DISTRICT COURT CONFERENCE 2021

COURT OF CRIMINAL APPEAL ROUND-UP 2020

7 April 2021 - Hyatt Regency

The Honourable Justice R A Hulme

(22 March 2021)

CONTENTS

SCOPE OF PAPER

The purpose of this paper is to provide brief notes concerning the range of issues that have been considered in appellate criminal decisions in the past 12 months. Where reference is made to the author of a judgment in the Court of Criminal Appeal it should be taken that the other members of the Court agreed unless otherwise indicated.

I am most grateful for the assistance in the compilation of this paper provided by Mr Henry Robinson BA LLB (Hons) and Mr Daniel Larratt LLB (Hons 1) BEc.

APPEALS

Factors influencing discretion to order new trial – s 8 Criminal Appeal Act 1912

In ***A2 v R; Magennis v R; Vaziri v R*** **[2020] NSWCCA 7***,* the Court considered whether to exercise its power to order a new trial under s 8 *Criminal Appeal Act 1912* (NSW). Convictions for female genital mutilation had been quashed in the CCA, but a Crown appeal to the High Court was upheld in *The Queen v A2; The Queen v Magennis; The Queen v Vaziri* [2019] HCA 35; (2019) 93 ALJR 1106. The matter was remitted to the CCA for determination of one ground, which was then abandoned.

The Court (Hoeben CJ at CL, Ward JA and Adams J) granted a retrial. The factors in favour included that there was a reasonable prospect of conviction, the abandonment of the unreasonable verdicts ground, and that it would not be unfair to retrial the appellants. The error in interpretation was not the fault of the Crown. Most importantly, the public interest in the administration of justice required the resolution of the charge. The Court considered a new trial the most effective option to remedy any potential miscarriage of justice.

Crown seeks to re-open and adduce fresh evidence in applicant's severity appeal

The offender in ***Barrett v R*** **[2020] NSWCCA 11** pleaded guilty to kidnapping, acts of indecency and murder. He detained, bound and gagged the victim – his wife's niece – in their shared home, photographed her, stabbed her 31 times and disposed of her body by throwing it off a cliff into a blowhole. After judgment was reserved, the Crown sought leave to bring fresh evidence that the victim was violently sexually assaulted while she was detained.

Garling J dismissed the motion for three reasons. Firstly, there was no challenge to the findings of fact below. Secondly, the new evidence was disputed, and the CCA is not suited to resolving factual disputes. Thirdly, the Crown could simply bring new charges, so there was no injustice in denying the application. His Honour dissented on the dismissal of the appeal. Bathurst CJ (Wright J agreeing) held that the 46 year aggregate sentence (34 years, 6 months non-parole) was severe but not disproportionate.

Unreasonable verdict – appellate court should not view recorded evidence unless in an exceptional case for a real forensic purpose

Pell was convicted of child sexual offences in a second jury trial, the first having been unable to return a verdict. The prosecution were obliged to call witnesses who gave evidence of practices inconsistent with the complainant's account. While leave to cross-examine was granted, much of this evidence went unchallenged – the prosecution sought to show that the practices left open a reasonable *possibility* of the offending taking place. The High Court held unanimously that, in fact, the prosecution were required to exclude the reasonable possibility of the offending *not* taking place – an issue further confused by defence counsel's assertion of "impossibility": ***Pell v The Queen*** **[2020] HCA 12**.

Pell appealed, unsuccessfully, to the Victorian Court of Appeal, which watched the video recordings of evidence and conducted a view of the cathedral. The High Court criticised this, holding that the mere availability of recordings is not enough to justify watching them on appeal – there must be some real forensic purpose, likely only to arise in an exceptional case on application by the parties.

The advantage of the jury is not the mechanical or technical advantage of access to the evidence (the sort of advantage replicated by recordings), but a "constitutional" advantage: the jury's role as a unanimous representative of the community leaves it best placed to determine credit and reliability. An appellate court's analysis, therefore, should proceed on the basis that the jury assessed the complainant's evidence as credible and reliable, and ask – notwithstanding that assessment – whether a rational jury should have entertained a reasonable doubt.

Here, the unchallenged evidence of direct inconsistencies and inconsistent practices should have enlivened a reasonable doubt. The conviction was quashed and a verdict of acquittal entered.

Application of s 25AA Crimes (Sentencing Procedure) Act to CCA re-sentencing where it came into force between sentence and appeal

The offender in ***Corliss v R*** **[2020] NSWCCA 65** appealed his sentence for historical child sexual offences. Between his sentence and his appeal, s 25AA *Crimes (Sentencing Procedure) Act 1999* came into force.

Johnson and Lonergan JJ, in separate reasons, dismissed the appeal. Johnson J held, Lonergan J agreeing, that if the Court had proceeded to re-sentence, he would have applied s 25AA *Crimes (Sentencing Procedure) Act 1999*. The language of the provision, confirmed by extrinsic materials, evinced a clear intent to displace any benefit an offender might glean from the historical nature of their offending. Its application to a court on re-sentencing, his Honour held, stemmed from the inclusion of the CCA in the definition of "a court" in s 3 *Crimes (Sentencing Procedure) Act 1999* and from the present tense of "is warranted in law" in s 6(3) *Criminal Appeals Act 1912*. (Brereton JA dissented.)

A sentence does not become manifestly excessive because of COVID-19

Mses Borg and Gray were sentenced for supplying a commercial quantity of meth. Ms Borg appealed, contending manifest excess while Ms Gray's appeal concerned manifest excess

and parity. In Ms Borg's submission, COVID-19 was relevant not only on re-sentence but also in determining manifest excess. No evidence or authority was relied on – Ms Borg submitted, "the pandemic does not accord with principle". In ***Borg v R; Gray v R*** **[2020] NSWCCA 67**, Adamson J rejected this submission, noting that the Court hasn't the jurisdiction to overturn a sentence that was not excessive at the time it was imposed. McCallum JA agreed, finding that this form of post-sentence review was properly the domain of the Executive.

Basis for admissibility on appeal of Sheriff's investigation into jurors

Mr Agelakis was convicted of sexual assault against a person with a cognitive impairment. It emerged after this conviction that one juror was related to a complainant in another charge against Mr Agelakis and had mentioned this to the rest of the jury. In addition, one juror drank regularly with a Crown witness. The only issue on appeal was the admissibility of the Sheriff's report and interviews with the jurors: ***Agelakis v R*** **[2020] NSWCCA 72**. Bathurst CJ held that the evidence fell outside the usual exclusion of jury deliberation evidence because it was evidence that a juror held knowledge of matters that should not have been taken into account. The Court should preference its duty to preserve the integrity of the criminal justice system by admitting the evidence.

Indicative sentences nominated notwithstanding conclusion no lesser aggregate sentence warranted

The offender in ***Maxwell v R*** **[2020] NSWCCA 94** was sentenced for 17 counts of child sexual offences against his daughter. The Crown conceded the sentencing judge erred by referencing standard non-parole periods in formulating the indicative sentences, given that those SNPPs were not operative at the time of the offending. Johnson J noted that the CCA should outline indicative offences when resentencing, particularly where those indicatives were impugned. Ultimately, his Honour came to an aggregate sentence that was higher than that below, so the appeal was dismissed.

Application of Bugmy where not raised at sentence despite evidence

The applicant in ***Kliendienst v R*** **[2020] NSWCCA 98** appealed his sentence for glassing a man who slept with his partner four years earlier. There was substantial uncontested evidence that the applicant was exposed to violence and alcohol abuse as a child, but there was no explicit reference to *Bugmy*. N Adams J granted the appeal on the ground that, inter alia, there should have been express recognition that the violent offending was caused in part by the applicant's disadvantaged upbringing, despite the failure of counsel below to submit on it.

Sentence appeal – submissions on excessive indicative offence do not demonstrate excessive aggregate sentence

The offender in ***TB v R*** **[2020] NSWCCA 108** committed six offences across two home invasions, including murder as part of an extended joint criminal enterprise. On appeal, the offender argued that a 38 year aggregate sentence was excessive because his liability for the murder was remote and he otherwise had a strong subjective case. Hoeben CJ at CL held, dismissing the appeal, that any excess in the indicative sentence for murder was of limited use in determining excess in the aggregate, because there was no way to tell how much accumulation and concurrency there was as between the murder sentence and those for the other very serious offences.

Inadvertent sentencing error does not require full resentencing

The trial judge in ***Zeiser v R*** **[2020] NSWCCA 154** intended to impose the same sentence for armed robberies on the applicant and his co-offender (adjusted for the co-offender's discounts for pleas of guilty). The sentence imposed did not match this intention because the judge neglected to apply a plea discount for one of the offences. The Court held that this was merely an error of inadvertence that could be corrected without the full *Kentwell* re-sentencing exercise.

Stated case from the District Court under s 5B of the Criminal Appeal Act 1912 not obligatory where practitioner's request is impractical

Mr Forrest was found with a bag containing $165,000 cash near a drug-dealing apartment. In the apartment were documents detailing a cocaine deal for that same sum of money. He was convicted in the Local Court and unsuccessfully appealed to the District Court. On the afternoon of the last day of the 28-day period, Mr Forrest asked the District Court judge to submit a case to the CCA under s 5B *Criminal Appeal Act 1912*. Her Honour refused. Mr Forrest sought judicial review: ***Forrest v DPP (NSW)*** **[2020] NSWCA 162**.

Basten JA noted that the deadline in s 5B(2) is for the *judge* to submit the case, not for the applicant to make the request. His Honour found that there was no requirement for a judge to state a case where the request was impractical. Here, the request was made too late for the judge to meet the deadline. In addition, the request did not clearly state a question of law – rather, the request sought to re-agitate the inferences to be drawn from facts. The application was refused.

Appellate assessment of whether injustice at sentencing because of paucity of evidence adduced

Ms Nauer, under pressure from her father, drove whilst tired and disqualified. She crashed, killing her father and 2-year-old niece, severely injuring her 23-year-old sister and 9-month-old nephew and slightly injuring 2 other young siblings. Very little evidence was presented in mitigation. Ms Nauer appealed on the basis that this caused a miscarriage of justice: ***Nauer v R*** **[2020] NSWCCA 174**. Cavanagh J dismissed the appeal. His Honour accepted that Ms Nauer's representation was deficient in a number of areas but held that there was no miscarriage because the sentencing judge nevertheless determined each area favourably to Ms Nauer.

Delay in bringing appeal – three years without detailed explanation unacceptable

The offender in ***AT v R*** **[2020] NSWCCA 178** was convicted of sexually assaulting a child under 10 - he digitally penetrated his 19-month-old stepdaughter. He appealed his sentence of 8 years imprisonment (5 years NPP) on grounds including that it was manifestly excessive. Wilson J upheld that ground, but excoriated the three-year delay in bringing the appeal as undermining the principle of finality.

Unacceptable for jointly-represented appellants to become separately-represented without notice to the Court

The appellants in ***Decision Restricted*** **[2020] NSWCCA 189** were siblings who were jointly tried for child sexual offences committed against their cousin. Johnson J upheld the appeal and ordered a re-trial for one sibling but not the other. One sibling was cross-examined on concocting and rehearsing their evidence, which was unfair and prejudicial to the sibling who did not have the allegation put to them.

The appellants were represented by the same instructing solicitor and counsel until two weeks out from the hearing of the appeal, when the solicitor briefed separate counsel. Only one set of written submissions had been filed (on behalf of both appellants). The Court was surprised on the day of the hearing by new counsel advancing arguments not foreshadowed in written submissions. Johnson J noted that this should not reoccur.

Section 5AE Criminal Appeal Act 1912 only for pure questions of law

An employee was trapped and drowned in a mine drain. His employer was prosecuted for a WHS offence. After delivering reasons for judgment but before making orders, the trial judge adjourned to allow the prosecution to request a stated case under s 5AE *Criminal Appeal Act 1912*: ***Orr v Cobar Management Pty Limited*** **[2020] NSWCCA 220**. The employer argued that this exposed them to double jeopardy.

Bathurst CJ and Bell P found that there was power to state the questions because the proceedings were not finalised until final orders were made. There was no double jeopardy because proceedings had not finalised. However, their Honours held that s 5AE only permitted the stating of "pure questions of law" because the purpose of the provision is to empower the CCA to give advice and assistance to a first-instance judge. It is not a de facto right of appeal for the Crown. Moreover, formulae such as "Did I err in?" or "was it open to me to find?" do not transmute questions of fact into questions of law.

Re-sentencing required where correct plea discount given but for wrong reason

Mr Hong was sentenced in 2012 for the Commonwealth offence of possessing a commercial quantity of heroin. He received a 25% discount for his plea of guilty because he thereby facilitated the administration of justice. Then, it was held in *Xiao v R* (2018) 96 NSWLR 1;

[2018] NSWCCA 4 that discounts for the utilitarian benefits of a plea could be given in Commonwealth offences. Mr Hong appealed: ***Hong v R* (2020) NSWCCA 225**. Button J held that the Court should resentence even though the discounts were numerically equivalent.

Sentence appeal alleging matters not given enough weight require House v King error

Mr Harkin was sentenced for a number of offences, chief among them reckless wounding (he drunkenly set upon a man with a box-cutter). He appealed on the basis that the sentencing judge did not "adequately take into account" or "give adequate weight" to certain matters: ***Harkin v R* [2020] NSWCCA 242**. Hoeben CJ at CL dismissed the appeal, holding that this was essentially a manifest excess appeal and therefore required there to be *House v King* error. There was not.

Literal interpretation of s 10(1)(a) Criminal Appeal Act 1912

On 25 January 2019, Mr McIlwraith was convicted of supplying meth and heroin. It was a deemed supply case, the issue being whether the drugs were for personal use. He was sentenced on 30 May 2019 and a filed a notice of intention to appeal against conviction and sentence on 5 June 2019. Meagher JA held that this was in time for the sentence appeal but out of time for the conviction appeal because it came more than three months after the conviction: ***McIlwraith v R* [2020] NSWCCA 274**. An extension was granted but the appeal was dismissed.

NOTE: Practitioners should be wary of the practical burden imposed by this interpretation.

Cannot jump to conclusion that "no lesser sentence warranted in law" – must undertake re-sentencing exercise

Mr Abreu's sentence appeal for a Commonwealth drug matter was upheld for *Xiao* error: ***Abreu v The Queen* [2020] NSWCCA 286**. The Crown argued that an extension of time should be refused because no lesser sentence was warranted. Campbell J rejected this submission. The conclusion that no lesser sentence is warranted can only be reached after re-exercising the sentencing discretion. It cannot be reached summarily unless the sentence is so demonstrably lenient that there is no prospect of a lesser sentence being imposed.

Inconsistent verdict principles

The applicant in ***Kim v R* [2020] NSWCCA 288** was found guilty of assault and one count sexual assault of his ex-girlfriend, but not guilty of another count of sexual assault which related to conduct occurring on the same evening. The applicant argued that the verdicts were inconsistent. Like an older student passing on their notes for a difficult subject, Payne JA succinctly and clearly summarised the principles regarding inconsistent verdicts (at [26]-[37]). Essentially, the test is whether the acquittals are capable of explanation without resort to doubts about credibility. The verdicts in this case were capable of such explanation and the appeal was dismissed.

Crown can't rely on parity in appeal against sentence – disparity is instead an indicator of inadequacy

The offender in ***R v Lembke*** **[2020] NSWCCA 293** was sentenced for his yacht-sailing role in a cocaine conspiracy. He received 9 years' imprisonment, while his two co-conspirators received 19 years 6 months and 13 years respectively from a different sentencing judge. The Crown appealed arguing that the sentences were too disparate. Garling J held that the Crown can't rely on the principles of parity because it isn't able to feel a legitimate sense of grievance. Instead, the disparity is illustrative of inadequacy. The appeal was dismissed, the difference in sentence being warranted by the offender's minimal knowledge of the conspiracy. Garling J exhorted the practicality of having one judge sentence all co-offenders.

Parity or "justified disparity"?

The applicant in ***Eakin v R*** **[2020] NSWCCA 294** argued that his sentence should be reduced solely because his co-offender had their sentence reduced on appeal. Ultimately, he was successful, but one could be forgiven for thinking that each of the three appellate judges was discussing an entirely different case. Basten JA commented that the applicant's complaint did not reflect the true operation of the parity principle, but rather an "justified disparity" principle. Rothman J agreed with Basten JA that the correct comparison was between the applicant's sentence and the co-offender's altered sentence but held that the principle of parity should govern that comparison. Price J agreed with Rothman J that parity was the relevant principle to apply, but he deferred to the sentencing judge's assessment of parity between the co-offenders.

NOTE: the divergence of opinions in this case is surprising given it is well established that the principle of parity applies when an applicant is arguing for greater disparity.

Invalid application for leave to appeal against conviction and no jurisdictional error caused by incompetent counsel

The appellant in ***Dacich v Director of Public Prosecutions (No 2)*** **[2020] NSWCA 298** pleaded guilty and was sentenced in the Local Court for dishonesty offences. She appealed to the District Court by filing a notice of appeal without an application for leave to appeal against conviction which was required by the *Crimes (Appeal and Review) Act 2001* ss 12, 13.

Basten JA held there was no error by the District Court in treating the appeal as against sentence only, and not against conviction, because the notice of appeal was invalid rather than merely deficient. This was essentially because the statutory context required an appeal against conviction to be heard based on the original evidence in the Local Court. Where, like in this case, there is a plea of guilty in the Local Court, there will have been no such evidence. Additionally, Basten JA commented in obiter that it is extremely doubtful that "a court commits jurisdictional error if it sentences a person who has failed to obtain competent legal representation".

No intervention in Crown appeal against sentence without manifest inadequacy

A chasm of judicial authority[1] has erupted between NSW and the ACT. Moving first, the ACT Court of Appeal held in *R v Ralston* [2020] ACTCA 47 that once a specific error is made out in a Crown appeal against sentence, there is no need for manifest inadequacy for an appeal court to interfere with the sentence. However, in a respectfully disrespectful move, N Adams J held the opposite in ***Manojlovic v R; R v Manojlovic*** **[2020] NSWCCA 315**; that it is doubtful that a court of appeal would intervene to increase a sentence before first being satisfied that the sentence was manifestly inadequate. After finding both patent error and manifest inadequacy, N Adams J allowed the appeal.

No departure from concessions below unless there are "exceptional circumstances"?

The applicant in ***Lambkin v R*** **[2020] NSWCCA 327** encouraged his brother to light multiple fires which raged out of control on public land. The applicant's counsel conceded that he was more morally culpable because of his position as a firefighter. On appeal, the applicant argued that the sentencing judge was wrong to accept that concession. Ironically, this argument lit a fire in the appeal judges. Bellew J found that "exceptional circumstances which demonstrate that there has been a miscarriage of justice" must be shown before a party may depart from concessions made below. There were no exceptional circumstances in this case and the appeal was dismissed.

NOTE: it is not clear why there must be "exceptional circumstances"; as if the Court would not otherwise act on a miscarriage of justice.

Incompetent defence solicitors must cooperate with DPP

In ***Momoa v R*** **[2020] NSWCCA 328** it was common ground between the parties that there had been a miscarriage of justice because the applicant's solicitor failed to disclose two matters of real substance at sentencing: (a) the applicant's assistance to authorities, and (b) his mental illness. The failure meant the sentencing proceeded on incomplete information and, in turn, that the sentencing process was unfair. In a further attempt to end her career, the applicant's solicitor did not provide an affidavit to the DPP in response to the allegations of her incompetence despite there being no issue of client legal privilege. McCallum JA was also critical of this conduct.

Evidentiary ruling determinative of interlocutory order not reviewable per s 5F(3)(a), Criminal Appeal Act 1912

In ***Decision Restricted*** **[2020] NSWCCA 339** the applicant was accused of breaking into one victim's house and sexually assaulting her in 1995 as well as breaking into another victim's house and committing acts of indecency in 2017. His application for separate trials was refused by the trial judge who found each charge was cross-admissible as tendency

[1] Or at least a shallow ditch.

evidence. The applicant sought to appeal the interlocutory decision under s 5F(3)(a) of the *Criminal Appeal Act 1912* (NSW), primarily because the evidence was not cross-admissible. Hoeben CJ at CL refused leave because: (a) s 5F is not available to review admissibility decisions, which is a strong consideration against leave to appeal a refusal of separate trials, and (b) there was ample evidence connecting the charges even without the tendency evidence.

BAIL

Bail or stay sought pending special leave application

Mr Karout sought special leave to appeal to the High Court following the CCA's dismissal of his sentence appeal. In addition, he sought bail, or in the alternative a stay of his sentence, pending the application. In ***Karout v Director of Public Prosecutions (NSW)*** **[2020] NSWCCA 15**, Johnson J refused both applications. His Honour held that the Court had no jurisdiction under s 67(1)(d) of the *Bail Act 2013* (NSW), because that provision applied only to pending *appeals*, not special leave applications. His Honour refused the stay due to the special leave application's poor prospects of success.

The following month, the High Court refused an extension of time as the proposed grounds of appeal had insufficient prospects of success to warrant a grant of special leave: [2020] HCASL 56.

COMPLICITY

No marital immunity from conspiracy in the Criminal Code

Ms Namoa appealed her conviction for conspiring to do acts in preparation for a terrorist attack: ***Namoa v R*** **[2020] NSWCCA 62**. Her co-conspirator, Mr Bayda, gave evidence at his sentencing hearing that he never intended to carry out a suicide-attack. He stated that his talk of an "extremist operation" was a deceptive bid to win back the affections of Ms Namoa, lest she marry another man. The conspirators, aged 18, married on 30 December 2015. On New Year's Eve, Mr Bayda unsuccessfully attempted to set fire to a bush. The appeal proceeded on two grounds – firstly, that Mr Bayda's sentencing evidence was "fresh" evidence that would have acquitted Ms Namoa before a jury, and secondly that she was immune to conspiracy under the Criminal Code by virtue of her marriage.

Payne JA dismissed the appeal. His Honour held that while the evidence was fresh, there was no significant possibility the jury would have acquitted Ms Namoa had they known about it. The fact that she was mistaken as to the scale of the attack did not alter the fact that she conspired to carry one out. On the second ground, his Honour held that the spousal defence to conspiracy was founded in the "one will" legal fiction (whereby a married couple are considered the one legal entity). His Honour held that that fiction had been abandoned before the inception of the Criminal Code.

NOTE: Special leave to appeal to the High Court of Australia was granted on 13 October 2020: [2020] HCATrans 163.

CONFISCATION

No joint and several liability for a drug proceeds order

The applicant and his co-offender in ***Sevastopoulos v Director of Public Prosecutions (NSW)*** **[2020] NSWCCA 331** were made jointly liable for a drug proceeds order under the *Confiscation of Proceeds of Crime Act 1989*. The Director conceded the order was erroneous because the text of the Act refers to an individual person and similar legislation in other States had been construed as only applying to individual defendants. R A Hulme J agreed with the holdings in those other cases, accepted the Director's concession, and held the joint order was an error.

COSTS

No jurisdiction to order costs in suppression applications within criminal jurisdiction

Messrs Martinez and Tortell were awaiting re-trial for murder, following a successful conviction appeal. Mr Tortell sought a non-publication order under the *Court Suppression and Non-publication Orders Act 2010* (NSW). This was opposed by Fairfax. The application was refused and Fairfax sought costs: ***R v Martinez; R v Tortell (No. 7)*** **[2020] NSWSC 361**. Johnson J held that the Court was exercising criminal jurisdiction when it dismissed the application, and that therefore there was no jurisdiction to order costs.

EVIDENCE

Tendency – similarity not enough to be probative – single events long ago less probative

The offenders in ***Ilievski v R; Nolan v R*** **[2018] NSWCCA 164** were convicted of bank robbery. The case was circumstantial – they were in the area and communicating at the time. It depended heavily on tendency evidence, as the offenders were convicted of another bank robbery in 2003. Bathurst CJ quashed the conviction and ordered a new trial. His Honour held that one offence more than a decade ago was not a sufficiently probative basis on which to establish a tendency. In addition, there needed to be close similarity between the conduct of the offences – similarity of charge was not enough. His Honour also noted that it was impermissibly circular to rely on the offence charged as establishing the tendency.

NOTE: This judgment was only recently published following a re-trial concluding in September 2020.

Tendency – standard of proof – multiple counts and complainants and a tendency witness

In ***Jackson v R*** **[2020] NSWCCA 5**, the offender was tried on six counts of child sexual assault. He was found guilty of two counts (one against each complainant) and not guilty of the remaining counts. The Crown led evidence of uncharged acts from a tendency witness. In addition, the Crown relied on the acts against each complainant establishing a tendency that could be used in relation to the other. The trial judge gave directions to the jury that they had to be satisfied beyond reasonable doubt of: each tendency act; that it established the tendency (namely, a sexual interest in young males known to him through familial or personal relations); and that Jackson acted upon that tendency.

Jackson appealed, somewhat confusingly, on the grounds that the trial judge overestimated the standard of proof required. His concern was, inter alia, that by requiring the tendency acts to be proven beyond reasonable doubt, they were elevated in the minds of the jury and therefore would be perceived as having a probative value that outweighed the risk of unfair prejudice. As Price J noted at [114], it was unsurprising the defence did not object to the direction during the summing up.

His Honour noted that *The Queen v Bauer* [2018] HCA 40; (2018) 92 ALJR 846 dispensed with the criminal standard for tendency evidence in single complainant matters, but declined to resolve the question of whether that standard applied in multiple complainant matters. His Honour found that the reversal of the "usual argumentation" made this case an inappropriate vehicle to answer that question ([68]).

NOTE: An application for special leave to appeal to the High Court in this matter was refused: [2020] HCASL 142.

NOTE: Section 161A was inserted subsequently in the *Criminal Procedure Act 1986*. Unless there is a need for a *Shepherd* direction, a direction must not be given that evidence adduced as tendency or coincidence evidence must be proved beyond reasonable doubt. This took effect from 1 March 2021.

Improperly/illegally obtained evidence – whether desirability of admitting outweighs undesirability – remoteness from illegal conduct

Kadir v The Queen; Grech v The Queen **[2020] HCA 1** concerned the live-baiting of greyhounds. An activist organisation employed an investigator to illegally record surveillance footage of the alleged conduct. These recordings were supplied to the RSPCA, who obtained and executed a search warrant. Finally, the investigator posed as a prospective trainer and elicited admissions from Kadir. The appellants submitted that these three bodies of evidence were tainted and inadmissible due to the illegality of the surveillance recordings.

The High Court (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ) held that the surveillance footage should be excluded, as it was obtained in repeated and deliberate contraventions of law. The search warrant and admission evidence was also held to have been gathered improperly, but the Court found that the desirability of admitting the evidence outweighed the undesirability of admitting evidence obtained in the way it was: s 138 *Evidence Act 1995* (NSW). Critical factors included the highly probative nature of the evidence, the seriousness

of the charges, the importance of the evidence in making out those charges and the remoteness of the evidence from the impropriety – the RSPCA did not know, when executing the search warrant, that the recordings were obtained illegally. Neither did the admissions depend on anything captured in the unlawful recordings.

Drawing inferences from photographs to prove facts

The offender in ***Amante v R*** **[2020] NSWCCA 34** set fire to his ex-partner's apartment (part of a Department of Housing complex). An agreed statement of facts and photographs of the damage, including holes in the roof, were put before the sentencing judge. No expert was called. The sentencing judge purported to take judicial notice from the photographs that the fire – having gotten into the roof void – seriously threatened the structural integrity of the building.

On appeal, N Adams J held that the sentencing judge had not taken judicial notice but merely drawn an inference. Her Honour further held, dismissing the appeal, that the inference was open on all the evidence, including the photo. Beech-Jones J held, agreeing, that the *Evidence Act 1995* (NSW) had overridden most principles relating to the admissibility and weight of photographic evidence. The Court's role, therefore, was simply to determine whether the inference was open or mistaken.

Section 125(2) Evidence Act 1995 – test for loss of client legal privilege due to misconduct

Izod and his solicitor, Zreika, were charged with perverting the course of justice. Izod gave false symptoms to a doctor to obtain a medical certificate, which Zreika (aware of the falsity) used to obtain an adjournment. Zreika's culpability for the offence lay in his advice to Izod in relation to the false certificate, such advice being founded upon intercepted telephone communications. The magistrate upheld a privilege claim over the intercepted communications, finding that the misconduct was not established.

This was overturned on appeal: ***Director of Public Prosecutions (NSW) v Izod; Director of Public Prosecutions (NSW) v Zreika*** **[2020] NSWSC 381**. Simpson AJ held that the magistrate had applied a "test of finality". What was required was far less conclusive – an evaluation of evidence to determine whether there was a basis for a conclusion that there were reasonable grounds for finding that the communications were made in furtherance of the misconduct.

Admissibility where witness advised of s 18 Evidence Act after completion of evidence

The offender in ***Jurd v R*** **[2020] NSWCCA 91** was accused of a child sexual offence. His de facto partner gave a police statement and then oral evidence. She was not advised about a potential s 18 objection until after she had given evidence. This was likely for forensic reasons – her oral evidence was more exculpatory than her police statement, which would have been admitted if she was not compellable. She stated on voir dire that she would not have given evidence had she known she could object. On appeal, Price J held that the

section could not be complied with retrospectively. Nevertheless, the rest of the evidence was strong enough that there was no miscarriage of justice – the appeal was dismissed.

Victim's interpretation of intent of blackmailer not admissible as lay opinion

Ivan Petch, former mayor of Ryde, was charged with blackmail offences for attempting to coerce the council's general manager into settling a costs dispute against him. On appeal, Petch argued, inter alia, that the trial judge erred in admitting lay opinion evidence (over objection) of what the manager understood Petch to be implying: ***Petch v R* [2020] NSWCCA 133**. Hamill J distinguished such opinion evidence from evidence of victims' reactions. He found that the opinion was not based on what the victim saw, heard or perceived, and was not necessary to understand the events. The conviction was quashed and no re-trial ordered in light of Petch's age, likely delay (he had served most of his sentence), and opprobrium suffered.

Admissibility of tendency evidence – similarities between tendency act and alleged act – probative value where identity in issue

The offender in ***Vagg v R* [2020] NSWCCA 134** was convicted of child sex offences, having assaulted the child of a client he was cleaning windows at a domestic home. Tendency evidence was led from another young girl about the offender twice luring her to a secluded bathroom and exposing (or attempting to expose) himself. On appeal, the offender argued that the tendency evidence was inadmissible by contending, inter alia, that the tendency act and the indicted act were too dissimilar. Simpson AJA, dismissing the appeal, found the evidence was capable of showing that the offender had a sexual interest in young girls and would act on that interest in secluded locations. Moreover, the evidence had significant probative value in circumstances where it might dispel doubts as to the offender's identity.

Admissions of a co-accused must be in furtherance of common purpose reflected in charged offence to be admissible

The applicant in ***Higgins v R* [2020] NSWCCA 149** was convicted, in his third trial, of three historical child sex offences committed against a student at the school where he taught. A co-accused had died between trials. One of the issues on appeal was whether this co-accused made admissions on behalf of the applicant when pressuring the complainant to lie. Payne JA held that the admission by the co-accused was inadmissible in the applicant's trial because it was not made in pursuit of a common purpose constituting a charged offence (and was otherwise irrelevant).

Evidence of previous false allegations inadmissible under s 293 Criminal Procedure Act

In ***Jackmain (a pseudonym) v R* [2020] NSWCCA 150**, evidence that the complainant – the applicant's former partner – had previously concocted 12 complaints was ruled inadmissible by the trial judge, who declined to stay the proceedings under s 192A *Evidence Act 1995*. A

five-judge bench was called upon to consider the validity of s 293 of the *Criminal Procedure Act*, despite failed attempts to impugn it in the past.

Bathurst CJ dismissed the appeal, finding that evidence led to show the complainant had made false allegations of previous sexual activity would necessarily also be evidence that she had not, in fact, taken part in that activity. Therefore, it would be inadmissible pursuant to s 293 of the *Criminal Procedure Act*. The assailment upon the validity of the provision also failed.

NOTE: Special leave was refused: ***Jackmain (a pseudonym) v R*** **[2020] HCATrans 149**. Nettle J held that the prejudice was too abstract and dispute too hypothetical to justify making an exception to the standard practice of not allowing appeals on interlocutory rulings on evidence. His Honour noted that it was undesirable to interrupt criminal proceedings except in exceptional cases.

Accomplice witnesses can corroborate other accomplice witnesses

The three Quami brothers headed the Brothers for Life gang's Blacktown chapter. They were convicted of a spate of homicide and related offences, mostly in the context of a gang war with the Bankstown chapter. The Crown relied on a number of their accomplices giving evidence with the trial judge giving directions about their unreliability. The brothers challenged their verdicts as unreasonable: ***Qaumi, Farhad v R; Qaumi, Mumtaz v R; Qaumi, Jamil v R*** **[2020] NSWCCA 163**.

Hoeben CJ at CL reviewed the evidence and dismissed the conviction appeal. His Honour accepted that the unreliability of one accomplice's evidence could be mitigated by corroborating evidence from another accomplice who appeared genuine and independent. Johnson J noted that it was common for gang prosecutions to depend on accomplice witnesses. His Honour deferred to the jury's advantage in assessing the evidence.

Outstanding allegations do not render character evidence admissible

The applicant in ***Decision Restricted*** **[2020] NSWCCA 247** appealed his conviction for child sex offences. There were eight complainants across two trials. The trial judge refused to admit evidence that the applicant had no prior convictions, despite the Crown's consent, on the basis that the applicant had outstanding allegations and hence was not of good character. Payne JA held that this was in error. The other allegations amounted to rebuttal evidence and did not affect admissibility.

Handwriting comparison by jury – directions

The appellant in ***Shi v R*** **[2020] NSWCCA 258** was convicted of drugging and sexually assaulting a co-worker. The Crown relied on a letter, allegedly written by the appellant, guaranteeing the victim that there were no images of the sexual activity. The appellant claimed that the letter was forged by the victim. Much of the letter was in Chinese, though there were some numerals. No expert evidence was called, but the letter was left to the

jury for comparison with other examples of the handwriting of both the victim and the appellant. The trial judge directed the jury extensively on this evidence, reminding them that they were not experts, had no familiarity with the authors and should not attempt to compare the Chinese characters. The appellant took issue with this direction.

Rothman J dismissed the appeal, holding that a careful direction was appropriate. N Adams J would have refused leave, noting that there was no objection at trial.

Take improperly obtained evidence at its highest when assessing probative value – s 138 Evidence Act

Mr Riley stood trial for dangerous driving causing death while under the influence of a drug. The Crown relied on expert evidence to show that Mr Riley lost control of his vehicle while impaired by cannabis. That evidence was founded on the analysis of a blood sample that had been improperly obtained because the cap wasn't fitted correctly per cl 24 sch 3 *Road Transport Act 2013*. The trial judge held that the evidence was inadmissible because the potential contamination undermined its probative value. The Crown appealed under s 5F *Criminal Appeal Act 1912*: ***R v Riley, Christopher*** **[2020] NSWCCA 283**.

Bathurst CJ held that the trial judge was mistaken. The failure to affix the seal raised a reliability issue. However, the evidence, taken at its highest, remained extremely probative. Its reliability was a matter for the jury – they had to be satisfied beyond reasonable doubt that the sample retained integrity despite the loss of the cap.

Precision of tendency overcomes 20-year gap for cross admissibility

The applicant in ***Decision Restricted*** **[2020] NSWCCA 339** was accused of two offences of break and enter and commit a sexual offence. The incidents were about 20 years apart. One victim was raped, the other was indecently assaulted. The alleged tendency was to break and enter into homes of women who live alone in the early hours of the morning and perform sexually motivated acts on the women without their consent. Hoeben CJ at CL held that the charges were cross admissible. The precision of the tendency meant each charge had significant probative value vis a vis the other which substantially outweighed any unfair prejudice, despite the length of time between the incidents.

Precision of tendency overcomes ten-year gap between offending

The applicant in ***Taylor v R*** **[2020] NSWCCA 355** was charged with multiple domestic violence offences against his ex-girlfriend. About 10 years earlier, he pleaded guilty to recklessly occasioning grievous bodily harm to his ex-wife. The prosecution sought to adduce an agreed statement of facts regarding the earlier offence to establish the applicant's tendency to be "violent or threatening towards women with whom he had an intimate relationship". Beech Jones J (Walton J agreeing, Bell P dissenting) held that the evidence had significant probative value, despite the length of time between incidents, because of the precision of the alleged tendency. It did not relate to women generally, only women who he had a relationship with and there was no evidence of any relationship in the

intermediate period. Additionally, any danger of unfair prejudice could be ameliorated with a jury direction.

(Bell P provided quite a thorough survey of the jurisprudence surrounding tendency evidence which should not be overlooked because of his dissent as to the outcome in this appeal.)

OFFENCES

Joint criminal enterprise for specially aggravated break, enter and commit serious indictable offence – what intention is required?

Messrs Ford and Francis attacked Mr Meurant in his home at the urging of Ms Makin. Makin was Francis' partner and was once the victim's stepdaughter. On appeal, Ford established doubt as to whether he or Francis (who cooperated with the Crown) was the principal assailant: ***Ford v R* [2020] NSWCCA 99**. His conviction was not overturned, however, because Brereton JA found that there was a joint criminal enterprise to attack Mr Meurant using a bottle and a lamp, which contemplated (the special aggravating circumstance of) wounding.

Intent to threaten is essential element of blackmail

In ***Petch v R* [2020] NSWCCA 133**, Hamill J considered a direction on the mental element of blackmail. Petch argued that the trial judge misdirected the jury by not requiring proof of an intention to menace – that being: an intention to threaten with detrimental action that would cause an individual of normal courage in the complainant's position to act unwillingly. His Honour held that this intent to threaten, implicitly or explicitly, was essential to establishing the "menaces" element, and the applicant lost a chance of acquittal because of this misdirection. His Honour upheld this ground of appeal and entered a verdict of acquittal.

Specially-aggravated circumstance same as aggravated circumstance, so element not missing from indictment and directions

Messrs Taufa and Siola'a robbed their meth dealer using an imitation firearm. They were convicted of specially aggravated breaking and entering under s 113(3) *Crimes Act 1900*. The wielding of the imitation firearm (a dangerous weapon) was the specially aggravating circumstance. They appealed their conviction alleging a defect in the indictment and, consequently, flawed directions to the jury: ***Taufa v R; Siola'a v R* [2020] NSWCCA 264**. They argued that s 113(3), the specially aggravated offence, required proof of s 113(2), the aggravated offence, as well as s 113(1), the base offence. The aggravated offence was left off the indictment and out of the judge's directions.

Davies J rejected this argument and dismissed the conviction appeal. His Honour held that the aggravated circumstance (use of an offensive weapon) and specially aggravated

circumstance (use of a dangerous weapon) were each established, albeit in the same way. Pursuant to s 4, a dangerous weapon is also an offensive weapon. Therefore, proof of the specially aggravated element was necessarily proof of the "missing" element. The jury must have been satisfied beyond reasonable doubt of the missing element. There was no miscarriage of justice.

Meaning of "under authority" in context of appeal against conviction

The applicant in ***Manojlovic v R; R v Manojlovic*** **[2020] NSWCCA 315** was convicted of aggravated sexual assault against a Year 12 student for whom he was a teacher mentor at the time. Hoeben CJ at CL concluded that it was open to the jury to find that the victim was in the applicant's care and, therefore, under his authority at the time of the offence because of his mentorship. In dismissing the appeal, Hoeben CJ at CL commented on the dearth of judicial explanation about the meaning of the words "under authority" in s 61J(2)(e) of the *Crimes Act 1900* (NSW) other than to say that the words are ordinary English words which the jury should have no difficulty understanding.

("Under authority" is defined in s 61H(2) in the following helpful term: "a person is under the authority of another person if the person is in the care, or under the supervision or authority, of the other person").

POLICE POWERS

PRACTICE AND PROCEDURE

Courts should supervise Form 1 use in accordance with statute

The offender in ***Ghalbouni v R*** **[2020] NSWCCA 21** pleaded guilty to drug offences. Seven offences were taken into account on a Form 1, including the deemed supply of MDMA. However, this offence did not actually arise on the agreed facts as the MDMA was for personal use. Hidden AJ allowed the appeal and re-sentenced the offender, stressing the importance of courts and practitioners heeding the procedure for Form 1 offences outlined in s 33 *Crimes (Sentencing Procedure) Act 1999* (NSW).

Use of "answer cards" by child complainants under s 26 Evidence Act 1995 (NSW)

ABR was convicted before a jury of multiple indecent assaults against his ex-partner's daughter. The complainant appeared distraught and struggled to give evidence in cross-examination, so – at the Crown's suggestion and over objection – she was permitted to answer by pointing to cards reading "yes", "no" or "I don't know". The complainant used the cards twice. Ground 12 – of the 23 grounds of appeal – alleged that this gave rise to a

miscarriage of justice. In ***ABR v R*** **[2020] NSWCCA 33**[2], Meagher JA dismissed the appeal, holding that s 26 of the *Evidence Act 1995* (NSW) gave the trial judge the power to allow answer cards (that were, in any event, barely used).

Local Court trial stayed due to prosecutor's lack of compliance with duty of disclosure

Mr Bradley was arrested in relation to biting a complainant's finger. He was interviewed, wherein he claimed self-defence. He sought to obtain documents from police relevant to his trial, including his custody management record and the criminal history of the complainant (mainly violence and dishonesty offences). The magistrate refused to enforce the subpoena, denouncing the applicant's "classic fishing expedition" as an attempt to "frustrate the prosecution of this matter by putting the police to additional work" such that the "criminal justice system in New South Wales" would be brought "potentially to a grinding halt".

The decision was overturned on appeal: ***Bradley v Senior Constable Chilby*** **[2020] NSWSC 145**. Adamson J held that the magistrate misconstrued the duty of disclosure – the documents sought were relevant to important issues, in addition to being easy to provide. That a hearing "could" be conducted without these documents did not relieve the prosecutor of the duty. The magistrate's concern for police resources was misguided. Accordingly, the matter was remitted and the trial was stayed pending compliance with the duty of disclosure.

Where no legitimate forensic purpose behind subpoena for criminal histories of prosecution witnesses

In ***Mann v Commissioner of Police*** **[2020] NSWSC 369**, the offender appealed from a Local Court decision setting aside a subpoena for the production of criminal records of prosecution witnesses. The magistrate found that the offender had not shown that it was on the cards that the records would materially assist.

The appeal was rejected by Adamson J. Her Honour noted that no attempt had been made to tailor the subpoena to the issues. She distinguished *Bradley v Senior Constable Chilby* [2020] NSWSC 145 as a duty of disclosure case where the spectre of self-defence put the criminal record in issue. Her Honour also distinguished *R v Jenkin (No 2)* [2018] NSWSC 697 – there, it was accepted that there was legitimate forensic purpose and the Commissioner had already produced some documents. The issue was whether privacy could shield criminal histories from a subpoena, and Hamill J held that it could not. Adamson J found that this did not mandate the production of records in an average criminal case.

Strip search footage of young Aboriginal woman – whether magistrate had power to order matter heard by female magistrate and exclude men from viewing evidence and courtroom

[2] The full case title includes that "ABR" is a pseudonym, but it would appear unnecessary to point that out.

TR sought orders in the Children's Court that a matter be heard by a female magistrate, men be excluded from viewing the evidence and the venue changed accordingly. TR argued that the cultural shame arising from the viewing by men of sensitive parts of her body would scuttle her will and ability to defend the charges, and thereby threaten her right to a fair trial. The magistrate refused, noting that the footage might not need to be shown and, if it did, the sensitive parts could be pixelated.

TR appealed: ***TR v Constable Cox & Ors*** **[2020] NSWSC 389**. Wilson J held, dismissing the appeal, that most of the magistrate's rulings were not "interlocutory orders" and so were not appellable. In addition, the magistrate had no power to transfer the matter to a female magistrate, exclude men from the courtroom or suppress evidence only in relation to men – therefore, there was no error of law in refusing to do so. Wilson J endorsed a practical solution, noting that while the court must recognise an individual's interests in cultural traditions, privacy and modesty, this recognition will be qualified by the public interest in resolving proceedings and the proper administration of justice.

Likelihood of fair trial was the critical question in a jury discharge application following withdrawal of counsel

Defence counsel withdrew from a matter, without leave and seven days into the trial, citing coronavirus fears. Counsel was 69 years old and immunocompromised, while his client and instructing solicitor were both displaying flu-like symptoms. The client, finding himself unrepresented, sought an urgent s 5F appeal against the trial judge's refusal to discharge the jury and vacate the trial.

In ***Kahil v R*** **[2020] NSWCCA 56** Adamson J held that the trial judge's discretion miscarried as a result of not addressing the issue of unfairness. The key question was not whether the withdrawal was reasonable but whether, now that he was unrepresented through no fault of his own, the applicant would receive a fair trial. Harrison J noted that no alternatives – continuing with the solicitor, retaining new counsel or trial counsel appearing by AVL – could mitigate the unfairness.

Kahil cited ***Croke v R*** **[2020] NSWCCA 8**, which agitated a similar issue. Croke's counsel withdrew shortly before his trial – the trial judge refused to vacate on the basis that a witness had been, with difficulty, brought from the US; Croke had an experienced solicitor; and Croke himself was an experienced criminal law practitioner. Croke's erstwhile counsel had agreed to a unique funding arrangement, which made securing new counsel difficult. The Court (Adamson, Beech-Jones and Ierace JJ) embraced the *Dietrich* test of asking whether the accused, unrepresented through no fault of their own, is likely to receive a fair trial. The Court vacated the hearing.

Section 306J Criminal Procedure Act – prospective test examining fairness of new trial

The appellant in ***WX v R*** **[2020] NSWCCA 142** was convicted, in his third trial, of child sex offences committed when he was 15 and the victim was 7 years old. The defence counsel and case changed between the first and second trial, and the appellant sought to compel the complainant's appearance under s 306J *Criminal Procedure Act 1986*, on the basis that

the original recorded cross-examination was limited and insufficient. The trial judge refused, holding that a mere change in forensic strategy did not make the original cross-examination inadequate. Payne JA allowed the appeal, finding that this put an impermissible gloss on the test and bound new counsel to old forensic decisions, particularly where there remained relevant and unexplored inconsistencies in the complainant's evidence. Section 306J is concerned purely with a prospective assessment of the fairness of the subsequent trial. A retrospective assessment of tactical decisions in the previous trial may be relevant but is not determinative.

Section 306P Criminal Procedure Act does not require an explicit positive finding by court where all parties consent

Mr Dogan was charged with various violence and robbery offences committed against his neighbour, who was cognitively and physically impaired. The complainant's evidence was given by recording and AVL pursuant to s 306S *Criminal Procedure Act 306S*. Three defence counsel raised no objection. On appeal, Dogan contended the trial miscarried because the trial judge was not positively satisfied, under s 306P, that "the facts of the case may be better ascertained" by this method of giving evidence: ***Dogan v R* [2020] NSWCCA 151**. R A Hulme, Fagan and Cavanagh JJ rejected this argument, holding that as the provision is for the protection of the vulnerable person, it does not need a positive and express finding by the court. Leave was refused.

Crown's duty to call witnesses that flesh out the narrative - not obliged to call defence expert where nothing added to narrative

The applicants in ***WG v R; KG v R* [2020] NSWCCA 155** were parents of the complainant, who was aged between 5 and 19 at the time of the offending. WG was convicted of 73 counts of violent sexual assaults and KG was convicted of 13 counts of sexual offending. The second ground of appeal alleged a miscarriage of justice flowing from the Crown's refusal to call a defence expert. Both the Crown and defence expert examined the complainant at the same time - they agreed on observations but differed on their conclusions. The Defence, for forensic reasons, did not call the expert themselves.

Bathurst CJ held, hesitantly, that the Crown had no obligation to call a defence expert where she contributed nothing to the narrative. A difference in opinion but not in observation did not enliven any obligation to call. Even if the Crown should have called the expert, there was no miscarriage of justice because the Defence could've called her but chose not to for forensic reasons. His Honour noted that an appeal report from the expert, which reviewed the trial transcript, was of limited utility because the focus was on her evidence at trial. Fullerton J agreed.

Fagan J agreed, adding that the expert had been engaged by defence, was ready and willing to give evidence for the defence and was not called. His Honour noted that juries are directed on evaluating competing expert evidence without regard to who has engaged them. Also, because the expert was qualified by the applicants, the Crown could not have called her without impeding on privilege. The appeal was dismissed, Fagan J dissenting on the unreasonableness of the verdict where there was no contemporaneous complaint.

Notes of counselling of sexual assault victim are "protected confidences" - cannot subpoena without regard to ss 295 - 299D of the Criminal Procedure Act

Mr Bonanno, charged with sexual offences, was granted a subpoena over documents belonging to the complainant's psychologist. The protected confider appealed on the ground that the trial judge failed to consider the requirements in ss 295 to 299D *Criminal Procedure Act* predicating production of protected confidences: ***R v Bonanno; ex parte Protected Confider*** **[2020] NSWCCA 156**. Adamson J set aside the subpoena, noting that the trial judge failed to have regard to the statute.

Warning against making proposition unsupported by evidence and cross-examination is distinct from rule in Browne v Dunn

Partway through Mr Petryk's trial, his lawyers had to withdraw. New counsel changed course, suggesting in his closing address that a Crown witness (who had received immunity from prosecution) had fudged her evidence to minimise the role of her partner, the co-accused. Counsel was warned by the trial judge not to stray into suggestions that were not put to the witness. On appeal, Mr Petryk impugned this warning, arguing that *Browne v Dunn* was not strictly applicable to criminal trials: ***Petryk v R*** **[2020] NSWCCA 157**. The Court dismissed the appeal, holding that the trial judge was reminding counsel of how the case had progressed before he was briefed, and preventing him from making a submission without evidence or support from cross-examination. It was not an application of the rule in *Browne v Dunn*, and its propriety was accepted by counsel at trial in any event.

Crown must present case fully and fairly – mixed evidence should not be withheld for strategic reasons

T

he applicant in **Nguyen v The Queen [2020] HCA 23** threw two beer bottles at the complainant. In his police interview, he admitted to throwing the bottles but said that he did so in self-defence. The prosecutor decided not to lead the interview for forensic reasons – namely, the accused would be forced to give evidence in order to raise self-defence. The majority in the High Court (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ) held that this was impermissible, there being a fundamental prosecutorial duty to present the Crown case fully and fairly. Evidence that is both inculpatory and exculpatory must be led by the Crown, even where doing so would be forensically disadvantageous.

Problematic delay in judge-alone trial

Mr Toohey was convicted of a child sex offence committed against his partner’s 11-month old daughter. The matter was heard over four days, separated across six weeks, with a judgment of guilty delivered two-and-a-half weeks later and reasons for judgment four months after that. Mr Toohey appealed: ***Toohey v R*** **[2020] NSWCCA 166**.

The appeal was successful and a re-trial ordered. N Adams J found that the trial judge had not addressed an exculpatory defence expert report. Leeming JA and Rothman J noted that

the delay was problematic – reasons should not follow judgment, particularly where those reasons contain warnings that need to be taken into account in *reaching* judgment.

"Confirming a conviction" is not convicting – the "court that convicted" is still the lower court

Following an ICAC investigation, Ms Lazarus was convicted in the Local Court of several fraud offences against two hospitals. Her sentence appeal to the District Court resulted in a slight variation, with the conviction being "confirmed". The hospitals sought victim's compensation in the District Court rather than the Local Court (likely because of the higher ceiling). This was dismissed on the basis that the District Court *confirmed* the conviction but was not itself the "court that convicted": s 97 *Victims Rights and Support Act*.

The hospitals appealed: ***South Eastern Sydney Local Health District v Lazarus*** **[2020] NSWCA 183**. Bell P dismissed the appeal, holding that the District Court's "confirmation" did not in any way supersede or affect the Local Court's conviction. As a matter of ordinary English, his Honour noted, they are different concepts.

Trial judge should have recused because of prior association with principal Crown witness

McIver v R **[2020] NSWCCA 343** concerned a judge alone trial for multiple historical child sexual offences. The trial judge recognised one of the complainants as a shop assistant at a butcher she frequented 18 years ago. Davies J held that the judge should have disqualified herself because: (a) the judge's assessment of guilt turned on their assessment of the complainants' credibility, (b) the association was lengthy and impressed positive feelings on the judge, and (c) the prosecutor at the time seemed to agree with the application for disqualification. Therefore, a fair-minded lay person might have reasonably apprehended bias on the part of the trial judge.

Jurisdiction to arraign accused via AVL from outside the jurisdiction

In ***R v Douglas; R v Reid; R v Linke; R v Casamento; R v Counihan*** **[2020] NSWSC 1731**, Adamson J allowed a co-accused to appear for arraignment via AVL from London in circumstances where all parties consented. Section 22C(7A) of the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) expressly states that appearance via AVL may take place within or outside NSW. Accordingly, defendants no longer need to be worried about using Zoom backgrounds depicting exotic locations from around the world!

The specific advantage in s 86(1)(b) of the Crimes Act is not an essential fact or element.

The defendant in ***Hamilton v DPP*** **[2020] NSWSC 1745** was accused of kidnapping with intent to obtain an advantage. He accepted he had kidnapped the complainant to obtain a monetary advantage, rather than a sexual advantage as the Crown alleged. Button J held that the defendant should have been committed for sentence rather than trial because the specific advantage sought to be obtained is not an essential fact of the offence. Button J's

conclusion mainly rested on his interpretation of the provision. He reasoned that the phrase "other advantage" operated as a catch all phrase and it would be odd in both a practical and theoretical sense if such a phrase required specificity.

SENTENCING – GENERAL ISSUES

Indicative sentences not actually operative – no need for accumulation

The offender in ***Vaughan v R*** **[2020] NSWCCA 3** was sentenced for domestic violence offences – namely, GBH with intent to murder and wounding with intent to cause GBH – against his former partner and her co-worker. He was imprisoned for an aggregate term of 21 years (NPP 14 years). The single ground of appeal advanced was that there was a calculation error in the accumulation of indicative sentences. Johnson J refused leave for an extension to appeal. Indicative sentences assist with totality and transparency but are not actually passed by the court so have no operative effect. The aggregate sentencing regime is intended to simplify sentencing, not complicate it further. The indicatives merely indicate; they do not cascade into the aggregate.

Phrase "in this country, that is sexual intercourse" not impermissible consideration but part of duty to give reasons to offender and laypeople

The applicant in ***Rahman v R*** **[2020] NSWCCA 13** was sentenced for a penile-vaginal sexual assault offence with a cunnilingus sexual assault offence taken into account on a Form 1. The sentencing judge, in his remarks, said "in this country, that [cunnilingus] is sexual intercourse". On appeal, the applicant inferred from this that the sentencing judge took into account an irrelevant consideration – namely, that the applicant wasn't Australian.

Beech-Jones J held, dismissing the appeal, that the sentencing judge was merely fulfilling the duty to give reasons. The offender had expressed confusion as to what cunnilingus was. Additionally, it was not readily clear to the layperson that cunnilingus amounted to sexual intercourse in Australian law. Therefore, the sentencing judge was explaining the law in this jurisdiction for the benefit of both the offender and the observer.

Distinction between assessment of objective seriousness and instinctive synthesis of objective and subjective matters

The offender in ***Simmons v R*** **[2020] NSWCCA 16** pleaded guilty to 7 offences with a further 6 taken into account on a Form 1. The offending was largely in the nature of knifepoint robberies and breaking and entering. The sentencing judge delivered an ex tempore judgment the day following the sentencing hearing. On appeal, it was alleged he elided subjective matters (criminal history; conditional liberty) with an assessment of objective seriousness.

On closer inspection, Adamson J held that, while the factors might have been referred to in the same sentence, they were treated as distinct concepts. Her Honour dismissed the

appeal – while the sentencing judge was discursive, he appreciated the need to separate an assessment of objective seriousness from the process of intuitive synthesis (which takes into account subjective matters).

Not double-counting to consider guilty plea both for utilitarian value and as evidence of remorse – Bugmy principles where offender now pro-social

Mr Hoskins hit and killed a woman with his car, panicked, and drove off. There was no evidence that his driving was negligent or dangerous. He turned himself in the next day, was charged with failure to stop and assist and pleaded guilty at the earliest opportunity. The sentencing judge refused to double-count the guilty plea as evidence of remorse, having already granted the 25% utilitarian discount. His Honour also rejected a causal link between Mr Hoskins' disadvantaged background and the offending, given that Mr Hoskins was at the time of the offence living a pro-social life.

In ***Hoskins v R*** **[2020] NSWCCA 18**, Basten JA allowed the appeal. His Honour held that the guilty plea should have been taken into account as evidence of contrition, given how clearly remorse was raised on the facts (conceded by the Crown). R A Hulme J held that the actual criminal act of Hoskins – fleeing the scene – was clearly a poor decision consistent with his troubled background, such that *Bugmy* principles could not be discarded.

Discount for offer to plead guilty to lesser offence where offer rejected but offender then found guilty of lesser offence

Mr Magro was charged with murder after fatally shooting a man in the neck. This followed a confrontation the previous night. Magro offered to plead guilty to manslaughter, arguing that the Crown could not rule out excessive self-defence. The offer was refused, the matter proceeded to trial, self-defence was raised and Magro was found guilty of manslaughter. The sentencing judge allowed a discount of 10% for the offer, finding "no great utilitarian value" given the significant factual and culpability disputes.

Gleeson JA ruled that this was in error. In ***Magro v R*** **[2020] NSWCCA 25**, his Honour held that the importance of the offer was its potential utilitarian value, not its actual value. In addition, his Honour held that the offer resolved all the criminal elements – it did not need to resolve every fact. Disputes about culpability could be resolved in the normal course of a sentencing hearing.

Form 1 procedural issues

The applicant in ***LS v R*** **[2020] NSWCCA 27** was sentenced for three aggravated sexual assaults against his daughter. Further counts were taken into account on a Form 1. The Form 1 only listed one principal offence, but the sentencing judge considered the Form 1 offences across all three offences. Harrison J held that this was in error – Form 1 offences can only be contemplated when considering a stipulated principal offence. The appeal was dismissed as no lesser sentence was warranted.

Ex tempore judgment – failure to adequately address objective seriousness, moral culpability and mental health

In ***Tuncbilek v R*** **[2020] NSWCCA 30**, the offender robbed a service station with a butter knife. He did so hoping to be sent to gaol where his drug use and mental health could be addressed. The sentencing judge delivered an ex tempore judgment in which there was no reference to submissions on objective seriousness and scant mention of the offender's mental health. On appeal, Johnson J held that objective seriousness and moral culpability were central issues that demanded determination, particularly given the unusualness of the robbery. Equally, the offender's mental health impacted questions of deterrence, and the lack of any brief explanation of this factor was an error. The offender was re-sentenced.

Parity appeal rejected where incongruous with case below

Mr Raine and his wife were sentenced for defrauding their employer, Tabcorp, by falsifying betting tickets. At sentencing, they were represented by the same senior counsel who argued that Mr Raine was the "ringleader" and his wife a "follower". This argument was accepted by the sentencing judge, and Mr Raine received a higher sentence as a result. On appeal, Mr Raine argued that this disparity gave rise to a legitimate sense of grievance. In ***Raine v R*** **[2020] NSWCCA 32**, Lonergan J rejected that argument as being incompatible with the submissions made below.

Sentencing hearing where facts disputed – can adverse inferences be drawn from silence of offender?

The offender in ***Strbak v The Queen*** **[2020] HCA 10; 94 ALJR 374** pleaded guilty to the manslaughter of her son. At sentence, it was disputed whether she killed her son through neglect or through the infliction of blunt force trauma. She did not give evidence. The sentencing judge, noting the lack of contradictory sworn evidence, found facts against her.

The Court (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ) held that *R v Miller* [2004] 1 Qd R 548 was wrongly decided, and that adverse inferences cannot be drawn from the refusal of an offender to give evidence in sentencing proceedings. *Miller* suggested that the presumption of innocence enlivens the rule, and this presumption is lost at sentence. However, it is actually the accusatorial nature of criminal trials that is critical. Sentencing, like a trial, is an accusatorial process and the facts found are still adverse and significant to the offender. The appeal was upheld and the proceedings were remitted to the Queensland Supreme Court.

Totality and accumulation in aggregate sentencing

Mr Taitoko pleaded guilty and was sentenced to an aggregate sentence of 4 years for 5 offences. The offences reflected an hour of random, drunken violence. He appealed on nine grounds, many of which were spurious and without merit, but was successful on manifest excess: ***Taitoko v R*** **[2020] NSWCCA 43**.

Leeming JA held that the sentencing judge misunderstood the purpose of aggregate sentencing. It is not to avoid "crushing" sentences but rather to relieve courts of the burden

of having to cascade sentences when accumulation is required. Here, the aggregate sentence did not appropriately represent the totality of the offending, given that the criminality of the offences elided across the hour of encounters.

Difficulty in identifying error in objective seriousness where only slight difference between parties

Mr Pearce was sentenced to an 18-month ICO for providing a false alibi in his friend's sexual assault trial. The Crown appealed on manifest inadequacy, which the Court would have upheld but for Mr Pearce's exemplary subjective circumstances: **R v Pearce [2020] NSWCCA 61**. The Crown submitted that the sentencing judge erred in his assessment of objective seriousness – the Court noted the difficulty with this ground when where there was only slight difference between the parties' submissions below. The Crown alleged "in the mid-range", while defence submitted "not yet at the mid-range". The Court could not divine what sort of offending lay in the difference.

Re-sentencing and the coronavirus

The offender in ***Scott v R*** **[2020] NSWCCA 81** was convicted of numerous child sex offences. His appeal against sentence was upheld on the ground of manifest excess, and Hamill J proceeded to re-sentence. A number of late submissions were filed without leave annexing various internet articles and pages from WebMD concerning the offender's ill-health and the coronavirus. His Honour disregarded much of this material, but held that the offender's ill-health, advanced age, vulnerability to Covid-19 and the increased hardship of custody were factors relevant on re-sentence.

Anomalous advantage of aggregate over concurrent individual sentences regarding availability of ICOs

The applicant in ***Abel v R*** **[2020] NSWCCA 82** appealed his sentence for cocaine supply and proceeds of crime offences. Originally, the proceeds offence was on a Form 1. When the sentencing judge proposed, after his remarks, a sentence of 2 years, 6 months for the principal offence, the applicant sought an adjournment to disentangle the offences and have them dealt with on separate indictments. This would allow the court to impose an aggregate sentence and therefore an ICO (by virtue of s 68(2) *Crimes (Sentencing Procedure) Act 1999* (NSW)).

When the applicant then complained, inter alia, of a lack of assessment of objective seriousness of the proceeds offence, Button J refused leave. A number of criticisms were also made about procedural aspects of the case.

Interaction between discounts and jurisdictional limits

Mr Park was sentenced for a number of sexual assaults. There were two further offences on a certificate pursuant to s 166 *Criminal Procedure Act 1986* (NSW). They were indictable

offences to be dealt with summarily and thereby subject to the Local Court's jurisdictional limit of two years imprisonment. The issue in ***Park v R* [2020] NSWCCA 90** was how the jurisdictional limit interacted with s 22 *Crimes (Sentencing Procedure) Act 1999* (NSW) which allows for sentences to be reduced on account of pleas of guilty. The focus was upon the words: "may accordingly impose a lesser penalty than it would otherwise have imposed". The question was whether s 22 or the jurisdictional limit fell to be considered first – whether the sentence that would otherwise have been imposed was two years (at most) because of the limit, or whether the sentence that would otherwise have been imposed was the sentence appropriate in all the circumstances.

Bathurst CJ and R A Hulme J held that s 22 referred to the sentence appropriate in all the circumstances. The jurisdictional limit is not the maximum penalty – that is, it is not reserved for a worst-case offence. An appropriate sentence might, for example, be 2 years, 3 months, in which case it would be reduced by the limit. The plea of guilty is one of numerous factors that is synthesised when determining the appropriate sentence. Otherwise, courts would be constrained to passing disproportionate sentences by virtue of incoherence in the legislation. Fullerton J dissented, favouring the alternative construction.

"Sentencing remarks" is not anachronistic

In ***Maxwell v R* [2020] NSWCCA 94**, Johnson J responded to criticism of the term "remarks on sentence" as being inaccurate and depreciatory. His Honour held that the remarks on sentence play an important role in explaining the sentencing process to offenders, victims, the community and appellate courts. His Honour pointed to usage of the term in recent English decisions and in parliamentary and legislative materials. The term is also used in recent decisions of the High Court.

Failure to give effect to finding of special circumstances

The applicant in ***AM v R* [2020] NSWCCA 101** was 19 when he committed sexual offences against his 10-year-old half-sister. The sentencing judge made a finding of subjective circumstances and purported to calculate this by reducing the non-parole period by 9 weeks to 6 years (with a balance of 2 years, 3 months). On appeal, Hidden AJ held that while fixing a non-parole period was a matter for the discretion of the judge, such a small reduction required explanation to not be in error.

Discount for spontaneous cooperation where no evidence of value in Commonwealth matters

Mr Weber pleaded guilty at an early opportunity to an offence of importing a marketable quantity of methylamphetamine. In his police interview, he gave up the names of two other offenders. His appeal, alleging a failure to account for his plea, was successful: ***Weber v R* [2020] NSWCCA 103**. At re-sentence, the issue arose as to what discount could be given for his assistance where there was no evidence of its value. Bellew J gave a 5% discount, noting that s 16(2)(h) of the *Crimes Act 1914* (Cth) made no specific reference to the usefulness of the assistance (cf s 23 *Crimes (Sentencing Procedure) Act 1999* (NSW)).

Breach of conditional liberty a subjective aggravating factor that does need to relate to the offending

Mr Field stabbed a man. He was on two good behaviour bonds at the time. He argued on appeal (inter alia) that it was wrong to regard breach of the bonds as aggravating because they did not contribute to the seriousness of the offending in a material sense: ***Field v R*** **[2020] NSWCCA 105**. *In particular, he was not abusing his freedom or abandoning his rehabilitation because he believed the stabbing was necessary in self-defence. Hoeben CJ at CL rejected this argument, holding that while breach does not elevate the objective seriousness of an offence, it will always aggravate because of its effect on factors like deterrence and community protection.*

Assessing objective seriousness where multiple indicative sentences

The applicant in ***FL v R*** **[2020] NSWCCA 114** pleaded guilty to multiple child sex offences committed against his stepdaughter. He argued that the sentencing judge erred in assessing objective seriousness "globally", rather than assessing each offence separately. Wilson J held that the judge did in fact step through the facts and circumstances relevant to the seriousness of each offence before concluding that the offending was well within the mid-range. Nothing further was required.

Is a fixed term sentence a head sentence or a non-parole period?

In ***Waterstone v R*** **[2020] NSWCCA 117**, the offender was convicted of state offences (aggravated acts of indecency) and Commonwealth offences (carriage service sexting) committed against his stepdaughter. The trial judge imposed an effective fixed term sentence, which was overturned on appeal because of a lack of reasons for how that effective term was reached. N Adams J, in obiter, provided a detailed historical analysis of the controversial question of whether a fixed term of imprisonment is set at the level of the overall sentence or represents a reduction of a sentence to the level of the non-parole period, the latter being despite any legislative authority to do so. (Proponents of the latter appear to favour the flawed argument suggested in *Tuvunivono v R* [2013] NSWCCA 176 at [10]: see (2020) 27(6) Crim LN [4293].)

"In company" not always aggravating despite inclusion in s 21A Crimes (Sentencing Procedure) Act

Mr Pehar and two associates robbed an industrial complex under cover of night, committing 10 offences. On appeal, he contended that the sentencing judge was wrong to find that the offences were aggravated by the fact he was in company: ***Pehar v R*** **[2020] NSWCCA 118**. Fullerton J found that circumstances aggravate to different degrees, despite their inclusion in s 21A. Being in company is more aggravating where, as is usual, victims are intimidated by superior numbers of offenders. Here, there were no bystanders and no confrontations.

The trial judge should have considered whether, on the evidence, the offences were actually aggravated by the presence of two other men.

Intention to "prank" makes no difference to objective seriousness of firing a handgun

Mr Ah-Keni challenged the finding of objective seriousness in his sentence for discharging a pistol in a taxi (while on bail): ***Ah-Keni v R*** **[2020] NSWCCA 122**. He argued that, as he had taken the loaded pistol into the taxi as a "prank", and its discharge only resulted from the ensuing struggle, a finding of objective seriousness above the mid-range was excessive. Hoeben CJ at CL dismissed the appeal, holding that the finding was well within the ambit of the judge's discretion. The fact that it was intended to be a "prank" did not make any difference to the risk and the potential consequences.

Accounting for course of conduct in lead-up to offence distinct from sentencing for uncharged offence

The offender in ***LN v R*** **[2020] NSWCCA 131** was convicted alongside her partner for the murder of their three year old son. In the two months prior to his death, the son was repeatedly physically and psychologically abused. On appeal, the offender submitted that the trial judge erred by taking these uncharged assaults into account in assessing the objective seriousness of the murder charge.

Basten JA held, dismissing this ground, that sentencing for an uncharged offence was distinct from taking into account conduct that could constitute an offence when sentencing for another, more serious offence. His Honour noted that the administration of justice would only be frustrated by requiring the Crown to charge every assault potentially arising on the course of conduct. The events were relied upon to prove the seriousness of the murder, not to prove the elements of uncharged offences. Moreover, the earlier violence was relevant because it contributed to the child's death - the child was weakened and vulnerable as a result of weeks of abuse.

Hamill J dissented on this ground, finding that the offender was indeed punished for uncharged offences. The appeal was otherwise allowed as the judge made insufficient reference to evidence of the offender's mental illness.

Sentencing judge not bound by submissions of parties on objective seriousness, unless agreement expressly indicated

Mr Brown was sentenced for two assault offences, including puncturing a man's lungs with scissors. At sentencing, the Crown agreed with defence counsel that the objective seriousness of the offending fell below mid-range. In his remarks, the judge disagreed with these submissions. Brown appealed, alleging a lack of procedural fairness because he was not given notice or an opportunity to dissuade the judge from that course: ***Brown v R*** **[2020] NSWCCA 132**.

Harrison J dismissed the appeal, finding that the judge was not bound by the submission or concession of the Crown on objective seriousness without some express or implied indication that he intended to adopt it. Here, it was clear that the assessment remained a matter for the judge, and so Brown was not denied an opportunity to be heard on it.

Parity a relevant factor even where co-offenders dealt with summarily

The applicant in ***Greaves v R*** **[2020] NSWCCA 140** appealed his sentence for a number of assaults and thefts. His two co-offenders were dealt with in the Local Court, while he was sentenced in the District Court. On appeal, the applicant argued a lack of parity between him and his co-offenders – the trial judge had disregarded parity because the co-offenders were dealt with summarily.

Cavanagh J held that this was in error. The sentencing exercise is the same in both the Local and District Courts, and takes as its point of maximum reference the maximum sentence, not the jurisdictional limit. The limit should only have entered the equation if the final sentence exceeded it. Parity should therefore not be disregarded because of the limit.

Section 16BA Crimes Act 1914 (Cth) - sufficient if instructed counsel agrees that offender admits offence - artificial to require offender to admit personally

Mr Kabir, a tax agent, pleaded guilty and was sentenced for proceeds of crime and fraud offences. A further dishonesty offence was taken into account under s 16BA of the *Crimes Act 1914* (Cth). On appeal, Mr Kabir alleged (inter alia) that the failure to formally ask him if he admitted to the 16BA offence amounted to a procedural error: ***Kabir v R*** **[2020] NSWCCA 139**. Harrison J rejected this argument. Mr Kabir signed the charge sheet and he was present in court when his counsel, presumably acting on instructions, agreed to the charge being taken into account. This satisfied the s 16BA requirements - to find otherwise would be to allow form to triumph over substance.

Three-step process in considering an ICO sufficiently followed

The applicant in ***Kember v R*** **[2020] NSWCCA 152** pleaded guilty to his part in supplying a pistol and possessing a silencer, with eight other firearms offences taken into account. He sought, unsuccessfully, an ICO. On appeal, he argued that the sentencing judge failed to follow the three-step process in refusing an ICO and gave insufficient reasons as to why an ICO was unsuitable while overvaluing community safety.

Bellew J dismissed this ground, finding that the judge gave extensive reasons for why the seriousness of the offending militated against an ICO. His Honour also dismissed submissions on parity – while the co-accused were sentenced by different judges, specific regard was had to parity and material differences between the offenders justified a higher sentence.

Guilty plea discounts in Commonwealth offences are purely for utilitarian value – lack of remorse does not affect numerical discount

The offenders in ***Betka v R; Ghazaoui v R; Hawchar v R*** **[2020] NSWCCA 191** pleaded guilty at an early stage to money laundering offences. The trial judge gave them a discount of 20% for these pleas, reasoning that they were made in the face of a strong prosecution case and so were born more of fatalism than a desire to facilitate the administration of justice. On appeal, Fullerton J held this was in error. Her Honour found that the discount for a guilty plea is purely for its utilitarian value, and therefore its timing. The reason for the plea may be relevant to remorse, but that is a separate and subjective factor.

Discontinued charges as irrelevant considerations in sentencing

The offender in ***Farrell v R*** **[2020] NSWCCA 195** pleaded guilty to charges that he posted the details of "informer" witnesses on Instagram (with the hashtag "supergrass"). N Adams J held that the trial judge erred by placing weight on the similarity of these charges to other charges that were discontinued against the offender in 2017, and therefore were not established in fact. Moreover, the trial judge placed minimal weight on a character reference written by the offender's partner, who had been a co-accused before charges against her were discontinued. N Adams J found that, where the charges had been discontinued (and therefore her involvement not proven), and the referee not called or cross-examined, the trial judge had had regard to an irrelevant consideration without appropriate warning. The appeal was upheld.

Gangland sentencing

The Quami brothers had some success in their conviction and sentence appeals, so it was necessary to re-sentence them: ***Qaumi, Farhad v R; Qaumi, Mumtaz v R; Qaumi, Jamil v R*** **[2020] NSWCCA 163**. Johnson J drew together (see [390]-[399]) numerous authorities in support of the conclusion that the gangland context of the violent offending significantly elevated its seriousness such that it was unsurprising the trial judge considered a life sentence.

Procedural fairness – comments of judge in exchanges with counsel are usually not conclusions

Mr Christou was sentenced for attacking and kidnapping a woman. He appealed, complaining primarily that the sentencing judge erred in assessing the objective seriousness as above mid-range: ***Christou v R*** **[2020] NSWCCA 193**. At sentencing, the judge said "it's pretty close to mid-range, isn't it?" Mr Christou argued that he was denied procedural fairness because of this comment, which signalled a conclusion that foreclosed further submissions. Wilson J rejected this ground and dismissed the appeal – comments from the bench during submissions are not conclusions, and misinterpretation of those comments is not a denial of procedural fairness.

Criminal history of children not admissible in sentencing where no conviction recorded: s 15 Children (Criminal Proceedings Act) 1987

Mr Dungay pleaded guilty to several armed robberies of clubs and hotels. At sentencing, his criminal history was handed up, including offences committed when he was a juvenile but for which no conviction was recorded. Defence counsel did not object to the history on the basis that it illustrated Mr Dungay's disadvantaged upbringing. The sentencing judge in her remarks noted the violence and breaking and entering offences on his juvenile record. Mr Dungay appealed this as a breach of s 15 *Children (Criminal Proceedings Act) 1987*: ***Dungay v R* [2020] NSWCCA 209**.

N Adams J upheld this ground, which the Crown conceded. Her Honour found that s 15 renders inadmissible any finding of guilt for a child where no conviction is recorded and there is no other offending in the two years before the present offence. This mistake had the capacity to cause error, so Mr Dungay was re-sentenced.

Old age and sentencing – "crushing effect" is justifiable

The applicant in ***Jackson v R* [2020] NSWCCA 230** was sentenced for his (significant) role in a cocaine syndicate. He received 19 years 6 months, with a non-parole period of 12 years 6 months. He appealed this as manifestly excessive and "crushing", given he would be 76 years old when first eligible for release. Rothman J dismissed the appeal, finding that any crushing effect was the applicant's own fault for engaging in serious criminal conduct when 63. Age is relevant to the onerousness of custody and ensuring time for rehabilitation but does not result in an automatic discount.

Parity – grievance not justifiable where co-offender's sentence is manifestly inadequate

Mr Bridge supplied drugs in the Newcastle area. He obtained his drugs from Mr Hassian, who led a drug syndicate from Sydney. Both received aggregate sentences for a range of offences, but they shared a charge of supplying commercial quantities of meth. Mr Hassian's indicative sentence starting point was 7 years, 5 months, while Mr Bridge's was 10 years. Mr Bridge complained of the disparity on appeal: ***Bridge v R* [2020] NSWCCA 233**. Price J dismissed the appeal, holding that Mr Bridge's grievance was understandable but not justifiable because Mr Hassian's sentence was manifestly inadequate.

Insufficient reasons as to effect of aggravating factor on gravity of offence

The applicant in ***Chong v R* [2020] NSWCCA 235** appealed his sentence for his role in a meth syndicate. The sentencing judge found that the threat to public safety was an aggravating factor, as was the "potentially significant" financial gain. The parties had not submitted on this. The Court (Macfarlan JA, Fagan and Cavanagh JJ) held that the applicant should have had the benefit of knowing the extent to which the gravity of the offending was aggravated because of those factors. In addition, the sentencing judge should have made express findings as to remorse and prospects of rehabilitation, both of which were clearly raised by

the evidence. Nevertheless, the appeal was dismissed because no lesser sentence was warranted.

Impermissible exchange as to range of sentence – Barbaro principles

Mr Tatur anally penetrated his partner, the complainant, while she slept, having taken medication for her schizophrenia. At sentence, Armitage ADCJ and counsel discussed the "most common" sentences and non-parole periods. The Crown Prosecutor submitted that a "stiff sentence" of full-time imprisonment would be appropriate. On appeal, Rothman J found that this was an inappropriate breach of the principles in *Barbaro*: ***Tatur v R* [2020] NSWCCA 255**. Bellew J held that such submissions were unhelpful and inappropriate and should be discouraged.

Wrong standard non-parole period causes error in aggregate sentence

The offender in ***Oncu v R* [2020] NSWCCA 260** received an aggregate sentence for manufacturing meth and possessing a revolver. At sentencing, the parties agreed that the standard non-parole period for the firearms offence was four years, when in fact it was three. On appeal, Wright J held that this error had a material effect on the aggregate sentence. The trial judge had taken an extraneous matter into account. His Honour therefore upheld the appeal and proceeded to re-sentence.

Rejecting special circumstances because offender has access to rehabilitative programs in custody is not the same as fixing sentence on assumption offender will undertake such programs (Muldrock error)

Mr Lonsdale, together with some co-offenders, attempted to burgle a house while the occupants were home. He was armed with a bat and his co-offenders carried a shotgun and a wrench. The sentencing judge declined to find special circumstances, noting that Mr Lonsdale had previously failed to engage with rehabilitative programs while in the community. Mr Lonsdale appealed, impugning an exchange between bench and bar where the sentencing judge suggested Mr Lonsdale would be more likely to attend programs in custody: ***Lonsdale v R* [2020] NSWCCA 267**. Mr Lonsdale alleged *Muldrock* error.

Hoeben CJ at CL dismissed the appeal. His Honour noted that such exchanges were usually irrelevant in comparison to actual remarks on sentence. In the remarks, the sentencing judge declined to find special circumstances on the basis that an extended period of parole would not assist Mr Lonsdale's rehabilitation given his previous failures to engage. This was different from fixing the custodial sentence on the assumption that Mr Lonsdale would access rehabilitative programs in custody. Therefore, there was no breach of the rule in *Muldrock*.

Parity – disparate sentences justified despite applicant's lesser role and earlier plea

Mr Bond pleaded guilty to supplying a commercial quantity of meth. He appealed the disparity of his sentence with that of his co-offender: ***Bond v R*** **[2020] NSWCCA 277**. He received a greater sentence despite the fact that he pleaded guilty early while his co-offender pleaded on the first day of trial. His role was also less significant than that of his co-offender. N Adams J found that the sentencing judge turned her mind to parity and justified the difference. Mr Bond's offence had a standard non-parole period; his co-offender's did not. In addition, Mr Bond had more guarded prospects of rehabilitation and more Form 1 offences than his co-offender. The appeal was dismissed.

No error in no reasons for being three-quarters of a month over statutory non-parole ratio

The applicant in ***Rizk v R*** **[2020] NSWCCA 291** had an ICO for driving offences. The ICO was revoked and he received 5 months imprisonment when he was arrested for drug supply. That period expired on 6 January 2019. The sentence for the drug supply was backdated to that date. The sentence was one of 3 years 6 months with a 2 year 7 month non-parole period – a ratio of 73.8%. Taking the period in custody for the ICO into account, the ratio was 76.5%. The applicant argued that the sentencing judge should have given reasons for exceeding the statutory ratio of 75%.

Wright J dismissed the appeal. His Honour reiterated that there is no statutory requirement to give reasons where the ratio is exceeded; rather, it is desirable to avoid errors. There was no error here. The 73.8% ratio was clearly a result of rounding down to the nearest month. The 76.5% ratio was clearly a result of accumulating the period of imprisonment for the driving offence. That was obviously intended because the commencement date of the sentence was the end-date of the ICO. In any event, the non-parole period only amounted to being three-quarters of a month over the statutory ratio. Basten JA decried this ground of appeal, noting that a minor failure to comply with common practice is not an appellable breach of duty.

Wrong maximum penalty in indicative sentence had no impact on aggregate sentence

Mr Vickers was sentenced for a wide range of offences, including perverting the course of justice, fraud, drug and firearms offences. Two counts of driving whilst disqualified were dealt with summarily under a s 166 certificate. The sentencing judge misstated the maximum penalty for one of the driving offences, so Mr Vickers appealed: ***Vickers v R*** **[2020] NSWCCA 297**. Wright J dismissed the appeal. His Honour noted that mistaking the maximum penalty will usually be a *House v King* error because it is usually a significant consideration in sentencing. The question, however, is whether the error in the indicative sentence caused error in the aggregate sentence. Here it did not because the sentences for the driving offences were made "wholly concurrent" with the other offences.

Sentences for State and federal offences cannot be mixed by aggregation or Form 1

Ilic v R **[2020] NSWCCA 300** must surely be the first case where both parties agreed at sentence, and then agreed on appeal that they were wrong at sentence. The applicant was sentenced for two NSW offences. On his application the sentencing judge took into account

six Form 1 offences, two being federal offences. McCallum JA (Garling J agreeing) held that while the State Form 1 legislative scheme could theoretically be picked up as federal law by the *Judiciary Act 1903* (Cth), the scheme was inconsistent with Commonwealth legislation. Particularly, s 19AJ of the *Crimes Act 1914* (Cth) prohibits a single non-parole period being applied for both a State and federal offence. Therefore, s 19AJ evinces an intention to prohibit the mixing of State and federal sentences by either aggregate sentence or Form 1. Garling J thought the point moot because the aggregate sentence imposed was well open for the State offences alone. In any event, he saw an inconsistency because the federal legislation had its own Form 1 type provision.

Application of Crimes Act 1914 (Cth) ss 17A and 20AB to federal sentencing

The applicant in ***Lee v R*** **[2020] NSWCCA 307** pleaded guilty to multiple offences against federal legislation. He had used his position as a biosecurity officer to obtain exotic aquatic animals which he would then sell. He was sentenced to full time imprisonment despite arguing that an alternative was appropriate. Johnson J held that no error was made by the sentencing judge in the way ss 17A and 20AB of the *Crimes Act 1914* (Cth) were applied. It was enough that the sentencing judge found that the only appropriate sentence was full time imprisonment. Additionally, Johnson J commented that a failure to follow the three-stage approach to sentencing is not indicative of error in itself in NSW sentencing cases.

Full discount applied for guilty plea despite factual dispute at trial

The applicant in ***Dean v R*** **[2020] NSWCCA 317** became enraged after finding out his former partner was in a relationship with his friend (a clear breach of the 'bro-code'), so he sent death threats and took a rifle to his former partner's house. The applicant offered a plea of guilty to possession of the rifle with intent to intimidate yet he was still charged with possession with intent to murder. The jury found him guilty of the intent to intimidate offence and the sentencing judge allowed a discount of only 20% because the applicant had disputed the level of his intoxication which was relevant to sentencing. The Court of Criminal Appeal did not find any *House v The King* error in the discount. However, for other reasons the Court was re-exercising the sentencing discretion and allowed the full 25% because it was unlikely such a factual dispute would have arisen had the initial plea been accepted.

Firearms aggravated by drugs; drugs not aggravated by firearms

The applicant in ***SY v R*** **[2020] NSWCCA 320** pleaded guilty to charges of drug supply and possessing firearms. The Court held that it was an error for the sentencing judge to find that the drug charges were aggravated by the presence of firearms. The objective seriousness of the drug offences lay in the quantity of drugs and commercial purpose of the activity. Instead, the firearms charges were aggravated by their connection with the drug charges because it meant that the firearms were being used for the purpose of committing another offence.

No need to quantify discount under s 22A, Crimes (Sentencing Procedure) Act

A woman who was the partner of Man Haron Monis at the time of offending was convicted at a judge alone trial of murdering Monis' former wife: ***Droudis v R*** **[2020] NSWCCA 322**. The trial judge found that admissions she made during the trial limited the facts in issue and helped facilitate the course of justice. The Court of Criminal Appeal rejected the applicant's argument that the discount for assistance needed to be quantified and could not merely be taken into account as a mitigating factor. The Court stated that facilitation of the administration of justice pursuant to s 22A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) could simply be taken into account as part of the instinctive synthesis approach. However, the Court also commented that, ideally, the discount should be made clear. (Will this encourage a practice, then a usual practice, and then become such an accepted practice that failure to do so without explanation will be argued to be erroneous?)

Witness interests may be considered in disputed facts hearing

The applicant in ***BC v R*** **[2020] NSWCCA 329** pleaded guilty to wounding with intent to cause grievous bodily harm. In a disputed fact hearing the applicant contended that the victim was holding a screwdriver. The sentencing judge rejected the contention. In doing so, the sentencing judge commented that the applicant had an interest in the outcome while a bystander, who gave evidence that there was no screwdriver, did not. Price J (Gleeson AJ and Wright J agreeing) held there was no error because the comment merely involved factoring into an assessment of the evidence whether the interests of a witness would be served in giving evidence. Such an approach is consistent with High Court authority.

Failure to deal with submissions about Bugmy-background and mental illness

Sypher v R **[2020] NSWCCA 336** involved an offender who pleaded guilty to accepting hush money in exchange for not giving evidence against another offender. Davies J (Basten JA and Johnson J agreeing) upheld her appeal against sentence, finding that the sentencing judge erred by failing to accept that the offender's moral culpability was reduced by her disadvantaged background and mental illness. The sentencing judge also erred in concluding that general deterrence remained important despite the applicant's mental illness.

Ambiguity in reasons leads to miscarriage of sentencing discretion

An aggregate sentence was imposed in ***Connell v R*** **[2020] NSWCCA 352** with nothing expressly said by the sentencing judge to suggest he erroneously applied the discount for pleas of guilty to the aggregate. In specifying the indicative sentences, he said

> "[62] …The result that I come to is that the indicative sentences, prior to applying the 25% discount, should be as follows:
>
> (1) Supply large commercial quantity of MDA: 9 years:
> (2) Possess shortened firearm:2½ years:
> (3) Possess pistol: 1½ years.

> [63] Allowing for the discount for the early guilty plea and allowing for a reasonable degree of concurrency for the firearms offences, I set an aggregate term of imprisonment pursuant to section 53A of 8 ½ years. …
>
> [67] … The non parole period I would have set if dealing with the s25(2) offence solely would have been 4½ years, which is the indicative sentence discounted by the 25% for the guilty plea, then further discounted taking into account the special circumstances set out at par 62 above."

Hoeben CJ at CL upheld an appeal against sentence, accepting the offender's argument that it was ambiguous whether the discount had been erroneously applied to the aggregate sentence or correctly applied to the indicative sentences. It was held that in such circumstances, the parties were left to speculate as to what had occurred and so there had been a miscarriage of justice.

What appears to have been overlooked was the Crown submission to the effect there was no scope for speculation at all; the fact that the judge had adopted the correct approach in applying the discount to the indicative sentences was plain on the face of his reasons.

Youth and immaturity not apposite to a 23yo fraudster and special circumstances doubtful

The offender in ***Singh v R*** **[2020] NSWCCA 353** was an accountant for a large advertising agency. Between the ages of 23-27, he was happily swindling millions of dollars to spend on material items, including a large sum at strip clubs, as well as on gambling (on contracts for difference) until an (un)fellow employee dobbed him in. After summarising the principles and surveying the case law, Bell P (Johnson J and R A Hulme J agreeing) concluded that the offending did not have any of the characteristics which justify a lower sentence because of the offender's young age or immaturity. To the contrary, the offender was not that young, and the offending was highly sophisticated. R A Hulme J also took the opportunity to (passively aggressively) clarify that the rationale for having special circumstances reduce a non-parole period on account of "accumulation of sentences" does not apply when an aggregate sentence is imposed because there is only notional accumulation. "First time in custody" is also a dubious reason where the lack of prior record is usually taken into account in setting the overall term (and nothing is said about it having additional significance). Johnson J agreed with this criticism of the sentencing judge's reasons.

SENTENCING - SPECIFIC OFFENCES

Proceeds of crime worth $1 million – 5-year imprisonment not unjust – moderately serious

The applicant in ***Olivier v R*** **[2020] NSWCCA 26** was the de-facto partner of an airport baggage handler who used his position to import cocaine. Around $5.4 million was found in their house, though the applicant only knew about $1 million. She pleaded guilty and was sentenced to 5 years imprisonment (3 non-parole). She appealed on the grounds that, inter alia, the sentence was manifestly unjust and the assessment of objective seriousness mistaken.

Harrison J held, dismissing the appeal, that both the finding of moderate objective seriousness and the 5-year sentence were open to the sentencing judge, who considered all the submissions raised by the applicant. The quantity of money was not insignificant, and the applicant knew that it derived from crime (though not specifically that it was derived from cocaine importation). His Honour reiterated that manifest excess is not made out unless no judge exercising the discretion could reasonably have come to the result.

Drug supply – seriousness of GBL given modest profitability

Mr Petkos appealed his sentence for supplying a large commercial quantity of gamma-butyrolactone (GBL): ***Petkos v R* [2020] NSWCCA 55**. He alleged that not enough regard was had, when assessing seriousness, to the limited financial gain he would have reaped from the supply. Hamill J held that the sentencing judge took account of the modesty of the profits and concluded that the sentence was within the bounds of the judge's discretion.

Possess prohibited firearm – objective seriousness

Mr Andary rented out a basement for use as a clandestine meth lab. He and his family lived in premises across the road. A rifle was found in his bedroom. It lacked a retaining pin, which made it dangerous to the user if fired, and also lacked a magazine, meaning it was not self-loading. On appeal, Mr Andary established that the sentencing judge erred in finding that the drug operation and the firearms were located in the same premises – there was no evidence that the two were linked: ***Andary v R* [2020] NSWCCA 75**. Hamill J also held that the fact the rifle was disassembled placed the offence between the low and the mid-range of objective seriousness.

Objective seriousness of possess child abuse material - parents exploiting children

The offenders in ***R v LS; R v MH* [2020] NSWCCA 148** were sentenced for child abuse material offences relating to sexually explicit messages and an image they sent to each other. The material featured their newborn son and MH's infant daughter from a previous relationship. LS, the father/step-father, received an aggregate of 4 years with an 18 month non-parole period. MH received 3 years, with a non-parole period of 21 months. The Crown appealed on manifest inadequacy.

Wilson J, upholding the appeal, found that the sentencing judge underestimated the objective seriousness of the offending. In particular, her Honour noted that the children were real; vulnerable due to their age; in the care of the offenders; and the material was produced for their own gratification. These factors significantly elevated the seriousness of the offending. Meanwhile, a lack of conscious memory - due to the youth of the victims - did not diminish the gravity of the offending. Furthermore, the trial judge erred in taking into account that no more serious offending eventuated. More serious offending would have grounded its own charge - its absence did not detract from the seriousness of the actual offending.

Dangerous driving causing death – alcohol and objective seriousness

The offender in ***Rummukainen v R*** **[2020] NSWCCA 187** had at least two beers at lunch. That afternoon, he drove on the wrong side of the road and crashed, killing another man. Because of the expert evidence, the sentencing judge could not find beyond a reasonable doubt that the offender's blood-alcohol level was more than 0.05. While accepting he was impaired, his Honour could not determine the extent of that impairment. Nevertheless, the consumption of alcohol was taken into account as increasing the moral culpability of the offending, as well as demanding a greater degree of general deterrence.

On appeal, Payne JA held that this was not in error. It was sufficient that when his blood test was taken, the offender had a concentration of 0.07. It was then on him to disprove any impairment at the time of the offending, which he could not do.

Drug supply - objective seriousness where drug is fake

Mr Khoury supplied an undercover officer with 27.9 grams of cocaine. He went on to supply more than 2kg of a powder that was revealed not to be cocaine. He was arrested during this second supply. He pleaded guilty and was sentenced to 4 years and 3 months (non-parole period of 2 years, 9 months).

On appeal, Khoury argued that the sentence was excessive considering that no drug was actually supplied: ***Khoury v R*** **[2020] NSWCCA 190**. Johnson J dismissed the appeal, finding that while drug "rip-offs" are less serious than drug supplies in that no actual drug filters through to the community, there are a number of countervailing factors. The transaction was fraudulent; general deterrence was important (particularly given that most offenders escape punishment because victims don't report); and drug rip-offs beget further violent offending.

Cybersex offences against children – seriousness of

Mr Small appealed his sentence for cybersex and grooming offences he perpetrated against a 14-year-old girl (mostly pressuring and blackmailing her for nude photos): ***Small v R*** **[2020] NSWCCA 216**. He was re-sentenced to allow for the utilitarian discount for his plea of guilty (following *Xiao v R* (2018) 96 NSWLR 1; [2018] NSWCCA 4). In re-sentencing, Johnson J noted that the victim was real and vulnerable; the offending was sustained, coercive and predatory; and significant harm was done to the victim. There was no real basis to distinguish the harm here from that of an "in person" offence.

Supply of pistol – contemplation of death or serious injury does not infringe De Simoni if no knowledge of essential elements of murder

Mr Alameddine supplied a pistol to Mr Alou, who then gave it to Mr Mohammad, who then shot Mr Cheng – a police accountant. He appealed his sentence for supplying a pistol, partly on the basis that the sentencing judge should not have taken into account his "anticipation"

that the pistol would be used to cause death or serious injury: ***Alameddine v R*** **[2020] NSWCCA 232**.

Bathurst CJ disagreed, finding that there was no *De Simoni* breach here because an accessory to murder charge required actual knowledge of the essential elements of the offence. A reckless contemplation of harm to the public was not enough to ground an accessory charge, and therefore could be taken into account as aggravating the supply charge. The appeal was upheld on a separate ground (the sentencing judge erred in finding that the supply was ideologically motivated).

Child sexual assault – lack of grooming a result of opportunism, violence and intimidation and does not mitigate

An uncle and elder sexually assaulted many of the children left in his care. In order to sexually assault the children, the offender would hit them, threaten them and lock them in rooms. The assaults were opportunistic. The offender had a powerful subjective case. He was sentenced to 14 years' imprisonment with an 8-year non-parole period. The Crown successfully appealed the inadequacy: ***Decision Restricted*** **[2020] NSWCCA 275**. N Adams J took issue with the sentencing judge's finding that there was no grooming as relevant to the offence's seriousness. There did not need to be grooming here because the offender was forceful and opportunistic. In such circumstances, a lack of grooming does not mitigate. Hoeben CJ at CL, the author of the principle judgment and with whose proposed orders the other members of the Court agreed, gave no reasons for upholding the appeal except for agreeing entirely with the Crown submissions, and made no mention of any of the respondent's submissions. Rothman J agreed with both.

Crimes Act 1900 s 66EA – persistent sexual abuse of a child – assessing objective seriousness where multiple ingredient offences

Mr Burr pleaded guilty to sexually abusing his stepdaughter, contrary to s 66EA *Crimes Act 1900*. There were 12 ingredient offences arising from 8 incidents over 20 months. He unsuccessfully appealed his sentence on grounds that, inter alia, the objective seriousness of the offence was improperly calculated: ***Burr v R*** **[2020] NSWCCA 282**. Johnson J held that sentencing for the s 66EA offence was not just a matter of sentencing for each ingredient offence. His Honour found the following factors relevant to determining the seriousness of the persistent offence: the number of ingredient offences; the nature of the offences; the age of the victim; the age of the offender (and age differential); the span of time in which the offences were committed; and the context and power-dynamic of the offending (e.g. within a family unit).

Here, the sentencing judge gave an ex tempore judgment that stepped through the facts and features of the offending in detail before concluding that the ingredient offences and overall offence were in the mid-range of objective seriousness. Johnson J found nothing to impugn. Further, his Honour held that the sentencing judge's finding that the applicant abused a position of trust was a feature of the offending put forth in the Crown's submissions and accepted in the "ordinary parlance" of the ex tempore judgment; it was not a *De Simoni* breach.

Terrorism - youth outweighed by extreme violence and planning

Mr Atai pleaded guilty to aiding and abetting a terrorist act, namely the murder of Curtis Cheng, a civilian employee with the NSW Police Force in Parramatta, and to making funds available to a terrorist organisation. He was sentenced to 38 years imprisonment with a non-parole period of 28 years and 6 months. He argued that the sentencing judge gave inadequate weight to his youth. In ***Atai v R*** **[2020] NSWCCA 302**, Bathurst CJ (Price J and N Adams J agreeing) rejected this argument, saying that the effect of youth was moderated by the level of violence, degree of planning and adult like conduct involved in the offending. These factors meant considerations of punishment, deterrence and protection of the community far outweighed the offender's youth.

NOTE: this case and ***Singh v R*** **[2020] NSWCCA 353** consistently maintain the boundaries on the mitigating effect of youth and immaturity in sentencing. The common thread being that planning and adult-like conduct reduces the mitigating impact of youth.

Firefighters involved in lighting fires are more morally culpable than others

In ***Lambkin v R*** **[2020] NSWCA 327**, the applicant encouraged his brother to light multiple fires which raged out of control on public land. On appeal, the applicant argued that his offending did not involve a breach of trust. Bellew J rejected this, finding that there was a breach of trust. His conclusion was supported by reference to analogous case law where it was held to be relevant that offenders had engaged in conduct which was the antithesis of their line of work. Importantly, the applicant's position as a firefighter meant he was well aware of the potential harm which fires can cause.

Sexual offences – relationship of trust between employer and job applicant

The applicant in ***Mohindra v R*** **[2020] NSWCCA 340** pleaded guilty to, amongst other offences, indecently assaulting a prospective employee during a job interview. The sentencing judge found that the offence was aggravated because the applicant had abused a position of trust as a prospective employer. Basten JA (Johnson J and Davies J agreeing) held that the sentencing judge was correct to find a relationship of trust existed because of the power imbalance between the applicant and the victim. Additionally, Basten JA referred to equal opportunity legislation which makes it unlawful for an employer to sexually harass a person who is seeking employment.

Assessing objective seriousness for social security fraud offences

The applicant in ***Tham v R*** **[2020] NSWCCA 338** could be likened to James Bond but was more unsavoury and less ambitious. He unlawfully came to Australia and lived here for 32 years under a fake identity; helping himself to social security benefits throughout his stay. He pleaded guilty to passport and social security fraud offences. On appeal, he argued that the sentencing judge erred in assessing the objective seriousness of the social security

offences as above mid-range. Bellew J dismissed the argument and found the following factors supported the sentencing judge's conclusion: (a) the applicant's status as an unlawful citizen, (b) the substantial monetary value obtained, (c) the period over which the offences were committed, (d) the premeditation and sophistication of the fraud, (e) the fraud only ceased after arrest, and (f) the breach of the government's trust.

Failure to stop and assist - post offence cover up does not go to objective circumstances of the offence

The applicant in ***Geagea v R*** **[2020] NSWCCA 350** hit and killed a pedestrian on the side of the road with his vehicle. He drove away at speed. A week or so later he tried to dispose of the vehicle and told lies to police to avoid detection. In sentencing the applicant for the offence of failing to stop and assist, the sentencing judge found that the attempts to cover up his involvement made the objective seriousness of the offence substantially worse. The Court of Criminal Appeal held that this reasoning was erroneous. The post-offence cover-up was not part of the objective circumstances of the crime; nor was it part of the offender's moral culpability.

SUMMING UP

Summing up not unfair if judge draws attention to evidence not mentioned in closing addresses

The offender in ***Balachandran v R*** **[2020] NSWCCA 12** was convicted of stabbing a man during a party. Much of the Crown case relied on identification evidence adduced from multiple witnesses. In the summing up, the trial judge referred to evidence of prior meetings and brief introductions between the offender and witnesses – evidence that the Crown did not refer to in closing.

White JA held that this was not a miscarriage of justice because the evidence was uncontroversial. Reminding the jury of evidence that was in the trial but not raised in the Crown's address could not amount to an unfair or unbalanced summing up. Any lack of balance was attributable to the strength of the Crown case. In addition, the trial judge gave ample direction to the jury that they should disregard any opinions they perceived him to have. The appeal was dismissed.

Markuleski direction not crucial in every word against word case – ultimate question is whether it is required as a matter of fairness

The appellant in ***R v Keen*** **[2020] NSWCCA 59** was charged with a number of drug supply and manufacture offences. He pleaded guilty to the former and not guilty to the latter. Much of the Crown case relied on evidence from his accomplices. The jury found him not guilty of three counts but guilty of one count. The appellant challenged this conviction on the ground that, inter alia, there should have been a *Markuleski* direction.

McCallum J held, dismissing the appeal, that a *Markuleski* direction is not required simply because a case is word against word – the essential question is one of fairness. Her Honour held that, in any event, the case was not truly word against word. The acquittals could have been founded on the weakness of other Crown evidence (the drugs were not recovered). The conviction could have been founded on other direct and circumstantial evidence. The evidence of the accomplices was accompanied by judicial warnings and directions. Therefore, there was no unfairness.

Tendency direction not required where risk of tendency reasoning is remote, even where tendency application brought and rejected

Hamilton (a pseudonym) v R **[2020] NSWCCA 80** concerned an array of child sexual offences committed against the applicant's five children. A tendency application was refused at the close of the Crown case. *Murray* and separate evidence directions were given, but not an anti-tendency direction. One ground of the applicant's appeal was that this resulted in a miscarriage of justice.

Beech-Jones J held, Adamson J agreeing, that no direction was required. Multi-complainant cases do not always require tendency directions – the question is whether the lack of one caused a miscarriage, which turns on the likelihood the jury engaged in tendency reasoning. Here, the *Murray* and separate evidence directions assuaged that risk – the jury already had to satisfy themselves positively of a relevant child's reliability before convicting on their respective count. In addition, his Honour found that not seeking a tendency direction was a forensic decision – the defence case invited the jury to "join the dots" between the complainants to conclude that they had been poisoned by their mother against the applicant. Therefore, there was no miscarriage.

In addition, Adamson J held that a trial judge cannot delegate the drafting of the summing up – it is a judge's legal responsibility, and delegation would unfairly distract counsel from preparing their closing addresses. Macfarlan JA disagreed with their Honours on the tendency ground, holding that almost every multi-complainant sexual assault case will require an anti-tendency direction.

Murray direction unnecessary where jury already addressed and directed on need to consider weaknesses in complainant's evidence

Mr Neto was convicted of violently sexually assaulting a woman he had been messaging on Instagram. At trial, he argued that the encounter was consensual, the complainant regretted it, and her complaints of rape the following day were an attempt to control the narrative. He appealed on the grounds that the trial judge failed to give a direction with the force of a *Murray* direction and that the verdict was unreasonable: ***Neto v R*** **[2020] NSWCCA 128.**

Hidden JA, Fagan J agreeing, found that the trial judge sufficiently directed the jury to carefully consider the evidence of the complainant. No further direction was sought. The jury was perfectly capable of considering the weaknesses in the complainant's evidence following the adept address of defence counsel, and so no further direction was needed.

Basten JA noted in obiter that a complaint that a close scrutiny direction lacked the force of *Murray* was fraught with peril in light of s 294AA *Criminal Procedure Act*, which prohibits a judge warning the jury of convicting on uncorroborated evidence.

Departure from Bench Book direction not appellable error – no need for anti-tendency direction where tendency evidence admitted, lest jury be confused

The applicant in ***BRC v R* [2020] NSWCCA 176** appealed his conviction for historical child sex offences committed against multiple complainants. The charged acts were relied on as tendency evidence in support of each other. Uncharged acts were relied upon as context evidence to explain delay in complaint.

On appeal, the applicant argued that the tendency direction was deficient in its departure from the direction in the Bench Book – namely, that a paragraph was omitted warning the jury against reasoning that the applicant was of bad character and more likely to commit offending. Simpson AJA held, dismissing the appeal (Johnson and Hamill JJ agreeing in separate judgments) that the paragraph would only have confused the jury and undermined the admissible tendency evidence. Her Honour noted that departure from the Bench Book is not a ground of appeal.

Bench Book complaint direction – complaint not independent of complainant

SB was convicted of child sexual offences committed against his daughter. The victim complained to her mother following an after-school care program on sex education. The trial judge gave the jury the complaint direction from the bench book, including that they could use the complaint as "some evidence independent of the evidence given to you of that incident by [the complainant]". The use of "independent" was impugned on appeal: ***SB v R* [2020] NSWCCA 207**.

Rothman J held that "independent" was erroneous because the complaint was not independent or corroborative <u>of the complainant</u>. However, his Honour found that this did not result in a miscarriage of justice. The appeal was allowed on another ground.

NOTE: The Bench Book complaint direction has been given for years and not been the subject of adverse comment. The content of the same direction was analysed in *DV v R* [2017] NSWCCA 276, where Hoeben CJ at CL noted that the direction was one that had "been given since the promulgation of the *Evidence Act* without challenge". Regrettably, the view taken about the direction here may involve a misconstruction – the Bench Book suggests that the complaint can be used independently <u>of the evidence</u> given in the trial by the complainant. This is confirmed by the subsequent reference to the jury using the complaint as evidence "in addition to the evidence that has been given about [the subject incident] in this courtroom".

Question Trails – direction reversed the onus of proof

Mr Gregg appealed his conviction and sentence for falsifying company books: ***Gregg v R* [2020] NSWCCA 245**. He impugned, inter alia, a direction that if the jury could not agree on the answer to one question in a question trail, they should move on to see if they agree on a "no" for any subsequent question. Bathurst CJ, upholding the appeal on this and other grounds, found that the jury should have been directed that they must be satisfied that each question was a "yes" beyond reasonable doubt. Agreeing on a "no" reversed the onus.

NOTE: It is possible that the direction was crafted to avoid a hung jury where there should be an acquittal. For example, a jury may be unable to agree on one question, but may not be satisfied beyond reasonable doubt of a later question. If they do not move past the disagreement, they would not get to the break in the chain later and therefore would not acquit.

Edwards direction not needed for every lie; only where Crown asserts consciousness of guilt

In ***Decision Restricted* [2020] NSWCCA 247**, the applicant told three lies at trial. Only one of those lies was asserted to stem from a consciousness of guilt, but the trial judge gave an *Edwards* direction on all three. Payne JA held that this unfairly expanded the scope of the Crown case in circumstances where the applicant could not counteract the prejudice. Not every untruth, his Honour noted, requires a direction on consciousness of guilt. The appeal was upheld.

Unfair summing up in circumstantial case

A gunman on a motorbike shot a man dead. The man's father ran out and fought the gunman with a garden stake, knocking off his helmet and sunglasses. The gunman wore a balaclava underneath. The Crown relied principally on DNA evidence to prove the gunman was the appellant. The appellant argued that he left the DNA on those items on an earlier occasion. The appellant criticised a swathe of the summing up as being unfair and unbalanced: ***Decision Restricted* [2020] NSWCCA 256**.

Simpson AJA held that much of the criticism was unwarranted, without foundation and trivial. Her Honour noted that judges were entitled to comment on factual matters in order to ensure a fair trial. In a circumstantial case, judges should comment to "restore the balance" where fantastic conjectures are put forward instead of reasonable alternative hypotheses. Some of the comments here, however, were dismissive or mischaracterised the evidence. The appeal was upheld and a re-trial ordered.

Impermissible direction that accused's silence "may make it easier" to assess complainant's evidence

In Queensland, a man was charged with multiple child sex offences against his half-sister. He did not give evidence. After giving the usual directions about the onus of proof, the trial judge urged the jury to approach the complainant's evidence with care and caution. However, he noted that the fact the accused had not given sworn evidence to the contrary "may make it easier". The Queensland Court of Appeal found the direction problematic but

was satisfied no real miscarriage of justice occurred. The accused appealed to the High Court: ***GBF v The Queen*** **[2020] HCA 40**.

Kiefel CJ, Bell, Keane, Gordon and Edelman JJ upheld the appeal. Their Honours found that the direction reversed the onus of proof. It encouraged the jury to reason in a forbidden manner by suggesting that the accused had deprived them of some missing piece of evidence. The direction could have affected the jury's assessment of the complainant's credibility and thereby caused a substantial miscarriage of justice.

Offender's conduct still relevant to s 165B warnings

In ***Cabot (a pseudonym) v R (No 2)*** **[2020] NSWCCA 354**, the applicant argued that previous Court of Criminal Appeal authority was wrong; the reasons for a complainant's delay in reporting sexual offences is *irrelevant* in determining whether to give a forensic disadvantage warning under s 165B. The argument was rejected. First, conduct by an offender may mean that the disadvantage was not "because of the delay" for the purposes of s 165B(2), but rather because of the offender's conduct. Secondly, an offender's conduct may be a "good reason" not to give the warning under sub-s (3). Therefore, the trial judge made no error by referring to the fact that the applicant warned the victim not to tell anybody about the offences as a reason to refuse the application for a s 165B warning.