Supreme Court of New South Wales 2018 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 Ms Christina White BA (Hons) LLB (Hons) and Mr William Bruffey BA LLB (Hons 1).

APPEALS

Particularisation of specific error in grounds asserting manifest excess/inadequacy

Regina v Baker* **[2017] NSWCCA 233** was a Crown appeal against sentence, where the only ground of appeal was manifest inadequacy. In submissions, however, the Crown alleged four "specific errors". McCallum J observed that the distinction between patent and latent error is long-recognised and remains appropriate. The notion that particulars are required to support a ground of manifest inadequacy or excess is apt to blur that distinction. *R v Harris* [2015] NSWCCA 81 (where Adamson J commented that identifying specific error may assist to explain why a sentence is manifestly inadequate: at [46]) does not advocate that specific errors should be identified in support of a ground of manifest inadequacy/excess.

Judgment was given in ***Hurmz v*** **R [2017] NSWCCA 235** a week later. The sole ground of appeal was that the sentence was manifestly excessive. It was submitted that the appellant was "unfairly disadvantaged" by the sentencing judge's assessment that a drug supply offence was "well into the middle range" of objective seriousness. The complaint was addressed, but Beech-Jones J noted that such complaints should be the subject of a separate ground of appeal and must establish one of the errors specified in *House v The King* [1936] HCA 40; 55 CLR 499 (citing *Mulato v R* [2006] NSWCCA 282).

Scope of "interlocutory judgment or order" in s 5F Criminal Appeal Act – *orders that witnesses give evidence by way of AVL*

The applicant in ***KN v R*** **[2017] NSWCCA 249** was charged with sexual offences. The trial judge ordered that the complainant and another witness could give evidence from a foreign jurisdiction via audio-visual link (AVL) using "Jabber" technology. The applicant sought an order temporarily staying the trial pending an appeal pursuant to s 5F *Criminal Appeal Act 1912* and an order refusing the Crown's application for those witnesses to give evidence via AVL by Jabber. The Court (Beazley ACJ, Walton and N Adams JJ) refused the temporary stay application and held that such orders do not fall within s 5F(3). An order permitting or authorizing the use of particular technology for the taking of evidence is not an "order" for the purposes of the subsection; it is not "a command to someone that a thing be done or not done and is enforceable by the Court should there be non-compliance, including by way of contempt". The decision was a discretionary one for the trial judge.

Role of current sentencing practices in sentence appeals

In ***Director of Public Prosecutions v Dalgliesh (a pseudonym)*** **[2017] HCA 41** the Crown had appealed against the asserted inadequacy of sentencing for incest. The parties were notified that the Victorian Court of Appeal considered the case to be an appropriate vehicle for consideration of the adequacy of "current sentencing practices" for the offence but the Court also indicated that this would not affect the outcome of the appeal. Ultimately it held that whilst the sentence was manifestly inadequate, it was within the range established by current sentencing practices and so the appeal was dismissed.

The High Court allowed the DPP's appeal. Kiefel CJ, Bell and Keane JJ held that consistency in sentencing does not warrant the application of an erroneous range just because that range is established by current sentencing practices. In this case the range was erroneous and the Crown appeal should not have been dismissed. The plurality criticised the two-step approach adopted by the Victorian Court of Appeal whereby it found error in sentencing practices but did not remedy that error in determining the outcome of the appeal. On the concern expressed for fairness to the respondent, their Honours said that an offender's only expectation on sentence is that a just sentence according to law be imposed.

New facts arising after sentence – claim for backdating a sentence arises post-sentencing

The appellant in ***Little v R*** **[2018] NSWCCA 63** was arrested in July 2015 and subsequently pleaded guilty to various serious indictable offences. He was also charged on the same occasion with driving offences for which he was sentenced in the Local Court to 10 months' imprisonment. At sentencing in the District Court, the judge took into account the principle of totality and backdated his sentence to commence 4 months after the day he was arrested. An appeal against conviction for the driving offences was heard after the appellant was sentenced in the District Court and the convictions were quashed. The appellant contended on appeal of the District Court sentence that his sentence for the serious matters should be backdated to the date of his arrest.

The appeal was allowed and the sentence was backdated by a further 2 months. Hoeben CJ at CL first noted that this was an unusual case in which the sentencing judge had had regard to the principle of totality, but this was with reference to a sentence that was later quashed. Second, his Honour noted that although no error could be established, there was a close analogy to the present case in the line of authorities where a matter has been raised at sentencing but the full facts were not known at that time but have become known post-sentencing. His Honour held that the CCA could have regard to those changed circumstances.

Crown appeal to revoke an assistance to authorities discount

The appellant in ***R v OE*** **[2018] NSWCCA 83** was convicted of serious drug offences. At sentencing the trial judge allowed a discount of 65% to reflect the fact that the appellant

had undertaken to give evidence against a co-offender; 15% of the 65% discount was for future assistance. The appellant failed to give that assistance and the Crown appealed pursuant to s 5DA of the *Criminal Appeal Act 1912*. An issue that arose – and one which may arise in the future – was whether the appeal was confined to adjusting the sentence to remove the 15% or whether the Court could take a broader assessment of the issues that may have influenced the discount as a whole.

The appeal was allowed. Rothman J found that this was a case where the offender had failed to do that for which he was given a 15% discount. His Honour stated (at [44]) that a Court may go beyond the limited issue of removing the future discount but declined to decide that point in this case. Button J agreed, and added that his judgment in *R v GD* [2013] NSWCCA 212 should be understood in the context of the problem in that case – a failure by a judge to separately discount for past and future assistance. It provided no support to the proposition sought to be advanced in the present case.

Proviso should not have been applied where jury's verdict might not have been unanimous

Lane v The Queen **[2018] HCA 28** concerned a charge of murder in relation to two physical altercations between the appellant and the deceased, each of which was alleged by the Crown to have involved a blow capable of causing the deceased's death. The appellant was found not guilty of murder but guilty of manslaughter. On appeal the CCA held that the trial judge erred by failing to direct the jury that it must be unanimous as to which of the two actions caused the death. However, the court by majority applied the proviso to dismiss the appeal. No substantial miscarriage of justice had occurred because the jury could not have been satisfied beyond reasonable doubt that the first act caused the death.

The High Court (Kiefel CJ, Bell, Keane, and Edelman JJ, Gageler J agreeing), allowed the appeal and ordered a new trial. The majority first held that the likely effect upon the jury of the trial judge's failure to give a unanimity direction must be understood in the context of the trial; this included that the Crown alleged (and the trial judge left it open to the jury to find) that the first act was capable of causing death. The majority held that the absence of a specific unanimity direction, coupled with the trial judge's direction that it was open to the jury to convict on the basis that *either* acts caused the death, means that it is possible that some jurors might have convicted on the basis that the first act caused death. The majority held that this possibility could not be excluded by saying that the jury should have *necessarily* entertained a doubt as to whether the first act caused the death. The majority concluded that to dismiss the appeal despite the error disregarded the requirement of a unanimous verdict.

Approach of appellate court where submission in support of appeal ground contrary to submission made at first instance

The applicant in ***Adams v R*** **[2018] NSWCCA 139** pleaded guilty to an offence of aggravated break and enter and commit serious indictable offence. Two co-offenders were sentenced together and received identical sentences. At the urging of counsel, the same judge imposed an identical sentence to those imposed upon the co-offenders. Then,

however, Mr Adams contended on an application for leave to appeal that his sentence should have been less.

Johnson J observed that a sentence appeal to the CCA is not an occasion for a rehearing of a plea in mitigation, especially where an argument is put which is contrary to what was put at first instance. His Honour noted that although the Court retains the discretion to hear new evidence in order to avoid miscarriages of justice, the High Court has held that justice does not miscarry where an appellate court refuses to allow an appellant to run a new and different case upon resentencing (*Betts v The Queen* (2016) 258 CLR 420; [2016] HCA 25 at 425-427). Leave to appeal was refused. His Honour held that the Court should not intervene because the approach urged by the appellant at first instance, and applied by the sentencing judge, was reasonably open in all the circumstances.

Substituting a verdict when indictment inaccurately avers a circumstance of aggravation

In ***MM v R* [2018] NSWCCA 158** the appellant had been found guilty of aggravated sexual intercourse without consent contrary to s 61J of the *Crimes Act*. The circumstance of aggravation was that the victim had sustained actual bodily harm but s 61J(2)(a) requires that the harm be "intentionally or recklessly" inflicted, whereas the indictment simply averred that it was "occasioned". The judge directed the jury in accordance with the indictment and not the statutory provision.

Walton J (with whom the other members of the Court agreed), allowed the appeal and substituted a verdict under s 61I (sexual intercourse without consent). His Honour accepted that the trial judge had misdirected the jury. The verdict could only be allowed to stand if the proviso in s 6 of the *Criminal Appeal Act 1912* could be applied. His Honour considered *Kalbasi v Western Australia* [2018] HCA 7 and *Lane v The Queen* [2018] HCA 28 and concluded that the proviso could not be applied because there was significant doubt that the injuries sustained by the victim were inflicted intentionally or recklessly. A verdict under s 61I was substituted and the appellant was resentenced.

Denial of procedural fairness in resentencing by Court of Criminal Appeal

A 16-year-old boy killed a 15-year-old girl by stabbing her 48 times. He was found guilty of murder and sentenced to 22 years' imprisonment. On appeal it was conceded by the Crown that "*Muldrock* error" infected the sentencing: *DL v R (No 2)* [2017] NSWCCA 58. However, the majority determined that no lesser sentence was warranted and the appeal was dismissed. The sentencing judge had found that it was probable that the appellant was acting under the influence of some psychosis at the time of the murder and he was not satisfied beyond reasonable doubt that there was premeditation or an intention to kill. Aside from describing the findings as generous, the prosecutor in the CCA did not challenge them. However, the majority made findings that were adverse to the appellant, partly on the basis of evidence tendered "on the usual basis".

It was held in ***DL v The Queen* [2018] HCA 32** that the parties were not on notice that the findings of the primary judge might not be applied. There had been a denial of procedural fairness and therefore a miscarriage of justice. It was unnecessary to address a second

ground of appeal which invited the High Court to state a principle respecting the power of an appellate court to substitute aggravated factual findings for the unchallenged findings of a sentencing judge.

BAIL

Show cause requirement under the Bail Act

The appellant in ***Barr (a pseudonym) v Director of Public Prosecutions*** **(NSW) [2018] NSWCA 47** was granted bail in the Local Court after being charged with historical child sexual offences. He pleaded guilty on the day of his trial, and the DPP made an oral detention application later that day. Because Barr had pleaded guilty to "show cause offences" under Div 1A of the *Bail Act*, the judge refused bail on the basis that Barr had failed to discharge the onus in s 16A to show cause why his detention would be unjustified. The appellant filed a summons in the Court of Appeal seeking judicial review and certiorari, as well as a bail application in the Supreme Court.

On the issue of whether the show cause requirement can be satisfied by the accused persuading the bail authority that there is no unacceptable risk, Leeming JA, with whom N Adams J agreed, disagreed with the reasons of McCallum J. By way of obiter dicta, Leeming JA and N Adams J held that the show cause requirement in Div 1A (ss 16A and 16B) is distinct from the unacceptable risk test in Div 2 (ss 17-20A). While Div 2 lists a number of criteria used to determine whether there is an unacceptable risk, no such criteria exist to determine the show cause test. *DPP (NSW) v Tikomaimaleya* [2015] NSWCA 83 was cited.

Leeming JA said (obiter) that there will be times when a court may form the view that an accused person who poses no unacceptable risk may nonetheless fail to show cause. N Adams J, agreeing with Leeming JA on this point, said that s 16A confers a wide discretion on the bail authority that cannot be met solely by an accused person persuading the bail authority that there is no unacceptable risk. A plea of guilty, her Honour noted, is a relevant factor to both tests: it can no longer be contended that the accused is entitled to the presumption of innocence or that any period on bail would exceed any sentence imposed.

Supreme Court has no jurisdiction to hear a bail application pending an appeal to the CCA where there has been no prior refusal of bail

The applicant in ***Noufl v Director of Public Prosecutions (NSW)*** **[2018] NSWSC 1238** was convicted and sentenced in the District Court of NSW for drug supply offences. He filed a notice of intention to appeal against sentence to the Court of Criminal Appeal and made a release application to the Supreme Court. No application for bail was made to the District Court. The Director of Public Prosecutions disputed that the Supreme Court had jurisdiction, contending that s 48(3) empowered the District Court or the Court of Criminal Appeal or the District Court to hear the application but not the Supreme Court. Hamill J accepted that contention and refused the application for want of jurisdiction.

The Director drew his Honour's attention to the terms of s 28 of the repealed *Bail Act 1978*, which granted the Supreme Court a broader power than the current Act. His Honour considered the Second Reading speech for the *Bail Act 2013* and held that an unintended consequence of the reform of the *Bail Act 1978* was the removal of the power of a single judge to hear such an application. His Honour held that the provisions in ss 48(3), 61, 62, and 66(1) suggest that the Supreme Court could only have jurisdiction in the present case if a release application had been refused by another court. No such refusal had been made. A suggestion that the Court retained an inherent power was rejected.

COSTS

Power to award costs to a third party recipient of a subpoena to produce documents

In the course of pending criminal trial proceedings, the legal representatives for the accused issued subpoenas to KEPCO Bylong Australia Pty Ltd. KEPCO filed a Notice of Motion seeking to have the subpoena set aside but also began preparing documents in order to comply with the terms of the subpoena. Eventually the subpoena was set aside by consent and KEPCO sought an order for costs. There were two issues for consideration: first, whether there was power to order costs upon the setting aside of a subpoena; and second, whether there was power to order costs in respect of a recipient's efforts to comply with the subpoena.

Beech-Jones J held in ***R v Obeid*** **[2018] NSWSC 1024** that the only power in the court was to make an order for costs in respect of compliance with the subpoena. His Honour held that on its face Part 75 r 3 of the *Supreme Court Rules* empowers the court to make costs orders in respect of reasonable loss and expense incurred in complying with the subpoena but not the costs of any application made to set the subpoena aside. His Honour held that an application to set aside a subpoena issued at the behest of the accused in criminal proceedings on indictment is not governed by either the CPA or the UCPR. His Honour held that such a conclusion is consistent with the Court of Criminal Appeal's decision in *Stanizzo v Complainant* [2013] NSWCCA 295. His Honour concluded that the inherent powers of the Court do not extend to making an order requiring an accused facing trial on indictment to pay the costs of setting aside a subpoena issued to a third party.

EVIDENCE

Competence – child giving evidence by way of pre-recorded interview

The appellant in ***Tikomaimaleya v R*** **[2017] NSWCCA 214** was convicted of sexual intercourse with a child under 10. The complainant was 4 years old when she participated in a recorded interview soon after the offence and was 6½ at trial. Her pre-recorded interview constituted her evidence-in-chief, pursuant to s 306V(1) of the *Criminal Procedure Act 1986*. The trial judge found that she was competent to give sworn evidence at trial but no issue was raised about her competence to give evidence at the time of the pre-recording. On appeal, the appellant contended that s 61(1) of the *Evidence Act 1995* required that the complainant was competent at the time of the pre-recorded interview. Section 61 is concerned with exceptions to the hearsay rule in Ch 3 Pt 3.2 (i.e. ss 59-75).

Dismissing the appeal, Simpson JA said s 61 of the *Evidence Act* was irrelevant. Whilst the complainant's answers in the pre-recorded interview were previous representations within s 59 and prima facie inadmissible by the hearsay rule, the evidence was not made admissible by any of the exceptions in Pt 3.2 of the *Evidence Act*; rather, it was made admissible by the specific provisions of s 306V(1) of the *Criminal Procedure Act*. Further, Simpson JA noted it was merely an untested and unproven assumption that the complainant was not competent to give evidence about a relevant fact at the time of the interview. It was not part of the appellant's case at trial that the complainant lacked either of the required capacities. Had the question been raised, the trial judge would have been obliged to make a finding about the complainant's capacity at the time of the interview. However, since no such issue was raised about the complainant's capacity or competence at the time of the interview, the trial judge was not asked to make any determination as to her competence at that time.

Whether evidence of possible concoction or contamination relevant to assessment of probative value of tendency evidence

The appellant in ***BM v R* [2017] NSWCCA 253** was charged with 15 counts of sexual misconduct in relation to three child complainants. There was some evidence that the complainants had spoken to one another about the misconduct before reporting the incidents to the police. The appellant sought leave to appeal pursuant to s 5F(3) of the *Criminal Appeal Act* after the trial judge rejected the appellant's motion for separate trials. On appeal, the appellant argued that the judge erred in his finding that the proposed tendency evidence had significant probative value and that the probative value substantially outweighed any prejudice to the appellant. The appeal was dismissed.

Bathurst CJ considered what the High Court said in *IMM v The Queen*, that it is not the task of a trial judge in assessing the extent of the relevance of evidence to consider questions of credibility or reliability, but that there may be "a limiting case in which evidence is so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury". His Honour cited with approval the decision of Bellew J in *Jones v R* [2014] NSWCCA 280 that in assessing probative value pursuant to ss 97 and 101, the court may take into account such "competing inferences" as arise from the evidence. Bathurst CJ then affirmed what Hoeben CJ at CL said in *GM v R* [2016] NSWCCA 78. In *GM*, Hoeben CJ at CL held that the possibility of concoction or contamination is a relevant consideration in determining probative value, and that it is an error to determine issues of concoction separately from the issue of whether evidence has significant probative value. Bathurst CJ held that it was not appropriate for the Court to depart from that approach taken by the Court of Criminal Appeal where the plurality in *IMM* reserved the question of the role concoction could play with regard to the test in s 101. Bathurst CJ held that the principle to be applied is whether there are competing inferences which deprive the evidence of significant probative value.

Exclusion of evidence as a result of a failure to caution

In ***Director of Public Prosecutions (NSW) v Owen*** **[2017] NSWSC 1550**, police were called to a hotel at 2 o'clock in the morning and discovered Mr Owen intoxicated and agitated. Upon learning that there was an outstanding warrant for having failed to appear in court, police officers informed Owen that he would be placed under arrest. He was not cautioned. He became violent and was subsequently charged with assaulting and resisting the officers. A magistrate excluded the police officers' evidence of what Owen did to resist arrest and dismissed the charges on the basis that the failure to caution rendered the evidence "improperly obtained": ss 138 and 139 of the *Evidence Act*. She placed significant weight on the Police Code of Practice, which advises that "although the requirement to caution an arrested person is enlivened upon questioning, it is good practice to question a person when they are arrested, whether or not there is to be any questioning".

Allowing the appeal, R A Hulme J held that the evidence was not "taken to have been obtained improperly" under either ss 138 or 139, referring to the description of what amounts to improper conduct provided by Mason CJ, Deane and Dawson JJ in *Ridgeway v The Queen* (1995) 184 CLR 19. His Honour held that even if the conduct amounted to impropriety, s 138 is only engaged when there is a link between the impropriety and the obtaining of the evidence. There was no link in this case between the procurement of evidence (i.e. the officers' accounts of Owen's violent behavior after arrest) and the failure to caution. With respect to s 139, it was held that because Owen was not "under arrest for an offence" pursuant to s 139(1)(a) and was not being questioned, the provision was not engaged.

Admissibility of evidence of single act as context evidence

CA was charged with five counts of aggravated indecent assault, three having occurred between June 2006 and June 2007, and two between 2011 and 2012. The complainant also alleged a further incident which took place between those two periods (in 2009) in Victoria. CA contended that the judge erred in admitting this as context evidence but the appeal was dismissed: ***CA v R*** **[2017] NSWCCA 324**.

N Adams J extensively reviewed the relevant case law and held that the trial judge was correct to conclude that the evidence was relevant and significantly probative because it offered a link between the two periods of offending – "without the evidence a jury may well be left with an unrealistic and/or misleading picture as to the two series of apparently unconnected indecent assaults committed upon the complainant". She distinguished the case from *R v Young* (1996) 90 A Crim R 80, and rejected the appellant's submission that one incident alone is *incapable* of being relevant as context evidence.

Assessing the probative value of proposed tendency evidence

Armstrong was charged with the assault and sexual assault of his partner. At trial the judge admitted evidence of a prior assault against his partner for which Armstrong had been convicted. He appealed on the basis that the tendency evidence was wrongly

admitted because it did not have significant probative value and that its probative value did not substantially outweigh its prejudicial effect: ***Armstrong v R* [2017] NSWCCA 323**.

The Court dismissed the appeal. Meagher JA held that it is not necessary that tendency evidence directly establish all elements of an offence charged. The Court had regard to the decision of the High Court in *Hughes v The Queen* (2017) 344 ALR 187 where the High Court held that the test in s 97(1)(b) is that the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence, but that it is not necessary that the disputed evidence has this effect by itself. The High Court considered the decision in *Ford* (2009) 201 A Crim R 451, and held that it is sufficient if the disputed evidence together with other evidence makes significantly more likely any facts making up the elements of the offence. Meagher JA concluded that, in light of *Hughes*, it is not to the point that the tendency evidence may not directly establish all the elements of an offence charged.

Cross-examination of an unfavourable witness

The appellant in ***Odisho v R* [2018] NSWCCA 19** was charged with being party to a joint criminal enterprise to wound a person by shooting him in the legs with intent to cause grievous bodily harm. The victim gave statements to police in which he said that the appellant was in a car where he, the victim, was shot. He retracted this at trial. The trial judge granted leave under s 38(1) to cross-examine the victim as an unfavourable witness, but refused leave under s 38(3) (to question on matters relevant "only" to credibility) on the ground that it was unnecessary. The Crown then cross-examined the victim about various matters relating to the retraction of his story, including matters going to credibility. The appellant contended on appeal that there was a miscarriage of justice because of the credibility cross-examination without the Crown having been granted leave.

Price and Bellew JJ (Hamill J dissenting) dismissed the appeal on the basis that there was no miscarriage of justice although they differed in their reasoning. Bellew J held that cross-examination "about" matters under s 38(1) permits a wide range of questioning. Leave under s 38(3) is not required where the cross-examiner seeks to challenge the credibility of answers given by the witness in respect of the subjects about which leave has been granted under s 38(1). However, his Honour considered that the trial judge was in error by allowing the Crown to cross-examine beyond that wide scope in s 38(1). His Honour held that because the Crown had put to the victim that he had lied because he was angry at police for charging him with additional offences, refusing bail, and granting an indemnity to another witness, the Crown's questions traversed the subjects about which leave had been granted. However, his Honour concluded that the error did not amount to a miscarriage of justice.

Price J took the view that there was no error because leave under s 38(3) was not required. His Honour found that the Crown's cross-examination as to the prior inconsistent statements and the reasons for the victim's retraction were not relevant *only* to the witness's credibility.

Court of Criminal Appeal overturns trial judge's decision to exclude tendency and coincidence evidence

The respondent in ***R v Chase (a pseudonym)*** **[2018] NSWCCA 71** was charged with two offences of possessing drugs for the purpose of supply. The prosecution sought to tender evidence that the defendant was previously convicted of drug supply offences (he was found in possession of drugs and ran away from police, later claiming he only did so because he was on parole). The trial judge excluded the evidence; the appellant proposed to appeal his earlier conviction and so allowing the evidence to be called on the new charges would cause prejudice not substantially outweighed by its probative value.

The appeal was allowed. Basten JA held that the trial judge had erred by taking into account three aspects which did not constitute relevant prejudice. The first aspect was revisiting the verdict of a judge alone. Basten JA held that although revisiting a verdict might be a challenge to the finality of the verdict, it does not constitute prejudice to the appellant. The second aspect was whether, if the evidence was admitted, the appellant would be "forced" to give evidence again as to his reason for running from police (being on parole). Basten JA held that that would be a forensic decision for the appellant that would not involve unfair prejudice. The third aspect was whether there was a possibility of pre-empting things that might be said on an outstanding appeal. Basten JA did not find any relevant prejudice in this respect. His Honour noted that a more difficult situation could arise if the appeal was successful and a retrial was ordered; there would be no way of telling whether a jury verdict on the later charges would involve disbelief of his account or whether that evidence had been merely put to one side. Nonetheless, Basten JA held that it was unclear how that could prejudice the retrial.

Admissibility of expert evidence of translator where errors in translation alleged and where translator had not read or agreed to be bound by the Expert Witness Code of Conduct

Chen v R **[2018] NSWCCA 106** concerned a conviction for drug supply where telephone intercepts had been admitted at trial. They had been translated from another language and the appellant had challenged the admissibility of the translations on the basis of the translator's lack of expertise, lack of impartiality, bias, and the inaccuracy of her translations. After they had been ruled admissible, the appellant sought to have them withdrawn from the jury when it emerged that the translator was not familiar with the Expert Witness Code of Conduct. On appeal the appellant contended that the evidence was inadmissible under s 79 of the *Evidence Act*, that it should have been excluded under ss 135 or 137 or that the trial judge should have withdrawn the evidence once it became known that the translator had not agreed to be bound by the Expert Witness Code of Conduct. The appeal was dismissed.

The Court applied *Wood v R* (2012) 84 NSWLR 581, where it was held that while there is no rule that precludes the admissibility of expert evidence which fails to comply with the Code, the Code is relevant when considering the exclusionary rules in ss 135-137 of the Act. That is, the expert witness's failure may result in the probative value of their evidence being substantially outweighed by the danger of unfair prejudice. The Court held in this case that Part 75 r 3J of the *Supreme Court Rules* did not confine the operation of s 79 such that a failure to comply with the Code mandated the exclusion of the witness's evidence.

The Court held that the trial judge correctly approached the application for the withdrawal of the evidence as a matter relevant to the determination under ss 135-137. The Court held that the issues surrounding the non-compliance with the Code were not unfairly prejudicial but rather raised questions which properly fell to the jury to determine.

Whether admissions said to be ambiguous should be excluded under s 137 of the Evidence Act

The appellant in ***Flood-Smith v R*** **[2018] NSWCCA 103** was found guilty of recklessly causing grievous bodily harm to his two year old daughter. The Crown relied on a number of statements made by the appellant like, "I don't know what happened, I don't know what I've done". They were admitted without objection but it was contended on appeal that the evidence was wrongly admitted in that s 137 of the *Evidence Act* required the evidence to be excluded because of its ambiguity and equivocality.

In dismissing the appeal, Hoeben CJ at CL applied the decision of *R v Burton* [2013] NSWCCA 335 in which Simpson J (as she then was) held that where an item of evidence is capable of different interpretations, its actual probative value will depend upon what interpretation is placed on it by the jury; it is no part of the judge's function to make that assessment when determining admissibility. His Honour also noted that there is considerable authority that s 137 has no application where the impugned evidence was not objected to at trial: *Perish v R* (2016) NSWLR 161; [2016] NSWCCA 89.

Whether documents from Family and Community Services concerning a child are admissible in Supreme Court proceedings where an accused is charged on indictment with offences against that child

The appellant in ***Hayward v R*** **[2018] NSWCCA 104** was charged with various offences against a child. Prior to trial the appellant obtained reports from the Department of Family and Community Services concerning the victim. Section 29(1)(d) of the *Children and Young Persons (Care and Protection) Act 1987* (NSW) provides that such reports are not admissible "in any proceedings other than the following proceedings". Certain types of proceedings are then listed. The list does not include proceedings in the District Court but it does include in s 29(1)(d)(iii), "proceedings in relation to a child or young person before the Supreme Court".

The Acting Chief Justice granted an exemption for the indictment to be presented in the Supreme Court, conditional upon the evidence derived from the FACS reports being held to be admissible there. The trial judge ruled that they were inadmissible. The accused sought leave to appeal under s 5F(3) of the *Criminal Appeal Act 1912*. A five-judge bench was constituted because of an arguably conflicting prior decision in the CCA (which the trial judge had not regarded as a binding precedent).

Bathurst CJ held that the phrase "any proceedings" in s 29(1)(d) encompassed criminal proceedings. The legislature had indicated with irresistible clearness an intention to exclude the production of reports or evidence of their contents in criminal proceedings. Further, the phrase "proceedings in relation to a child or young person before the

Supreme Court" does not encompass proceedings on indictment for charges in relation to which a child was the victim. The phrase is a reference to proceedings which affect the legal rights and interests or concern the welfare of a child or young person.

Section 87 of the Evidence Act is not directed to the admission of evidence in the substantive proceedings

The accused in ***Decision Restricted*** **[2018] NSWCCA 127** was alleged to have supplied drugs to M on three occasions, who then supplied the drugs to a registered source. The conversations between M and the source were covertly recorded. The Crown tendered the recordings pursuant to s 87(1)(c) of the *Evidence Act* but the trial judge rejected them. The Crown appealed pursuant to s 5F(3A) of the *Criminal Appeal Act*.

Section 87 provides, relevantly:

> "(1) For the purpose of determining whether a previous representation made by a person is also taken to be an admission by a party, the court is to admit the representation if it is reasonably open to find that … (c) the representation was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party or one or more persons including the party".

Simpson AJA, with whom the other members of the Court agreed, allowed the appeal. At trial, the parties approached the application of s 87 on the assumption that it is directed to the final determination of the admissibility of the evidence in the substantive proceedings. Her Honour held that s 87 is directed to an intermediate question of whether a representation by a third party should be taken to be an admission by a party to the proceedings. If it is, there remains the question of whether it is admissible as such. Her Honour observed that in this case subsequent questions concerning ss 84, 85 and 86 and ss 135 and 137 may need consideration.

Tendency evidence – error in having regard to the offence charged in assessing the strength of the evidence establishing the tendency

Two men were alleged to have jointly committed a bank robbery in a Sydney suburb. The Crown relied upon various items of circumstantial evidence including an assertion that they had a tendency to act in a particular way. It asserted that they had a tendency to be involved in the armed robbery of banking institutions; to be involved in such robberies with two nominated co-offenders; to do so whilst armed with dangerous weapons including a sledgehammer and a screwdriver; to threaten the staff within the bank; to do so whilst wearing a disguise; to do so whilst in possession of a stolen high performance luxury motor vehicle and to use same; and to leave the said vehicle in a carpark once the robbery is completed. To prove this, the Crown relied upon evidence that the accused had committed an armed robbery in similar circumstances upon a bank in Melbourne in 2003.

The trial judge found that the evidence of the 2003 robbery had the capacity to reveal the tendency for the three men, when together, to commit an armed bank robbery with the circumstances described in the tendency notice. She said that those circumstances exist between the 2003 robbery and the robbery charged. In ***Decision Restricted*** **[2018]**

NSWCCA 164, Bathurst CJ held that such reasoning was erroneous. The judge should have considered whether the 2003 robbery was, without more, sufficient to support the tendency alleged. Secondly, in relying upon the similarities between the two robberies, she engaged in impermissible reasoning by assuming that the tendency could be established by reliance on the robbery for which the men were charged.

OFFENCES

Persistent sexual abuse of a child – when multiple incidents alleged judge should ask jury which incidents were proven

The appellant in ***Chiro v The Queen*** **[2017] HCA 37** was found guilty by a jury of persistent sexual exploitation of a child contrary to s 50(1) of the *Criminal Law Consolidation Act 1935* (SA) (similar but not identical to persistent sexual abuse of a child in s 66EA *Crimes Act 1900* (NSW)). The Crown alleged multiple underlying incidents of abuse, more than the minimum number for the offence to be made out (ranging in seriousness, from kissing to digital penetration and fellatio). The trial judge did not ask the jury which incidents were proved. On sentence, the judge found that all the alleged acts had been proved and sentenced him upon that basis. The High Court considered whether, in such circumstances, the judge should question the jury to identify which underlying incidents the jury found to be proved. (NB. At the time s 50 was silent on extended unanimity, which was required at common law. The NSW provision s 66EA(6)(c) requires that "all the members of the jury must be so satisfied about the same 3 occasions").

The majority of the High Court (Kiefel CJ, Keane and Nettle JJ, Bell J agreeing with separate reasons) held that where the jury return a general verdict of guilty, the judge should question the jury to identify the underlying acts of "sexual exploitation" which the jury found to be proved. It also would be appropriate for the judge to tell the jury before they retire that, if their verdict was guilty, they would be asked to state which of the alleged acts of sexual exploitation had been proved. Such an approach would not engender uncertainty and dissuade them from convicting an offender, as the Crown contended. The judge could reiterate the elements of the offence.

The Crown also submitted that injustice could arise if the jury do not deliberate beyond finding the minimum number of underlying acts, even though more acts were proved beyond reasonable doubt. The majority rejected this argument; the actus reus of the offence is comprised of discrete underlying acts of sexual exploitation and an accused is not to be convicted or sentenced on any basis other than having committed only those acts of sexual exploitation which the jury are agreed have been proved.

In relation to the sentence, the majority held that, given the judge had not ascertained which acts the jury found were proved, the appellant should have been sentenced on the view of the facts most favourable to him (namely that the offence was made out based upon the less serious acts, namely kissing).

N.B. Section 66EA has been significantly recast by the *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018 (not yet in force).

Misconduct in public office committed by a Parliamentarian

In ***Obeid v R*** **[2017] NSWCCA 221** the Court of Criminal Appeal was faced with an array of legal and factual challenges to the offender's conviction for misconduct in public office which occurred while he was a member of the Legislative Council of New South Wales. The offence was constituted by the offender making representations to a public servant with the intention of securing an outcome which would result in pecuniary benefits to him and his family. It was held that such conduct, which amounted to a breach of the duty of trust owed by a public officer, was capable of making out the offence provided the elements of wilfulness and seriousness were made out (which they were). A challenge to the jurisdiction of the Supreme Court to hear the charge, it being contended that the matter was in the exclusive cognisance of Parliament, also failed.

(Special leave to appeal to the High Court was refused: [2018] HCATrans 54.)

Break and enter – no "break" if permission to enter has been obtained without trick, artifice or threat

The appellants in ***Hussein Ghamrawi v R; Khaled Ghamrawi v R; Mustapha Ghamrawi v R; Omar Ghamrawi v R*** **[2017] NSWCCA 195** were four brothers, each convicted of aggravated break and enter and commit serous indictable offence, contrary to s 112(2) *Crimes Act 1900.* The property they entered was occupied by Mustapha Ghamrawi's sister-in-law. The defence said that the brothers were invited in to the premises. The trial judge directed the jury that "If the person intends to commit an unlawful act at the time that they are given permission to enter the house, then there is a breaking, because the permission or invitation to enter is only if it is for a lawful purpose." At issue on appeal was whether this was an accurate statement of law.

Allowing the appeal, Leeming JA held that there is no actual breaking if the person has express or implied permission to enter through a closed (but unlocked) door, even if the person had felonious intent at the time they entered. His Honour's judgment provides an interesting discussion of the history of the common law offence and statutory provisions. He noted the concerns of Simpson J in *R v Stanford* (2007) 70 NSWLR 474; [2007] NSWCCA 370 at [24]-[25] as to the lack of statutory definition of "break" and her Honour's comment that it may be time for s 112 to gain law reform attention, observing that the same issues continue to affect the materially unamended section a decade later.

Meaning of "damaging" property – causing a machine to be inoperable can constitute damage

The appellant in ***Grajewski v DPP (NSW)*** **[2017] NSWCCA 251** was a protester who climbed up and locked himself to a coal loading machine, rendering it inoperable for more than two hours. He was convicted in the Local Court of damaging property. His appeal to the District Court was dismissed, but the judge stated a case to the Court of Criminal Appeal, asking whether his act of locking himself to a machine rendering it inoperable was conduct capable of constituting "damaging property" within the meaning of s 195(1)(a) *Crimes Act*

1900. The appellant argued that the natural meaning of s 195(1) requires physical damage to the tangible property.

Leeming JA held that physical interference causing property to be inoperable is captured by s 195(1). In reaching the conclusion that the broader interpretation should be adopted, his Honour discussed the legislative history and purpose of the provision, as well as authority (both Australian and English). Interference with functionality alone would not constitute damage; there must be some physical interference with the property. His Honour said that a protester who lies down in front of a bulldozer, and does not tie themselves to the wheel for example, would not contravene s 195 as there has not been the necessary combination of physical interference and temporary inoperability to satisfy "destroys or damages".

(Special leave to appeal to the High Court was granted: [2018] HCATrans 89.)

Sexual intercourse without consent – the element of knowledge of no consent

The respondent in ***R v Lazarus*** **[2017] NSWCCA 279** was acquitted after a judge-alone trial of sexual intercourse without consent contrary to s 61I of the *Crimes Act*. An issue in the Crown's appeal concerned the element of the offence that the person must "know that the other person does not consent". Section s 61HA(3) provides that a person is to be taken to *know that there is no consent* if: (a) the person knows there is no consent; (b) if the person is reckless as to whether the other person consents; or, (c) the person has no reasonable grounds for believing that the other person consents. In determining the knowledge of the accused, s 61HA(3)(d) states that the trier of fact must have regard to all the circumstances of the case, including *"any steps taken by the person to ascertain whether the other person consents to the sexual intercourse*".

The trial judge concluded that there were reasonable grounds for the respondent to have formed the belief that the complainant was consenting. The Crown contended that the judge had erred by failing to identify steps the respondent had actually taken to ascertain whether or not the complainant was consenting, and had failed to include reference to the principles of law her Honour had applied.

The CCA found error on the part of the trial judge but dismissed the appeal. Bellew J held that "steps" for the purpose of s 61HA(3)(d) must involve the taking of some positive act, which includes a person's consideration of, or reasoning in response to, things or events which he or she perceives. Bellew J held that the trial judge erred by failing to make any reference to s 61HA(3)(d) or state the steps taken by the respondent to form a reasonable belief that the complainant was consenting. (The appeal was dismissed in the exercise of the Court's discretion.)

Sexual intercourse with another person who is under "special care" and is aged 17

In ***R v PJ*** **[2017] NSWCCA 290**, the defendant was charged under s 73 of the *Crimes Act* with having sexual intercourse with a former pupil at which time he was still a teacher. The Crown appealed against a permanent stay of proceedings which had been ordered on

the basis that there was insufficient evidence to establish the offence; specifically, that the intercourse could not be shown to have occurred while the defendant was in a position of authority in respect of the complainant. The appeal was dismissed.

Latham J held that criminal liability does not arise unless sexual intercourse takes place while the position of authority is being exercised by way of the provision of instruction relevant to ss 73(2)-(3). Her Honour accepted the respondent's submission that there must be a temporal connection between the personal relationship and the sexual intercourse. Latham J held that the wording of the provision ("in connection with") requires that the personal relationship between the offender and the child is both a result of the provision of instruction and confined to the ongoing provision of instruction.

(Parliament moved quickly to amend the definition of "special care" in s 73 in response to this decision: see Sch 1.4 [1]-[2] of the *Justice Legislation Amendment Act 2018*.)

Child abuse material offences - meaning of "breasts of a female person" in the definition of "private parts"

Turner v R **[2017] NSWCCA 304** concerned an appeal against the severity of sentences imposed on the appellant, who was convicted of producing child abuse material contrary to s 91G(1)(a) of the *Crimes Act 1900*. The appellant also sought to appeal against two convictions relating to the contravention of s 91G(1)(a). One offence was committed when the appellant lifted up the shirt of a 9 year old girl and photographed her chest. "Child abuse material" is defined in s 91FB of the Act, and includes material that depicts the "*private parts* of a person who is, appears to be, or is implied to be, a child". Private parts include "the breasts of a female person". The question was whether an image of a 9-year-old girl's chest area depicted "the breasts of a female person".

A majority of the Court allowed the appeal. Basten JA, with whom Bellew J agreed, held that the use of the term "breasts" connotes a "visible degree of sexual development". Basten JA held that the ordinary meaning of the term "breasts of a female person" suggests at least the commencement of sexual development or pubescence, which should be visible, but need not have reached a particular stage of development.

Note: If "breasts" for the purpose of this provision were intended to be confined to those having some level of sexual development, the words "of a female person" are left with no work to do. By the *Justice Legislation Amendment (No 2) Act* 2018 (Sch 1.4); the definition now includes "whether or not the breasts are sexually developed".

Whether definition of "child pornography material" in s 473.1 of the Commonwealth Criminal Code extends to communications concerning future sexual activity

In several online messaging exchanges the appellant in ***Innes v R*** **[2018] NSWCCA 90** described to a person whom he thought was a 30 year old single mother (in fact a police officer) the sexual activities he wanted to engage in with her and her 11-year-old daughter. Three particular chats describing the appellant's fantasies were alleged to constitute child pornography material. The appellant argued the use of present tense

verbs in the definition of "child pornography material" in s 473.1 of the Criminal Code suggested that "child pornography material" could not include future imagined activity.

Johnson J held that the use of the present tense verb "describes" in the definition of child pornography material in s 473.1 was used to achieve harmonious interaction with the offence provision in s 474.19. His Honour found that although the words are in the present tense, those words are intended to encompass present descriptions of past, present and future sexual activity. His Honour concluded that a narrow construction would lead to an absurd result in which a description in the present tense would constitute an offence but a description in a future tense would not. The appeal was dismissed.

Procuring a child for unlawful sexual activity (s 66EB(2) Crimes Act) - meaning of "procure"

The applicant in ***ZA v R*** **[2018] NSWCCA 116** arranged for a 26-year-old man, AC, to marry his 12-year-old daughter, MG, in a traditional Islamic marriage. Following the ceremony MG began living with AC and they had sexual intercourse. The applicant was convicted of procuring a child under 14 years of age for unlawful sexual activity with another person contrary to s 66EB(2)(a) and being an accessory before the fact to the offence of sexual intercourse with a child aged 10-14 contrary to ss 66C(1) and 346. In (unsuccessfully) seeking an extension to appeal out of time it was contended that the trial judge had erred in her interpretation of the word "procure" in s 66EB(2)(a).

The applicant contended that the meaning of "procure" in s 66EB(2) required some positive "care and effort" to bring about the desired end; the Crown argued that the broader meaning of procure was to "effect, cause, or bring about". Adamson J rejected the applicant's interpretation and held that the Court must prefer a construction of the provision which will advance its purpose. Her Honour considered the context of s 66EB(2) and held that the term should be afforded the broader meaning contended by the Crown. In doing so, Adamson J distinguished the case from *Truong v The Queen* (2004) 223 CLR 122, which dealt with the term "procure" in a different statutory provision alongside the words "aids, abets, counsels…" Her Honour held that the trial judge had not erred by finding that the word "procure" in s 66EB(2) meant "to cause or bring about".

Supplying a large commercial quantity of a prohibited drug – mental element

The respondent in ***R v Busby*** **[2018] NSWCCA 136** pleaded guilty to two offences contrary to s 25 of the *Drug Misuse and Trafficking Act* for supplying more than 20kg of ecstasy and more than 2kg of cocaine, both being found in a suitcase in his possession. He told police and gave evidence at sentencing that he believed the suitcase actually contained cannabis. The large commercial quantity of ecstasy is 0.5kg and the large commercial quantity for cocaine is 1kg, whereas the large commercial quantity of cannabis leaf is 100kg. Senior counsel for the respondent had advised him that pleas of guilty were appropriate because they were founded upon an intention to involve himself in the supply of drugs and he was aware that the weight was in excess of 1.5kg, which objectively amounted to the large commercial quantity for the drugs that were in fact in the suitcase. On appeal the Crown contended the sentence was manifestly inadequate, but when the appeal was heard an issue arose as to the propriety of the pleas of guilty. In an unusual outcome for a Crown

appeal against sentence, the pleas of guilty were rejected, the convictions quashed and the charges were remitted for trial.

Button J set out a number of propositions. First, an offender is guilty of a drug offence even if the drug actually supplied was different from the drug the offender believed the substance to be. Second, in order to prove an offence under the Act that is aggravated by virtue of its quantity being a commercial or large commercial quantity, the prosecution must prove not only an intention to do that act but also an intention to do so with regard to that alleged quantity. Applying *Yousef Jidah v R* [2014] NSWCCA 270, to make out the offence, the drug one intends to supply and the drug the aggravated quantity of which one intends to supply, must be identical. His Honour held that for the respondent to be guilty he needed to believe that the suitcase contained a prohibited drug and for him to believe that it contained not less than the large commercial quantity applicable to the drug that he believed it to be.

PRACTICE AND PROCEDURE

Speculation in a judge-alone trial application

The respondent in ***Director of Public Prosecutions (NSW) v Farrugia*** **[2017] NSWCCA 197** was charged with offences alleged to have been committed at the home of his former partner. On the day his trial was to be heard in a regional centre he pleaded not guilty and made an application for a judge-alone trial. The basis of the application was an assertion from the bar table that there would be cross-examination of the complainant as to conversations she had with the respondent when he was in custody on remand. The prosecutor consented to leave being granted for the application to be made out of the time permitted in s 132A(1) of the *Criminal Procedure Act 1986*. The trial judge granted the application because the jury would know it was unusual for a person to be refused bail in respect of such charges and they would speculate as to why.

Basten JA regarded this as purely speculative. There was no proper basis for the application to be granted. The judge had no evidence or explanation as to why the conversations were relevant; why it would be necessary to disclose that they occurred while he was in gaol; or why he was in gaol bail refused. No consideration was given to whether directions could cure any prejudice. The appeal was upheld and the judge-alone trial order was quashed.

Basten JA also questioned the appropriateness of the prosecutor having consented to leave being granted for the application to be made out of time. Any appearance that applications are made after the identity of the judge becomes known should be avoided.

A no case submission can be made before the close of the Crown case

The respondent in ***R v TS*** **[2017] NSWCCA 247** was charged with indecent assault and attempted sexual intercourse without consent. At the conclusion of the complainant's evidence in chief the respondent's counsel applied for a directed verdict of acquittal on one of the counts and the trial judge granted the application. One ground of the Crown's

appeal concerned the fact that the directed verdict occurred before the end of the Crown case. This ground was rejected.

Latham J held that the evidence relied on by the Crown had reached its high point. As there was no further evidence to take the case higher there was no error in the judge determining the no case application at that point in time. The Crown contended that complaint evidence would have supplemented the complainant's evidence, but Latham J found that this evidence (had it been called) could not have improved the complainant's evidence of what occurred.

Revision of judgments

The respondent in ***R v Lazarus*** **[2017] NSWCCA 279** was acquitted after a judge-alone trial for an offence of sexual intercourse without consent knowing the complainant did not consent. In relation to the knowledge element, s 61HA(3) of the *Crimes Act 1900* states that the trier of fact is not to have regard to "any self-induced intoxication of the person".

In delivering her judgment, the trial judge stated that she was "not" entitled to take into account self-induced intoxication, yet at one point said, "I am entitled to take into account his level [of] self-induced intoxication". Her Honour revised the transcript of her judgment a number of times, and inserted "not" before "entitled". The Crown appealed against the acquittal. One issue was whether the trial judge was permitted to insert a word that she had not in fact said.

The Court of Criminal Appeal (per Bellew and Davies JJ, Hoeben CJ at CL dissenting on this point) dismissed the appeal. Bellew J noted that a judge has a restricted power to revise his or her reasons. His Honour cited *Spencer v Bamber* [2012] NSWCA 274 in which the Court of Appeal held that in deciding what is an impermissible alteration one must consider not only whether the alteration is substantial, but also where, because of the error, the reasons as expressed do not reflect what the judge in fact meant to say. The Court in *Spencer* held that the test of whether a revision is permissible is an objective one and requires consideration of the degree to which the reasons conform to the arguments presented in court. In this case it was held that there could be no doubt that the judge knew she could not take into account intoxication, and the revision conformed wholly to the arguments presented in court and her Honour's previous correct statement of the law.

No miscarriage where alternative counts not left to the jury following acquiescence by counsel for the accused

The appellant in ***GM v R*** **[2017] NSWCCA 298** pleaded not guilty to multiple counts of sexual misconduct with a child under the age of 10. He denied the misconduct but there was also an issue whether the child was under the age of 10 at the relevant times. The trial judge raised the issue of whether alternative verdicts should be put to the jury. Counsel for the accused did not indicate that he wanted alternative verdicts to be put to the jury. Notwithstanding the silence of his counsel at trial, GM contended on appeal that the possibility of alternative verdicts ought to have been left to the jury.

The appeal was dismissed. Adamson J held that the silence of counsel for the accused as to whether alternative verdicts should have been left to the consideration of the jury reflected his forensic decision that it was more advantageous for the appellant to retain the chance of acquittal on the basis that the jury found the complainant to have been over the age of ten, than to face the possibility of being convicted of lesser charges.

(Special leave to appeal to the High Court was refused: [2018] HCASL 152.)

Irregularity to accede to a jury's request to be provided with unsupervised access to a recording of the complainant's evidence

The appellant in ***CF v R* [2017] NSWCCA 318** was convicted of four counts of sexual assault committed against a 12 year old. Various interview recordings of the complainant, as well as recordings of CF's ERISP and intercepted phone calls, were tendered by the Crown. After the jury had retired, there was a request to view the complainant's first interview (i.e. unsupervised). Neither defence counsel nor the Crown objected to this occurring. CF contended on appeal that the unsupervised access to the video was an irregularity occasioning a miscarriage of justice.

The appeal was dismissed; there was an irregularity but it did not amount to a miscarriage of justice. Gleeson JA held that the unsupervised production of the videotape to the jury was not an error of law but of procedure, and that it did amount to an irregularity. However, his Honour went on to state that the question then becomes whether the irregularity was so fundamental that it occasioned a miscarriage of justice under s 6(1) of the *Criminal Appeal Act*. He concluded that it did not; the jury had had all the evidence before it and had been given a sufficient warning by the trial judge.

Reasonable apprehension of bias

The appellant in ***Tarrant v R* [2018] NSWCA 21** was charged with the murder of her partner with whom she had a turbulent relationship. The Crown case was that she had incapacitated the victim with sleeping pills before he was killed by another man who was her sexual partner. The evidence of psychiatrists called by both parties was that the appellant was suffering from "battered-woman syndrome". The jury returned a verdict of not guilty of murder but guilty of manslaughter on that basis. Ms Tarrant was subsequently called to give evidence in the trial of the principal offender. Certain things said by the trial judge during both trials were said to give rise to a reasonable apprehension of bias but the trial judge refused to recuse himself.

An appeal against conviction was allowed. Basten JA held that a lay observer might well think that the judge might have stepped beyond the role of an impartial arbiter and so there was a reasonable apprehension of bias. His Honour enunciated a number of key principles applicable to the "double might" test of apprehended bias. First, that it is public confidence in the administration of justice which is sought to be preserved. Secondly, that the test is objective, being a third party's assessment of the judge's conduct and capacity. Thirdly, that the test is two-staged, it being necessary to articulate the connection between the events giving rise to the apprehension and the possibility of departure from

impartial decision-making. Fourthly, that the use of the term "might" lowers the threshold below the balance of probabilities.

Basten JA held that the trial judge's recusal judgment was of very limited value. His Honour held that in light of the judge's conduct, particularly that relating to the expert witnesses' testimony, and the active way in which the judge intervened in the witnesses' examination, might have led an objective lay observer to perceive an apprehension of bias. At [72], his Honour found that the lay observer might have thought that the judge would not make findings of fact based on the evidence or the prosecution case, but on the judge's pre-judgment.

Judge revoking bail part way through sentence proceedings, and other conduct, gave rise to reasonable apprehension of bias

The appellant in ***Anae v R*** **[2018] NSWCCA 73** was sentenced to imprisonment for 4 years and 6 months after having pleaded guilty to an offence of recklessly causing grievous bodily harm. At sentencing and after the Crown case was closed, the sentencing judge revoked the appellant's bail and said, "There is no sentence other than full time custody…" In the course of the appellant's counsel's submissions the judge said that counsel should not abandon her submissions because she may want to protect herself if the matter was taken on appeal. On appeal, inter alia, the appellant argued that the judge evinced an apprehension of bias.

The appeal was dismissed on the basis that no lesser sentence was warranted. Price J held that a fair minded observer might reasonably apprehend that the judge might not have brought an impartial and non-prejudiced mind to the sentencing task. He cited the decision of Callinan J in *Antoun v R* [2006] HCA 2; 224 ALR 51 and held that the principles of impartiality and procedural fairness require a judge to give some time to an offender's arguments which are to be listened to with an open mind. His Honour held that although all the factors before the sentencing judge strongly pointed to a full-time custodial sentence, the judge formed that view without giving the appellant's solicitor the necessary opportunity to present her case.

Sexual assault communications privilege

The appellant in ***Rohan v R*** **[2018] NSWCCA 89** sought leave to issue subpoenas for the production of documents containing protected confidences in relation to sexual assaults he was alleged to have committed. Section 298 of the *Criminal Procedure Act 1986* (NSW) provides that leave is required before a person can compel someone to produce a document containing a protected confidence. Section 299D sets out the elements necessary before a court can grant an application. Section 299B makes provision for a court to inspect documents in the event "a question arises under this Division relating to a document". The trial judge refused leave, holding in part that s 299B was irrelevant. The appellant appealed pursuant to s 5F(3) of the *Criminal Appeal Act 1912* (NSW).

R A Hulme J held that the judge had erred in disavowing the availability of the power under s 299B to order the production of the documents for inspection. His Honour

considered that it was doubtful that Parliament had in mind the "strained logic" that a court may compel a person to produce documents in order to determine whether that person may be compelled to produce the documents but it was clear that *KS v Veitch (No 2)* [2012] NSWCCA 266 held that s 299B(4) could be used to determine a question of leave to issue a subpoena under s 298(1) when the documents were not yet available. However, in this case the trial judge was correct to refuse leave because the documents sought would not have had substantial probative value.

Magistrate's obligation to give reasons for sentencing in written pleadings

A school teacher was arrested and issued with a Court Attendance Notice for possessing a prohibited drug. She completed a written notice of pleading, attached some character references, and submitted them to a Local Court for her case to be dealt with in her absence. The magistrate convicted her and imposed fines but did not provide reasons. In ***Roylance v Director of Public Prosecutions (NSW)*** **[2018] NSWCCA 933**, Bellew J held that a magistrate is under an obligation to provide reasons for his or her decision and that a failure to provide adequate reasons is an error of law. Even making allowance for the busy work load of magistrates and the fact that this case was determined *ex parte*, it was necessary for there to be some indication of how the magistrate took into account what had been submitted by the offender and why the case was being dealt with by way of fines.

Not necessary to make non-publication order concerning offender's name when identification is already prohibited by legislation

The appellant in ***R v AB*** **[2018] NSWCCA 113** pleaded guilty to a number of historical child sex offences, some of which occurred when he was under the age of 18 such that publication of his name was prohibited under s 15A. Despite this the judge made an order under the *Courts Suppression and Non-publication Orders Act 2010* prohibiting the publication of the offender's name. The Crown appealed on the basis that the order was unnecessary for any purposes under the Act. It was held by Meagher JA that the order was not necessary. Section 15A of the *Children (Criminal Proceedings) Act* 1987 (like s 578A of the *Crimes Act* 1900 in relation to complainants in prescribed sexual offence proceedings) automatically prohibits publication of anything that would identify the person.

Whether juror should have been removed from jury and whether erroneous removal of juror affected validity of verdicts delivered thereafter

The appellant in ***Hoang v R*** **[2018] NSWCCA 166** was tried in relation to a number of sexual assault offences.

During a trial concerning sexual assaults a Crown witness said that teachers were required to get a clearance under the *Children and Young Persons Protection Act*. After the jury had deliberated for some days they advised the judge they had reached verdicts on some counts. That night, one of the jurors, a former teacher, researched the requirements for a

working with children check, she being curious as to why she had not been the subject of such a check. The next morning she told other jurors of her inquiry. This was disclosed to the judge in a note. The judge took the jury's verdicts on the counts upon which there was agreement and then determined that she should discharge the juror who made the inquiry. The balance of the jury continued and ultimately returned unanimous verdicts of guilty on the remaining counts. It was contended on appeal that the judge should not have deferred the discharge of the juror until after some verdicts had been delivered.

N Adams J held there was no basis in s 53A of the *Jury Act* to discharge the juror. First, there was no "misconduct" in that the juror had made the inquiry out of personal curiosity and not *for the purpose of obtaining information relevant to the trial* (s 68C). Secondly, the conduct of the juror did not give rise to a risk of a substantial miscarriage of justice. The validity of the earlier verdicts was not affected by the subsequent decision (albeit erroneous) that there had been misconduct. As to the later verdicts which were given after the juror was discharged, there was no breach of any mandatory provision relating to the constitution and authority of the jury so there was no miscarriage of justice.

Whether pre-recorded statement in domestic violence proceedings must be tendered for it to become evidence

The respondent in ***Director of Public Prosecutions (NSW) v Al-Zuhairi*** **[2018] NSWCCA 151** was charged with a domestic violence offence. The alleged victim made a pre-recorded (DVEC) statement pursuant to s 289F of the *Criminal Procedure Act*. In the Local Court the recording was played and marked for identification but not tendered. On appeal to the District Court, the judge held that the recording was not properly before the court and set aside the conviction. The judge stated a case to the Court of Criminal Appeal at the Director's request.

The Court, per Payne JA, quashed the order setting aside the conviction. His Honour held that the playing of the recording in the Local Court was sufficient to make it evidence in those proceedings for the purpose of an appeal to the District Court. His Honour held that the contents of the exhibit, once “viewed” or “heard” in the Local Court, met the description of “evidence given in the original Local Court proceedings” for the purpose of s 18(1) of the *Crimes (Appeal and Review) Act*.

SENTENCING – GENERAL ISSUES

Lack of remorse is not an aggravating factor

The appellant in ***Roff v R*** **[2017] NSWCCA 208** was convicted of murder. He killed the partner of the woman he was having an affair with. He continued to disclaim responsibility and the sentencing judge found that there was no remorse. The judge held that “the absence of remorse or of acknowledgement of his crime” was a reason for fixing a longer non-parole period than the standard non-parole period. A ground of appeal that the sentencing judge erred in treating the absence of remorse as an aggravating factor was upheld by Leeming JA, Button and Hamill JJ. The Court considered the distinction mandated by the structure of s 21A of the *Crimes (Sentencing Procedure) Act 1999*, noting

it was a fine one: "the absence of remorse may *explain* why a heavier sentence was imposed upon the co-offender … However… regard may not be had to the absence of remorse in *imposing* a heavier sentence". On balance, the Court found that a fair reading of the reasons indicates that the judge did consider the absence of remorse as a reason to impose a heavier sentence. The appeal was allowed.

Inferring injury, harm or loss as an aggravating factor without direct evidence

The appellant in ***WAP v R*** **[2017] NSWCCA 212** was sentenced for offences of sexual assault and armed robbery. He tricked a woman to let him into her house, before threatening her with a knife and violently raping her. The sentencing judge said that, although there was no victim impact statement, he was satisfied that the victim would have suffered substantial emotional and physical harm. The appellant contended that it was not open to the sentencing judge to make such a finding in terms of s 21A(2)(g) *Crimes (Sentencing Procedure) Act 1999*.

Johnson J rejected this argument. A finding of "substantial harm" (meaning harm greater than that which ordinarily attaches to an offence of the kind in question) can be made without reference to a victim impact statement or another form of evidence external to the material before the sentencing court. Whether the evidence does support such a finding depends on the evidence in the particular case. In this case it was open to the judge to be satisfied of the emotional injury based upon the "appalling [nature of the] offences committed with considerable violence" derived from the Agreed Statement of Facts. The appeal was dismissed.

Common law offences – sentencing where no maximum penalty

The appellant in ***Obeid v R*** **[2017] NSWCCA 221** was convicted of the common law offence of wilful misconduct in public office. While a member of the NSW Legislative Council the appellant made representations to a public servant in relation to leases at Circular Quay with the intention of securing an outcome which would result in pecuniary benefits to himself or his family. As it is a common law offence, there is no maximum penalty. The sentencing judge found that the offences in Pt 4A *Crimes Act 1900* were statutory analogues, in particular s 249B(1) which criminalises most forms of bribery. The judge found that the appellant's offending was "broadly analogous" because his conduct involved him breaching his duty to the public by using his position to further his or his family's financial interests. The judge did not regard the offence in s 249B as being on all fours with the common law offence at hand; indeed he identified two significant differences.

On appeal, it was contended that the sentencing judge erred in finding that s 249B was "broadly analogous". This ground (and the appeal generally) failed. It was held that it was not to the point that the appellant could not possibly have been charged with an offence contrary to s 249B. The purpose of identifying a statutory analogue was merely to find a "reference point". It does not fetter the sentencing judge's discretion. The practice of identifying, where possible, a statutory analogue when sentencing for a common law offence where the penalty is at large does not involve identification of a statutory offence

that the offender committed, or for which the offender could have been convicted. It was open to the sentencing judge to have regard to the offence in s 249B as broadly (not precisely) analogous; s 249B and the appellant's offending shared the common features of a breach of duty by the inducement of another person to show favour for the advancement of personal pecuniary interests.

Domestic violence – importance of general deterrence

The respondent in ***Director of Public Prosecutions v Darcy-Shillingsworth*** **[2017] NSWCCA 224** assaulted his partner several times (punching her in the face, pulling her out of a car, and knocking her to the ground) and her father (when he tried to call the police). For three offences of violence, the sentencing judge imposed individual sentences of imprisonment and a community service order. The Crown appealed on the ground of manifest inadequacy. Basten JA held that general deterrence is a matter of some importance in cases of domestic violence. His Honour said that the current response of criminal law requires rigorous and demanding consequences for perpetrators of domestic violence in order to protect partners, family members and the community (referring to statements *The Queen v Kilic* [2016] HCA 48 at [21] and *Cherry v R* [2017] NSWCCA 150 at [78]). Basten JA also found that the community interest in general deterrence was not adequately reflected in the sentences imposed. Fagan J held that the purposes of sentencing that were particularly important in this case were deterrence, denunciation and recognition of harm to the victim and community. He found that offences of such gravity (even when committed by a man of otherwise good character) cannot be dealt with as leniently as was done in this case in order for those sentencing purposes to be served and the criminal law to play its part in the endeavour to quell and redress domestic violence.

Parity – disparity need not be "gross, marked or glaring"

In ***Miles v R*** **[2017] NSWCCA 266**, one of the grounds of appeal was that the appellant had a justifiable sense of grievance in relation to the disparity between his sentence and that of a co-accused. The Crown referred to *Tan v R* [2014] NSWCCA 96 to argue that the test of whether disparity will give rise to a ground of appeal is whether the difference is "gross, marked or glaring".

Rothman J, with whom Leeming JA and Hamill J agreed, adopted the analysis of Hamill J in ***Cameron v R*** **[2017] NSWCCA 229**, in which his Honour had regard to the fundamental principles that underpin the parity principle. These principles, outlined by Dawson and Gaudron JJ in *Postiglione v R* (1997) 189 CLR 295 and Hoeben CJ at CL in *Tuivaga v R* [2015] NSWCCA 145, are based on equal justice; that like should be treated alike but that due allowance should be had to relevant differences between co-accused.

Rothman J held that the epithets "gross", "marked" and "glaring" do not reflect the test; the test is whether the principles of equal justice have been misapplied. Leeming JA also rejected the proposition that it is necessary to demonstrate a "marked, gross, or glaring" disparity between sentences, and said that the descriptors are apt to mislead. Rather, his Honour held that the question is whether the sentence imposed on a co-accused is

reasonably justified in light of the objective and subjective differences between the co-offenders.

In ***Adams v R*** **[2018] NSWCCA 139** Johnson J (Simpson AJA and Adamson J agreeing) endorsed the notion that the parity principle involves a consideration of discretionary assessments by sentencing judges. Thus in ***Lloyd v R*** **[2017] NSWCCA 303** it was said that the question was whether "the differentiation made by the judge was one that was open to her in the exercise of her discretion". This was seen to echo the approach taken in the Victorian Court of Appeal where "it has been said that the concept of (an objectively) justifiable sense of grievance is a way of expressing the conclusion that a sentencing differential (or lack of differential) was not reasonably open to the sentencing judge given the relevant similarities and differences between the offending and the offenders". His Honour quoted Ashley JA saying in *Tran v R* [2017] VSCA 346 that sentences are not weighed "with a pretence of arithmetical certainty" and that "an attempt to demonstrate that a sentence imposed upon one of the offenders was not reasonably open, by resort to a minute examination of the individual circumstances of the offending and the offenders, runs counter to the concept of instinctive synthesis".

In ***Fenech v R*** **[2018] NSWCCA 160** the applicant took the Court to what was said in *Miles v R*. In response, it was said (at [30]-[32]) that the better course is to confine discussion of the parity principle to the terms used in judgments of the High Court. These included "marked disparity", "marked and unjustified disparity" and that for interference to be justified the difference between the sentences must be "manifestly excessive", an expression well known to mean "unreasonable or plainly unjust".

Objective seriousness assessment – mental state, duress, provocation, and mental illness (where causally related to commission of the offence) are relevant

The appellant in ***Yun v R*** **[2017] NSWCCA 317** was found guilty and sentenced for murder – an offence which carries a standard non-parole period. He was re-sentenced by the Court of Criminal Appeal in 2008 prior to *Muldrock v The Queen* (2011) 244 CLR 120. In 2017 his case came back to the CCA via Pt 7 of the *Crimes (Appeal and Review) Act* 2006. It was contended that the CCA in 2008 had, contrary to *Muldrock*, incorrectly taken into account matters personal to the appellant when assessing the objective seriousness of the offending. The appeal was dismissed.

Latham and Bellew JJ rejected a submission that *Muldrock* precludes consideration of the offender's mental state, duress, provocation and mental illness in assessing objective seriousness. Their Honours considered the High Court's distinction between "matters personal to a particular offender" (which the court is not permitted to take into account) on the one hand and matters affecting "the nature of the offending" (which the court is permitted to take into account). The latter was said to be sufficiently broad to include the mens rea and intention of the offender; it was held to be "an integral part of the offender's conduct that constitutes the offence". It was held to be incorrect to describe duress and provocation as personal characteristics of the offender which a court cannot take into account; the offender's mental condition is a critical factor affecting the objective seriousness of the offence.

There was a divergence of authority between *Badans v R* [2012] NSWCCA 97 (in which the Court held that the mental state of the offender cannot be taken into account), and later authorities (*Biddle v R* [2017] NSWCCA 128; *McLaren v Regina* [2012] NSWCCA 284). Their Honours concluded that in light of the authorities, it is now clear that an offender's mental condition at the time of the commission of the offence is a critical component of "moral culpability" which in turn affects the assessment of objective seriousness.

Aggravating factor of an offence being committed in the presence of a child

The appellant in ***Lloyd v R* [2017] NSWCCA 303** was involved in a violent melee in which he and his two older brothers seriously injured two victims. Lloyd was 15 at the time, and the incident included the 15 year old son of one of the victims. The sentencing judge took into account that the offences were committed in the presence of the victim's child as an aggravating factor under s 21A(2)(ea) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). The appellant alleged that the judge was in error because the offender was also a child of the same age.

The appeal was dismissed. It was held that the aggravating factor was capable of applying to an offence committed by a child. R A Hulme J cited *Gore v R; Hunter v R* [2010] NSWCCA 330 and held that whether the factor is aggravating in a particular case will depend on the nature of the offence and the likelihood that the child will be affected by it. In this case, the child was a victim of the affray offence and a witness to his brother and father being wounded in the melee. There was no reason to limit the aggravating factor to offences committed by adults but not children.

When imposing an aggregate sentence the judge should first announce the head sentence

An aggregate sentence was imposed upon the appellant in ***Hunt v R* [2017] NSWCCA 305**. One ground of appeal was that the judge had failed to comply with s 44(2A) of the *Crimes (Sentencing Procedure) Act 1999* because his Honour had set the non-parole period for the aggregate sentence before setting the head term of the aggregate sentence. Counsel for the appellant contended that the error was not "merely technical" and had therefore occasioned a miscarriage of the sentencing discretion.

The appeal was dismissed on the basis that the error was purely technical which did not occasion a miscarriage. Adamson J (Bellew J agreeing) held that the starting point (per *Eid v R* [2008] NSWCCA 255) is that the statutory provisions relating to the setting of terms or non-parole periods regulate the pronouncement of the sentence but not the reasoning process behind the determination. Her Honour considered the legislative history of the provisions, and held that because the error in the pronouncement of the sentence was no more than technical it did not lead to invalidity. Her Honour cited a similar conclusion reached by the High Court in *Kentwell v The Queen* regarding s 44(1).

Relevance of temporal gap between offence and sentence due to inability to identify offender

The respondent in ***R v Hall*** **[2017] NSWCCA 313** was sentenced after having been found guilty of four serious sexual assaults on a prostitute at knife point. After the attack, the victim reported it to the police and swabs were taken. The offender was only identified by DNA many years later. The sentencing judge referred to "delay" between the offence and sentencing and found that the offender had since demonstrated rehabilitation. The Crown appealed against the sentence of 5 years with a non-parole period of 1 year.

The Court allowed the appeal and found the sentence to be manifestly inadequate. It was held that the trial judge was wrong to apply the decision of *R v Moon* [2000] NSWCCA 534 as "authoritative" in any case involving delay and rehabilitation. In that case Howie J had regard to the offender's rehabilitation during the period of delay but it was a case in which there had been "very gross delay in raising complaint". In this case, the delay was caused by the respondent having decamped, remained silent, and evaded prosecution. However, it was proper for the judge to have regard to the fact that the respondent had pursued a productive lifestyle, was of otherwise good character, was useful to society in the intervening 27 years, and had physical and mental health issues.

Use of "judicial memory" in sentencing for historical child sexual offences

The appellant in ***MC v R*** **[2017] NSWCCA 316** was charged with historical child sex offences committed against his daughters between 1972 and 1981. He appealed on the basis that the sentencing judge had used "judicial memory" of sentencing practices of the time of the commission of the offences. The appeal was dismissed. Hamill J (Simpson JA and Rothman J agreeing) adding his voice to the criticisms of the use of judicial memory: see, for example, Garling J in *MPB v R* (2013) 234 A Crim R 576; [2013] NSWCCA 213 and Basten JA in *R v MJR* (2002) 54 NSWLR 368; [2002] NSWCCA 129.

Note: Such issues will be of historical interest only with the insertion of s 25AA into the *Crimes (Sentencing Procedure) Act* 1999 by the *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018 (not yet in force).

Related offences can be dealt with under s 166 Criminal Procedure Act when person under the age of 18 is being sentenced

It was contended in ***DJ v R*** **[2017] NSWCCA 319** that a sentencing judge had no jurisdiction to impose sentence upon a juvenile for related summary offences on a s 166 certificate but the appeal was dismissed. The primary offence against s 33A(1)(a) of the *Crimes Act* (discharge of a firearm with intent) is a "serious children's indictable offence" so that the Children's Court did not have jurisdiction. One of the certificate offences, contrary to s 93I(2) of the *Crimes Act* is an indictable offence capable of being dealt with summarily. The other, against s 39(1)(a) of the *Firearms Act* is a purely summary offence. Johnson J held that the offences could be dealt with by the higher court under s 167(2)(b). In light of the policy underpinning s 167, his Honour noted that the parties had wished for the offences to be dealt with under the s 166 certificate in the interests of efficiency, and that

the case of *R v Farrell* (1976) 2 NSWLR 498 supports the view that the provisions for taking other offences into account (ie s 167) apply to juvenile offenders.

Plea of guilty for Commonwealth offences - s 16A(2)(g) requires a court to take into account the utilitarian value

The appellant in ***Xiao v R*** **[2018] NSWCCA 4** pleaded guilty to insider trading offences under the *Corporations Act 2001* (Cth). Whilst the investigation was ongoing, ASIC obtained orders preventing Xiao from leaving the country. He was subsequently granted overseas travel for a particular purpose but breached the orders and remained overseas for some years. Xiao was later extradited and entered a plea of guilty. The sentencing judge stated that the utilitarian discount identified in *R v Thomson; R v Houlton* (2000) 49 NSWLR 383 did not apply to federal sentencing and that there was no obligation to give any specific quantification of a discount for a guilty plea. Moreover, the sentencing judge held that the pleas had to be evaluated in the overall context including the appellant's failure to return from overseas in breach of court orders. The appellant appealed against the severity of the sentence on several grounds, two grounds contending that the judge failed to take into account the utilitarian value of an early guilty plea and that the reduction by reason of the guilty pleas was inadequate.

The Court was constituted by a bench of five judges in order to resolve conflicting views expressed in earlier cases, primarily in *Tyler v The Queen* [2007] NSWCCA 247; 173 A Crim R 458 and *Director of Public Prosecutions (Cth) v Thomas* (2016) 347 ALR 275; [2016] VSCA 237. It was held s 16A(2)(g) of the *Crimes Act 1912* (Cth) requires a court to take into account the utilitarian value of a guilty plea and that it is desirable but not obligatory to specify the discount specified by the Court.

The discount for pleading guilty cannot be expressed as a range

The appellant in ***Jinde Huang aka Wei Liu v R*** **[2018] NSWCCA 70** pleaded guilty to the importation of a commercial quantity of methamphetamine and dealing with the proceeds of crime. The plea for the first offence was entered earlier than the plea for the second. Upon sentencing the judge resolved to reflect the extent to which the pleas facilitated the course of justice by discounting the sentence for the first offence by "between 10% and 15%" and "between 5% and 10%" for the second offence. On appeal it was contended, inter alia, the sentencing judge erred by specifying a range for the discounts.

The appeal was heard by a five judge bench at the same time as *Xiao v R* [2018] NSWCCA 4 (see above) although judgment was delivered some months later. The members of the Court were generally of the view that a "range" of discount for a plea of guilty should not be utilized, although the strength of such views varied. Usefully, Bathurst CJ stated (at [9])

> "Because somewhat divergent views have been expressed on the issues raised in this appeal, it may be of assistance to specify the approach which should be taken by sentencing judges in dealing with the utilitarian value of a plea of guilty in respect of Commonwealth offences having regard to the decision in *Xiao v R* and the judgment handed down in the present case:

1. Sentencing judges should take into account the utilitarian value of a plea in Commonwealth sentencing offences. Failure to do so constitutes error.
2. It is desirable that any discount given for the utilitarian value be specified. However, a failure to do so would not of itself constitute error.
3. It is an error to specify a range of percentage discounts as distinct from a specific percentage."

Elderly person living in circumstances of social isolation is "vulnerable" for the purposes of s 21A(2)(I) of the Crimes (Sentencing Procedure) Act

The appellant in ***Katsis v R*** **[2018] NSWCCA 9** was found guilty of murder and sexual intercourse without consent. The victim was a 66 year old woman who lived alone in social housing, did not have visitors, and was not seen in the company of others. On sentencing, the judge took into account the fact that the deceased was "vulnerable" within the terms of s 21A(2)(I) of the Act. The appellant contended that the judge was in error.

Hoeben CJ at CL held that elderly people living in social isolation with no community support can be regarded as members of a class who are vulnerable. The Crown referred to *Longworth v R* [2017] NSWCCA 119 in which the Court found that security guards at a licensed venue could be classed as vulnerable. The Appellant submitted that the age of the victim was insufficient to bring the victim within the scope of s 21A. Vulnerability is determined by reference to a class of persons with a vulnerability deriving from that class, as opposed to the particular circumstances of the particular victim (at [61]).

When misstatement of maximum penalty will result in intervention by Court of Criminal Appeal

The appellant in ***Campbell v R*** **[2018] NSWCCA 17** was sentenced to a number of offences but the judge said in respect of one of them that the maximum penalty was 15 years imprisonment whereas it was 5 years. He assessed an indicative sentence of 2 years. Campbell J referred to *Andreata v* R [2015] NSWCCA 239 where Beech-Jones J likened the error of acting upon an erroneous maximum to the *House v The King* error of acting upon a wrong principle. Campbell J distinguished the present case from *Baxter v* R [2007] NSWCCA 237; 173 A Crim R 284 where the misstatement of a maximum was in respect of one offence where there were many other offences carrying significantly higher maximums. In this case the offence in question was the one that carried the highest maximum. The appeal was allowed.

A judge considering imposing a non-parole period greater than three quarters of the head sentence should alert an offender to that possibility

After failing the Drug Court program, the appellant in ***Brennan v R*** **[2018] NSWCCA 22** was sentenced for a number of offences. The sentencing judge said he had been asked to find special circumstances but concluded that he would not. He imposed an aggregate sentence of 3 years 6 months with a non-parole period of 3 years (86%). The appellant argued, first, that the judge was required to find special circumstances for imposing a non-parole period that exceeded three quarters of the sentence, and secondly, that he was

denied procedural fairness by there being no warning of the possibility there might be a non-parole period greater than three quarters of the sentence.

Button J considered *Connelly v R* [2012] NSWCCA 114 to conclude that the working of s 44 of the *Crimes (Sentencing Procedure) Act* did not require the sentencing judge to find special circumstances in order to impose a non-parole period that is more than 75% of the head sentence. As for ground two, Button J held the sentencing judge was, in the circumstances, obliged to forewarn that he might impose a non-parole period greater than three quarters so as to provide the appellant with the chance to make submissions.

A reference to Bugmy factors does not demonstrate that the sentencing judge was taking into account an offender's intellectual disability

A man pleaded guilty to a home invasion offence and an issue was raised in the sentence proceedings as to him having a mild intellectual disability. When sentencing, the judge said that he had "taken into account what I'd describe as *Bugmy* matters" and "I also accept that he has a mild intellectual disability". It was contended on appeal in ***Kerwin v R* [2018] NSWCCA 23** that the sentencing judge failed to assess the effect of the offender's mental disability on his moral culpability and whether the mental condition operated to reduce the weight required to be given to general deterrence.

The appeal was allowed. Garling J said that he could not see in the judge's reference to "Bugmy matters" that there was a proper consideration of the impact of the appellant's intellectual disability on his moral culpability and on the weight to be given to general deterrence. There was clear evidence of a causal connection with the commission of the offence which lessened the degree of moral culpability and impacted upon the weight to be given to general deterrence.

Judge should backdate imprisonment to reflect quasi-custody whether or not such submissions were put to the judge

The appellant in ***Gardiner v R* [2017] NSWCCA 27** was sentenced with a co-offender, Bourke, for an offence of armed robbery in company. Both offenders received the same sentence. Gardiner, unlike Bourke, had attended a residential rehabilitation centre prior to sentencing. On appeal the appellant submitted that the trial judge erred by failing to backdate the sentence to take into account the time in quasi-custody he had already served.

The appeal was allowed. Simpson JA noted the decision of *Hughes v R* (2008) 185 A Crim R 155, in which Grove J held that recognition should be given for time an offender has spent in quasi custody, and that a calculation of 50% is often appropriate. Although counsel for the appellant had not, at trial, explicitly asked the sentencing judge to backdate the sentence to take into account time spent in rehabilitation, Simpson JA found that the submissions of counsel on that point had been extensive and detailed. Her Honour found that exceptional circumstances existed to allow the Court to consider arguments as to whether the Court should take into account time spent in rehabilitation. She held that 50% of the time spent in rehabilitation, 44 days, was not insubstantial.

Error in referring to a wrong standard non-parole period

The appellant in ***Portelli v R*** **[2018] NSWCCA 28** was found guilty by a jury for a number of break enter and steal offences in circumstances of aggravation. That offence carries a SNPP of 5 years. The sentencing judge, in his opening remarks, stated that the offence carried a SNPP of 7 years. The appellant contended that this was erroneous and affected the sentencing discretion; the Crown argued that the misstatement was a mere slip of the tongue.

The appeal was allowed. The issue was whether the misstatement should be treated as an error that affected the exercise of the sentencing discretion. Simpson JA had regard to the SNPP scheme in s 54B in light of *Muldrock* and held that the SNPP is a guidepost to be considered among various other factors. Her Honour found that although the sentencing judge had referred later in the judgment to a SNPP, the judge did not nominate what that period was. Simpson JA therefore accepted the Crown's contention that it was *possible* that the judge had in mind the correct SNPP, but concluded that it was doubtful whether that was so. Her Honour held that the offender should be resentenced according to *Kentwell*.

Mere presence of children in a house outside which an offence occurs is not sufficient to establish the aggravating feature in s 21A(2)(ea) of the Crimes (Sentencing Procedure) Act

Two children were said to be inside a house outside of which there was a violent melee in which two men were being attacked by ten men. A judge found the offence of affray was aggravated (per s 21A(2)(ea)) by the fact that the offence was committed in the presence of children. This was held to be erroneous: ***Alesbhi v R; Esbhi v R*** **[2018] NSWCCA 30**. Howie AJ said in *Gore v R; Hunter v R* [2010] NSWCCA 330 that the provision was aimed at preventing the deleterious effects of crime on the emotional wellbeing of children. In *R v Seymour* [2012] NSWSC 1010, Price J rejected a Crown submission that the factor was made out notwithstanding that the child was asleep at the time of the offence. In this case, there was no basis for the sentencing judge to conclude beyond reasonable doubt that the affray was committed "in the presence of a child under 18 years of age" because there was no evidence to suggest that any children saw, heard or were aware of the affray.

Two aspects regarding discounts on sentence for pleading guilty

The appellant in ***Gordon v R*** **[2018] NSWCCA 54** was sentenced for two serious offences, and had other offences taken into account on Forms 1. He pleaded guilty to the substantive offences; one after the complainant had given evidence. He did not plead guilty to all the Form 1 offences, one of those offences had been fixed for trial after a committal hearing in which the complainant had been cross-examined. On appeal it was contended that the sentencing judge had erred in her approach to the discount for pleading guilty.

The appeal was allowed. Simpson JA explained the history of affording offenders a sentence discount for an early plea of guilty; s 22 of the *Crimes (Sentencing Procedure) Act* 1999; and the guideline judgment of *R v Thomson; R v Houlton* (2000) 49 NSWLR 383. She found, contrary to RA Hulme J and Hidden AJ, that because the appellant did not plead guilty to all the Form 1 offences at the earliest time, this reduced the utilitarian value of the plea. Further, her Honour held that the value of the guilty plea for one of the substantive offences was also reduced because of the late guilty plea for one of the Form 1 offences that was attached to that substantive offence.

On this point, RA Hulme J (with the agreement of Hidden AJ) held that section 22 requires a court to take into account a guilty plea "in sentencing for an offence". There is no statutory requirement to take into account whether an offender pleaded guilty to an offence taken into account on a Form 1. His Honour therefore held that a court need not, when sentencing for one offence, consider the procedural history of any additional offences that are taken into account in assessing by how much the sentence for the primary offence should be reduced on account of the utilitarian value of the plea of guilty. Comments were made about a myriad of potential complications to the sentencing process if judges were required to analyse the utilitarian value of an offender's acknowledgement of guilt in respect of offences on a Form 1. In this case, his Honour held that an appropriate discount for an offence to which there was an early plea of guilty was 25%, notwithstanding a late acceptance of guilt in respect of a Form 1 matter.

General principles relating to the sentencing of children

The appellant in ***Paul Campbell v R*** **[2018] NSWCCA 87** was a 13 year old child who pleaded guilty to very serious sexual offences against younger relatives. At sentencing he did not rely on the defence of *doli incapax*. He was sentenced to 16 months' imprisonment with a non-parole period of 8 months. He appealed on four specific grounds and a general manifest excess ground.

The Court allowed the appeal and remitted the matter to the District Court for resentencing. Hamill J held that the sentencing judge erred by rejecting a concession by the Crown that a sentence other than full-time custody was in range; by failing to consider an alternative to full-time custody; in his assessment of the seriousness of the offences; by finding that the appellant abused his position of trust; and by taking into account an offence listed on a Form 1 that carried a maximum penalty of imprisonment for life.

This case is notable for Hamill J providing a useful collection of principles that apply to the sentencing of children (at [20]-[32]).

Error in finding that drug supply offence was committed "in company"

The appellant in ***Elliott v R*** **[2018] NSWCCA 69** pleaded guilty to two offences of supplying drugs. The appellant gave evidence that the drugs were to be supplied by him to a man named Dunn at the direction of a man named Kennedy. At sentencing the judge found that the appellant had acted "in company". Under a ground of appeal contending a denial

of procedural fairness, the appellant argued that the finding was not open to the judge in any event.

Fullerton J upheld the ground, at least on the basis that the finding of "in company" was not open on the facts. Her Honour cited *White v R* [2016] NSWCCA 190 where Simpson JA held that each case will depend upon its own facts but that it is appropriate to focus on at least three questions: first, whether the presence of other persons had a potential effect on the victim by way of coercion or intimidation; second, whether the presence of others had an effect of emboldening the offender; and third, whether the evidence establishes that the other person present shared a common purpose with the offender. Fullerton J concluded that in this case, there was no evidence to suggest that the other men involved in the drug supply chain supported or assisted the appellant in his offending for the purposes of s 21A(2)(e) and therefore that the aggravating factor was not made out.

Parity principle does not apply where relevant offence appears on Form 1 for co-offender

The appellant in ***Dunn v R*** **[2018] NSWCCA 108** pleaded guilty to seven counts relating to drug supply. The seventh count was for knowingly taking part in the supply of a prohibited drug. For the appellant's co-offenders, the only offence in common was that in Count 7 but for them it was an offence taken into account on a Form 1. The sole ground of appeal was that there was "a legitimate sense of grievance when comparing the sentence imposed upon him to the sentences imposed upon his co-offenders".

Leave to appeal was refused. Adamson J held that the parity principle had no application because of the inclusion of the corresponding charges on a Form 1; there could be no relevant comparison between a sentence for an offence and an unspecified increase in a principal sentence incorporating a Form 1 offence.

Incorrect classification of objective seriousness in relation to drug offence

Mr Cheuk Hang Yiu and Ms Mung Yi Yau were convicted in the District Court for the supply of 1kg of methylamphetamine and were each sentenced to 3 years with a non-parole period of 2 years. The methylamphetamine the subject of the charges totaled 999.1g with a 78.5% purity. The Crown appealed on the basis that the sentences were manifestly inadequate: ***R v Yiu; R v Yau*** **[2018] NSWCCA 155**. On appeal the Crown submitted that the sentences imposed on Mr Yiu reflected latent error and four patent errors: first, the finding that the criminality was "towards the lower end"; second, that the respondents' role was "at the bottom of the batting order"; third, failing to find as an aggravating factor that the offence was committed while on conditional liberty; and four, failing to take into account the Form 1 offences. With respect to the first contention, the Crown argued that a higher criminality was reflected in the quantity of drugs supplied and that the purity of those drugs was high. Ms Yau argued that the sentence was not manifestly inadequate on the basis that although the purity was high, she had no knowledge of the level of its purity.

The appeal was allowed. Rothman J considered the offence had a maximum penalty of life imprisonment and standard non-parole period of 15 years. He held that it was incorrect for the sentencing judge to assess the respondents' objective criminality as "towards the

lower end" or "at the bottom of the batting order". His Honour, in doing so, had regard to the facts that the drug quantity was twice the large commercial quantity, its purity was very high, and the offence was not an isolated offence for either respondent. The sentence was manifestly inadequate.

SENTENCING - SPECIFIC OFFENCES

Drug supply - error to take into account purity of drugs when there is no evidence

The appellant in ***Murray v R*** **[2017] NSWCCA 262** was sentenced for supplying a large commercial quantity of methylamphetamine and MDMA. The sentencing judge had regard to the 80% purity of the 4.96kg of methylamphetamine, and determined that this would be diluted to a street level purity of 20% which would yield 20kg from the initial 4.96kg base. A ground of appeal against sentence was that there was a denial of natural justice because the judge postulated a theoretical street level purity without evidence; failed to provide the parties with an opportunity to address this finding; and placed undue weight on the purity of drugs when determining the objective seriousness of the offence.

Price J held that the trial Judge had failed to explain to the appellant's counsel his understanding of how the drug could be diluted and of its common street purity. The Court found that this omission was procedurally unfair and his conclusion was not based on evidence. Price J cited the decision of *Munday v R* [2017] NSWCCA 95, in which Beech-Jones J held that if a sentencing judge relies on facts ascertained from a source external to the proceedings, the judge must provide parties with an opportunity to respond, and it may still be erroneous to rely on that evidence unless properly adduced and proven.

Murder/manslaughter – verdict of guilty of manslaughter but no discount for earlier offer to plead guilty to it

In ***Merrick v R*** **[2017] NSWCCA 264**, the offender had offered prior to trial to plead guilty to manslaughter. No factual basis for such a plea was advanced. The matter went to trial but the jury rejected murder and returned a guilty verdict for manslaughter. The sentencing judge declined to provide a discount for the earlier offer to plead to the offence for which the offender was ultimately found guilty. On appeal, reference was made to authorities to the effect that a discount may be allowed for an earlier offer to plead guilty to a lesser offence which was rejected by the Crown but where the jury returned a verdict for that lesser offence. The primary judge in this case noted that the offender's evidence was inconsistent with acceptance by him of his guilt for manslaughter. She considered his earlier conditional offer to plead to manslaughter was no more than "exploratory". The Court held there was no error in not providing a sentencing discount.

Drug supply sentencing – Clark *"principle" overruled*

After the landmark decision in ***R v Robertson*** **[2017] NSWCCA 205** (Simpson JA with whom Harrison and Davies JJ agreed), the Chief Justice agreed to sit a bench of five judges in ***Parente v R*** **[2017] NSWCCA 284** to consider a contention that the Court consign to history the so-called "principle" derived from *R v Peter Michael Clark* (Court of Criminal Appeal (NSW), 15 March 1990, unrep) that "drug trafficking in any substantial degree should normally lead to a custodial sentence and that only in exceptional circumstances will a non-custodial sentence be appropriate".

Mr Parente was sentenced for two drug supply offences, one involving a commercial quantity. The primary judge took into account the *Clark* principle. He imposed an aggregate sentence of 4 years with a non-parole period of 2 years. On appeal the appellant argued that by applying *Clark* the sentencing judge had erred by impermissibly constraining his sentencing discretion.

The Court found error on the part of the trial judge but dismissed the appeal. The Court considered the general principles of sentencing as laid down by the High Court in *Hili v R; Jones v R* (2010) 242 CLR 520 and *Wong v R; Leung v R* (2001) 207 CLR 584. The Court held that the principle in *Clark* is apt to mislead in that once it is concluded that the offence involved trafficking in any substantial degree, it suggests that the defendant must then demonstrate some exceptional circumstances to negate a presumption of a full-time custodial sentence. This was held to be inconsistent with the majority view in *Hili v R*, in which the High Court held (at [44]) that "it is wrong to begin from some assumed starting point and then seek to identify 'special circumstances'". The Court affirmed the decision of Simpson JA in *Robertson v R*.

The Court went on to say that a sentence of imprisonment will generally be ordered in cases of drug dealing "to a substantial degree". However, the *Crimes (Sentencing Procedure) Act* stipulates that a sentencing judge should not impose a custodial sentence unless it is satisfied that no other penalty is appropriate. If that be the case, in accordance with cases such as *R v Zamagias* [2002] NSWCCA 17 at [22]-[29], it was then necessary for the court to determine the length of the sentence and whether any alternatives to fulltime incarceration are available and appropriate. In this case, with the judge determining upon an aggregate sentence of 4 years, no alternative to full-time custody was available and so the primary judge's consideration of whether there were "exceptional circumstances" was a rather arid exercise.

Error having been established, however, the Court was required to reconsider the exercise of the sentencing discretion. It concluded that no lesser sentence was warranted and the appeal was dismissed.

Cause child to engage in sexual intercourse or in sexual activity – assessing objective seriousness

A judge imposed an overall sentence of 10 years with a NPP of 6 years for a State offence of possessing child abuse material and 23 Commonwealth offences of causing a child to engage in sexual activity (x 1) or sexual intercourse (x 22) in the offender's presence. The

offences concerned the offender, who was in Sydney, paying for and directing live sexual acts between adults and 17 child victims in the Philippines, via a real-time video link and by typing instructions to an adult in that country. The sentence was held to be manifestly inadequate, with a majority determining to resentence to an overall 14 years with NPP 10 years whilst Basten JA considered a sentence of at least 20 years with NPP 14 years was warranted: ***Director of Public Prosecutions (Cth) v Beattie*** **[2017] NSWCCA 301**.

The Commonwealth offences are in ss 272.8(2) and 272.9(2) and, although they are somewhat unusual, this case is useful for the listing by Price J (at [127]) of 14 factors that may be of relevance in assessing the objective seriousness of such offences.

Child sexual assault offences generally – relevance of paraphilic disorder

The Court in ***Director of Public Prosecutions (Cth) v Beattie*** **[2017] NSWCCA 301** was asked to consider the relevance of a diagnosis of paraphilic disorder. The appellant's submission was based on the judgment of Kirby J in *Ryan v The Queen* (2001) 206 CLR 267, in which his Honour held that it might be appropriate in sentencing such an offender to consider the common cause of the offences. However, Price J also considered the judgment of McHugh J in that case, in which his Honour said that there is no reason to give a paedophile a lesser sentence because of the paraphilic disorder; it may be that a paedophile ought to get a heavier sentence to protect the community. Price J concluded (at [205]) that although the appellant's disorder might explain his offending and reduce his moral culpability, it also heightens the need for specific deterrence.

Child prostitution offence – error in assessing objective seriousness

The respondent in ***R v Toma*** **[2018] NSWCCA 45** was sentenced to imprisonment for 20 months to be served by way of an intensive correction order for an offence of participating as a client in an act of child prostitution with a child under the age of 15. His defence at trial was that he only engaged in sexual intercourse with the child once and that at all times he honestly believed on reasonable grounds that the victim was over the age of 18. The Crown appealed on the basis of manifest inadequacy and on the basis of error in the assessment of objective seriousness.

It was held, per White JA, that the facts did not support the finding by the sentencing judge that the objective seriousness of the offence was towards the bottom of the range. His Honour held that it was irrelevant that the child appeared to be a willing participant; if the child opposed the intercourse it would be an aggravating matter. Such a conclusion ought not to have put the offence at the lower level of the range. It was also found to be irrelevant that the appellant did not seek out a child but that a child had been offered to him. (The sentence was manifestly inadequate but the appeal was dismissed.)

Give corrupt benefit to Commonwealth public official – seriousness of such an offence

Rodgers was sentenced for two offences involving the supply of a large commercial quantity of cocaine as well as an offence of giving a corrupt benefit to a Commonwealth

public official contrary to s 142.1(1) of the *Criminal Code* (Cth). He was sentenced to individual terms of imprisonment, with the Commonwealth sentence commencing first and the two drug supply sentences partially accumulated and commencing six months later. On appeal it was contended that the total effective sentence for the state and federal offences was manifestly excessive: ***Rodgers v R* [2018] NSWCCA 47**.

Johnson J considered the seriousness of the Commonwealth offence and found that the appellant was fortunate that only six months of the overall imprisonment was referable to it. The Commonwealth offence involved the appellant paying $10,000 to an AFP officer in order to obtain intelligence to be used for the importation of narcotics. His Honour considered the authorities dealing with the offence of providing a corrupt benefit to a police officer, which invariably categorised the offence as a very serious one that warrants severe punishment. Johnson J held that the assistance sought to be derived by the corrupt benefits offence for those involved in serious criminal activity increased the objective seriousness of the offence, and it was necessary for the sentence to involve general and specific deterrence.

Domestic violence offences

The appellant in ***Patsan v R* [2018] NSWCCA 129** assaulted the victim with whom he was in a domestic relationship, causing grazing and bruising to her torso. The morning after the assault the victim told the appellant she was moving out, at which point the appellant grabbed her and punched her in the face, fracturing her jaw in two places. The sentencing judge assessed the objective seriousness of the offence as "just below the middle of the range" and the appellant was sentenced to full-time imprisonment. He contended on appeal that the judge erred in her assessment of the seriousness of the offence and that he should have received a suspended sentence. Leave to appeal was refused.

Adamson J rejected a submission that the sentencing judge had used the offender as a scapegoat for the prevalence of domestic violence. She held that there was no error in the manner in which the judge assessed the seriousness of the offence in its domestic violence context. She noted that the Court's experience and statistics relied upon by the Crown indicated that domestic violence offences not infrequently conform to a pattern, as the offence at hand did:

> "[A] male attacks (or kills) a woman with whom he is, or has been, in an intimate relationship when she expresses a wish to leave that relationship. Typically, the male is physically stronger than the female. The male is thus generally in a position to inflict considerable harm to the female and there is no real prospect of spontaneous physical retaliation because of the disparity between their respective strengths."

Her Honour applied *Munda v Western Australia* (2013) 249 CLR 600; [2013] HCA 38 and *R v Edigarov* [2001] NSWCCA 436 and held that the judge correctly charaterised the offences as domestic violence and properly regarded that fact as a matter of real significance for the purposes of specific and general deterrence.

Child abuse material and child pornography offences – factors affecting objective seriousness

In *Minehan v R* [2010] NSWCCA 140; 201 A Crim R 243 a non-exhaustive list of factors that may bear upon the assessment of the objective seriousness of offences concerning the possession, dissemination or transmission of child pornography and child abuse material was provided which has been (apparently) cited regularly. In ***R v Hutchinson*** **[2018] NSWCCA 152** the Commonwealth Director asked the Court to consider augmenting the list with two further features that were evident in the case at hand. It was a feature of Mr Hutchinson's offending that he had persuaded pubescent males to send pornographic images of themselves to him while he pretended to be a young person of about the same or a slightly older age (he was in fact 29). The Court obliged and amended item 9 and inserted a new item 10:

> 9. The degree of planning, organisation, sophistication and/or deception employed by the offender in acquiring, storing, disseminating or transmitting the material.
>
> 10. The age of any person with whom the offender was in communication in connection with the acquisition or dissemination of the material relative to the age of the offender.

The complete list, as amended, may be found in *R v Hutchinson* at [45].

SUMMING UP

Jury directions on "beyond reasonable doubt"

The trial judge in ***The Queen v Dookheea*** **[2017] HCA 36** directed the jury that the Crown had to satisfy them "not beyond any doubt but beyond reasonable doubt". In the Victorian Court of Appeal it was held that the judge had erred. The High Court held that mentioning the distinction may be confusing, but a miscarriage of justice will only have occurred if the jury would have got a false perception of what the Crown has to prove. This is to be determined based upon the summing up as a whole, as the jury would have understood it, and (if applicable) how the defendant's competent counsel reacted to the relevant direction. The High Court also said that the practice of contrasting "beyond reasonable doubt" with the civil standard was to be encouraged: "It is an effective means of conveying to a jury that being satisfied of guilt beyond reasonable doubt does not simply mean concluding that the accused may have committed the offence charged or even that it is more likely than not that the accused committed the offence charged."

Whether direction concerning forensic disadvantage was required

Binns v R **[2017] NSWCCA 280** was concerned with a conviction for one count of sexual intercourse with a person under the age of 10. The offence was alleged to have occurred in 2008 or early 2009 but no complaint was made to police until 2013. It was contended on appeal that the trial judge should have directed the jury about forensic disadvantage caused by delay under s 165B of the *Evidence Act* because of the impossibility of DNA evidence being adduced. The appeal was dismissed.

Basten JA rejected the appellant's argument that any lapse of time which resulted in a possible source of relevant evidence engaged the obligation to warn the jury under s 165B. It was held that the obligation in s 165B(2) to warn was not engaged because the trial judge was not satisfied that the defendant suffered a significant disadvantage. He held that it is not correct to describe any potential disadvantage as resulting from the lack of DNA evidence in terms of delay of complaint or reporting. The concept of "delay" involves a departure from a time period which would be expected or might be considered reasonable in the circumstances. (What is reasonable or expected in relation to a 9-year old girl as to when an offence might be disclosed?) Moreover, Basten JA held that DNA evidence will not usually fall within s 165B(2) because it will rarely be possible for a judge to say that he or she is satisfied that the absence of such evidence involves a significant forensic disadvantage – there would be no basis for knowing whether the DNA evidence was inculpatory or exculpatory.

Unbalanced or unfair summing up

Jason McKell was tried with a co-offender (McGlone) for a commercial quantity drug importation. He contended on appeal that the trial judge's summing up caused a miscarriage of justice because of the cumulative effect of certain things the judge said: ***McKell v R* [2017] NSWCCA 291**. There were three consignments but there was no evidence of drugs being in the first but the judge had said things suggesting that there were. It was also contended that the judge had raised arguments beyond those raised by the Crown and had conveyed to the jury that the judge thought McKell was knowingly involved in the importations. (The extracts from the summing up that are included in the CCA judgments are notable for the number of times the judge used expressions like "You might think" and for the number of times the judge suggested what the jurors would think or do if they had been involved in the same factual situations as the accused were.)

The appeal was dismissed by a majority. Payne JA and Fagan J were not satisfied that a miscarriage had occurred. Payne JA said that in relation to the first matter that it "would have been far preferable" if a certain remark was not made by the judge but the matter had been later corrected. In relation to another matter it was said that it was necessary for the judge to correct a misleading impression created in the closing address of McKell's counsel. In relation to another matter it was said that the use of the term "you may think" was "a clear indication that the appropriate factual finding was one for the jury"; it "comprised no more than a typical and permissible comment by the trial judge about a finding of fact that he carefully explained was a matter for the jury".

Beech-Jones J considered that the trial was rendered unfair by the judge having "made an address to the jury the substantive parts of which were a sustained attempt to persuade them of the appellant's guilt". His Honour described the use of an expression like "you might think" as "a rhetorical device used by the trial judge to emphatically suggest to the jury not just what they 'might think' but what they should think and what they should find".

(Special leave to appeal to the High Court was granted on 17 August 2018: [2018] HCATrans 151.)

Posing questions as to whether there is a "reasonable possibility" in relation to a matter the Crown must disprove

The appellant in ***Towney v R*** **[2018] NSWCCA 65** was tried for murder and argued that he was acting in self-defence. In summing up, the trial judge posed six questions to the jury in a "question-trail" style document. First, whether the jury were satisfied beyond reasonable doubt that the deceased died; second, whether it was a direct result of the stab wound; third, whether there was a reasonable possibility that the accused believed that his actions were necessary; fourth, whether there was a reasonable possibility that his response was a reasonable one; and finally whether the jury were satisfied beyond reasonable doubt that accused intended to kill or cause grievous bodily harm. (There was also a sixth question concerning provocation.) The appellant contended on appeal that the trial judge erred by failing to direct that the Crown bore the onus of negativing any reasonable possibility that the appellant was acting in self-defence and that there was an attempt to explain the standard of beyond reasonable doubt as the converse of the existence of a reasonable possibility.

Hoeben CJ at CL concluded that the trial judge had not misdirected the jury. His Honour rejected the fundamental premise of the appellant's argument that expressing questions three and four in terms of whether there was a "reasonable possibility" was a reversal of the onus of proof and that that premise was contrary to authority in *Moore v R* [2016] NSWCCA 185. His Honour noted that special leave to appeal to the High Court had been refused: *Moore v R* [2016] HCASL 323. He quoted at length the decisions of Basten JA and R A Hulme J where their Honours held that there are a number of High Court authorities in which the existence of a reasonable possibility of an exculpatory matter had been expressed as the corollary of the Crown not having proved guilt beyond reasonable doubt. In the present case, Hoeben CJ at CL held that the trial judge had repeatedly used the terminology of "beyond reasonable doubt", together with its corollary, and stressed that the Crown bore the burden of proof. His Honour held that in doing so, the trial judge was merely restating the standard of proof. The appeal was dismissed.

Hoeben CJ at CL rejected the appellant's submission that it is an error of law for a judge to attempt to explain the meaning of "beyond reasonable doubt" to a jury. While the High Court has cautioned against such a task, his Honour held that there are a number of authorities where such an explanation did not amount to error. His Honour concluded that even if it had been found that his Honour did seek to explain the meaning of "beyond reasonable doubt", that the explanation he gave was in accordance with *Moore v R*. His Honour held that the directions given were satisfactory and that no error was established.