disease: *R v Dica* [2004] EWCA Crim 1103; QB 1257.

Joint criminal enterprise liability – presence at the offence is not the only way to establish participation

The applicant in ***Dickson v R*** **[2017] NSWCCA 78** was convicted of five offences relating to break and enters. The Crown case was that there was a joint criminal enterprise to enter homes and steal property in order to sell it and divide the proceeds. No witnesses observed the applicant or his three co-offenders break and enter the houses or steal any property. The Crown case largely rested on intercepted phone calls between the co-offenders (which were said to evidence the formation and participation in the criminal agreement) and mobile phone tower data indicating that the applicant travelled to the suburb where the burglaries happened on the night they occurred. The applicant appealed his conviction, contending that the verdict was unreasonable or could not be supported having regard to the evidence because it was not proved that he was present when the offences were committed. Bathurst CJ reviewed the principles on joint criminal enterprise, which emphasise that a person is only liable if they participated in the commission of the offence. Presence at the actual commission of the crime is sufficient but not necessary. A party to an agreement to commit a crime can still be liable if they participated in the furtherance of the enterprise in some other way. The Chief Justice gave the examples of someone who agrees to murder a victim and supplies the poison to the other party but is not present when the poison is administered; or someone who creates a fraudulent instrument in an agreement to defraud a victim but is not there when the instrument is used. The verdict was open to the jury and the appeal was dismissed.

Murder – s 18 Crimes Act *does not apply to self-killing*

The appellant in ***IL v The Queen*** **[2017] HCA 27** was tried for murder and manufacturing a large commercial quantity of methylamphetamine. The manufacturing was carried out in a suburban house. A ring burner attached to a gas cylinder was lit which caused the ignition of flammable vapours. The deceased, a co-participant in the joint enterprise of manufacturing, died in the ensuing fire. The case was one of constructive murder (killing in the course of committing an offence punishable by imprisonment for life or 25 years). The Crown allowed for the deceased having been the one to have lit the ring burner but contended that IL was criminally liable for all acts carried out in the enterprise; thus she was criminally liable for the consequences of the act of the deceased.

The trial judge directed an acquittal on the basis that IL's liability was derivative as a principal in the second degree. As the deceased could not be convicted of his own murder, IL was not liable. The Court of Criminal Appeal held that the judge had erred in holding that IL's liability was derivative. It was said that the correct question was whether the ignition of the ring burner was within the scope of the joint enterprise, or within contemplation; if so, both participants were responsible for that act and liable for its consequences.

The High Court (by a majority of 5/7) set aside the orders of the CCA and substituted an order that the appeal to that Court be dismissed. It held that the trial judge was correct, even though his reasoning was incorrect.

Kiefel CJ, Keane and Edelman JJ allowed the appeal upon the simple basis that s 18 is not engaged if a person kills himself or herself intentionally. Nor is it engaged if the person kills himself or herself in the course of committing a crime punishable by imprisonment for life or 25 years, or by an unlawful and dangerous act. Their Honours also held, as did Bell and Nettle JJ, that IL was not liable on joint criminal enterprise principles given that it is the *acts* of each person to effect the common purpose which are attributed to the others, not the *liability.* As Bell and Nettle JJ put it (at [66]): "It is not open under the doctrine of joint criminal enterprise liability to attribute criminal liability to one participant in a joint criminal enterprise for an act committed by another participant in the course of carrying out the enterprise unless the act is or is part of the actus reus of a crime".

In dissent, Gageler J said that it was irrelevant whether that the act of the accomplice amounted to an element of a crime committed by the accomplice, citing *Osland v The Queen* [1998] HCA 75; 197 CLR 316. The criminal responsibility of IL for the constructive murder of the deceased did not depend on whether he was a constructive murderer of himself.

Also in dissent, Gordon J said that because the act of the other party in carrying out the joint enterprise is attributed to the accused, then if the act of the other party causes the death charged and the act was done in an attempt to commit, or during or immediately after the commission of, the foundational offence, then the accused would be liable for constructive murder.

Sexual intercourse without consent in circumstances of aggravation (under authority)

The offender in ***Kennedy v R*** **[2017] NSWCCA 193** was sentenced for four offences of aggravated sexual intercourse without consent committed against the daughter of his partner when the daughter was aged 15 to 18. The circumstances of aggravation were that the daughter was under the age of 16 (count 1) and was under his authority (counts 2 – 4). The offence in count 4 occurred after the offender's relationship with the complainant's mother had broken down and they had separated. It occurred on a day upon which he had been looking after two children who had been born as a result of the offences in counts 1 and 2. Leave to appeal against conviction in relation to count 4 was sought on the basis that the agreed facts did not make out the "under authority" element because he was not in a relationship of step-father/daughter with the complainant at the time.

Davies J rejected this contention. There was nothing to impugn the integrity of the plea as an admission of all of the elements of the offence. The offender was in the best position to know whether he continued to be in a position of authority at the time of the last offence. As a father to her children he could also be regarded as having de facto authority over the complainant because he had the ability to take or retain custody of those children.

PRACTICE AND PROCEDURE

Discharge of a juror due to illiteracy in a case where significant evidence was only comprehensible in written form

The appellants in ***Lee v R; Tang v R*** **[2015] NSWCCA 157** (a judgment made publicly available at the end of 2016) were two of four co-accused charged with drug offences. The jury initially returned verdicts of guilty with respect to the two appellants. The jury then continued their deliberations but were unable to reach a unanimous verdict for one of the other co-accused, and were discharged in relation to charges against him. They continued deliberations in respect of the final co-accused. At this point in the deliberations, the foreperson alerted the judge to two issues about one juror, "Juror X". First, he had a chronic illness and now wished to drop out due to ill health. Second, he was illiterate. After questioning it appeared that he had a limited ability to read English. The trial judge discharged Juror X under s 53B(a) of the *Jury Act 1977* (NSW).

The CCA focussed on the issue of illiteracy (as the details of when Juror X's health deteriorated, and to what degree, were not evident). The Court held that, in the circumstances, the illiteracy of one juror was a sufficient irregularity to call for a retrial without inquiring as to the effect of the irregularity on the jury's deliberations. Basten JA observed that there is a degree of flexibility inherent in the element of illiteracy, depending on the nature of the trial. In the appellants' trial, a key part of the Crown case was telephone intercepts in Mandarin or Cantonese. The jury were given English translations of the recorded calls, some of which were never read out in Court. The Crown accepted that Juror X's inability to consider all the evidence deprived the appellants of a fair trial. The appellants' convictions were quashed.

Non-publication orders – in extreme cases, orders can be made in relation to an entire criminal trial until the conclusion of a related trial – but take down orders will fail the test of necessity when they are futile.

There were two murder trials relating to the Brothers for Life "turf war" which the primary judge ordered to be heard separately, with the second trial to commence immediately after the first finished. ***Nationwide News Pty Ltd v Quami*** **[2016] NSWCCA 97** concerned orders made under the *Court Suppression and Non-publication Orders Act 2010*. The trial judge prohibited publication of all evidence and submissions in the first murder trial and also ordered certain media entities to remove specified articles from their websites. Nationwide News and the ABC sought leave to appeal against both the non-publication and take down orders.

The Court (Bathurst CJ, Beazley P and Hoeben CJ at CL) dismissed the appeal in relation to the non-publication order. The key issue was whether the orders made were "necessary" within the meaning of s 8 of the Act. The Court held that the non-publication order was necessary for the fair trial of the accused in the second trial. This was an exceptional case. There were no practical alternatives capable of ensuring that that media coverage of the first trial did not prejudice the second trial. For example, delaying the second trial would prolong risks to witnesses; and using pseudonyms for the accused would fail to overcome the fact that the cases had unique identifiers allowing anyone following the media to make

the connection between the two trials. On the trials being conducted back-to-back, the Court noted that the justification went well beyond administrative reasons; determining charges as soon as possible and protecting the integrity of evidence (from both threats to witnesses and fading memories) are fundamental to the administration of justice.

The Court allowed the appeal in relation to the take down orders. The main question on appeal was whether such orders can be made on the sole basis that a juror might defy a trial judge's direction not to conduct internet searches. The Court held that the take down orders would not result in the articles being sufficiently removed from the internet for the orders to be effective, rendering the orders futile. Whilst the removal of one item would have had an effect in reducing the information available on the internet, the Court pointed to two factors; first, much of the material was old, and second, a trial judge will be able to give adequate directions to jury that they must determine the matter on the evidence.

Doli incapax presumption – to rebut, the Crown must adduce evidence separate from the circumstances of the offence which proves that the child's development is such that they knew the conduct to be morally wrong.

The appellant in ***RP v The Queen*** **[2016] HCA 53** was aged between 11½ and 12 years old at the time of the offending. He was convicted of sexual intercourse with a child under 10 (x2) and aggravated indecent assault (x1). The Crown adduced no evidence apart from the circumstances of the offences. The trial judge held that the presumption of *doli incapax* had been rebutted by the circumstances in which one of the offences was committed. The CCA upheld the convictions of sexual intercourse without consent, but quashed the conviction of aggravated indecent assault. The High Court allowed the appeal and quashed the remaining two convictions. The plurality (Kiefel, Bell, Keane and Gordon JJ), Gageler J agreeing, held that the CCA erred by finding the presumption of *doli incapax* had been rebutted.

The plurality held that the presumption of *doli incapax* cannot be rebutted merely by an inference from the doing of the act(s) which constitute the offence, no matter how obviously wrong the act(s) may be. Evidence is required from which an inference can be drawn that the child's development is such that they knew it was morally wrong. The plurality directed attention to the child's education and the environment in which the child has been raised. A child's awareness that their conduct is merely naughty or mischievous is insufficient; there must be proof that the child knew the conduct was "seriously wrong" or "gravely wrong". What constitutes sufficient evidence to rebut the presumption will vary depending on the nature of the allegation and the child. A child will more readily understand the seriousness of an act if it relates to values they have had direct personal experience with. Answers given in a police interview may establish the requisite knowledge in some cases but in others, evidence of the child's progress at school and home life will be required. The plurality criticised suggestions that the strength of evidence required depends on the child's age on the basis that they imply children mature at a uniform rate. Rebuttal of the presumption must focus on the intellectual and moral development of a particular child. On what can be inferred from child sexual behaviour, the plurality said children who engage in sexual play may try to keep it secret because they know it is naughty, and it cannot necessarily be inferred they know it to be morally wrong.

In the present case, the appellant's conduct went well beyond normal childish sexual experimentation, but that does not mean he knew it was morally wrong.

Resident of another State charged with a State crime – s 80 of the Constitution has no application and majority verdict available

The appellant in ***Rizeq v Western Australia*** **[2017] HCA 23** was charged with two offences against s 6(1)(a) of the *Misuse of Dugs Act 1981* (WA) in the District Court of Western Australia. The jury was unable to reach a unanimous verdict on either charge, but he was convicted after majority verdicts of guilty were taken for both offences. The appellant was a resident of New South Wales at all relevant times. The District Court was exercising federal jurisdiction under s 39(2) of the *Judiciary Act 1903* (Cth) because the trial involved a matter "between a State and a resident of another State": s 75(iv) of the Constitution. The appellant contended that, because the District Court was exercising federal jurisdiction, the *Misuse of Dugs Act* could not apply as a state law, and instead was picked up and applied as a law of the Commonwealth by operation of s 79 *Judiciary Act*. He thus argued that he was convicted of an offence against a law of the Commonwealth and the jury's verdicts had to be unanimous: s 80 Constitution. The High Court unanimously dismissed his appeal. Bell, Gageler, Keane, Nettle and Gordon JJ held that s 6(1)(a) of the *Misuse of Drugs Act* applied to impose criminal liability on him as a law of Western Australia despite the fact that the jurisdiction subsequently exercised by the District Court was federal jurisdiction. Section 79 of the *Judiciary Act* was not needed or engaged to pick up and apply the text of s 6(1)(a) of the *Misuse of Drugs Act* as a law of the Commonwealth. Section 80 of the Constitution had no application. Where s 79 of the *Judiciary Act* was engaged, was in picking up and applying the text of s 114(2) of the *Criminal Procedure Act 2004* (WA) as a law of the Commonwealth.

SENTENCING – GENERAL ISSUES

"Tailoring" a sentence to facilitate the imposition of a suspended sentence

Each of the four respondents in ***R v Dong, Matur; R v Marial; R v Dong, Ayuok; R v Mathiang*** **[2016] NSWCCA 195** pleaded guilty to one count of causing grievous bodily harm with intent to do so contrary to s 33(1)(b) of the *Crimes Act 1900*. A two year suspended sentence was imposed on each respondent. The Crown appeal included a ground alleging that the judge's decision to impose uniform two year sentences indicated that they were "tailored" to facilitate the imposition of a suspended sentence. It was submitted that, taking into account the 10 per cent discount, a sentence of 2 years suggests a starting point of 2 years 2 months and 20 days, which is highly improbable especially given that the standard non-parole period is 7 years. Payne JA rejected this argument and dismissed the appeal. The sentencing judge followed the "staged procedure" set out in *Zamagias v R* [2002] NSWCCA 17. His Honour first determined that a custodial sentence was required and then determined that a term of sentence of 2 years was appropriate. Only then did his Honour suspend the sentences. Furthermore, the Crown's submission about the judge's "improbable starting point" assumes an application of the discount with mathematical precision which is unwarranted.

Mere lip service paid to statutory mitigating and aggravating factors

The respondent in ***R v RMW*** **[2016] NSWCCA 211** pleaded guilty to offences of administering a poison so as to endanger life, administering poison with intent to injure and two counts of assault. The victim of each offence was her seven year old daughter who suffered complications at birth resulting in brain damage, epilepsy and cerebral palsy. The offences were committed while the victim was in hospital recovering from a lengthy and life-threatening coma. The poison administered was chloral hydrate, a sedative previously prescribed to the victim but in respect of which the respondent had been strictly and repeatedly instructed to no longer administer to the victim, as it was suspected to have been causative of some of her medical problems. The respondent was sentenced to an overall sentence of 1 year 10 months to be served by way of an intensive correction order. Bellew J, dismissing a Crown appeal against the sentence in an exercise of the residual discretion, found that the sentence was manifestly inadequate and suffered from several specific errors. One such error related to the sentencing judge's failure to make any reference to, much less specifically identify, arguably the two most significant aggravating factors in the sentencing process, namely the extreme vulnerability of the victim and the significant breach of trust by the respondent. His Honour merely paid lip service to the statutory requirements by stating "I have considered s 21A [of the *Crimes (Sentencing Procedure) Act 1999*] both in terms of mitigating and aggravating factors."

No error in refusal to allow leniency for delay caused by the offender absconding

The applicant in ***Walker v R*** **[2016] NSWCCA 213** pleaded guilty in 2004 to an offence of maliciously inflicting grievous bodily harm contrary to s 35(b) of the *Crimes Act 1900*. He failed to appear for sentence and a bench warrant was issued. He was arrested by chance over 11 years later in Victoria in 2015. He maintained his guilty plea and was sentenced in 2016 to 2 years with a non-parole period of 1 year. His sentence appeal included a ground that the judge erred by finding that it would not be appropriate to make any finding of leniency because of the delay in sentencing. Gleeson JA dismissed the appeal and held that the sentencing judge properly distinguished between cases where delay occurs because of circumstances outside of the offender's control, and those where it is the offender's actions that cause the delay. To allow leniency on account of delay alone with respect to the latter could hardly be said to further the public interest. Consistent with authority, her Honour took into account the evidence of the applicant's rehabilitation up to the date sentence was imposed.

An indicative sentence is a sentence and not a non-parole period

The applicant in ***Dimian v R*** **[2016] NSWCCA 223** pleaded guilty to an offence of detain for advantage and cause substantial injury and one of aggravated sexual assault, the aggravation being malicious infliction of actual bodily harm. The offences arose from a single incident in 1993. The identity of the applicant was only established in 2013 as the result of a cold case notification concerning the DNA profile obtained from the victim contemporaneously to the offence. He was sentenced to an aggregate sentence of 9 years with a non-parole period of 6 years. The judge indicated a sentence of 2 years for the kidnapping offence and 5 years 6 months for the sexual assault offence.

Davies J allowed the applicant's appeal against sentence on the basis that the judge erred by imposing an aggregate sentence that exceeded the sum of the indicative sentences. His Honour rejected the Crown contention that the sentences indicated by his Honour should be understood to be the non-parole periods as opposed to the head sentences. On any proper construction of s 53A of the *Crimes (Sentencing Procedure) Act 1999*, seen in the context of the whole of that Act, the indicative sentence must be a reference to the overall sentence. Any suggestion that an indicative sentence is the non-parole period is inconsistent with the legislative provisions. The strongest indications of this are the requirement in s 54B(4) to indicate the non-parole period of an indicative sentence where the penalty for the offence carries a standard non-parole period and the absence of a requirement to state a non-parole period in s 53A: see *JM v R* [2014] NSWCCA 297 at [39]. The only circumstance where an indicative sentence might be thought to equate with a non-parole period would be where the sentencing judge expressly said that the indicative sentence was to be treated as a fixed term. (In relation to the latter, his Honour referred to the somewhat controversial suggestion of Basten JA in *McIntosh v R* [2015] NSWCCA 184.)

Uncharged sexual conduct erroneously used to elevate the objective seriousness of index offences

The applicant in ***AK v R* [2016] NSWCCA 238** pleaded guilty to sexual offences committed between 2010 and 2011 against two girls aged 10 to 11 years old. One of the complainants was the daughter of the applicant's partner. A statement in the agreed facts indicated there had been inappropriate sexual touching of her since 2009 when she was aged 8. The applicant's appeal against sentence included a ground that the judge erred in the manner in which he took into account that uncharged conduct. Johnson J, after expressing reservations as to the correctness of the law, observed that the principles to be applied when imposing a sentence in respect of representative counts are those from *R v JCW* (2000) 112 A Crim R 466: (a) that the overall history of the conduct from which the representative charges have been selected may be looked at for the purpose of understanding the relationship between the parties; (b) to exclude any suggestion that the offences charged were of an isolated nature; and (c) as bearing upon the degree of any leniency the court might be considering in regard to sentencing.

In light of those principles, it was open to the sentencing judge in this case to have regard to the applicant's uncharged sexual conduct on sentence. It was not erroneous to describe the conduct concerning the relevant complainant as part of a "course of conduct" in the circumstances of this case – however, such a description may not be apt in a particular case if, for example, the uncharged conduct is said to constitute a small number of incidents. The error in the judge's approach was to elevate the objective seriousness of the offences by way of aggravation as a result of that finding. Despite the error, no lesser sentence was warranted in law.

Sentences imposed in comparable cases impermissibly treated as defining the sentencing range

The respondent in ***The Queen v Kilic*** **[2016] HCA 48** successfully appealed his sentence to the Victorian Court of Appeal ("VSCA"). The Crown appealed to the High Court on the ground that the VSCA erroneously dealt with cases identified as being comparable. The High Court held that the VSCA correctly observed the relevant sentencing principles, specifically that sentences imposed in comparable cases provided a relevant "yardstick" by which a sentencing court can attempt to achieve consistency in sentencing but that requirement to have regard to those cases does not mean that the range of sentences imposed fixes the boundaries within which future sentences must be passed. Despite correctly observing those principles, the VSCA fell into error in the significance it in fact attributed to sentences imposed in past cases when it concluded that they were so disparate to the sentence imposed in the present case that there was a breach by the sentencing judge of the underlying principle of equal justice. The VSCA thereby impermissibly treated the past sentences as defining the sentencing range.

Offences falling within the "worst category"

In ***The Queen v Kilic*** **[2016] HCA 48** the Victorian Court of Appeal ("VSCA") held the sentence imposed upon the respondent for an offence of intentionally causing serious injury was manifestly excessive. In its decision, the VSCA described the offence as being within "the worst category" of the offence. The High Court noted that, properly described, such an offence is an instance of the offence which is so grave that it warrants the imposition of the maximum prescribed penalty for that offence, taking into account both the nature of the crime and the circumstances of the criminal. An offence may fall within this category notwithstanding that it is possible to imagine an even worse instance of the offence. The High Court warned that it is potentially confusing and likely to lead to error to describe an offence which does not warrant the maximum prescribed penalty as being "within the worst category"; it is a practice which should be avoided. Further, the common practice of describing an offence as "not within the worst category" may be misleading to laypersons. Instead, sentencing judges should state in full whether the offence is or is not so grave as to warrant the maximum prescribed penalty.

The discretion to reduce the utilitarian discount for a guilty plea under s 22(1A) of the Crimes (Sentencing Procedure) Act 1999 *is wide, but should not be applied inconsistently*

The applicant in ***Silvestri v R*** **[2016] NSWCCA 245** pleaded guilty to three charges of dangerous driving occasioning grievous bodily harm. Each charge related to one victim; two men and a pregnant woman who lost her baby as a result. For each of the two counts relating to the male passengers, the applicant was given a 25% discount for his guilty pleas. On the count relating to the female passenger however, the sentencing judge (who was also the sentencing judge in *Lehn v R* [2016] NSWCCA 255) only allowed a 20% discount on the basis that any greater discount would not reflect the object gravity of the offence. The applicant appealed on the ground that the trial judge erred in allowing a discount of only 20% for the utilitarian benefit of the guilty plea to that last charge.

Hidden AJ observed that the discretion to reduce a sentence for the utilitarian value of a guilty plea remains a wide one. However, his Honour held that there was incongruity in reducing the sentence for two counts by 25% but the other by 20%. Given the severity of the sentence for the last count (5 years, 3 non-parole), it was said to be hard to see how a 25% discount would have produced a sentence less than was required to mark the gravity of the offence. Hidden AJ held that if this was the only ground in the application the Court would not intervene because the difference is only a matter of a few months. However, his Honour found that there was merit in the ground on accumulation, so the combination of errors rendered the sentencing process erroneous. The appeal was allowed and the applicant was re-sentenced.

Form 1 offences taken into account – inappropriate to include offences that are more serious than the principal offence, involve a different victim, or carry a standard non-parole period.

The applicant in ***PB v R*** **[2016] NSWCCA 258** was sentenced for five offences of child sexual assault against one stepdaughter. He was sentenced to an aggregate sentence of 14 years with a non-parole period of 8 years. The sentencing judge took into account multiple Form 1 offences, some of which were against a different victim, the principal victim's younger sister. Some of the counts had attached up to four or six offences. The applicant contended that the sentencing judge failed to indicate how he took into account the Form 1 offences in arriving at the indicative sentences for certain counts.

The CCA dismissed the appeal, finding no lesser sentence was warranted, but discussed the appropriate use of Form 1 lists of further offences and the inappropriate use in this case. Davies J noted that the CCA has criticised the inclusion of offences on a Form 1 where a separate victim was involved, or where the offences carry standard non-parole periods. It is illogical to include crimes relating to one victim on a Form 1 where the offence charged related to another victim: *SGJ v R; KU v R* [2008] NSWCCA 258 at [26]. His Honour held that it was inappropriate for four offences of aggravated indecent assault against a different victim to have been placed on a Form 1 attached to one count of aggravated indecent assault against the principal victim, as was done for Count 1. The second victim's younger age (10/11 years, cf the principal victim's age of 15) made the Form 1 offences objectively more serious than the principal offence charged. Counts 3 and 5 both had included on the Form 1 aggravated indecent assault which carries a standard non-parole period. His Honour held that, as the Court made clear in *Karel Eedens v R* [2009] NSWCCA 254 at [19], the standard non-parole periods lose their impact when the offence is placed on a Form 1.

Offences committed in a home – aggravating factor not confined to intruders

The applicant in ***Jonson v R*** **[2016] NSWCCA 286** was the victim's partner and their relationship involved domestic violence. The applicant physically and sexually assaulted the victim in the home where they lived together. The applicant was convicted of recklessly inflicting grievous bodily harm and sexual intercourse without consent. The sentencing judge took into account as an aggravating factor for all the offences the fact that they were committed in the home of the victim or any other person under s

21A(2)(eb) of the *Crimes (Sentencing Procedure) Act 1999.* The applicant appealed and one issue was whether the sentencing judge erred in determining that the offences were aggravated under s 21A(2)(eb). The applicant relied on a series of cases to support the claim that it was a rule of law or sentencing principle that it was not an aggravating factor for an offence when the offender was lawfully present, relying on *R v Comert* [2004] NSWCCA 125 and a series of cases said to consistently apply that principle.

A five-judge bench of the CCA dismissed the appeal and held that the offender does not need to be an intruder in the home for s 21A(2)(eb) to apply. First, the Court construed the text of the section. Bathurst CJ observed that there is no explicit pre-condition in the section that the offender be an intruder for the section to operate. Further, the section is not limited to the victim's home, but extends to the home of any person, which literally construed includes the offender. The Chief Justice held that the legislature did not appear to intend the section to only apply where the offender was an intruder. His Honour found this construction to be consistent with the purpose of the section, that a home should be safe and secure. It is also consistent with the purpose of "preserv[ing] the notion of sanctity of the home, whereby individuals are entitled to feel safe from harm of any kind" in the Second Reading Speech.

Secondly, the Court considered the interaction of s 21A(2)(eb) with s 21A(4), which provides that the Court should not have regard to an aggravating/mitigating factor if it would be contrary to any Act or rule of law. Bathurst CJ held that s 21A(4) does not limit the operation of s 21A(2)(eb) just because sentencing principles up to the present time have only recognised the aggravating factor where the offender is an intruder. Inconsistency with sentencing principles must be shown for s 21A(4) to have an effect. There is no relevant rule of law limiting the content of s 21A(2)(eb) in the way contended for by the applicant. The decisions which said *Comert* stood for the contrary proposition were plainly wrong.

Special circumstances – basis for finding

The respondent in ***R v Lulham*** **[2016] NSWCCA 287** was given a sentence of 2 years imprisonment with a non-parole period of 1 month and 13 days for wounding with intent to cause grievous bodily harm. The Crown appealed, contending that the sentence was manifestly inadequate, in part asserting that the sentencing judge gave undue weight to the respondent's subjective circumstances, which in turn directed attention to the finding of special circumstances. The appeal was heard on the same occasion as *Jonson v R* [2016] NSWCCA 286 (see above). On this issue, Bellew J held that there was no evidence before the sentencing judge to support a finding of special circumstances (ultimately finding manifest inadequacy, but using the residual discretion to dismiss the appeal). There was a divergence of opinions as to what was a proper basis for a finding special circumstances.

Bellew J said: "before a finding of special circumstances can be made, it is necessary for a sentencing judge to be satisfied that there exist significant positive signs which show that if the offender is allowed a longer period on parole, rehabilitation is likely to be successful as opposed to a mere possibility". The Chief Justice held that, in dealing with rehabilitation, "a judge would be entitled to find special circumstances if there is evidence before him or her that demonstrates that the offender has prospects of rehabilitation and

that these prospects would be assisted if a longer parole period was allowed." Beazley P stated that, whilst Bellew J's statement is supported by authority, the "seemingly unqualified nature of his Honour's observation would not be appropriate in every case." Her Honour stated that one situation where the statement may be inappropriate is in the case of a long prison sentence, where the prospects of rehabilitation may be difficult to assess or even be non-existent. The Court may nevertheless be satisfied that a finding of special circumstances is appropriate to assist or promote an offender's rehabilitation: *R v Simpson* (2001) 53 NSWLR 704; [2001] NSWCCA 534 at [58]; *Dashti* at [81]-[91]. Hall and N Adams JJ also expressed their disagreement with the statement and agreement with the position of Bathurst CJ (and others, in the case of N Adams J).

Assistance to authorities – importance of CCA taking a strong view of breaches of undertakings

When the respondent in ***R v X*** **[2016] NSWCCA 265** was sentenced in 2014 he was given a combined discount of 50% (25% for his guilty plea and 25% for his past and future assistance to authorities). The future assistance consisted of the respondent undertaking to assist authorities with three matters, including the prosecution of Mohamad Hamzy for murder. The respondent undertook to give evidence against Hamzy in accordance with his statement, which said he was in the car with the deceased, unarmed, when Hamzy shot at them. At trial, the respondent gave evidence that he was not unarmed as previously stated; instead, he said he brought a gun with him, intending to shoot Hamzy, which gave Hamzy an evidentiary basis upon which to claim self-defence.

The Crown successfully appealed pursuant to s 5DA of the *Criminal Appeal Act 1912* (NSW), contending that the respondent failed to fulfil his undertaking. Bellew J found that the respondent did breach the undertaking, and then addressed the question of whether the Court should exercise its discretion and decline to intervene. Bellew J held that, due to the importance of requiring offenders to adhere to undertakings to assist authorities, the Court should intervene and impose a sentence of 6 weeks imprisonment. His Honour accepted the Crown's submission that persons in the respondent's position should be under no misapprehension that if they breach an undertaking to assist, they will ordinarily be re-sentenced: *R v KS* [2005] NSWCCA 87 at [19]. Intervention from the Court was not prevented by the fact that the respondent had already served his sentence, the short period for which he would be returned to custody (6 weeks), or that there was unexplained delay in the Crown pursuing the appeal.

Offence committed in custody – need for accumulation of sentence to reflect separate criminality

The respondent in ***R v Jeremiah*** **[2016] NSWCCA 241** was being held on remand for several charges at Parklea Correctional Centre, during which time he assaulted a fellow inmate causing actual bodily harm. For that assault he was sentenced to imprisonment for 1½ years with a non-parole period of 1 year 1 month, concurrent with the sentences for the original charges. The Crown appealed against inadequacy of the sentence. The CCA (Meagher JA, Davies and Fagan JJ) allowed the appeal, finding that the sentence appealed against was manifestly inadequate by reason of its concurrence with the pre-existing term

of imprisonment. The Court found totality error. The mere fact that the later assault occurred inside prison, after 11 months of remand, whereas the earlier offences were outside prison before his arrest, was sufficient to support a conclusion that the assault in custody involved entirely separate and unrelated criminality. The Court held that full concurrence would undermine public confidence in the administration of criminal justice.

In the present case, the sentence must affect sufficient general deterrence to demonstrate that violence and disorder between prisoners in custody will not be tolerated by the courts: *R v Fyffe* [2002] NSWSC 751 at [33]. The Court held that the sentence should have been fully accumulated on the non-parole period for the original offences. It was observed that full accumulation was consistent with the legislative policy underlying s 56(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) which provides that, if a "convicted inmate" commits an offence against the person while in custody, that sentence is to be consecutive upon the pre-existing term, unless otherwise ordered.

Delay – when a sentencing judge is entitled to give limited weight

The applicant in ***Hudson v R*** **[2016] NSWCCA 278** committed the relevant offences in 2008 and was not sentenced until 2016. Whilst the applicant made admissions to the offences in documents filed in court in 2009, charges were not laid until 2014. The Crown gave no explanation for the almost five year delay after the admissions were made, other than that the applicant moved interstate in 2009. The applicant appealed against her sentence. One ground of appeal was that the sentencing judge erred in concluding that the delay was not significant. The applicant contended that delay should have been taken into account as a significant mitigating factor.

The appeal was dismissed. Hoeben CJ at CL found it to be clear from the sentencing judge's remarks that delay was taken into account as a mitigating factor. The sentencing judge considered the two important aspects of delay; the opportunity to pursue rehabilitation and anxiety created by the prospect of future punishment. Therefore, the applicant's complaint must be that the sentencing judge only took it into account "to some limited extent". A sentencing judge has a wide discretion as to the weight to give to the issue of delay: *Luong v R* [2014] NSWCCA 129. Hoeben CJ at CL found it was clear why the sentencing judge only took delay into account to a limited extent; there was no evidence at all that applicant was in fact anxious about the prospect of future punishment. The sentencing judge was thus entitled to limit the extent to which he took that aspect of delay into account.

Vulnerability of the victim – Aboriginal victim of DV – vulnerability not inherent but finding was legitimate in the circumstances of her emotional attachment to the offender

The applicant in ***Drew v R*** **[2016] NSWCCA 310** pleaded guilty to wounding with intent to cause grievous bodily harm. The victim was his partner, and there was an Apprehended Domestic Violence Order in place for her protection at the time of the offence. The sentencing judge found the victim's vulnerability to be an aggravating factor: s 21A(2)(l) *Crimes (Sentencing Procedure) Act 1999*. Her Honour found that the victim was less likely to seek help or complain, and stated "[t]here is a well-known culture of silence and

ostracism of those who do complain in relation to acts of violence within the Aboriginal community". The applicant's first ground of appeal against sentence was that the sentencing judge erred in finding that the victim was vulnerable.

Fagan J (Gleeson JA agreeing and N Adams J reaching the same conclusion) held that the sentencing judge did not have evidence upon which to make findings that there is a culture of silence about domestic violence within the Aboriginal community; that victims who do complain are ostracised, or; that such a culture of silence was applicable to the relevant community. Irrespective of whether these propositions are valid, they were not open to the sentencing judge without evidence. It was therefore not open to her Honour to conclude that those cultural phenomena made the victim "less likely" to seek help or complain to the authorities. Whilst the sentencing judge erred, there was other evidence upon which to find vulnerability. Fagan J found that the inescapable conclusion from the victim's emotional and intimate attachment to the applicant was one of individualised vulnerability. There was evidence of the victim returning to their home after numerous threats and recanting previous complaints. She was therefore less likely than other potential victims of his violence to try to avoid him or put herself out of harm's way. Therefore, despite the sentencing judge's error on this issue, the sentence was not excessive. The appeal was dismissed.

Availability of summary disposal – offences could have been dealt with in the Children's Court?

The applicant in ***DS v R*** **[2017] NSWCCA 37** was 16 at the time of the offending. He went to a party uninvited and became aggressive when asked to leave. He punched several guests. He jumped onto the roof of a shed and began throwing building materials (including steel bars) onto the guests. One bar hit a guest on the head causing catastrophic permanent injuries. He pleaded guilty to five offences and was convicted of grievous bodily harm with intent after a judge alone trial at the District Court. He received an aggregate sentence of 12 years 6 months with a non-parole period of 8 years. On appeal against sentence, it was argued that the sentencing judge overlooked his age and treated him as an adult. One ground was that the sentencing judge failed to consider the fact that all the offences except for one (grievous bodily harm with intent) could have been dealt with in the Children's Court, where the maximum penalty is a control order not exceeding 2 years.

Schmidt J rejected this ground. Her Honour held that none of the offences could have been dealt with in the Children's Court; s 18 of the *Children (Criminal Proceedings) Act 1987* could have had no application. The most serious offence was a "serious children's indictable offence". Whilst the Court did have a discretion under s 18 to deal with the other five offences through the Children's Court, given the applicant's extremely violent conduct, the considerations in s 18(1A) precluded those counts being dealt with under s 18. It would therefore have been an improper exercise of discretion to deal with those offences through the powers of the Children's Court. The risk of such severe injury caused by the applicant's conduct explains why s 18 was not referred to by the parties or sentencing judge. The appeal was dismissed.

Hardship to third parties – conflicting case law in respect to Commonwealth offences – evidence required that the offender's imprisonment would significantly and deleteriously affect those persons' lives.

The respondent in ***Director of Public Prosecutions (Cth) v Pratten (No 2)*** **[2017] NSWCCA 42** was convicted of seven counts of obtaining a financial advantage by deception contrary to s 134.2(1) of the *Criminal Code Act 1995* (Cth). The Crown appealed against sentence, contending that the sentencing judge erred in finding that hardship caused to the respondent's daughters warranted mitigation of sentence. The sentencing judge had taken into account the effect on the daughters, mentioning their ill health. The appeal was allowed.

Basten JA found that the sentencing judge erred in relying on hardship to the offender's daughters in circumstances where the evidence did not establish that imprisonment of the offender would significantly and deleteriously affect their lives. His Honour discussed the tension between s 16A(2)(p), which requires the Court to take into account "the probable effect that any sentence or order under consideration would have on any of the person's family or dependents", and the general law principle that hardship to a family member can only be relied on to reduce the sentence in "exceptional" circumstances. It was thought that s 16A(2)(p) was intended to reflect the general law principle: *R v Togias* [2001] NSWCCA 522; 127 A Crim R 23. However, there have been expressions of disquiet that such an approach requires a reading down of the Commonwealth statute in a manner which finds no basis in statutory language: *R v Zerafa* [2013] NSWCCA 222 per Beech-Jones J, who was of the view that *Togias* was wrongly decided. Ultimately it was not necessary for the CCA to decide whether Beech-Jones J's view in *Zerafa* should be followed. The respondent on appeal conceded that exceptional circumstances were required and had not been established. However, Campbell and N Adams JJ both observed there was force in Beech-Jones J's position in *Zerafa*.

A subsidiary issue was whether the trial judge was entitled to take the effect on the offender's family into account in setting "an unusually short non-parole period", as the respondent contended. Basten JA rejected this submission, holding that the fixing of a non-parole period is as much part of a sentence as the nomination of a full term. Whilst there are State cases supporting the argument, there is no federal equivalent to s 44 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). The Crown appeal was allowed.

Further on whether exceptional circumstances are required before hardship to third parties can be considered a mitigating factor when sentencing for Commonwealth offences

The applicant in ***Kaveh v R*** **[2017] NSWCCA 52** was sentenced for importing a marketable quantity of opium contrary to s 307.2(1) of the *Criminal Code Act 1995* (Cth). A ground of appeal was that the sentencing judge erred by failing to give any weight to the issue of probable hardship experienced by the applicant's family. Both Basten JA and Latham J (Campbell J agreeing with both) found that the ground was unsupportable as a matter of fact. The sentencing judge expressly found imprisonment would have an adverse effect on the applicant's family but that hardship should not result in any substantial reduction of the sentence. There was no error found in this approach. Whilst it was not contended that the sentencing judge misunderstood the correct sentencing principles, Basten JA observed

that the ground raised the same issue addressed in *Director of Public Prosecutions (Cth) v Pratten (No 2)* [2017] NSWCCA 42. His Honour confirmed that there is still a live issue whether the standard of "exceptional" applies to third party hardship for s 16A of the *Crimes Act 1914* (Cth). He noted the division of opinion between the majority in *Elshani v R* [2015] NSWCCA 254 and Beech-Jones J's dissent in that case (repeating his view in *R v Zerafa* [2013] NSWCCA 222; 235 A Crim R 265) which found support from the CCA in obiter in *Pratten*. Leave to appeal with respect to this ground was refused.

Gambling addiction, generally, is not a mitigating factor

The applicant in ***Johnston v R*** **[2017] NSWCCA 53** was sentenced for one count of obtaining a financial advantage by deception contrary to s 192E(1)(b) of the *Crimes Act 1900.* The applicant had a gambling problem and all the money gained was lost through gambling. The sentencing judge said that there were differences between a gambling addiction and a drug addiction; gambling does not physically alter the mind or body, so a gambler knows what they are doing. On appeal against sentence, the applicant asserted errors in the sentencing judge's approach to his gambling addiction. Dismissing the appeal, Bathurst CJ found no error in the sentencing judge's observations; he was not postulating a hierarchy of addiction. He was simply stating that unlike some cases of drug addiction, the applicant could still exercise judgment and the crime was a willed act. The Chief Justice reviewed the principles on what relevance a gambling addiction has to sentencing. The fact that an offence was committed to feed a gambling addiction is generally not a mitigating factor. Whilst such an addiction may explain the crime and provide a motive, it will be rare for it to sustain an appreciable reduction in the sentence. This is particularly so where the offending involved planning or took place over a long period of time.

Assistance to authorities – discount should not be given when the assistance was given many years earlier for unrelated offences

The respondent in ***R v XX*** **[2017] NSWCCA 90** was sentenced for three offences relating to sexual abuse of his daughter. The offending occurred in 2013-14, when the daughter was four years old. The respondent received a discount of 15% for the assistance he gave to police and prosecuting authorities in 2006-7 in relation to a charge of conspiracy to murder. This was entirely unrelated to the child sexual abuse he was sentenced for. At the time he received $17,000 for his assistance. The Crown appealed, contending that the sentencing judge erred by allowing this discount. Beech-Jones J rejected the Crown's first submission that the discount was not open as a matter of law because the respondent did not fit into any category of witness established by the case law. The Crown's effort to ascertain the scope and limits of s 23 of the *Crimes (Sentencing Procedure) Act 1999* from case law was misconceived. On his Honour's construction, the respondent's assistance was capable of falling within s 23(1).

However, in the exercise of the discretion to reduce the sentence, Beech-Jones J accepted the Crown's alternative submission that the discount was not open to the sentencing judge in the circumstances. A proper exercise of the discretion under s 23(1), with regard to the factors in s 23(2), could only have led to a refusal to impose a lesser sentence. Beech-Jones J found that the sentencing judge acted on a wrong principle and the exercise of power

under s 23(1) was unreasonable. The offence the subject of assistance was unrelated to the subject offence in any sense and there was no temporal association. The sentencing judge acted on wrong principle by assuming that once assistance fell within s 23(1) a discount is available.

His Honour also observed that the sentencing judge's determination was unreasonable when regard is had to the purpose of s 23(1). That purpose, being the public interest in encouraging offenders to supply information to the authorities which will assist them to bring other offenders to justice and to provide evidence, is not advanced when the assistance was provided well prior to the commission of the subject offences. The sentencing judge failed to consider whether the unrelated nature of the offending the subject of the assistance affected the assessment of whether a lesser penalty should be imposed (s 23(2)(i)). The failure to give this factor great importance led to an unreasonable determination. The Crown appeal was allowed.

Objective seriousness assessment – whilst imprecise, a finding of a "serious offence of its type" can be sufficient

The applicant in ***Sharma v R*** **[2017] NSWCCA 85** was sentenced for several sexual offences, including sexual intercourse without consent contrary to s 61I *Crimes Act 1900*. A ground of appeal was that the sentencing judge failed to make a proper assessment of the objective seriousness of the s 61I offences. Her Honour had assessed the objective seriousness of those offences as "serious offences of their type". She reached this finding after mentioning a range of considerations (eg. the complainant saying "no", physical resistance, and the applicant's deliberate and to a limited extent predatory behaviour).

R A Hulme J rejected this ground of appeal, holding that there is no requirement for a sentencing judge to rank the objective seriousness of the offences on a scale. Sentencing judges are required to assess objective seriousness, and identify fully the facts, matters and circumstances which bear upon the judgment, both of which her Honour did. His Honour observed that the sentencing judge's assessment can be criticised for being vague or imprecise, but it was not erroneous. He noted that greater precision may be desirable, citing authority approving of sentencing judges assessing the gravity of offending according to a scale of seriousness. The sentencing judge did however err by mentioning the fact the offending occurred whilst the applicant was on conditional liberty in her assessment of objective seriousness. On that ground the appeal was allowed.

Objective seriousness assessment – a finding of "at a high range for the offence charged" can be interpreted to mean above mid-range but short of worst case category

The applicant in ***Mills v R*** **[2017] NSWCCA 87** was sentenced for one count of persistent sexual abuse of a child, contrary to s 66EA(1) of the *Crimes Act 1900*. The victim was his daughter and the abuse included intercourse culminating in ejaculation. The charge was based on particularised offences of aggravated sexual assault (s 61J) which were representative of ongoing conduct over a period of three years. On appeal, the applicant contended that the sentencing judge erred in assessing objective seriousness as "at a high range for the offence charged". R A Hulme J observed the difficulty in understanding what

sentencing judges mean when they use the terms such as “high range” and “mid-range”, or above or below those ranges. His Honour interpreted the sentencing judge’s finding as meaning that it was above mid-range but short of worst case category.

With regard to the circumstances of the case, he found this finding was open to the sentencing judge. His Honour stated that the absence of factors which, if present, would aggravate the offence, does not make the offence less serious. Attention was also paid to the seriousness of the “sexual offences” which can give rise to a s 66EA charge. It was submitted that s 66EA covered offences more serious than s 61J, such as offences with maximum penalties of 25 years’ and life imprisonment (compared to 20 years for s 61J) but R A Hulme J noted that most of the offences listed have maximum penalties less than s 61J. This ground of appeal was rejected. The applicant was successful in establishing the sentence was manifestly excessive, and the appeal was allowed on that basis.

Objective seriousness assessment – need to specify where an offence lay in the spectrum of offences

In *Delaney v R; R v Delaney* [2013] NSWCCA 150; 230 A Crim R 581 a ground of the Crown appeal contending that there was a failure to determine the objective criminality of the offending was rejected. While a judge did not in terms assess the objective gravity of the offending (it was said that this would have been preferable), he had implicitly done so by referring to the factors which bore upon its objective seriousness. The case involved multiple instances of extortion and the judge had expressly taken into account "the amount involved, the role of the appellant, the nature of the conduct and the period over which it took place": Hoeben CJ at CL at []56].

However, in ***Sponberg v R*** **[2017] NSWCCA 120**, in respect of an offence of supplying drugs to an undercover police officer on six separate occasions, it was held by Macfarlan JA to be erroneous that the judge failed to state where in the spectrum of offences the instant case fell. The judge had said: "Charge 1 is a very serious, large amount of drugs involved. It was committed for profit; it is above the commercial quantity of cocaine; it had quite a high purity; he was able to supply at short notice; obviously had access to drugs; he was supplying to an undercover officer, which meant it did not find its way into the community, but he did not know that." It was said that the judge had merely referred to the amount of drugs involved and failed to assess the objective seriousness of the offence.

On re-sentence, in finding the offence was "mid-range compared to other offences of its type", the factors taken into account were: the substantial quantity of drugs involved; the number of occasions of supply; the applicant's ability to supply such quantities at short notice and to negotiate price; his motivation being to profit, albeit in part to support his own habit; his involvement of another person to effect one of the supplies; and that the supplies were made to an undercover officer and not disseminated into the community, albeit that his moral culpability was not reduced.

Procedural fairness – no warning that an aggravating factor would be taken into account

The applicant in ***Aloniu v R*** **[2017] NSWCCA 74** was sentenced for three counts of aggravated sexual assault. The victim was his niece by marriage, who was 15 at the time and staying at the applicant's home. On appeal, the applicant contended that he was denied procedural fairness prior to the sentencing judge finding that the offences were aggravated by the fact that the applicant knew the victim was under 16 years old. The applicant had denied knowing the victim was under 16. The only aggravating factor on the indictment was that the victim was under the applicant's authority. Walton J (with whom Hoeben CJ at CL agreed, Price J dissenting on this ground) accepted this ground of appeal. His Honour found that the sentencing judge had treated knowledge that the complainant was underage as an aggravating factor. The Crown had not submitted that such a finding be made at the sentence hearing and the sentencing judge did not raise the issue. The applicant was entitled to be given an opportunity to be heard on the issue before the sentencing judge took it into account as an aggravating factor: *R v Tadrosse* (2005) 65 NSWLR 740; NSWCCA 145. The failure to give the applicant that opportunity was a denial of procedural fairness.

Objective seriousness assessment – criminal history irrelevant

The applicant in ***Kelly v R*** **[2017] NSWCCA 82** was sentenced for a number of robbery related offences. When assessing the objective seriousness of the offences, the sentencing judge listed a number of relevant factors, which included the applicant's criminal history. The applicant appealed against sentence. Price J held that the sentencing judge did err by taking into account the applicant's prior criminal history when assessing the objective seriousness of the offence. It is well established that a person's prior criminal record has no part to play in determining the objective gravity of an offence. It was a reserved judgment. The applicant's criminal antecedents were grouped with factors that were relevant to objective seriousness, mentioned between factors that are quintessentially part of an assessment of objective gravity. Despite error being established, the appeal was dismissed.

A security guard at licensed premises is a "vulnerable person" for the purposes of the aggravating factor in s 21A(2)(l) of the Crimes (Sentencing Procedure) Act 1999.

The applicant in ***Longworth v R*** **[2017] NSWCCA 119** was sentenced for recklessly causing grievous bodily harm. The victim of the offence was working as a security guard at the time. After the victim denied the applicant entry to a bar on the basis that he was too intoxicated, the applicant "launched a heavy blow to [the victim's] head" which caused him to fall and suffer a serious brain injury. The sentencing judge found that because the victim was engaged in work as a security guard at the time of the attack, he was a vulnerable victim for the purposes of s 21A(2)(l) of the *Crimes (Sentencing Procedure) Act 1999*. On appeal, the applicant contended that the sentencing judge erred by finding this aggravating factor was made out. Macfarlan JA held that there was no such error. Security guards for licenced premises are "vulnerable" in the relevant sense. The examples given in subsection (2)(l) are not exhaustive; they are occupations where the worker is often isolated from other people and sometimes in possession of significant amounts of money.

The victim's work as a security guard is also one where the worker is isolated from others who may be able to come to their assistance. Additionally, security guards for licenced venues are often liable to encounter, and have to control the conduct of, individuals who are intoxicated and/or disorderly. This is important given security guards' duties to prevent the admission of such persons and eject them from the venue. His Honour also noted that security guards assist in the licensees' performance of their duties under the *Liquor Act 2007*, and added that it was irrelevant that many security guards are physically strong or perhaps trained in self-defence. The appeal was dismissed.

Sentencing statistics must be used appropriately and practitioners should read "Explaining the Statistics" on the Judicial Commission's website

The applicant in ***Why v R*** **[2017] NSWCCA 101** received an aggregate sentence for two counts of supplying a prohibited drug, taking into account a further offence on Form 1. The applicant sought to appeal his sentence on the basis it was manifestly excessive. The appeal raised the issue of the proper use of sentencing statistics. One of the applicant's arguments relied upon a comparison between his aggregate sentence and the head sentence imposed on other offenders for the same offence (supply prohibited drug) where the offender had also pleaded guilty. Walton J criticised the invitation to compare an aggregate sentence and sentences for individual offences. The CCA has held on numerous occasions that statistics offer no guidance about the propriety of an aggregate sentence. His Honour noted that [in the past] the Judicial Commission only records the sentence imposed for one offence (the principle offence) in a multi-offence sentencing exercise and no statistics are maintained of the overall or aggregate sentence imposed in such cases: *Tweedie v R* [2015] NSWCCA 71 at [47].

In additional remarks, R A Hulme J said that sentencing statistics can be a very valuable tool if used appropriately and properly understood. If sentencing statistics are to be relied upon, counsel must ensure they understand the limits of their utility. His Honour implored practitioners to read the document called "Explaining the Statistics" on the Judicial Commission's website before relying upon sentencing statistics. He also discussed recent enhancements to statistics provided by the Judicial Commission, which include statistics for "Aggregate/Effective" terms of sentence and non-parole periods, and the provision of further information about individual cases which make up the database.

*Assistance to authorities – disclosure of otherwise unknown guilt (*Ellis*) – necessary to apply the requirements in s 23 of the* Crimes (Sentencing Procedure) Act

The respondent in ***R v AA*** **[2017] NSWCCA 84** pleaded guilty to sexual assault offences committed against his two nieces. The respondent first denied the allegations, but within a few days made full admissions. The sentencing judge said that the respondent would receive an unspecified "further *Ellis* type discount", referring to an additional measure of leniency afforded in circumstances where the offender voluntarily discloses guilt which would otherwise unlikely have been discovered and established: *R v Ellis* (1986) 6 NSWLR 603 at 604. The Crown appealed against the sentences imposed. One ground of appeal was that the sentencing judge erred in applying an *Ellis* discount.

Beech-Jones J upheld this ground. The sentencing judge allowed a discount for the respondent's assistance to authorities but failed to address the factors in s 23(2) of the *Crimes (Sentencing Procedure) Act 1999*, which are mandatory considerations in deciding whether to impose a lesser penalty. Beech-Jones J found that, contrary to the respondent's submissions, the sentencing judge had indeed given an *Ellis* style further discount, and not just considered his assistance as a demonstration of remorse. His Honour reviewed the authorities which hold that the disclosure of otherwise unknown guilt is subject to the stricture of s 23(3): *CMB v Attorney General for the State of NSW* [2015] HCA 9; 256 CLR 346 at [72]. If sentencing judges are considering imposing a lesser sentence due to a voluntary disclosure of unknown offending, the factors in s 23(2) must be considered in determining whether the discount should be given: *Williamson v R* [2015] NSWCCA 250 at [68]. They also must ensure that the penalty imposed is not disproportionate: s 23(3). Whilst error was made out, the sentences imposed were not manifestly inadequate and the appeal was dismissed.

Commonwealth offences – cannot defer commencement date of a sentence other than s 47 Crimes (Sentencing Procedure) Act 1999 *(NSW)*

The applicant in ***Shi v R*** **[2017] NSWCCA 126** absconded during the course of his trial and was convicted of Commonwealth offences in his absence. Sentencing proceedings subsequently proceeded, also in the absence of the applicant. A sentence of imprisonment was imposed but a commencement date was not specified. The sentencing judge said the sentence will commence when the offender is located, if ever, and the commencement should be backdated by six days from his time of apprehension or surrender. The applicant was later arrested and brought back to court. His counsel sought to adjourn the proceedings but the judge refused, indicating that the sentencing function was complete. The CCA (Hoeben CJ at CL, Harrison and Bellew JJ) allowed the appeal, holding that there was no power to defer the commencement to an unspecified date in the future. New South Wales law on commencement of sentences applies to Commonwealth offences: s 16E of the *Crimes Act 1914* (Cth). The only post-dating permitted in s 47 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) is when the sentence is served consecutively or partly concurrently with another sentence of imprisonment, which was not the case here. The matter was remitted to the District Court.

Totality principle - no two-staged approach

In ***ZA v R*** **[2017] NSWCCA 132** it was contended that it was a matter of established principle that there is a two-staged approach in the application of the principle of totality. The first stage was said to focus on objective considerations involving an assessment of the overall criminality; the totality of offending. The second stage was said to focus on subjective considerations; considering what would be the impact on the offender of a significant extension of sentence by reason of accumulation and the need to avoid a crushing sentence. This notion of two stages, or limbs, was derived from D. A. Thomas, *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division* (2nd ed 1979, London: Heinemann Educational). It was contended that the sentencing judge in the present case failed to have regard to the second limb.

The Court firmly rejected the contention as being contrary to the instinctive synthesis approach to sentencing required by various decisions of the High Court such as *Markarian v The Queen* (2005) 228 CLR 357 at 375 [39]; 377-378 [51]. It was also contrary to authorities in both the High Court and the Court of Criminal Appeal generally dealing with the totality principle such as *Postiglione v The Queen* (1997) 189 CLR 295 at 307-308, 313-314 and *Nguyen v R* (2016) 256 CLR 656 at [37]-[38]; [64].

Facilitating the course of justice (s 22A) – limiting the issues at trial does not necessarily justify a reduction on sentence

The applicant in ***Biddle v R* [2017] NSWCCA 128** was charged with murder. He pleaded not guilty to murder but guilty to manslaughter. The jury found him guilty of murder. One ground of appeal against sentence was that the sentencing judge erred in finding there was no reason to regard the applicant's conduct prior to and during the trial as meriting any lesser sentence because he facilitated the administration of justice. The applicant pointed to many concessions made by the defence which assisted the Crown. It was submitted that a lesser penalty should have been imposed: s 22A of the *Crimes (Sentencing Procedure) Act 1999*. Hoeben CJ at CL found that most of the concessions made were beyond argument and would have been very easy to prove. The applicant's submissions went no higher than the proposition that it was open to the sentencing judge to allow a small discount for the forensic decisions made on behalf of the applicant but he was not obliged to do so. It is significant that the issue was not raised at the sentence hearing. If reliance is placed on s 22A at first instance, the sentencing judge is able to assess whether the concessions made truly did facilitate the administration of justice and they are best placed to do so as the trial judge: *Mulvihill v R* [2016] NSWCCA 259. See also *RP v R* (2015) 90 NSWLR 234; NSWCCA 215.

Commonwealth offences – non-parole period 75% of total sentence – no error

The applicant in ***Aboud v R* [2017] NSWCCA 140** was sentenced for several Commonwealth offences arising from his use of Facebook accounts to engage in offensive and sexually explicit communications with underage girls. The sentencing judge imposed an overall effective sentence of 7 years, with a non-parole period of 5 years and 3 months. One ground of appeal was that the sentencing judge erred in her approach to setting the non-parole period, which was 75% of the head sentence. The applicant complained the non-parole period was higher than the usual proportion, punitive and "was not open" in his case. Harrison J rejected this ground of appeal. It is a discretionary decision to impose the non-parole period in the first place. Since that decision is unassailable, it becomes a matter of indeterminate relativity to criticise its length by reference to the proportion it bears to the overall head sentence. There is no "norm" for the ratio of the non-parole period to head sentence when sentencing for Commonwealth offences: *Hili v The Queen; Jones v The Queen* (2010) 242 CLR 520; HCA 45. Harrison J noted that before *Hili* courts had considered a non-parole period of 75% the total sentence to be punitive. Since *Hili* it has been noted that the range of non-parole periods customarily imposed is likely infected by the 'norm' jurisprudence. An appropriate non-parole period confers a benefit on an offender and also serves the interests of the community: *Afiouny v R* [2017] NSWCCA 23 at

[45]. Further, the sentencing judge's failure to give reasons for why a non-parole period of 75% was chosen does not amount to error. The appeal was dismissed.

Standard non-parole period – where it is a small proportion of the maximum penalty

An offence against s 7 of the *Firearms Act* 1996 is an example of where a standard non-parole period (recently increased from 3 to 4 years) is a small proportion of the maximum penalty (14 years). The sentencing judge in ***Tassis v R*** **[2017] NSWCCA 143** was perplexed and said that a higher sentence would have been imposed if not for the standard non-parole period. The notional starting point for the sentence imposed would ordinarily have a non-parole period that was slightly higher than then applicable standard and on this basis it was contended on appeal that the sentence was manifestly excessive for an offence found to be below the mid-range of objective seriousness.

Leave to appeal was refused. It was held by Bellew J (at [30]) that the judge was required to take into account all relevant factors and this included *both* legislative guideposts (the maximum penalty and the standard non-parole period) without giving priority to either one. The applicant's focus upon the standard non-parole period was contrary to the instinctive synthesis the sentencing judge was bound to apply. Moreover, careful attention must always be paid to maximum penalties: *Markarian v The Queen* (2005) 228 CLR 357 at [31].

Objective seriousness assessment – an offence is not less serious because it is not more serious

In ***R v CTG*** **[2017] NSWCCA 163** it was again affirmed that an offence should not be regarded as being less objectively serious because there is an absence of features that would, if present, have rendered it more serious. In this case the Court rejected an argument that offences of having sexual intercourse with a 3 year old child were not less serious because there was no bodily harm and no force or coercion. Hoeben CJ at CL cited *Bravo v R* [2015] NSWCCA 302, in which *Saddler v R* [2009] NSWCCA 83; 194 A Crim R 452 was cited, and *Mills v R* [2017] NSWCCA 87.

Affidavit evidence – when deponent does not give evidence at sentence hearing

The applicant in ***Van Zwam v R*** **[2017] NSWCCA 127** pleaded guilty to one count of importing a commercial quantity of methamphetamine. At the sentence hearing, the applicant relied on an affidavit where he said he was remorseful. He deposed "I am ashamed of myself… I have remorse… I am very sorry for that." The applicant did not give oral evidence and was not cross-examined on the affidavit. The sentencing judge said "Those documents are of not particularly great weight." The judge found that remorse and contrition were not evident from the applicant's failure to enter a plea until the first day of the trial or his delayed assistance to authorities. His Honour considered claims in the affidavit but found "in the absence of evidence on oath subject to cross-examination, I am unable to find any genuine evidence of remorse or contrition." One ground of appeal against sentence was that insufficient weight had been given to his remorse and

contrition. Macfarlan JA and Campbell J allowed the appeal, holding that the trial judge should not have disregarded the evidence of remorse in the affidavit given the Crown did not cross-examine the applicant or object to the affidavit.

Macfarlan JA stated that the applicant should not be prejudiced by the Crown's choice not to cross-examine the applicant on his affidavit. If the applicant declined to be cross-examined on the affidavit the Crown should have objected to it being read. The judge was entitled to treat the affidavit evidence as of less weight than evidence given orally, but he was not entitled to disregard it altogether. Campbell J added that the judge was not bound to accept the affidavit evidence, but his failure to appreciate that the affidavit was evidence led him into error.

Adamson J, in dissent, found there to be no material difference on a sentence hearing between the weight to be given to an affidavit where the deponent is unwilling to subject himself to cross-examination and the weight to be given to an unsworn statement or a statement to the author of a pre-sentence report. Her Honour found no error; the sentencing judge took the statements in the affidavit into account but, having regard to all the evidence, was not satisfied that there was genuine remorse or contrition. The sentencing judge was not obliged to accept the applicant's affidavit evidence, even in circumstances where he was not cross-examined by the Crown.

Accepting hearsay assertions in reports

A sentencing judge was not prepared to accept expressions of remorse by an offender set out in a psychiatric report in circumstances where the offender did not give evidence. It was contended on the appeal in ***Imbornone v R*** **[2017] NSWCCA 144** that the judge wrongly concluded that there was insufficient evidence to satisfy the requirement in s 21A(3)(i) of the *Crimes (Sentencing Procedure) Act* for remorse to be taken into account as a mitigating factor.

Wilson J noted a distinction between a finding that there was insufficient evidence to establish on the balance of probabilities that there was remorse with a conclusion that the offender was obliged to give evidence before a finding of remorse could be made. The former was open to the sentencing judge and was well supported by authority. Her Honour restated the principles (at [57]).

Compensation order made – not a mitigating factor

The offender in ***Upadhyaya v R*** **[2017] NSWCCA 162** diverted money from a company of which he was a financial director and board member to the tune of about $10 million. During the sentence proceedings the company applied for a compensation direction under the *Victims Rights and Support Act* 2013. After sentence had been imposed, the sentencing judge made a compensation direction in the maximum sum permissible, $750,000. It was contended on appeal that the judge should have taken this into account as a matter of mitigation of sentence.

Leave to rely upon this ground of appeal was refused. Leeming JA held that on the facts of the case there was no error in failing to have regard to the compensation direction which had not been made at the time of sentencing and which, at the time of the appeal some 19 months later, had not been enforced and might never be. The judge had not been asked to take it into account on sentence. Very commonly an offender's criminal conduct will also give rise to a civil liability and in this case the victim company had available a civil claim entitling it to judgment for many millions of dollars. The making of the compensation direction made no appreciable difference to the offender's civil liability.

Plea of guilty – failure of sentencing judge to acknowledge can indicate no regard was had to it

The appellant in ***Edwards v R*** **[2017] NSWCCA 160** pleaded guilty to robbery and two other offences were placed on a Form 1. She was sentenced to 3 years imprisonment with 18 months non parole. The sentencing judge considered the appellant's subjective case, including a disadvantaged upbringing and mental health issues. He noted that she had expressed remorse and had accepted responsibility for her behaviour. However, the remarks on sentence made no reference to the fact that the applicant had entered a plea of guilty or that she had done so at an early stage. On appeal it was contended that the sentencing judge failed to apply a discount of 25%, or any discount, in recognition of the guilty plea. Garling J held that clear error had been demonstrated. The sentencing judge failed to take into account a material consideration when determining the relevant sentence. When there is no mention of an early guilty plea it can only be inferred that the sentencing judge did not have regard to it. The appeal was allowed and in re-exercising the sentencing discretion afresh, a sentence of 2 years 3 months with a non-parole of 1 year 2 months was imposed.

Good behaviour bonds – Local Court power to deal with breach of bond imposed on appeal in the District Court

The offender in ***Director of Public Prosecutions (NSW) v Jones, Dillon Michael*** **[2017] NSWCCA 164** was sentenced to imprisonment in the Local Court. He appealed to the District Court where good behaviour bonds were imposed in lieu. The judge made a direction that any breach of the bonds be reported to him for further action. The offender committed further offences and when they were dealt with the magistrate also purported to re-sentence in respect of the breach of the District Court bonds. The offender again appealed, this time against the aggregate sentence imposed in the Local Court which included the offences the subject of the breached bonds. The District Court judge before whom the appeal came (not the same as the first judge) expressed concern about the failure to adhere to the direction of the other judge and about the power of the Local Court to call-up the offender and re-sentence. This resulted in a stated case coming to the Court of Criminal Appeal.

In relation to the first judge's direction, Basten JA held that it was not a condition of the bond; it was legally ineffective; it was unclear to whom it was directed; it was not based upon any statutory power vested in the judge; and it could not diminish the statutory authority of any other court or judicial officer to deal with a breach of the bond.

Basten JA also closely analysed the provisions of ss 95, 97-99 of the *Crimes (Sentencing Procedure) Act* 1999 and concluded that the Local Court had jurisdiction (as did the District Court) to deal with the breach.

His Honour also noted (at [18]) a practical matter favour a conclusion that the Local Court had power to deal with the breach: "Where the offender is before the Local Court for further offences which constitute breaches of a bond imposed for earlier offences, it would be unfortunate if the one court could not deal with both the breach of the bond and the further offences. For that purpose, it should not matter whether the bond was imposed by the District Court or a Local Court."

His Honour also referred to *Yates v Commissioner of Corrective Services of NSW* [2014] NSWSC 653 which held that the Local Court had (sole) jurisdiction in respect of breach of a bond imposed in that Court but purportedly "confirmed" upon dismissal of an appeal to the Local Court.

Aggregate sentencing – whether discounts should apply to the aggregate as well as the indicative sentences

An issue arose in ***PG v R* [2017] NSWCCA 179** as to whether discounts for pleas of guilty (and assistance to authorities) should be applied not only to the indicative sentences for the individual offences but also to the aggregate sentence. It arose in a parity argument where the applicant sought to compare his 9 year aggregate sentence with an identical aggregate sentence imposed upon a co-offender. He received a combined discount of 50% for his pleas of guilty and assistance while the co-offender received a 25% discount for pleas of guilty. Therefore, so it was argued, the starting point for the applicant's aggregate sentence was 18 years whereas the starting point for the co-offender was 12 years.

Basten JA examined the terms of the statutory provisions and the case law and concluded that the discounts should apply to the aggregate as well as the indicative sentences.

Button and N Adams JJ gave 9 reasons why this was wrong. They included that it would create complications in the sentencing process (what if some offences warranted different discounts, or no discount?) The introduction of aggregate sentencing was for a purpose of simplifying the sentencing task and not to make substantive changes to sentencing law. There was (and is) no requirement to discount the total head sentence in a traditional multiple offence sentencing exercise. The approach proposed in *JM v R* [2014] NSWCCA 297 at [39](3) and adopted on many occasions since (on appeal and at first instance) is correct.

Good prospects of rehabilitation and unlikelihood of reoffending are separate issues

A relatively young offender was sentenced for drug supply offences. He had some psychological issues and had fallen into drug use at the age of 18 and into supplying drugs at the age of 21. Following his arrest he had managed to abstain from drugs in the 3 years until he was sentenced, had managed to build a business, restore family relationships and

was remorseful. A psychologist opined that it would be highly surprising if he offended again. It was contended on appeal that while the sentencing judge made a favourable finding of good prospects of rehabilitation he was in error in not determining his likelihood of reoffending.

Price J held in ***Zuffo v R*** **[2017] NSWCCA 187** at [46]-[57] that as the two concepts are commonly linked but they are not the same (citing *R v Pogson* (2012) 82 NSWLR 60 at [118]-[121] – e.g. "rehabilitation is a concept which is broader than merely avoiding reoffending"). The issue was squarely raised in submissions and, in a reserved judgment, it should have been addressed by the sentencing judge. Adamson J agreed with the result but provided her own reasons in relation to this ground. She regarded it as significant that the judge had said there was a need for the sentence to reflect specific deterrence. Why would specific deterrence be required if there was an unlikelihood of reoffending? The judge should have addressed the issue and made a finding. Hoeben CJ at CL agreed with both judgments.

SENTENCING - SPECIFIC OFFENCES

Flying an aircraft recklessly leading to death and serious injury - objective seriousness and general deterrence

The respondent in ***R v Crumpton*** **[2016] NSWCCA 261** was flying a plane at a low level when it hit power cables and crashed. There were two passengers; an adult male was injured and an 11 year old girl died. The respondent was found guilty of two charges related to recklessly operating an aircraft, endangering life and endangering persons. The sentencing judge imposed suspended sentences of imprisonment (15 months and 9 months, concurrent). The Crown appealed on the basis that the sentence was manifestly inadequate. The Crown asserted errors in the assessment of objective seriousness and the approach to general deterrence.

The Court allowed the appeal. In the assessment of objective seriousness, the sentencing judge considered the fact that the maximum penalties for the offences were not substantial in relation to all criminal offences. Davies J held that this was an irrelevant consideration which infected the assessment of objective seriousness with error. His Honour also found that whilst the sentencing judge said he had considered general deterrence, it was doubtful whether it had been truly factored in. Davies J held general deterrence is a significant matter in relation to offences relating to the flying of aircraft. Smaller groups of society (such as pilots) are more likely to be deterred from offending than larger groups (such as drivers of motor vehicles). This group of people are likely to be aware of aircraft accidents, particularly those causing death. Punishment of reckless flying is calculated to come to the attention of this relatively small community of pilots. For this reason, there is a proper analogy with the effect of general deterrence on sentencing for white collar crimes: *DPP (Cth) v Gregory* (2011) 34 VR 1; [2011] VSCA 145 at [53].

Break, enter and steal - R v Ponfield – *care is needed in considering a prior record for similar offences in assessing objective seriousness*

The applicant in ***Dickinson v R*** **[2016] NSWCCA 301** pleaded guilty to five counts of break, enter and steal. He had a prior record for similar offences. Indeed, at the time of the relevant offending he was on parole for such an offence. The sentencing judge referred to *R v Ponfield* (1999) 48 NSWLR 327; NSWCCA 435 (a guideline judgment for sentencing s 112(1) *Crimes Act 1900* offences) and cited particular factors which were said in the judgment to increase the seriousness of the offence, including that an offender had a prior record for similar offences. The sentencing judge then found that the offences were objectively very serious.

On appeal, the applicant submitted that the sentencing judge erred in considering the fact that the applicant's prior record in his assessment of objective gravity. Hidden AJ rejected this ground of appeal (which was otherwise allowed), holding that the sentencing judge dealt with objective gravity as an issue separate from consideration of the applicant's history. The appeal nonetheless highlighted that *Ponfield* should be approached with care. The guideline judgment has been rendered of limited utility by the enactment of s 21A of the *Crimes (Sentencing Procedure) Act 1999*, which lists (more comprehensively) aggravating and mitigating factors: *Mapp v R* (2010) 206 A Crim R 497; NSWCCA 269 at [10]. Crucially, on the issue of an offender's prior record, *Ponfield* was decided before *R v McNaughton* (2006) 66 NSWLR 566; NSWCCA 242, which held at [24] that objective circumstances of an offence "do not encompass prior convictions".

Drug trafficking to a substantial degree - common factors like a need for substantial supervision and recidivism do not give rise to "exceptional circumstances" justifying an ICO

The respondent in ***R v Ejefekaire*** **[2016] NSWCCA 308** pleaded guilty to an offence of ongoing supply of methylamphetamine. He was sentenced to a term of imprisonment of one year and ten months to be served by way of an Intensive Correction Order (ICO): s 7(2) of the *Crimes (Sentencing Procedure) Act 1999.* The Crown appealed, contending that the sentencing judge erred in finding exceptional circumstances. The CCA allowed the appeal, holding that exceptional circumstances justifying the imposition of an ICO had not been demonstrated.

It is well established that an offender involved in supply of prohibited drugs "to a substantial degree" (it was unchallenged that the respondent was) must receive a full-time custodial sentence unless there are "exceptional circumstances". A guilty plea, remorse and rehabilitation are not matters constituting an exception unless together they render the case "one of real difference from the general run of cases": *Smaragdis v R* [2010] NSWCCA 276 at [31]. Whilst a sentence other than full-time custody is possible for drug trafficking offences (as per *EF v R* [2015] NSWCCA 36) the sentencing judge erred in making a finding of exceptional circumstances in this case. There was nothing exceptional in the respondent's subjective case; a need for "substantial supervision" applies to many offenders; recidivism was not outside the common range, and nothing in the circumstances of the offending was exceptional.

Child sexual assault - any suggestion that the child consented is misguided and irrelevant

The applicant in ***CT v R*** **[2017] NSWCCA 15** was convicted of numerous child sexual offences, which were committed against his step-daughter when she was aged between 6 and 10 years old. One ground of appeal against sentence was that the sentencing judge failed to consider the evidence given by the complainant that she remembered enjoying the intercourse. Hoeben CJ at CL held that the submission was misconceived and should be firmly rejected. The notion of consent has no role to play in sentencing for serious sexual assaults on very young children. His Honour observed that there is no authority for such a submission for good reason; it is inappropriate to equate a child's appreciation of sexual experience with that of a mature adult. Whilst the use of threats or force to overcome resistance would be an aggravating factor, to treat a lack of opposition as a mitigating factor is to misunderstand the nature of the offence. Persons of a young age are unable to give consent and even when sexual activity is not opposed by the victim, it will be damaging; *R v Nelson* [2016] NSWCCA 130 at [23]. The appeal was dismissed.

Drug supply to an undercover operative – culpability not reduced when offender ready and willing to supply

The applicant in ***Cam Huynh Giang v R*** **[2017] NSWCCA 25** was sentenced for two drug supply offences. Undercover operatives had been involved, requesting supply of methylamphetamine and meeting with the applicant on several occasions over a five-month period. He supplied the operatives with five ounces of methylamphetamine and then one kilogram of the same drug. On appeal against sentence, it was contended that the sentencing judge failed to consider the role of police provocateurs in aggravating the seriousness of the offending and the applicant's overall criminality.

Latham J rejected this submission. As the applicant acknowledged, the question is whether there is a real possibility that he would not have committed the offences but for the undercover operatives' involvement. It was clear from the agreed facts that the applicant was ready and willing to supply high-grade methylamphetamine to any prospective purchaser. For example, he had a practice of supplying samples so the purchaser knew they were buying a high quality product, he referred to having a usual supplier, and he contacted the operatives on his own volition. Contrary to the applicant's suggestion, any fair reading of the facts indicated that once the undercover operatives were referred to the applicant, they merely presented him with the opportunity to supply methylamphetamine and tested his capacity to supply commercial quantities. Thus, the fact that undercover operatives were involved could not be said to be a mitigating factor.

Historical child sex offences – temporary reduction in maximum penalty in intervening period irrelevant

The applicant in ***Woodward v R*** **[2017] NSWCCA 44** was sentenced for a number of child sexual assault offences, including rape, committed in the 1970s. Rape has been subject to varying maximum penalties over the years. At the time of the offending the penalty was life imprisonment. The "modern analogue" for such an offence committed against a child under 16 is s 61J(1) of the *Crimes Act 1900* with a maximum penalty of 20 years'

imprisonment. In between, there was a period where the offence in this case would have been punishable by 10 years' imprisonment. The applicant contended that it would align with policy for him to be sentenced according to the maximum penalty at its lowest point in the history. R A Hulme J rejected this argument and dismissed the appeal. His Honour held that the correct approach is to have regard to the maximum penalty at the time of the offence, any identifiable sentencing practices and patterns at that time, and the maximum penalty reflecting community attitudes prevalent at the time of sentencing. It would be inappropriate to grant the applicant leniency due to the fact that a lower maximum penalty had prevailed for a time before being abandoned prior to his sentence.

Drug supply – supply to undercover police – mitigating factor of "harm not substantial" (s 21A(3)(a)) does not apply

It was contended in ***Taysavang v R; Lee v R*** **[2017] NSWCCA 146** that a judge was in error when sentencing for drug supply to an undercover police officer that the mitigating factor in s 21A(3)(a) of the *Crimes (Sentencing Procedure) Act* 1999 applied because the drugs did not cause harm to the community. The Court (Simpson JA, McCallum and Fagan JJ) held that there was no error. Indirect and generalised harm flows from the supply of drugs; for example, funding drug manufacturers and importers, thereby increasing the availability of drugs. Further, a great deal of law enforcement time and resources are taken up with investigation of criminal drug activity. Also, it would be absurd to allow for this mitigating factor in other circumstances where the drugs did not find their way into the drug using community; for example, the seizure of large quantities upon importation, or when supplied from one drug supplier to a lower level supplier, or where the supplier is arrested in possession and before actual supply.

Drug importation offences – De Simoni *error by having regard to a net weight that would apply to a more serious offence*

The offender in ***Lee v R*** **[2017] NSWCCA 156** was sentenced for an offence of importing a border controlled drug contrary to s 307.3 of the *Criminal Code* 1995. The gross weight of the substance was 3.2kg but investigating police failed to have it analysed for purity which is the weight that determines the appropriate charge under the Code. Accordingly, it was not possible to charge an offence against s 307.1 (import/export commercial quantity – 0.75kg or more) or against s 307.2 (import/export marketable quantity – 2.0g or more). An offence against s 307.3 does not involve specification of any particular quantity. The sentencing judge had regard to the offender having imported "a substantial quantity". It was inferred that she had in mind something in excess of 2.0g, and probably well in excess of it. That was a finding that was well open on the facts, but without specific reference to the need to ensure she was not sentencing on the basis of facts that would render the offender liable for a more serious offence, it was concluded that error of the type described in *The Queen v De Simoni* (1981) 147 CLR 383 had occurred.

Historical child sexual assault offences – relevance of delay

An offender was sentenced at the age of 85 for indecent assaults and an act of indecency against his three daughters between 1965 and 1978. On appeal it was contended that the offender was under no obligation to disclose his offending and after such a long passage of time he was entitled to believe that he would never be charged and to order his affairs accordingly. He submitted that the delay was occasioned by the absence of a complaint to authorities, not by any conduct on his part.

Hoeben CJ at CL held that "this is a somewhat bold submission": ***Hornhardt v R* [2017] NSWCCA 186**. Where close family relationships are involved it is a significant distortion of reality to argue that the offender has been disadvantaged because his criminality has been undetected for almost 50 years when the lack of detection is directly related to the nature of his offending. Reference was made to *Wilson v R* [2017] NSWCCA 41 where Beech-Jones J said (at [48]) that the commission of an offence on someone so young even 30 years ago should not necessarily be regarded as a "stale crime" and to *Magnuson v R* [2013] NSWCCA 50 at [62] where Button J said that, whilst it is true that the offender had not offended for a long time, it was also true that he had escaped justice for decades and enjoyed a life free from opprobrium or punishment for his crimes.

Regime of damaging property and arson offences – De Simoni *error?*

In ***Issa v R* [2017] NSWCCA 188** it was contended that when sentencing for offences against s 195(1)(b) of the *Crimes Act*, namely intentional damage to homes by means of fire, a judge erroneously took into account as an aggravating feature contrary to *The Queen v De Simoni* (1981) 147 CLR 383 that the offender realised there was a likely risk of physical danger to the occupants. It was said that this involved a trespass into more serious arson offences in ss 196 and 198.

Adamson J referred to the legislative history of in ss 196 and 198 and noted that in their current form the elements comprised the intentional or reckless damage/destruction of property and a specific intent to cause bodily injury to another (s 196(1)) or a specific intent to endanger the life of another (s 198). Foreseeing the possibility of harm to others fell short of such intention and so there was no breach of the *De Simoni* principle.

SUMMING UP

Unbalanced summing up occasioning a miscarriage of justice

The four applicants in ***Decision Restricted* [2016] NSWCCA 202** were tried for their alleged involvement in a murder. In their appeals against conviction they raised a number of arguments challenging the fairness and balance of the judge's summing up to the jury. Adamson J allowed the appeal and quashed the convictions. Her Honour held that the cumulative effect of several errors was to produce a summing up that was so imbalanced so as to deprive the applicants of a fair trial. First, the judge erroneously gave a hearsay warning pursuant to s 165 of the *Evidence Act* in relation to a police officer's note

containing an apparent prior inconsistent statement by a critical prosecution witness. This was in circumstances where the hearsay rule did not apply to the note. The warning was plainly adverse to the applicants' interests and had not been sought by the Crown. Second, the effect of the trial judge's asking, rhetorically, why [a witness] would lie was not only to deprive the earlier warning under s 165(1)(d) of the *Evidence Act* (that he was criminally concerned) of any substantial force, but also to give the jury the impression that if they could not identify another reason why he would lie, they should accept his evidence. This was an error which could give rise to a substantial miscarriage of justice. Third, the judge inadequately dealt with the Crown case against each accused separately and failed to summarise the defence cases individually at all. In this case, the role of each applicant was separate and distinct and his Honour was obliged to distinguish between their respective positions and the evidence relevant to each.

Consciousness of guilt direction required where the prosecutor refers to disposal of evidence by an accused and the jury could be left wondering how to use a lie by the accused

The appellant in ***DN v R*** **[2016] NSWCCA 252** denied taking topless photos of the complainant, which gave rise to one of the charges for which he was convicted. In cross-examination he was asked whether he disposed of his phone because it contained photos of the complainant consistent with the allegations. The appellant denied this, saying he wasn't sure what happened to the phone three years ago. He said it may have been sold, swapped or broken. The Crown's closing address included, "On the Crown case getting rid of the phone in which the Crown says these photographs were contained, the topless photographs". The appellant appealed against his conviction on the ground that a miscarriage of justice occurred as a result of the prosecutor's use of consciousness of guilt reasoning and/or the trial judge's failure to direct the jury regarding such reasoning.

The Court dismissed the appeal. Beazley P held that a consciousness of guilt direction was required, but in the circumstances there was no substantial miscarriage of justice. Beazley P reviewed the authorities, including the statement in *Zoneff v The Queen* (2000) 200 CLR 234; HCA 28 at [16] that there may be cases where a jury's misunderstanding as to how they should use a lie requires an *Edwards*-type direction, even if the prosecutor has not put that the lie was told out of a consciousness of guilt. In the present case, Beazley P found that if the jury rejected the appellant's version of what happened to the phone, there was a real question as to what they should do with that part of his evidence. Her Honour found that the way the matter was left to the jury invited the jury to treat the disposal of the phone as evidence of guilt. For this reason, a consciousness of guilty direction was required.

A judge can give a "significant forensic disadvantage" direction under s 165B of the Evidence Act 1995 *without a party making an application for such a direction*

The appellant in ***TO v R*** **[2017] NSWCCA 12** was charged with child sexual assault offences alleged to have occurred in June 2012. The complainant told her mother in December 2013 and the police interviewed her in early 2014. The appellant was found guilty after a trial by jury in 2015. On appeal against his convictions, the appellant contended that a

miscarriage of justice was occasioned by trial counsel's failure to seek a direction pursuant to s 165B of the *Evidence Act 1995* (NSW) regarding forensic disadvantage suffered as a result of delay. Price J rejected this ground of appeal. There were two questions; first, as neither party applied for a forensic disadvantage direction, was the trial judge permitted to give such a direction on her own volition? Second, if the judge was permitted to do so, was the judge obliged to in the circumstances?

On the first issue, Price J held that the judge was not prevented from giving a forensic disadvantage direction despite the lack of application. This was consistent with the Victorian Court of Appeal's conclusion in *Greensill v R* (2012) 37 VR 258; VSCA 306. Price J considered case law on s 165 *Evidence Act*; it is well established there is no obligation for a judge to give a warning under s 165 if not requested by a party, but the obligation may otherwise arise (e.g. whenever necessary to avoid a perceptible risk of miscarriage of justice or where the courts have special knowledge or experience about a kind of evidence). Price J found further support for the conclusion in ss 9(1) and 165B(5) of the *Evidence Act*. On the second issue, Price J held that a direction was not necessary in the present case. Defence counsel relied upon a witness' evidence to contradict the complainant's account that she was screaming; the forensic disadvantage by reason of delay was not significant, and; if an application had been made it would have been open to her Honour to find that the appellant's misconduct significantly contributed to the delay because the complainant said that she did not complain because the appellant threatened her and she was scared. The appeal was dismissed.

When a Murray *direction and a s 165* Evidence Act 1995 *direction are not required in child sexual assault trials*

The applicant in ***AL v R*** **[2017] NSWCCA 34** was convicted by a jury of three counts of sexual intercourse with a child under 10. At the time of the offending the applicant was 12-13 years old. The complainant was a younger neighbour, 4-5 years old. At issue on appeal was whether the trial judge was required to give two jury directions which had been requested by the applicant's trial counsel and refused; a *Murray* direction cautioning the jury that where there is only one witness, their evidence must be "scrutinised with great care" (*R v Murray* (1987) 11 NSWLR 12 at 19D-E) and an unreliable evidence direction pursuant to s 165 of the *Evidence Act 1995.* The applicant conceded that s 294AA of the *Criminal Procedure Act 1986* applied, preventing the trial judge from giving any warning or suggestion to the effect that complainants as a class are unreliable witnesses. On appeal, it was contended that the trial judge erred by refusing to give those warnings. The applicant contended that ten features (listed in full at [62]) of the evidence required a warning of the *Murray*/s 165 nature to guard against a miscarriage of justice.

The Court (Leeming JA, Schmidt and Wilson JJ) held that the trial judge was not obliged to give either the s 165 warning or a *Murray* direction. There was no risk of a miscarriage of justice. The first feature identified by the applicant (that the Crown case relied solely on the evidence of the complainant) was addressed by directions on burden and standard of proof. Some features were the subject of directions about delay and consequent disadvantage. Other features (eg the complainant's age and the effect of passage of time on the memory of a child of that age) were not permissibly subject of a warning due to s 165A of the *Evidence Act* and s 294AA of the *Criminal Procedure Act.*

The Court held that any direction cautioning the jury about the possible unreliability of a child complainant's evidence must focus on matters relevant to the particular child and the particular circumstances. On the remaining features (eg the complainant's evidence of memory and nightmares), the Court held that they were matters evident to the jury, who saw the complainant give evidence and answer questions in cross-examination that were directed to the possible unreliability of his evidence. Trial counsel for the applicant gave a comprehensive address noting all the features which could point to unreliability in the complainant's evidence. The distinction drawn by the trial judge between matters of which the jury could have little understanding or appreciation (which may require warnings about unreliable evidence) and matters a jury is well able to assess without particular assistance is supported by *The Queen v GW* [2016] HCA 6 at [5]; where the definition of a "perceptible risk" included the quality that it "may not be evident to a lay jury".

Multiple acts capable of giving rise to murder or manslaughter – when unanimity required as to the act causing death

The appellant in ***Lane v R*** **[2017] NSWCCA 46** was in an altercation with the deceased outside a hotel. The deceased died nine days later and the appellant was charged with murder. The altercation was captured on CCTV, which showed the deceased falling to the ground twice. The Crown said that both falls were caused by voluntary acts of the appellant; first after the appellant made contact with the deceased (perhaps a "blow") which made him trip and fall, the second after the appellant punched the deceased in the head (one witness called it a "king-hit"). The injuries sustained from either fall were each sufficient to cause death. There were thus two discrete acts which were said to have been deliberate and caused death. The appellant's case was that the jury could not be satisfied either fall was caused by a voluntary act on his part. The jury found him not guilty of murder, but guilty of manslaughter. The trial judge gave a general direction on the need for unanimity. One ground of the appeal against conviction was that the trial judge erred in failing to direct the jury that they were to be unanimous as to the factual basis on which they might convict the applicant of manslaughter. The appellant contended that there were alternative factual bases of liability, being the two discrete acts relied on as capable of constituting the voluntary act causing death.

Meagher JA and Davies J held that the trial judge erred by not directing the jury that they could not convict of murder or manslaughter unless they were unanimous on the voluntary act upon which their verdict was based. If any of the discrete acts relied upon as proof of the offence would entitle the jury to convict, and the discrete acts go to the proof of an essential ingredient of the crime charged, then the jury cannot convict unless they are agreed upon that act which constitutes that essential ingredient: *R v Walsh* [2002] VSCA 98; 131 A Crim R 299 at [57]. In this case, it was left to the jury to decide whether each of the deceased's falls was caused by a voluntary act of the appellant. A specific direction was therefore required. In the absence of any such direction, it was possible that some jurors would reason to a guilty verdict by satisfying themselves that the appellant's voluntary act caused the first fall, but others may come to the same conclusion about the second fall. Whilst there was therefore a risk of a substantial miscarriage of justice, their Honours held that no such miscarriage actually occurred: s 6(1) *Criminal Appeal Act 1912.* It was not open to the jury to have reasonable doubt as to the appellant's guilt of

manslaughter by unlawful and dangerous act based upon the deliberate act causing the second fall. Fagan J agreed with Meagher JA and Davies J that the ground was made out, but disagreed on whether a substantial miscarriage of justice had occurred.

Importation offences – inferring intention to import from a finding that the accused saw there was a significant or real chance of a substance being inside an object they were bringing into the country

Smith v R; R v Afford **[2017] HCA 19** concerned two appeals heard together because they raised the same question about the process of inferential reasoning in relation to importation of a border controlled drug contrary to s 307.1(1) of the *Criminal Code* (Cth) (the Code). Mr Smith admitted to having concerns about what was in the suitcase he was given and Mr Afford recalled hoping there was nothing illegal inside his baggage. At both trials it was argued that even if the accused had been suspicious, that did not establish intent to import illegal substances. Challenges to directions to the jury based upon *Kural v The Queen* [1987] HCA 16; 162 CLR 502 were unsuccessful in Smith's case in the NSW CCA but successful in Afford's case in the Victorian Court of Appeal.

Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ held that the reasoning in *Kural v The Queen* was applicable. There is was held that it was open to infer intention to import a narcotic drug contrary to s 233B(1)(b) of the *Customs Act* where it was established that the accused knew or believed or was aware of the likelihood, in the sense of there being a significant or real chance, that what was being imported was a narcotic drug. Judges can direct juries that if they find beyond reasonable doubt that the accused saw there to be a real or significant chance of a substance inside an object they were bringing into the country, then they can infer that the accused intended to import a substance. If someone is aware of a real or significant chance that an extraneous substance in their luggage, and their state of mind is truly that they would not be prepared to take that substance into Australia, it is to expected that they would either inspect the luggage to ensure the presence of no such substance or at the very least declare their concerns to Customs upon arrival. Therefore, if such a person does not take any action to avoid the risk of the substance being present, there is a strong suggestion that the person's state of mind is that they were prepared to proceed with bringing the substance into the country. Rather than causing difficulties, it would likely be of considerable assistance to instruct the jury that it is open to them to infer intent to import provided certain requirements are met.

Their Honours found that whilst the directions in *Afford* and *Smith* were sufficient, it would be preferable if directions in the future aligned more closely with the language of the Code and particularly with the statutory definition of intent in s 5.2.

Suggested directions were listed at [69]. Regrettably, they included:

> (7) In order to draw an inference of intent, it is necessary to be satisfied beyond reasonable doubt of the facts and circumstances from which the inference of intent is drawn and that the inference of intent is the only reasonable inference open to be drawn from those facts and circumstances.

Obviously it is necessary for a jury to be satisfied beyond reasonable doubt of an inference of intent. But the necessity to be satisfied beyond reasonable doubt of the facts and circumstances from which that inference is to be drawn is novel. No authority was cited in support of the proposition.

Section 35 of the Crimes Act – recklessness *can be established by proof that the accused foresaw the possibility (not probability) of harm*

The appellant in ***Aubrey v R*** **[2017] HCA 18** knew he was HIV positive and had unprotected sexual intercourse with the complainant, who was then infected with HIV. The alternative count the appellant was charged with was maliciously inflicting grievous bodily harm contrary to s 35(1)(b) of the *Crimes Act 1900*. The second issue raised on appeal was whether recklessness requires foresight of the possibility or probability of grievous bodily harm. Kiefel CJ, Keane, Nettle and Edelman JJ held that in order to establish that an accused acted recklessly within the meaning of s 5 of the *Crimes Act*, and thus maliciously within the meaning of that section and s 35, it is sufficient for the Crown to establish that the accused foresaw the possibility (not probability) that the act of sexual intercourse with the other person would result in the other person contracting the grievous bodily disease. Whilst the requirements in other states might vary according to the terms of their legislation, for ss 18 and 35 of the *Crimes Act* the reasoning in *R v Coleman* (1990) 19 NSWLR 467 was correct; the fact that recklessness for common law murder requires that the accused foresaw the probability (not possibility) of death or grievous bodily harm does not mean the same standard applies to s 35. The reason for requiring foresight of probability in the case of common law murder was the near moral equivalence of intention to kill or cause grievous bodily harm and the foresight of the probability of death: *R v Crabbe* (1985) 156 CLR 464 at 469. The same does not necessarily, if at all, apply to statutory offences other than murder.

The role of reasonableness in risk-taking was also discussed. The appellant pointed to recent English decisions which had held that recklessly causing grievous bodily harm required not only proof that the accused foresaw the possibility of harm and still proceeded, but also that it was unreasonable for the accused to take that risk in proceeding. The plurality rejected the appellant's submission that these decisions represented an advance in the law that the High Court should follow by replacing the requirement of foresight of possibility with probability. Reasonableness of an act and the degree of foresight of harm are logically connected. If the act in question lacks any social utility then a jury might more readily consider that foresight of mere possibility is enough to amount to recklessness. If, on the other hand, the act in question has a degree of social utility (such as driving a car, or playing a contact sport) then the jury might properly consider that foresight of something more than possibility is required. It was said that juries are ordinarily, as a matter of common sense and experience (and therefore without specific directions) able to take into account the social utility of an act in determining recklessness. There is no reason to replace the requirement of foresight of possibility with a test of probability.

Directions as to the accused giving evidence

In ***BM v R*** **[2017] NSWCCA 133** a trial judge gave comprehensive directions as to the onus and standard of proof, both orally and in writing. He directed that if the jury accepted the accused's evidence they must acquit. He directed that even if the jury did not positively accept the accused's evidence, if it left the jury with a reasonable doubt they must acquit. (Such directions are in accordance with the suggested directions in the Criminal Trial Courts Bench Book.)

On appeal it was contended that by focussing on the accused's evidence the trial judge had placed "an evidentiary onus" on the accused. Basten JA said that the jury could not have been left in any doubt about the Crown bearing the onus of proof. It would have been remiss in the extreme for the judge not to refer to the accused's evidence and explain that even if they weren't affirmatively satisfied that it was reliable or truthful, it might still give rise to a reasonable doubt. It would also have been remiss for the judge not to have referred to trial counsel having made the same point in his address. If the directions had any tendency to deflect the jury from a correct appreciate of who bore the onus it would have been apparent to defence counsel; yet no complaint was raised. Leave under r 4 of the Criminal Appeal Rules was refused.