District Court of New South Wales

Annual Conference
2022

Criminal Law Review

The Hon Justice Robert Hulme
11 April 2022

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 my tipstaves over the past year, Mr Daniel Larratt LLB (Hons 1) BEc, Mr Jacob Carlberg LLB BA and Ms Alice Petch LLB (Hons) BA.

APPEALS

Xiao-*error – error in taking subjective factors into account in assessing plea discount*

***Lu v R*; *Huang v R* [2021] NSWCCA 68** is another one of those cases where the applicants probably should have realised that even if they made out a technical error, their sentence was not going to be changed. The applicants pleaded guilty to Commonwealth drug offences. The sentencing judge gave them both a 25% discount for their early guilty pleas. In doing so, the sentencing judge referred to four overlapping considerations: remorse, acceptance of responsibility, willingness to facilitate the course of justice and sparing the community the expense of a contested trial. The last of these considerations is the basis for the utilitarian value of a guilty plea which is a mandatory consideration. However, Johnson J found that the sentencing judge, while correct in referring to saving the community the expense of a trial, made a technical error by including alongside it the other, subjective considerations. Nevertheless, Johnson J held that the 25% discount was appropriate and that no lesser sentence was warranted.

Crown appeal on failure to comply with undertaking to assist authorities

***CC v R; R v CC* [2021] NSWCCA 71** involved a Crown appeal under s 5DA of the *Criminal Appeal Act 1912* (NSW). The offender had undertaken to give evidence against a co-accused to the murder which the offender pleaded guilty to. In the co-accused's judge-alone trial the offender failed to fulfil his undertaking and gave evidence which was totally inconsistent with previous statements that inculpated the co-accused. However, the trial judge expressly accepted the truth of the previous statements and rejected the offender's oral evidence. Therefore, Bathurst CJ rejected the Crown's appeal, reasoning that the purpose of s 5DA is not punitive and the Crown still received the utilitarian benefit of the offender's previous statements.

No lesser sentence "warranted "in law" – a semantic technicality in Criminal Appeal Act s 6(3)

It was accepted by the Crown and the Court of Criminal Appeal that the sentencing judge had made an error by failing to take into account the utilitarian value of the applicant's plea of guilty to Commonwealth offences. After considering whether to resentence the

applicant, Bellew J concluded that "no lesser sentence is warranted and should have been passed". Simpson AJA agreed but saw a potential conflict with comments she had made in past cases to the effect that the common Crown argument that "no lesser sentence is warranted *in law*" should be rejected. Her Honour clarified that there was no inconsistency. The phrase "warranted *in law*" refers to a range of possible sentences. On the other hand, "warranted and should have been passed" reflects the way the individual appellate judge re-exercised their sentencing discretion. Her Honour concluded that a lesser sentence may have been warranted *in law* in this case, but no lesser sentence should be imposed: ***Aboud v R*** **[2021] NSWCCA 77**.

Court must exercise jurisdiction if proper questions posed under s 108 Crimes (Appeal and Review) Act

The accused was a professional gambler who would use other people's accounts with their permission to place bets. He was charged with many counts of dishonestly obtaining a financial disadvantage or causing a financial disadvantage. However, the trial judge ordered an acquittal on all counts because the Crown could not prove that the deception caused the financial advantage/disadvantage. In response, the Attorney General submitted three questions of law to the Court of Criminal Appeal under s 108 of the *Crimes (Appeal and Review) Act 2001* (NSW). In dealing with a preliminary jurisdiction issue, Simpson AJA held that the Court cannot decline to answer a question properly submitted under s 108. She reasoned that: (1) s 108 leaves no room for discretion by stating that the Court "*is to* hear and determine", and (2) when jurisdiction is conferred on a court, there is an obligation to exercise that jurisdiction when properly invoked: ***Attorney-General's Application pursuant to s 108 Crimes (Appeal and Review) Act 2001 (NSW): Re Robert Burton (a pseudonym)*** **[2021] NSWCCA 87**.

Kentwell - v*ariation of sentence for arithmetic error in non-parole ratio*

In ***Li v R (Cth)*** **[2021] NSWCCA 100**, the sentencing judge intended to sentence the applicant with a non-parole period roughly similar to a co-offender for drug importation offences. The judge failed to give effect to that intention. Therefore, there was an issue as to what should be done about the error. Both parties agreed that there was no need to re-exercise the sentencing discretion afresh. N Adams J (Hidden AJ agreeing) found that the error was arithmetical and so the non-parole ratio could simply be varied to reflect the intention of the sentencing judge. Hoeben CJ at CL agreed, but also (questionably) pointed to the interpretation of s 7 *Criminal Appeal Act 1912* in *Voronov v R* [2017] NSWCCA 241 as providing the Court with power to simply vary a sentence in appropriate cases.

Prosecution sentence appeal to District Court subject to requirement for error and residual discretion

McCallum JA set out two principles regarding appeals from the Local Court to the District Court in ***DK v Director of Public Prosecutions*** **[2021] NSWCA 134**. First, in a Crown sentence appeal under s 23 of the *Crimes (Appeal and Review) Act 2001* (NSW) (CARA), an error must be shown before the District Court has power to vary the sentence. Two factors support

this interpretation: (a) the right to adduce fresh evidence in a Crown sentence appeal is restricted, suggesting the District Court is not re-exercising the sentencing discretion afresh, and (b) Crown appeals are exceptional because of the potential to visit injustice on an offender and clear language is required to create a Crown right of appeal without error being shown.

The second principle is that the District Court has a discretion to dismiss a Crown appeal against sentence even where error is shown. This residual discretion is akin to that in s 5D of the *Criminal Appeal Act 1912* (NSW). The existence of a residual discretion is supported by two factors: (a) the need to preserve fairness to the accused, and (b) s 68A of the CARA, which states that an appeal court must not dismiss a prosecution appeal against sentence for double jeopardy considerations, qualifies the residual discretion, thereby assuming it exists.

Powers in ss 19B and 20BQ of the Crimes Act 1914 (Cth) exercisable by District Court in conviction appeals but not sentencing appeals

Two questions about the District Court's jurisdiction in appeals relating to Commonwealth offences from the Local Court arose for determination in ***Huynh v R* [2021] NSWCCA 148**. Beech-Jones J held that, in an appeal against *sentence* under the *Crimes (Appeal and Review) Act 2001* (NSW) (CARA), the District Court has no power to set aside a Local Court conviction under ss 20BQ and 19B of the *Crimes Act 1914* (Cth). That is because there is no power in the CARA to set aside a conviction in a sentence appeal capable of being picked up by the provisions of the *Judiciary Act 1903* (Cth) which confer federal jurisdiction on the District Court. However, the CARA does provide such a power in *conviction* appeals, meaning the District Court does have power to set aside a Local Court conviction under ss 20BQ and 19B in conviction appeals. The same reasoning also applies to the power conferred by former s 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) and its successor, s 14 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW).

No error after all in the resentencing in Sigalla v R [2021] NSWCCA 22

In *Sigalla v R* [2021] NSWCCA 22, Brereton JA found that the sentencing judge made two patent errors. His Honour then reversed the effect of those errors and did not expose reasoning that indicated a full re-exercise of the sentencing discretion. The Crown sought leave under r 50C of the Criminal Appeal Rules 1952 (NSW) to argue that the Court should vary the decision because it mistakenly failed to follow *Kentwell v R* (2014) 252 CLR 601; [2014] HCA 37 which requires the Court to re-exercise the sentencing discretion afresh when an error is shown. However, the Court in ***Sigalla v R (No 2)* [2021] NSWCCA 151** reasoned that when Brereton JA said: "[b]ut for those matters, her Honour's statement of the relevant considerations… was not impugned, and I would adopt it. I would reduce, by between three and six months, each of the sentences imposed by her Honour which exceeded two years", his Honour was really exercising his independent discretion and turning his own mind to the relevant considerations. Therefore, there was no slip, oversight or misapprehension attracting r 50C and the only remedy now is an appeal to the High Court.

Artificial majority after divergent sentences

The applicant was erroneously sentenced for two offences to an aggregate sentence with a non-parole period which was greater than the sum of the non-parole periods of each indicative sentence. Each of the three judges in ***Zabakly v R*** **[2021] NSWCCA 155** re-exercised the sentencing discretion afresh to reach a different sentence. Basten JA would have imposed a total effective sentence of 8 years and 9 months, Beech-Jones J an aggregate sentence of 8 years, and Brereton JA an aggregate sentence of 7 years. To end the stalemate, Brereton JA chose to agree with the sentence closest to his Honour's own, that being Beech-Jones J's sentence.

"Correctness" standard applies to appellate review of s 135 of the Evidence Act 1995

One of the grounds argued by Mr McNamara was that the trial judge wrongly excluded evidence under s 135(a) of the *Evidence Act 1995* (NSW) which relevantly states that "[t]he court may refuse to admit evidence" if its probative value is substantially outweighed by the danger of unfair prejudice to a party. The Court rejected the Crown's argument that Mr McNamara was required to demonstrate error by the trial judge in accordance with *House v The King* (1936) 55 CLR 499; [1936] HCA 40. Instead, the Court held that s 135(a) involves an evaluative judgment rather than an exercise of judicial discretion, meaning the appellate court is to decide for itself whether the evidence should have been excluded (subject to natural limitations in an appeal). In reaching this conclusion the Court reasoned by analogy to the High Court's application of the "correctness" standard to appeals challenging the admissibility of tendency evidence in *The Queen v Dennis Bauer (a pseudonym)* (2018) 266 CLR 56; [2018] HCA 40. The Court's decision rendered a number of previous cases no longer good law on this point: ***Rogerson v R; McNamara v R*** **[2021] NSWCCA 160**.

Sigalla saga concluded

The judgment of Beech-Jones J in ***Young (a pseudonym) v R*** **[2021] NSWCCA 163** corrected the divergence from *Kentwell v R* (2014) 252 CLR 601; [2014] HCA 37 that appeared to have emerged in *Sigalla v R* [2021] NSWCCA 22. His Honour emphasised three points about *Kentwell*. First, any decision which might suggest that when an error is established the Court is to consider whether the impugned sentence is inside an appropriate range of sentences or the extent to which the error affected the length of the sentences, is not to be followed. In order to determine whether a sentence is warranted in law, the Court must re-exercise the sentencing discretion afresh. Second, the Court may adopt the sentencing judge's findings of disputed facts and evaluations which are not challenged. Third, the Court is not bound by any of the indicative sentences specified by the sentencing judge.

Brereton JA wrote separately, explaining why his judgment in *Sigalla v R* was not inconsistent with *Kentwell*. Basten JA simply agreed with Beech-Jones J.

Conviction appeals to the District Court are not always de novo hearings

The question in ***Lunney v Director of Public Prosecutions*** **[2021] NSWCA 186** was whether the determination of an appeal against conviction to the District Court by way of rehearing

under ss 11 and 18 of the *Crimes (Appeal and Review) Act 2001* always requires the District Court to independently consider all of the evidence before the magistrate to determine whether it is satisfied of guilt. McCallum JA (Meagher JA agreeing) held that that process is not always required. Relevantly, s 18 states that a conviction appeal is to be "by way of rehearing on the *basis of evidence* given in the Local Court proceedings". This language is different to s 17 which states that sentencing appeals are to be "by way of rehearing of *the* evidence". The semantic difference means that while sentence appeals are akin to a de novo rehearing, conviction appeals are not.

Instead, the extent of review of the evidence required in a conviction appeal will depend on the issues raised in the appeal. This case involved an appeal by the applicant which alleged two specific errors of reasoning. Therefore, there was no need for the District Court to review all of the evidence to determine guilt.

New account to psychiatrist after pleading guilty not "fresh" evidence

Mr Fuller pleaded guilty to murder in 2016. The plea was based on a psychiatric report which did not support the partial defence of substantial impairment. However, in 2019 after sentencing, the same psychiatrist expressed a second opinion that the partial defence of substantial impairment was available. Johnson J found that the critical reason why the opinion changed was Mr Fuller's new account to the psychiatrist that when he killed the deceased, he thought the deceased was part of "The Syndicate", a supernatural entity that consumes and controls people. Since Mr Fuller's new account was always available to him, it was new evidence and not fresh evidence. Even if it was fresh evidence, though, Johnson J would have still dismissed the appeal because the new account was not credible or capable of belief by a reasonable jury: ***Fuller v R* [2021] NSWCCA 194**.

Pandemic restrictions imposed in prison after sentencing a matter for the executive

***Toller v R* [2021] NSWCCA 204** is case about the impact of Covid-19 on prison sentences. The appellant tried to argue that his sentence should be reduced because his term of imprisonment had become more onerous due to Covid restrictions. Beech-Jones rejected the argument, pointing out that there was no alleged error in the sentence and there was no basis for the Court to consider the new evidence about the appellant's circumstances. The harshness of a prison sentence is exclusively a matter for the government.

Xiao-*error and whether resentencing required*

In accordance with the law at the time of sentence, the sentencing judge in ***Garcia-Godos v R* [2021] NSWCCA 229** did not take into account the utilitarian value of the applicant's guilty plea (*Xiao*-error). The Crown conceded on appeal that failing to do so is now considered an error and that the appellate Court should proceed to re-exercise the sentencing discretion afresh. This was even though the applicant took no issue with the value of the discount applied and expressly asked the Court to apply the same discounts on resentence. The Crown's concession was consistent with *Diaz v R* [2019] NSWCCA 216 where the same issue was decided.

However, Simpson AJA questioned the Crown's concession. In her Honour's view, the process of discounting a sentence is completely separate from determining the starting point of a sentence. The latter is the "discretion" referred to in the High Court's well-known comments about re-sentencing in *Kentwell v The Queen* (2014) 252 CLR 601; [2014] HCA 37 while the former has no more than a mathematical impact on the final sentence. Therefore, the error in this case could not have had a material impact on the sentencing discretion and there should be no need to re-sentence. Ultimately, though, the sentencing discretion was re-exercised because of the Crown's concession, but no lesser sentence was warranted.

Manifest excess not made out by merely pointing to similar cases with lesser sentences

In ***Bayssari v R* [2021] NSWCCA 235**, Bellew J rejected a version of the common approach by applicants in sentence appeals to point to similar cases where a lower sentence was imposed. First, his Honour methodically distinguished each of the supposedly similar cases relied on by the applicant. Second, his Honour pointed out that, even then, it is the nature of sentencing that others in similar circumstances will receive a lesser sentence. Identifying such cases cannot, without more, demonstrate manifest excess.

NOTE: this case is in contrast with *Chartres-Abbott v R* [2021] NSWCCA 239 (below) where the ground of manifest excess was upheld mainly by reference to statistics and comparable cases.

Instinctive synthesis informed by statistics and comparable cases

***Chartres-Abbott v R* [2021] NSWCCA 239:** Brereton JA found that the applicant's sentence for drug supply was manifestly excessive mainly by reference to sentencing statistics and comparable cases. The comparable cases were divided into two categories: (1) similar cases but with lower sentences, and (2) cases with much larger quantities of drugs but similar sentences. While acknowledging the limitations of sentencing statistics and similar cases, his Honour stated that comparable cases are illustrative, though not definitive, of the range of available sentences and that "[t]he process of 'instinctive synthesis' necessarily involves an instinct informed by awareness of sentences imposed in like cases; otherwise it would be entirely idiosyncratic".

Controversially, and without reference to any authority but "logic", for the purpose of comparing the sentence in question to others Brereton JA proceeded as if a 25% discount had applied to the aggregate sentence itself even though the discount was actually applied to the indicative sentences. His Honour held this was appropriate because the same discount of 25% was applied to all indicative sentences.

"New evidence" of further psychiatric report on an appeal against sentence rejected

The applicant in ***Wang v R* [2021] NSWCCA 282** had tendered on sentence two reports by Dr Richard Furst concerning her culpability in murdering her girlfriend. On appeal she sought to tender a further report on the basis it would clarify aspects of the earlier reports which

supposedly had been misunderstood by the sentencing judge. Mr Odgers SC conceded there were no previous cases in which further reports had been accepted on appeal for this reason, but it was nonetheless in the interests of justice that the new report be admitted.

The report was inadmissible. There was nothing ambiguous in the way Dr Furst expressed his opinions in the earlier reports; there was no reason why the opinions in the terms in which they were expressed in the third report could not have been provided in such terms in the earlier reports; and very experienced senior counsel who appeared at first instance seemingly had no concerns about the terms employed in the earlier reports. Receiving a report in such circumstances would be antithetical to the Court being one of error, not of rehearing pleas in mitigation of sentence.

Aggregate sentences and the futility of presuming a starting point by adding the discount assessed for pleas of guilty

In ***BB v R* [2021] NSWCCA 283**, the applicant argued that the aggregate sentence he received (4 years) for 7 counts of indecent assault on a child under 10 (a further 4 counts taken into account) was manifestly excessive assuming that a discount of 20% for pleading guilty was applied to the aggregate sentence (i.e., there was a starting point of 5 years). The argument was rejected. Wilson J cited authority that the discount is applied to the indicative sentences, rather than to the aggregate sentence. The applicant referred to Brereton JA (Campbell and Hamill JJ agreeing) in *Chartres-Abbott v R* [2021] NSWCCA 239 having found it useful to presume a starting point of an aggregate sentence by adding the discount for the pleas of guilty for the purpose of comparison with "comparable" cases". Wilson J consider this to be of no utility in the present case and could not envisage it being so in many other cases.

Ground of appeal asserting manifest excess with reliance upon statistics and comparable cases

Manifest excess was relied upon as a ground of appeal by the applicant in ***Nealon v R* [2021] NSWCCA 286**. He substantially relied upon sentencing statistics and comparable cases. Leeming JA reiterated the relevant principles:

- Even if a sentence is markedly different from other sentences, that does not suffice for an appellate court to intervene; it is necessary, rather, to conclude that there has been some misapplication of principle.
- Error can sometimes be *inferred* even where none appears on the face of the judge's remarks on sentence.
- Sometimes patterns of sentencing may support a conclusion that error exists. This is more likely to be the case where the statistics are plentiful and the nature of the offence is such that it does not admit of a wide range of conduct.
- In all cases where statistics are relied upon it is necessary to identify the unifying principles which the disparate statistics may reveal.

Conviction appeal to District Court – judge may consider magistrate's assessment of witness credibility; appellant needs to demonstrate error

In ***McNab v Director of Public Prosecutions (NSW)*** **[2021] NSWCA 298** the Court of Appeal dismissed a summons for judicial review, finding that in a District Court appeal against conviction the judge is entitled to take into account the magistrate's assessment of a witness's credibility, where the magistrate had the advantage of hearing oral testimony. Further, the appellant needs to demonstrate error in order for an appeal to succeed.

Basten and McCallum JJA held that where an appeal is a new hearing, the judge must disregard the reasoning of the primary fact-finder; however, this rule cannot apply where the judge is not required or permitted to hear witnesses give oral testimony. They found that ss 18 and 19 of the *Crimes (Appeal and Review) Act 2001* "do not provide a procedural code for the matters which can be taken into account", and in an appeal under s 11 of the Act the District Court judge is entitled to regard the findings of the Local Court, including findings as to the credibility of witnesses where the magistrate has had the advantage of hearing the oral testimony.

The Court found that the need to identify "error" is not a statutory requirement, and what is required to demonstrate error will depend on whether the error is to be found in the fact-finding exercise, the identification of the law, the application of the law, or in exercising discretionary power. While it is "unhelpful" to describe the jurisdiction under the *Crimes (Appeal and Review) Act* as "error-based", a Local Court decision "will not be overturned unless the District Court judge is satisfied that it was in some respect wrong."

Kentwell –*failing to give effect to finding of special circumstances requires full resentencing*

The Crown conceded on appeal in ***Christian v R*** **[2021] NSWCCA 300** that the sentencing judge had failed to give effect to a finding of special circumstances. The question arose whether that error could be resolved by simply adjusting the non-parole period rather than resentencing afresh. The Crown submitted the latter.

It was held that the Court could not confine itself to adjusting the non-parole period; it had to undertake the sentencing exercise afresh. Although there are circumstances where it is appropriate for the Court to simply adjust a sentence to correct an error, Beech-Jones CJ at CL held that the deciding question is whether the error at first instance (be it arithmetical or otherwise) can be addressed by giving effect to a sentencing judge's clear intention, compared with an error that can only be addressed by the appellate court making its own assessment. In this case, although the sentencing judge had provided reasons as to the finding of special circumstances, his Honour had not specified the non-parole period in respect of that finding and so the intended adjustment to the ratio of non-parole to overall term was unknown.

R A Hulme J agreed on the basis of precedent but was critical of the Crown's approach, for the Court can easily correct errors of this kind where there is agreement among the parties to confine the resentencing exercise to discrete errors. The Crown's approach merely added complexity to the appeal without any tangible benefit.

Fresh evidence as to onerous conditions of custody not admissible

In ***Richardson v R*** **[2021] NSWCCA 304** a sentencing judge had acknowledged that former law enforcement officers may experience harassment and a greater degree of hardship compared with other inmates if their occupational history becomes known in gaol. It was also acknowledged that it was too early to know whether protective custody orders would become available to the applicant. None of that, however, dissuaded him from imposing a penalty that he considered to be proportionate to the objective seriousness of the applicant's offending.

On appeal, Johnson J held that evidence of threats and assaults by other inmates was not admissible as fresh evidence. The sentencing judge had contemplated and appropriately taken into account the difficult situation that had in fact transpired because of the offender's former occupation.

Conviction not quashable after pardon in the absence of an inquiry

Mr Armstrong was pardoned by the Attorney General on compassionate grounds in respect of his convictions and applied to have them quashed under s 84(1) of the *Crimes (Appeal and Review) Act 2001*: ***Armstrong v R*** **[2021] NSWCCA 311**.

The Court found that the convictions could not be quashed where there had been no inquiry under Pt 7 Div 4 of the Act. Beech-Jones CJ at CL discussed the construction of the provisions of the Act, concluding that a consideration of extraneous materials and the legislative history of Pt 7 confirm that a narrow construction of s 84 is preferred.

Application of the common proviso where miscarriage of justice demonstrated on appeal

Both the appellant and the complainant of sexual assault in ***Orreal v The Queen*** **[2021] HCA 44** had tested positive to the herpes simplex virus type 1 (HSV-1). Evidence of that fact had been tendered during the appellant's trial, but on appeal to the Queensland Court of Appeal the prosecution accepted that the evidence was inadmissible and that a miscarriage of justice had occurred. However, a majority of the Court held that there had been no *substantial* miscarriage within the meaning of the proviso – *Criminal Code Act 1899* (Qld), s 668E(1A) – and the appeal was dismissed.

The starting point in the High Court's reasoning was the principle that an appellate court is not permitted to conclude that no substantial miscarriage of justice has occurred unless that court is satisfied that the evidence properly admitted at trial established guilt beyond reasonable doubt. The High Court (Gordon, Steward and Gleeson JJ; Kiefel CJ and Keane J agreeing) held that in the circumstances of this case it was not possible for the Court of Appeal to be so satisfied. Those circumstances included the following:

- In cases turning on contested credibility, the nature of an error such as this one may render an appellate court unable to assess whether guilt was proved beyond reasonable doubt, due to the natural limitations of proceeding on the record.

- In this case, proof of guilt was wholly dependant on acceptance of the complainant's evidence, and the evidence of HSV-1 may well have served to support her version of events in the minds of the jury.
- The HSV-1 evidence was given considerable attention by the prosecution throughout the trial and the trial judge gave no directions to the jury to disregard the evidence.

Failure to discharge a jury ground of appeal – principles to be applied

The appellant in ***Dries v R*** **[2022] NSWCCA 33** had been convicted of one count of having sexual intercourse with a child under the age of 10. He argued that he was prejudiced by impermissible statements made by the Crown Prosecutor in closing address (namely that the jury should consider the complainant's life experience and lack of sexual experience at the age of 4 or 5) and the judge's subsequent failure to discharge the jury.

It was held by Macfarlan JA that significant weight should be given to the trial judge's view that any prejudice could be overcome by directions to disregard the statements due to the judge's familiarity with the matter and the atmosphere of the trial. The judge gave "a strongly worded direction as to the absence of any evidence of the complainant's sexual experience or inexperience", and courts generally proceed on the assumption that juries will follow judicial directions. Any prejudice was overcome by the Crown's retraction of their comments, and by the judge's directions to the jury.

BAIL

No jurisdiction to hear release application when Notice of Intention to Appeal has expired

The applicant filed a notice of appeal *after* the expiry of the period which his notice of intention to appeal against conviction had effect. This meant the applicant did not have "proceedings for the offence… pending in the court" because of the operation of the *Criminal Appeal Act 1912*, s 10(2)(b) and r 3B of the (1952) Criminal Appeal Rules. Therefore, Hoeben CJ at CL and Wilson J held the Court of Criminal Appeal did not have jurisdiction under s 61 of the *Bail Act 2013* to hear his bail application. While the Court could have overcome the prerequisite in s 61 by extending the time to appeal or granting leave to appeal, the joint judgment refused to do so because there had already been five extensions granted with a sixth having previously being refused: ***Mashayekhi v R*** **[2021] NSWCCA 55**.

Summary dismissal of bail application in CCA not an option and electronic monitoring an option for bail in Federal offences

Mr Saadieh was charged with being a member of a terrorist organisation. The conduct said by the Crown to constitute the offence was essentially that he was sitting in his bedroom using his mobile phone. Mr Saadieh was granted bail in the Supreme Court and the Crown made a detention application to the Court of Criminal Appeal: ***Commonwealth Director of Public Prosecutions v Saadieh*** **[2021] NSWCCA 232**. There was no issue that the Court had jurisdiction to hear the application, but Mr Saadieh argued that the Court should decline to

exercise its jurisdiction and dismiss the application summarily. In support of that argument, Mr Saadieh referred to comments by Beech-Jones J (as he then was) in a previous case criticising the *Bail Act 2013* for allowing de novo reviews in an appellate Court. Adamson J (Beech-Jones CJ at CL agreeing) was not persuaded, pointing out that Beech-Jones J was merely calling for legislative review in that case. Her Honour found the detention application could not be dismissed summarily.

An issue about the adequacy of electronic monitoring as a bail condition also arose. Beech-Jones CJ at CL commented that a person charged with a federal offence can be released on bail subject to electronic monitoring because so much is consistent with (a) the position for State offences and (b) legislative provisions for post-conviction supervision of terrorism offences.

COSTS

No jurisdiction to order costs in non-publication order 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.

Impecuniosity, costs and procedural fairness in workplace safety offences

The respondent companies were convicted of charges for failing to comply with a health and safety duty. The sentencing judge imposed a fine on each company and awarded costs in favour of the prosecution. Because of their impecuniosity, the sentencing judge reduced the costs order, commenting that costs are an important aspect of punishment. Wilson J found the judge erred in two ways. First, the judge denied the prosecutor procedural fairness by awarding costs contrary to an apparent agreement as to costs between the parties without giving any pre-warning of her intention to do so. Second, costs are not a form of punishment. Instead, the fine should have been reduced, not the costs. Ultimately, though, Wilson J declined to intervene because the sentencing judge clearly sought to reduce the overall sum of money payable by the companies to recognise their limited means. Therefore, it would be unfair to make them pay costs, too: ***SafeWork NSW v Williams Timber Pty Ltd; SafeWork NSW v Easy Fall Guttering Pty Ltd*** **[2021] NSWCCA 233**.

DEFENCES

Construction and application of s 23 Crimes Act – extreme provocation defence

In ***Rogers v R*** **[2021] NSWCCA 61**, Johnson J considered the proper construction of the s 23 *Crimes Act 1900* extreme provocation defence and concluded that: (1) the same "conduct"

of the deceased is relevant for each sub-section; and (2) the provocation that the accused actually suffers is not relevant in determining the objective limb in s 23(2)(d). The second of these propositions arose because, after the 2014 amendments, s 23 simply refers to the "ordinary person" and omits the previous phrase "in the position of the accused".

In the present case Mr Rogers had a physical fight with his wife after finding out about her infidelity. During the fight Mr Rogers said he was kicked and in response he smothered his wife with a pillow to death. Johnson J found that Mr Rogers' reaction was not within the range of possible reactions of an ordinary person. Johnson J made clear that it was irrelevant that Mr Rogers: suffered from depression; was prone to overreactions; had declared his love for his wife and commitment to their relationship; and had a dominant personality.

EVIDENCE

Reminder that character evidence is not all or nothing

The trial in **Decision Restricted [2021] NSWCCA 74** was riddled with errors to the point where the Crown conceded on appeal that a retrial should be ordered. The trial was for 23 counts of physical violence and sexual offences. One of the errors related to the admissibility of character evidence. The applicant sought to adduce good character evidence that he had never been charged with violence or sexual offences before. The trial judge said that if such evidence was adduced, the Crown would be allowed to rebut the evidence by adducing evidence of the applicant's dishonesty offences. Davies J held this decision was an error because character evidence is not all or nothing under the *Evidence Act 1995* s 110. The good character evidence was connected to the present charges while the rebuttal evidence was not connected to either the present charges or the good character evidence.

No good character evidence in child sexual abuse trial causes miscarriage of justice

The appellant was convicted of nine non-penetrative sexual offences against two of his stepchildren. Button J allowed an appeal against the convictions because defence counsel failed to adduce good character evidence to the effect that the accused had never even been accused of a child sexual offence outside the current charges: ***Decision Restricted* [2021] NSWCCA 113**. Button J agreed that, while defence counsel at trial had made a forensic decision not to call the evidence, the disadvantage of adducing the good character evidence would have been slight. The only avenue of rebuttal open to the Crown would have been to point to the evidence from each complainant in the trial as bad character evidence. However, that was already before the jury as tendency evidence, meaning the disadvantage was merely taxonomical. Weighing against this slight disadvantage was the potential for the good character evidence to powerfully call into question the Crown case. Therefore, a miscarriage of justice occurred.

Co-accused is "a party" to proceedings for purposes of s 135(a) of the Evidence Act

Mr McNamara and Mr Rogerson were convicted of murder in a joint trial where they had pursued cut-throat defences. During the trial, Mr McNamara sought to adduce evidence

which would have been unfairly prejudicial to Mr Rogerson. Therefore, the trial judge rejected the evidence under s 135(a) of the *Evidence Act 1995* (NSW) because it might be "unfairly prejudicial to a party". On appeal, Mr McNamara argued that a co-accused is not "a party" to a criminal proceeding against an accused for the purposes of s 135(a) because there are, theoretically, two separate trials for each accused: ***Rogerson v R; McNamara v R* [2021] NSWCCA 160**.

The Court rejected the argument, instead finding that a co-accused is "a party". This conclusion was supported by a number of factors, including that: (a) s 29(2) of the *Criminal Procedure Act 1986* (NSW) expressly permits joint trials; (b) it is consistent with other provisions in the *Evidence Act*; (c) the word "party" is apt to describe a co-accused in a criminal trial; and (d) a similar position existed at common law.

Admissibility at trial of earlier compulsory examination of accused by Australian Taxation Office

***R v Kinghorn* [2021] NSWCCA 313** involved the question of the admissibility of the transcript of an examination of Mr Kinghorn by the ATO 12 years before the charges against him were brought. The charges, under s 135.1(7) of the *Criminal Code* (Cth), for dishonestly representing to a public official that he did not control certain companies, were particularised by representations he made to the ATO in that examination. Bathurst CJ and Payne JA allowed the appeal against the trial judge's finding that the content of the examination was inadmissible, having regard to the accusatorial principle and the companion rule. The content of the examination was admissible to prove the fact that the representations particularised in the charge were in fact made by the accused, and to prove the terms of those representations.

JUDGE-ALONE TRIALS

Important to comply with requirements of s 165 Evidence Act in judge-alone trial

***Constantinidis v R; Lazar v R* [2022] NSWCCA 4** concerned an appeal on a ground that the trial judge had failed to give herself an adequate warning pursuant to s 165 of the *Evidence Act 1995*. It was contended at trial by one accused that a Crown witness might reasonably be supposed to have been criminally concerned in the events giving rise to the proceedings. This was in spite of the fact that both accused claimed neither they nor the witness were involved in any crime.

The trial judge had accepted that s 165(1)(d) of the *Evidence Act* was engaged but she failed to provide reasons as to her application of the warning of potential unreliability. The failure to comply with ss 133(2) and 133(3) of the *Criminal Procedure Act 1986* was an error of law. Ironically, the error was of no consequence because it was also held by the Court that the judge should have found the witness's evidence could not be accepted beyond reasonable doubt and the verdicts were unreasonable.

OFFENCES

Husband and wife can conspire to commit Commonwealth offences

The issue in ***Namoa v The Queen*** **[2021] HCA 13** was whether the statutory offence of conspiracy within s 11.5(1) of the *Criminal Code* (Cth) applies to spouses who agree between themselves and only themselves to commit an offence. According to Gleeson J, the answer is it does apply. Section 11.5 relevantly sets out the following:

> "(1) A person who conspires with another person to commit an offence… is guilty of the offence of conspiracy to commit that offence…
> (2) For the person to be guilty: (a) the person must have entered into an agreement with one or more other persons…"

The applicant conceded that a husband and wife were each separate persons under the provision. However, the applicant argued that there is a common law rule in Australia that spouses cannot be guilty of conspiracy which affects the meaning of "conspires" and "conspiracy" in s 11.5. Gleeson J rejected the argument, reasoning that: (a) the plain meaning of the provision includes a married couple, (b) the overseas cases relied on by the applicant did not discuss the meaning of "conspires" and (c) extrinsic material necessitated against an interpretation with does not apply to spouses.

Bets, causation and financial advantages – s 192E(1) Crimes Act

The accused had used other people's accounts (with their permission) to make profitable bets with corporate bookmakers. He was charged with many counts of dishonestly obtaining a financial advantage or causing a financial disadvantage by deception under s 192E of the *Crimes Act 1900* (NSW). The Attorney General posed three questions of law arising from the trial to the Court of Criminal Appeal. Simpson AJA's answer to the first two almost identical questions was that the deception alleged by the Crown was capable of being an operative cause of the winnings. Simpson AJA reached this conclusion after reviewing multiple cases involving rather silly examples of people pretending to be someone else to obtain money. N Adams J agreed and added that there could be no winnings without the winning ticket which was obtained by deception: ***Attorney-General's Application pursuant to s 108 Crimes (Appeal and Review) Act 2001 (NSW): Re Robert Burton (a pseudonym)*** **[2021] NSWCCA 87**

The answer to the third questions was that a bet is capable of constituting a financial advantage for the purposes of s 192E(1). Campbell J summarised it nicely: "'You've got to be in it, to win it'… the law treats a chance as being of real and measurable value".

s 193B(3) Crimes Act - actual knowledge not required for reckless dealing with proceeds of crime

The applicant pleaded guilty to recklessly dealing with the proceeds of crime contrary to s 193B(3) of the *Crimes Act 1900* (NSW). She had been selling stolen baby formula. Her counsel argued on appeal that, among other things, the indictment to which the applicant

pleaded guilty was bad in law because the element of knowledge had to be actual knowledge and not recklessness. In separate reasons Brereton JA and Adamson J rejected the argument. Their Honours explained that the applicant's counsel had misunderstood the very difference between a charge of reckless dealing of proceeds of crime under s 193B(3) and the more serious offence of dealing with knowledge under s 193B(2). The Crown merely needed to prove that the applicant was aware of the possibility that the baby formula was stolen and dealt with it anyway: ***Ke v R* [2021] NSWCCA 177**.

"Breaking" turns on consent of the occupant, not person's legal right of entry

There was an issue as to whether the prosecution does not need to establish that an accused person did not have a pre-existing right to enter a dwelling house, irrespective of whether force was used, to prove the element of "breaking" under s 112(2) of the *Crimes Act 1900* in ***R v BA* [2021] NSWCCA 191**. According to Brereton JA, s 112 is concerned with the protection of *occupants* because even an owner can be guilty of the offence. Therefore, a proprietary or contractual right to enter does not negate a "break" under s 112. Instead, it is the consent of the occupant which is determinative of whether a forcible entry is a "break". Fullerton J agreed with Brereton JA but warned that even on his Honour's helpful analysis factual problems might still arise.

Adamson J took a different approach, reasoning that s 51(1)(d) of the *Residential Tenancies Act 2010* qualifies the right to forcibly enter a dwelling house by prohibiting damage being caused to the property. Therefore, an accused person on a tenancy lease does not have a right to forcibly enter by causing damage. Ultimately, though, each judge reached the same conclusion that the trial judge's directed acquittal of the respondent, who forcibly entered a house which he was a legal tenant of, should be quashed and a new trial ordered.

Extent of common law principle concerning honest and reasonable mistakes of fact

In ***Bell v Tasmania* [2021] HCA 42**, the High Court found that to be able to rely on the claim of honest and reasonable mistake of fact the accused person's act, on the facts as honestly and reasonably believed by them, must render the accused innocent of any offence. The appellant claimed that he honestly and reasonably believed that a child to whom he supplied a controlled drug was an adult; however, even on this belief, the supply of the controlled drug to another person remained unlawful.

Edelman and Gleeson JJ outlined the four possible approaches to the component of "innocence" in the definition of the honest and reasonable mistake excuse:

1. The facts as honestly and reasonably believed would involve no moral or legal culpability;
2. The facts as honestly and reasonably believed would not constitute any offence of legal wrong (including torts);
3. The facts as honestly and reasonably believed would not constitute any offence; or
4. The facts as honestly and reasonably believed would not constitute the offence charged.

Counsel for Mr Bell argued that the fourth of these approaches should be taken; however, the High Court found "it would be self-contradictory for a legal system to conclude, at the same time, that the acts of an accused person, on the facts believed by that person, would be an offence, and also that the actions of an accused person should be entirely excused based on that belief." The court noted that although the belief could not excuse the offence, it could be a matter relevant to sentencing.

The defence of necessity does not allow a person to enter inclosed lands and interfere with a business in order to take chickens said to be held in cruel conditions

The appellant in ***Veira v Cook*** **[2021] NSWCA 302** alleged that her criminal conduct (under s 4B(1)(a) of the *Inclosed Lands Protection Act 1901* (NSW)) was excused on the grounds of necessity caused by animal cruelty occurring in those inclosed lands. Applying the test in *R v Rogers (*1996) 86 A Crim R 542 — whether the unlawful conduct was in response to a threat of death or serious injury to her or some other person — Meagher JA found that the defence of necessity was not available. There was no support for the proposition that the harm need not be of death or serious injury, but rather could be harm to an animal or property.

The Court determined that the applicant was not entitled to respond to threatened harm based on their own value judgment as to how that harm may be weighed against harm involved in their unlawful conduct. The defence of necessity is reserved for circumstances in which there is a threat of death of serious injury that cannot otherwise be avoided and the accused's only course of avoiding that death or serious injury was to disobey the law, there being no reasonable legal alternative.

"In company" not the same as being in joint criminal enterprise

In ***Anda v R*** **[2022] NSWCCA 29** it was determined that there was no inconsistency caused by acquitting one co-accused and convicting the other for an offence committed in company. This charge does not rely on an allegation of joint criminal enterprise.

The applicant argued that because his co-accused was acquitted, he could not be found guilty of an offence committed "in the company of another person", alleging that this required proof that the two offenders share a common purpose. McCallum JA dismissed the appeal, and distinguished between the two "distinct doctrines" of joint criminal enterprise, and offending in company:

- Joint criminal enterprise is an allegation that two or more persons "embarked upon a common purpose to commit a particular offence. It provides a basis for holding one person criminally responsible for the act of another."

- Committing an offence "in the company of" another on the other hand "does not extend criminal liability for the acts of the person charged to the person with whom he is alleged to have been in company". It is simply an aggravating circumstance that makes the offence more serious.

PRACTICE AND PROCEDURE

Standard of proof in s 53A of the Jury Act 1977 (NSW)

Section 53A of the *Jury Act 1977* (NSW) states that the court *must* discharge a juror if the juror *has engaged* in misconduct in relation to the trial. The applicants in ***Zheng v R; Li v R; Pan v R*** **[2021] NSWCCA 78** argued that the court must discharge a juror under s 53A if there is a reasonable *possibility* that they engaged in misconduct. The argument was based on the definition of "misconduct" in s 53A(2)(b) which is effectively: "any other conduct that gives rise to the *risk* of a substantial miscarriage of justice". Specifically, the word "risk" was argued to suggest that a possibility of juror misconduct is enough. Bell P rejected the argument, reasoning that the standard required to prove that the misconduct did occur (in this case, "has engaged in") is not affected by the character of that conduct (in this case, "risk of a substantial miscarriage"). The trial judge did not find a juror had engaged in misconduct and so there was no error in refusing to discharge that juror. The appeal was dismissed.

Appropriate corrections to misleading defence closing which implied there was no forensic evidence available in the trial

KE v R **[2021] NSWCCA 119**: The applicant was charged with multiple child sexual assault offences. There was DNA and medical evidence which neither supported nor detracted from the Crown case and which was not admitted in the trial. In closing, the applicant's counsel pointed out the absence of DNA or medical evidence as a flaw in the Crown case. The trial judge was not impressed and immediately intervened, requiring defence counsel to withdraw the submissions in front of the jury. Additionally, the trial judge urged the jury not to speculate about the DNA and medical evidence in summing up. Garling J (Beech-Jones and N Adams JJ agreeing) was similarly unimpressed. His Honour found that the trial judge's interventions to correct the misleading submissions was appropriate. However, the appeal was allowed on other grounds.

Crown allowed to re-open its case to balance the record

Mr Croft appealed against his conviction on the basis that the prosecution impermissibly split its case: ***Croft v R*** **[2021] NSWCCA 146**. Mr Croft was charged with multiple historical child sexual offences. He did not give evidence but in support of his case he called twelve witnesses, including his wife, who gave evidence to the effect that the applicant is not an angry, aggressive or bad-tempered man. In response, the prosecution were permitted to call two witness who gave evidence of a time when the applicant was angry. Although the prosecution knew in advance of the good character witnesses to be called by the defence, Basten JA held there was no error in permitting the Crown to re-open its case. First, the evidence could not have formed part of the initial prosecution case. Second, the evidence was not a rebuttal of the applicant's good character and did nothing more than balance the record. Finally, the applicant's counsel at trial adduced the evidence of his lack of temper knowing full well there was contradictory evidence.

Statutory provision to assist historic child sex prosecutions applied to pending criminal proceedings

The applicant was charged with several historic child sexual offences. He was arraigned on 29 November 2018. Section 80AF came into force on 1 December 2018. It had the effect of making it easier for the Crown to achieve a guilty verdict for some of the charges. The prosecution later amended the indictment to reflect the s 80AF changes and the applicant was convicted of some of the amended charges.

Simpson AJA rejected the applicant's argument that s 80AF did not apply to his trial: ***Stephens v R* [2021] NSWCCA 152**. First, the presumption against retrospectivity of legislation did not apply because s 80AF is procedural, rather than substantive; the applicant's conduct was criminal at any time during the period encompassed by the charges and s 80AF did not change that. Second, even if s 80AF was substantive, it is clearly intended to apply retrospectively because that is the whole point of the provision. Third, the presumption that legislation will not retrospectively alter a criminal offence where a trial has commenced did not apply because s 80AF did not make past acts criminal. It merely facilitates the proof of criminal conduct.

Button J dissented. His Honour reasoned that s 80AF is a mechanism which expands inculpation. Section 80AF means some accused will now be found guilty where they would have otherwise been acquitted. That is enough for the presumption that legislation will not retrospectively alter a criminal offence where a trial has already *commenced* to apply to s 80AF. Since there was no clear intention to rebut the presumption, s 80AF did not apply to the applicant's trial.

Crown should particularise injury for sexual assault with reckless infliction of actual bodily harm

Mr Irmak and Mr Dagdanasar were charged with multiple counts of sexual intercourse without consent in company and recklessly causing actual bodily harm (s 61JA(1) *Crimes Act 1900*). The particulars of the charges included that the actual bodily harm was caused "immediately before, or at the time of, or immediately after the sexual intercourse". The Court was critical of the Crown for expressing the charges like that because it meant there could be no certainty that the jurors had unanimously found that the same injury had been inflicted at the same time with respect to the same act of intercourse: ***Irmak v R; Dagdanasar v R* [2021] NSWCCA 178**.

However, that did not mean the jury's verdict was unreasonable. The trial judge gave the jury a direction identifying the evidence of injury referable to specific acts of intercourse. There was also only one count where the offenders were found guilty which had evidence of harm referable to it. Finally, the following evidence was capable of supporting an inference that actual bodily harm was caused during that specific instance of anal intercourse, despite a lack of medical evidence: tenderness upon medical examination, pain in the hours following the intercourse, the complainant's evidence of feeling uncomfortable

at the time of penetration and the fact she had been given drugs which would have dulled the pain.

Raising a defence for first time in closing address causes unfairness to Crown

Defence counsel in the applicant's trial for driving in a dangerous manner causing death did not raise the argument that the applicant might have fallen asleep at the wheel until closing addresses. The trial judge told the jury to disregard the submission because there was no evidence to support it. Simpson AJA (***Rummukainen v R*** **[2021] NSWCCA 188**) held that the trial judge acted appropriately and also took the opportunity to criticise defence counsel at trial for raising the argument at such a late stage. While s 160(2) *Criminal Procedure Act 1986* allows the Crown to respond to newly "asserted facts" in the defence closing, the provision did not apply here because defence counsel was making an argument, not asserting facts. Therefore, the late argument introduced unfairness to the Crown because there was no opportunity to respond.

Correct "test" to apply in setting aside a subpoena

In ***Waters v Secretary of the Attorney-General's Department (Cth)*** **[2021] NSWCCA 193**, Davies J considered what test should be applied when deciding to set aside a subpoena. His Honour pointed out that initially in criminal law the test was whether (a) a legitimate forensic purpose for the access can be identified and (b) whether it is "on the cards" that the documents will materially assist the case. However, recent NSW appellate decisions in both criminal and civil jurisdictions appear to have lowered the bar so that it is generally sufficient if the documents sought to be produced on subpoena have an apparent relevance to the issues in the case. The formulation of the correct test was not determinative in this case, though, because the primary judge had accepted that the subpoena which the respondent sought to have set aside had a legitimate forensic purpose but correctly concluded that there was no evidence to support the purpose.

Timing of pre-recorded evidence warning in child sexual offence trials within judge's discretion

The applicant was convicted by a jury of multiple child sexual offences. The victims' evidence in the trial was given by way of audio-visual recording of police interviews, and from a remote location by audio-visual link for the purposes of further questioning. The trial judge gave the jury warnings in accordance with ss 306X and 306ZI to the effect that they were not to make anything of the way the evidence was given. The applicant did not take issue with the substance of the warnings but argued that the warning should have been given at the time and every time relevant evidence was given. Adamson J (Basten JA agreeing) rejected the argument, instead finding that the timing of the warning and how often it is repeated is up to the discretion of the trial judge: ***Long (a pseudonym) v R*** **[2021] NSWCCA 212**. The timing in this case was appropriate because there was a relatively small gap between the warning and the evidence, and the substance of the warning was repeated immediately prior to the evidence being replayed. Basten JA and Adamson J also cautioned that repeating the warning too often could defeat its purpose.

Pre-recorded evidence warning in child sexual offence trials not always required for replays

Section 306X of the *Criminal Procedure Act 1986* relevantly states:

> "[i]f a vulnerable person gives evidence of a previous representation wholly or partly in the form of a recording made by an investigating official in… any proceedings in which there is a jury, the judge must warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the evidence being given in that way."

The applicant argued that the trial judge erred by failing to give this warning to the jury when they asked to replay the victim's evidence during deliberations. Bathurst CJ rejected the argument, stating that while it is preferable to give the warning again when the evidence is replayed, the failure to do so in this case was not a miscarriage of justice because: (a) the warning was given immediately before the evidence was given during the trial only six days earlier, (b) the judge made remarks at the time the evidence was replayed which reinforced the earlier warning, (c) the evidence adduced in the trial did not cause any issues of imbalance when the recording was replayed (***JT v R* [2021] NSWCCA 223**).

Non-publication order sought in District Court re murder proceedings in the Supreme Court

An appeal against a decision in the District Court to refuse to make a non-publication order that would apply to details of recent murder proceedings in the Supreme Court, involving persons due to undergo a trial in the District Court, was refused in ***Sultani v R; Shekeb v R; Abdaly v R; MD v R; Baines v R; Munshizada v R; Hosseinishoja* v R [2021] NSWCCA 301**. Beech-Jones CJ at CL found that any application should have been brought before the judge presiding over the murder proceedings in the Supreme Court, rather than in the District Court.

Bringing the application for the non-publication order had "the hallmark of an abuse of process", appearing to be an attempt to subvert the determination of Fagan J who presided over the matters in the Supreme Court and was the judicial officer best placed to address the considerations of open justice relevant to the murder trials. His determination should not be undermined by seeking orders from the District Court.

Non-publication order re proceedings in Supreme Court sought to protect integrity of trial in District Court refused

In ***Munshizada v R; Baines v R; Danishyar v R; Hosseinishoja v R; Shekeb v R; Abdaly v R* [2021] NSWCCA 307** there was an appeal against a decision by the judge presiding over the murder proceedings in the Supreme Court to refuse a non-publication order in respect of those proceedings, following the failure of a like application in the District Court.

When determining the necessity of the continuation of a non-publication order, the court must consider the alternative relief available, as well as the risk that trial dates will have to

be vacated if the orders are not extended. That risk must be more than a possibility – there must be a "high degree of confidence" that this result would eventuate. This high degree of confidence was absent. Further, there was a strong possibility that many of the matters subject to the proposed order would become known to the jury in the course of proceedings. While the court conceded that there was a difference between information coming to the attention of the jury via the media rather than in the controlled environment of the court room, it was held that the potential prejudice arising from these matters could be managed with "carefully formulated directions" when they arose in the course of the trial. The applications were therefore dismissed.

Scope and limits of a Crown Prosecutor's closing address

Zurshig v R **[2021] NSWCCA 309** involved an appeal against conviction for sexual assault, including on the ground that the Crown Prosecutor made disparaging submissions about the defence case in closing address which caused a miscarriage of justice. (Despite no application having been made to discharge the jury.) The Crown had submitted that the applicant's version — that the sexual intercourse with a heavily intoxicated 23-year-old women in his car (which she thought was an Uber she had called to take her to hospital for fear she was overdosing) was consensual — was objectively improbable. Counsel for the defence submitted that the address cast racist aspersions on the accused and invoked the discriminatory suggestion that the victim would not have consented to sex with the man as he was Mongolian and middle-aged.

Adamson J found that the Crown address caused no miscarriage of justice. In closing address, the Crown is not permitted to make submissions not based on the evidence, use inflammatory comments that arouse prejudice or emotions, make comments that belittle or ridicule the accused's case, impugn the credit of a Crown witness if leave was not sought to cross examine that witness, or convey personal opinions. However, the Crown is entitled to firmly put their case to the jury, and to call upon the jury to reject the defence case as "inherently unbelievable" (*Hughes v R* (2015) 93 NSWLR 474). Basten JA added that it is best that "colourful language" and appeals to "instinctive responses" are avoided in a Crown's closing address.

SENTENCING – GENERAL ISSUES

No assistance discount for admissions in context of an otherwise viable Crown case

R v SS **[2021] NSWCCA 56** was a successful Crown appeal. The sentencing judge had given the offender a discount for assisting authorities because he admitted to shaking his baby like a ragdoll. The admission was argued to have allowed the Crown to exclude the possibility that another member of the family with care of the baby was responsible. R A Hulme J held that no discount should have been given because: (a) there was no evidence that police had *not* suspected the offender before his admissions were made; and (b) there was evidence which could support a circumstantial case against the offender even without the admissions. Additionally, the sentencing judge erred by failing to consider the mandatory factors relevant to a discount for assistance in s 23(2) of the *Crimes (Sentencing Procedure) Act 1999*.

Fixed term aggregate sentence interpreted as the non-parole period

The sentencing judge set an aggregate sentence of 20 months imprisonment for two indictable offences and four summary offences. The sentence was expressed as a "fixed term" and the judge stated he was "declining to set a non-parole period once I have settled upon the aggregate sentence". In ***Tuesley v R*** **[2021] NSWCCA 58**, Davies J interpreted the aggregate sentence and indicative sentences for each offence, not as reflecting head sentences, but as non-parole periods because: (a) it would be consistent with the findings of objective severity; (b) the judge commented that non-parole periods are referred to as fixed terms; and (c) the judge found that there would be no point in imposing a balance of term with supervision. This interpretation meant Davies J found there was no error under s 45(1A) *Crimes (Sentencing Procedure) Act 1999* which requires that a fixed term set for a standard non-parole period offence must be at least as long as the non-parole period if one was set.

NOTE: Approaching the sentencing exercise in the way the Court found the sentencing judge did in this case poses difficulties and is contrary to legislative policy. Most significantly, a non-parole period is not set without a view having been formed about the appropriate head sentence, and a non-parole period is not necessarily a fixed proportion of the head sentence.

Assistance to authorities: Crimes Act (Cth), s 16A(2)(h) and Crimes (Sentencing Procedure) Act, s 23

The applicant in ***Huggett v R*** **[2021] NSWCCA 62** was sentenced for two Commonwealth offences of accessing child pornography and two State offences of possessing child abuse material. The offences were discovered when the applicant had the misfortune of police examining his mobile phone for unrelated reasons. Police returned to the applicant's home the next day to arrest him. While being arrested, he told the police that he also had child abuse material on his laptop. The material on the laptop only related to the State offences. Johnson J rejected the argument that the sentencing judge failed to consider the applicant's assistance to authorities. First, the assistance had nothing to do with the Commonwealth offences for the material on his phone, meaning there was no need to consider it. Second, the sentencing judge did in fact have regard to his co-operation for the State offences. Furthermore, in all likelihood the police would have found the material on the laptop anyway.

Injuries not substantial in light of Crown concession

After someone crashed into the new car Mr Chemaissem had just bought his girlfriend, he hit the person twice in the back of the head, causing multiple wounds and a fractured skull. Mr C pleaded guilty to wounding with intent to cause grievous bodily harm. At sentence, the Crown stated: "Professor Duflou indicated in his opinion that the injuries are not of a really serious nature. Well, that of course is made plain by the offence… the Crown does not say there is really serious harm". In ***Chemaissem v R*** **[2021] NSWCCA 66**, Bellew J (Campbell

J agreeing) saw this as a concession by the Crown that the injuries were not substantial. Therefore, it was an error to use the injuries as an aggravating factor and the appeal was allowed. Brereton JA dissented, reasoning that the Crown's concession related only to whether the harm was "really serious" not whether it was substantial.

Incompetence of counsel may also explain asserted breach of procedural fairness

During a "super call-over", the applicant's lawyer made almost no submissions about the sentence to be imposed on the applicant and relied on no material in mitigation. Garling J found that there were two, equally open inferences which could be drawn from the record: (1) the lawyer was instructed not to make any further submissions; (2) the lawyer was incompetent. Therefore, his Honour rejected the applicant's argument that the lawyer's incompetence had caused a breach of procedural fairness on the face of the proceedings. His Honour also noted there was nothing placed before the appeal court as to evidence or submissions that could have been put forward at first instance: ***Harrold v R*** **[2021] NSWCCA 88**.

Special circumstances in the context of accumulation upon a pre-existing sentence

The applicant was sentenced to a head sentence of 7 years imprisonment for offences committed while in custody serving another sentence. The sentencing judge made a finding of special circumstances and reduced the non-parole period ratio to 57%, leading to a non-parole period of 4 years. The sentence was to be served consecutively with the previous sentence which meant the ratio between the overall period of minimum custody and overall sentence was 76.9%. N Adams J rejected the applicant's argument that the sentencing judge must have intended to reduce this overall ratio of 76.9% because there were special circumstances: ***Tammer-Spence v R*** **[2021] NSWCCA 90**. Her Honour set out two main reasons: (1) the sentencing judge expressly stated one of the reasons for finding special circumstances was "the accumulation of sentences"; and (2) if the ratio was reduced any further below 57% it would fail to reflect the criminality of the offences committed in custody.

Fact finding for offences with multiple possible particulars

Mr Gould was convicted by a jury of an offence against s 43 of the *Crimes Act 1914* (Cth). The Crown case was that he attempted to either obstruct, prevent, pervert or defeat the course of justice. Each of these alternative bases of liability arose from Mr Gould's attempt to coach a witness in Federal Court proceedings. Mr Gould was sentenced on the basis that all four bases of liability were proved. Adamson J (Bathurst CJ and Davies J agreeing) held that the sentencing judge did not err by making their own findings which were within the bounds of the jury's verdict. Adamson J explained that the approach in *Chiro v R* (2017) 260 CLR 425; [2017] HCA 37, which requires a sentencing judge to take the view of the facts most favourable to an offender, applies only to omnibus offences made up of other single offences of different types (e.g., an offence of persistent sexual exploitation). This was not such a case and there was no danger that Mr Gould was sentenced for an offence which the jury did not find him to have committed: ***Gould v R; R v Gould*** **[2021] NSWCCA 92**

ICO - confusion in relation to principles applicable

A significant issue in ***Mandranis v R*** **[2021] NSWCCA 97** was the proper interpretation of s 66 *Crimes (Sentencing Procedure) Act 1999* (NSW) which provides as follows:

> **66 Community safety and other considerations**
>
> (1) Community safety must be the paramount consideration when the sentencing court is deciding whether to make an intensive correction order in relation to an offender.
>
> (2) When considering community safety, the sentencing court is to assess whether making the order or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending.
>
> (3) When deciding whether to make an intensive correction order, the sentencing court must also consider the provisions of section 3A (Purposes of sentencing) and any relevant common law sentencing principles, and may consider any other matters that the court thinks relevant.

Simpson AJA explained that on one hand is Basten JA's "restrictive" approach in *R v Fangaloka* [2019] NSWCCA 173 at [63] to the effect that an ICO must be more likely to address the risk of reoffending than imprisonment before one may be ordered. On the other hand, Beech-Jones J stated in *Casella v R* [2019] NSWCCA 201 at [108] that s 66(2) merely designates the relative effect of an ICO or imprisonment on the risk of reoffending as one mandatory factor when considering community safety. In other words, the comparison is not determinative. Ultimately, Simpson AJA adopted the latter approach and concluded an ICO was appropriate.

NOTE: At [63] of his judgment, Basten JA referred to a "restrictive rather than facilitative" view of s 66 as "an alternative reading", and then at [65], set out a "better view". The latter is actually consistent with the approach preferred by Simpson AJA.

Likelihood of deportation still not relevant to NSW sentencing

Mr Afful was sentenced to a significant term of imprisonment for drug offences. Three years into the sentence he was notified that his visa would be cancelled because of his crimes, resulting in deportation at the end of the sentence. Mr Afful argued on appeal that the pending deportation made his time in custody more burdensome and, therefore, the sentence was manifestly excessive. N Adams J rejected the argument, pointing out that it is well settled in NSW that the fact of possible or pending deportation is not relevant to sentencing: ***Afful v R*** **[2021] NSWCCA 111**. In any event, Mr Afful's case could be distinguished from Victorian authority he relied upon because he had applied to the Minister to have the cancellation revoked. Since that application was not yet determined and could be subject to judicial review, it was unclear whether he would even be deported.

ICO - s 66 Crimes (Sentencing Procedure) Act must be considered if ICO sought

Mr Edelbi pleaded guilty to several dishonesty offences for embezzling money as a CTP claims processor. Submissions were made about whether any sentence might be served in

the community. The sentencing judge indicated that careful consideration would be given to the issue, but this was not reflected in the sentencing remarks. Particularly, no reference was made to s 66 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) which sets out mandatory considerations when deciding whether to make an intensive correction order. Referring to recent case law, Hidden AJ held that the sentencing judge erred by failing to address the considerations in s 66: ***R v Edelbi*** **[2021] NSWCCA 122**. In the end, the applicant was resentenced to a shorter sentence to be served by way of an intensive correction order.

No need to take 9-month rehabilitation program into account as "quasi-custody" on sentence

Garling J rejected the applicant's appeal against sentence which argued that the sentencing judge erred by failing to reduce or backdate his sentence on account of him having undertaken a residential rehabilitation program for nine months in compliance with a bail condition. Whether a bail condition amounts to "quasi-custody" is a question of fact and the effect of the quasi-custody on the sentence is a matter for the sentencing judge's discretion. The residential rehabilitation in this case did not need to be taken into account to reduce or backdate the sentence because it was unclear how the applicant's liberty was restricted. The restrictions cannot have been too onerous because he was able to obtain full time employment and even become betrothed to someone who was not even working at the residential program: ***La v R*** **[2021] NSWCCA 136**.

Irrelevant that one of multiple offences could have been dealt with summarily

The applicant in ***Cordoba v R*** **[2021] NSWCCA 144** fell foul of two notorious concepts in criminal appeals: (1) hypothetical scenarios are generally unhelpful, and (2) a criminal appeal is not an opportunity to re-argue a case. He had been sentenced for a number of offences, including a fraud offence of over $1 million. One of the offences was a Table 1 offence which could have been dealt with summarily. N Adams J held that the sentencing judge did not err by failing to consider that if the Table 1 offence was dealt with summarily, a lower maximum sentence would have applied. Such a situation was merely a hypothetical and was not even an argument put before the sentencing judge.

ICO – a "model" approach to consideration of whether to impose an ICO

Adamson J praised a "model" application of the law by Lerve DCJ to determine whether an intensive correction order (ICO) was appropriate: ***Elphick v R*** **[2021] NSWCCA 167**. First, his Honour referred to s 66 of the *Crimes (Sentencing Procedure) Act 1999* and the relevant case law interpreting the provision. Second, he concluded no finding could be made about whether an ICO or full-time custody would be more likely to address the risk of re-offending because the offender was equally *un*likely to reoffend either way. This conclusion meant s 66(2) was neutral and the assessment of the purposes of sentencing, as required by s 66(3), was critical to deciding whether an ICO was appropriate. Applying the purposes of sentencing, Lerve DCJ held that an ICO was not appropriate because the severity of the offending and need for general deterrence outweighed the offender's strong subjective case.

No need to expressly state potentially aggravating factors which are not taken into account

In a relief for District Court judges, Harrison J resisted Mr Ali's suggestion that a sentencing judge should list all matters potentially adverse to an offender which have not been taken into account. His Honour pointed out that such a requirement would be unnecessarily burdensome. Mr Ali had pleaded guilty to firearm offences relating to a single firearm. The sentencing judge found it was not used in connection with criminal activity but did not expressly address Mr Ali's submission at sentence that he did not *intend* to use the firearm in connection with criminal activity either. Harrison J concluded there was no need to because the difference was merely semantic, and the intention was not taken into account: ***Ali v R* [2021] NSWCCA 174**.

Correct application of s 16A(2)(fa)(ii) of the Crimes Act 1914 (Cth)

The applicants were sentenced for conspiring with each other and others to import tobacco without paying duty. Mr Jomaa abused his position as a licensed customs broker as part of the offence. The sentencing judge found that his position meant s 16A(2)(fa)(ii) of the *Crimes Act 1914* (Cth) applied to Mr Jomaa. The provision relevantly states

> "(2) … the court must take into account … (fa) the extent to which the person has failed to comply with:…(ii) any obligation under a law of the Commonwealth… *about pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence.*" (emphasis added)

Consistently with the Crown's concession, Beech-Jones J found that Mr Jomaa's position had nothing to do with disclosure in proceedings and so the sentencing judge had made an error. Ultimately, the appeal was dismissed because no lesser sentence was warranted in law (***Assi v R; Jomaa v R* [2021] NSWCCA 181**).

Whether Bugmy *extends to isolated traumatic incidents an open question*

There was a divergence in opinion about whether the sentencing judge in ***Nasrallah v R* [2021] NSWCCA 207** had adequately taken into account the applicant's background. The applicant had suffered two isolated incidents of trauma which a psychologist report opined had led to suicidal ideation, drug abuse and her offending. On one hand, Bell P and Price J held that it was open to the sentencing judge to find that the applicant's history was tragic but did not involve profound deprivation such as to attract the *Bugmy* principles. In any event, the judge adequately considered the applicant's background. Hamill J, on the other hand, felt the trial judge erred by focussing too much on whether the case fitted the description in *Bugmy*, rather than the effect of the circumstances at hand. According to his Honour, the applicant's background was one of profound deprivation.

Interestingly, Bell P (Price J agreeing) raised the issue of whether the *Bugmy* principles are limited to cases involving an *endemic* environment of deprivation or whether they might

extend to cases where there is merely an isolated incident of trauma. However, his Honour found it was not necessary to set the limits of *Bugmy* in this case and left the question open.

ICO - no error where no express reference to s 66 considerations

***Mourtada v R* [2021] NSWCCA 211:** Mr Mourtada was sentenced to an aggregate sentence of 21 months and 3 weeks for Commonwealth offences. When sentencing him, the sentencing judge found that an intensive correction order (ICO) was not appropriate because of the objective seriousness of the offending and the need for general and specific deterrence. No reference was made to the mandatory considerations for determining whether to impose an ICO in s 66 of the *Crimes (Sentencing Procedure) Act 1999*. Nonetheless, Basten JA (Adamson J and Campbell J agreeing) held that the sentencing judge had appropriately considered s 66 without expressly referring to it. Basten JA pointed out that s 66 must have been considered because it was expressly referred to in an exchange with counsel. Adamson J added that the judgment as a whole reflected appropriate application of s 66.

Basten JA also took the opportunity to clarify his judgment in *R v Fangaloka* [2019] NSWCCA 201 which had led to an unfortunate divergence in the law about how to correctly apply s 66. It might now have been made clear there is *no need* to reach a favourable opinion that an ICO would be more likely to reduce reoffending before an ICO can be imposed.

De Simoni *principle – statutory indications the only guide as to which offences are more serious*

Section 62(1)(a) of the *Firearms Act 1996* (NSW) creates an offence of shortening a firearm while s 62(1)(b) creates an offence of possessing a shortened firearm. Both have the same maximum penalty. Mr Weaver pleaded guilty to the latter offence. When sentencing him for that possession offence, the sentencing judge considered that the fact he had shortened the firearm himself aggravated the objective severity. One of Mr Weaver's grounds of appeal was that the trial judge breached the *De Simoni* principle which prevents circumstances being taken into account as aggravating factors when they would have warranted a conviction for a more serious offence: ***Weaver v R* [2021] NSWCCA 215**. Garling J rejected the argument, reasoning that the identical maximum penalties mean neither offence is more serious. His Honour also commented that reference to relative levels of inherent moral culpability is unhelpful in determining the relative severity of offences. Instead, statutory indications such as the maximum penalty and whether the offence has a statutory non-parole period provide the only guide for the *De Simoni* principle.

Unsworn statements by offender at sentence strongly discouraged

Bellew J in ***Lai v R* [2021] NSWCCA 217** rejected a complaint that the applicant's sentence was disproportionately disparate (not low enough) compared with his co-offenders' sentences. He was also critical of the applicant for tendering an unsworn statement in his case on sentence without giving sworn evidence. His Honour reiterated that such statements are of little to no value and there is no utility in tendering them.

No need to expressly refer to all aspects of the principle of totality

Mr Hall was sentenced to a significant aggregate sentence for multiple offences relating to his conduct in detaining and sexually abusing the victim over many hours. The overall sentence included partial accumulation in respect of each offence to reflect the principle of totality. Despite similar arguments having already been rejected in the CCA, Mr Hall appealed against his sentence arguing that the judge erred by failing to expressly refer to three aspects of the principle of totality: (1) the severity of the sentence is not linear, (2) it is necessary to take one last look at the sentence to see if it looks wrong, (3) "crushing" sentences should be avoided. R A Hulme J's judgment rejecting the argument was essentially a long-winded way of saying that sentencing judges don't need to spell out that they have correctly adverted to relevant sentencing principles (***Hall v R* [2021] NSWCCA 220**). Specifically, it is enough that a judge is mindful of the need for the overall sentence to reflect the totality of the criminality. That was done appropriately by the sentencing judge in this case.

Procedural fairness: favourable material about assistance to authorities to be provided to offender's counsel

A High Court decision, subsequent to the applicant's sentence (*HT v The Queen* (2019) 269 CLR 403; [2019] HCA 40) held that an offender was denied procedural fairness when his counsel was unable to view favourable material on sentence which detailed that offender's assistance to authorities. The relevant facts in that case were directly analogous to the applicant's case: ***Jones (a pseudonym) v R* [2021] NSWCCA 225**. In response, the Crown sought to distinguish the two cases by pointing to the fact that the applicant's counsel at sentence chose not to look at the material, saying "if it's assisting, your Honour, I don't necessarily need to see that". However, Cavanagh J found the applicant was denied procedural fairness because his counsel did not have a *real* choice for three reasons: (1) he had not seen the material, (2) there was a risk of an adjournment when this was the 6th day the matter had been listed for sentencing, and (3) the judge was suggesting the material was very favourable to the applicant. The matter was remitted to the District Court for re-sentence.

Quasi-custody taken into account in sentencing

***R v Quinlin* [2021] NSWCCA 284** concerned a Crown appeal against a sentencing judge's decision to back date a sentence by 6 months in order to allow for a period of "quasi-custody." The court dismissed the appeal, finding that the judge was entitled to backdate the sentence in order to allow for the 21-month period in which the offender had been on conditional bail. Price J stated that "there will be occasions where bail conditions are so harsh or restrictive that they may require a conclusion that at least some part of the period on bail should be treated as the notional equivalent of custody, conveniently referred to as "quasi-custody"." In this case, the judge had considered the following:

- A strict curfew preventing drinking and socialising with friends.

- A ban on attending Nambucca Heads, preventing the offender seeing friends and family and connecting with his culture.
- Delay which extended the length of time on conditional bail.
- The offender's mental health conditions which increased the burden of the bail conditions.
- The isolation and difficulty experienced by the offender while awaiting sentencing.

No non-parole period in the case of a repeat domestic violence offender

In ***Many v R*** **[2021] NSWCCA 302** the sentencing judge erred by not taking into account a period of interstate custody when considering the issue of totality, so the Court was required to re-exercise the sentencing discretion afresh. This led to the appeal being dismissed because no lesser sentence was warranted in law. In fact, it was found that the appropriate sentence was one that would "significantly exceed" that which was imposed by the sentencing judge.

Simpson AJA noted that under s 45 of the *Crimes (Sentencing Procedure) Act 1999* she would decline to set a non-parole period. That was due to the "nature of the offence" and the "antecedent character' of the applicant, the offences all being of domestic violence, and the applicant being a "repeat domestic violence offender." The applicant had been given parole opportunities in the past, and Simpson AJA found that leniency was unlikely to produce any beneficial result, that the applicant was likely to reoffend when released into the community, and so the leniency of setting a non-parole period should not be awarded.

Form 1 procedures not complied with but no prejudice as a result

Dale v R **[2021] NSWCCA 320** concerned a Form 1 listing two offences that was handed to the judge in sentence proceedings for 2 offences of ongoing supply of heroin. On appeal it was contended that the Form did not comply with the requirements of s 32 of the *Crimes (Sentencing Procedure) Act 1999* in that it had not been signed by or on behalf of the Director (s 32(4)(c)). Basten JA dismissed the appeal and found that although the procedural steps in ss 32 and 33 of the Act are important, in these circumstances the failure to follow them did not amount to a miscarriage of justice. There was no "practical consequence" of the Director having not signed the Form 1, where it had been signed by the Offender.

The Form 1 also failed to identify with precision the "principal offence" to which the additional offences were attached. Basten JA found that there was no "material prejudice to the offender" caused by this, rejecting the challenge to the sentence. In sentencing proceedings, the parties had proceeded on the basis that the additional offences attached to sequence 3, and so any omission on the form was "resolved by agreement".

A further complaint regarding the Form 1 was that s 33, requiring the court to ask the offender whether she wanted the court to take the further offences into account, was not complied with. However, counsel's submissions had expressly acknowledged that these offences were intended to be taken into account. Although "formalities should be attended to, wherever appropriate", a failure to comply with formalities will not form the basis of

appeal in circumstances such as these where "there is no shred of evidence that the applicant did not consent or did not wish the further offences to be taken into account."

Discount for plea of guilty to manslaughter when pre-committal offer to do so was rejected

An offer by the applicant in ***Black v R*** **[2022] NSWCCA 17** to plead guilty to manslaughter was rejected by the prosecution and in his trial, he pleaded not guilty to both murder and manslaughter. When the trial was adjourned for a few days to await the attendance of a witness, the applicant renewed his offer to plead to manslaughter which the Crown accepted. The sentencing judge allowed a discount of 10% in accordance with s 25D(1)(b)(ii) of the *Crimes (Sentencing Procedure) Act 1999*. On appeal it was found the discount should have been 25% per s 25E.

The critical question was whether manslaughter was a "different offence" – that is "not the offence the subject of the proceeding when the offer was made". Simpson AJA held that "the use of the definite article in s 25E(1)(b) is a clear indication that the legislature contemplated that … only one offence – the principal offence– is the offence the subject of the proceedings". Here the principal offence was murder and manslaughter was a "different offence". This construction of the statutory provisions, according to Simpson AJA, provided a fairer result and served the function of incentivising offenders to offer realistic pleas of guilty.

ICO - no requirement to consider s 66 criteria if full-time imprisonment must be imposed

The applicant in ***Thurlow v R*** **[2022] NSWCCA 20** contended a judge erred in her approach to the provisions of the *Crimes (Sentencing Procedure) Act 1999* relating to intensive correction orders (ICOs). Her Honour failed to properly consider s 66 and should have imposed an ICO instead of imprisonment.

Bellew J held consideration of the ss 66(1) and (2) criteria come into play at the end of the sentencing process and not at the beginning. Here, the judge determined that no other sentence than full-time imprisonment was appropriate, and so consideration of s 66 became unnecessary. Her Honour did not need to consider s 66(2) before reaching a conclusion as to the necessity of a full-time custodial sentence — these considerations come into play at the end of the sentencing process.

Totality principle where groups of offences separated by time and involve different victims

In ***Haak v R*** **[2022] NSWCCA 28**, Beech-Jones CJ at CL found that sexual offences committed in 2007 against a child were entirely separate to offending that occurred in 2010 concerning three children. The trial judge did not err in applying the principle of totality in these circumstances.

Counsel for Mr Haak contended that the trial judge should have considered the totality principle and followed the approach in *Mill v R* (1988) 166 CLR 59: where an offender has served a sentence for an offence and is later sentenced for similar offences committed "in

the same episode of criminality to their original sentence" then it will be appropriate to "adopt a lower head sentence that reflects the long deferment that has taken place during which the offender has been in custody".

Beech-Jones CJ at CL rejected this and considered that the 2007 offences were "entirely separate" to those than occurred in 2010. The episodes were separated by two to three years and involved different victims. The fact that the 2010 offences were relied on as tendency evidence to support the 2007 offences does not make them part of the same "episode of criminality".

Aggravating factor of offence in the presence of a child inapplicable where child is the victim

The court in ***Arvinthan v R*** **[2022] NSWCCA 44** found the aggravating factor that an offence was committed in the presence of a child has no application where the child is the victim of the offence. The sentencing judge erred in finding that the offences of break and enter and sexual touching were aggravated by the fact that they were committed in the presence of a child under 18 years of age (s 21A(2)(ea)) where that child was the victim of the offence. The fact that the victim of the crime was a child is relevant to the assessment of the objective circumstances, seriousness, and moral culpability of the offending, but does not go to the aggravating factor that the offence occurs "in the presence" of a child. (Leeming JA was in agreement but made some useful further observations about the issue (at [3]-[6]).)

SENTENCING - SPECIFIC OFFENCES

"Mercy killing" still murder

Mr Cooper killed his partner by injecting her with a lethal dose of heroin because she was suffering severe pain from pre-existing medical conditions and because she asked him to. He was sentenced to 13 years and 6 months imprisonment with a non-parole period of 10 years. Bathurst CJ held that the sentence was not manifestly excessive, even though the sentencing judge described the offence as a "mercy killing": ***Cooper v R*** **[2021] NSWCCA 65**. While it was an accurate description, there were facts which weighed against that mitigating aspect of the murder: (a) Mr Cooper deliberately killed the deceased with illegal drugs; (b) Mr Cooper was on conditional liberty at the time; (c) there were two Form 1 offences to be accounted for; and (d) specific deterrence remained of importance because of Mr Cooper's prior convictions and non-compliance with mental health treatment.

Murder without motive and offender mentally ill – error in failing to consider community protection

R v Dong **[2021] NSWCCA 82** was a Crown appeal against the respondent's sentence of 18 years with a non-parole period of 13 years and 6 months for murder. The respondent, who suffered from schizophrenia, had killed his flatmate one evening after turning the power to the house off. There was no apparent motive for the murder. Beech-Jones J agreed with the Crown's argument that the sentencing judge erred by failing to consider the need for

protecting the community. His Honour explained that the sentencing judge only referred to the respondent's mental health in a way which benefitted the respondent. However, in this case which involved a motiveless and premeditated murder and an offender who has poor prospects of rehabilitation, the need to protect the community had to be expressly addressed and the judge failed to do that.

Sexual assault - self-induced intoxication must not be used to support favourable findings on sentence

It was the Crown case that the accused, after having consumed significant quantities of alcohol at a party, had sexual intercourse with the complainant while knowing she was not consenting. The applicant had deceived the complainant by failing to identify himself and so she mistakenly thought he was her boyfriend. Adamson J (Fullerton J agreeing) allowed the Crown's appeal against sentence because the sentencing judge erroneously used the accused's self-induced intoxication. True, the sentencing judge had repeatedly stated that the accused's self-induced intoxication was not taken into account as a mitigating factor on sentence. However, the sentencing judge had taken the self-induced intoxication into account as supporting a finding that the applicant honestly believed the complainant was consenting: ***Fisher v R; R v Fisher*** **[2021] NSWCCA 91**. This was a favourable finding to the accused and so was prohibited by s 21A(5AA) *Crimes (Sentencing Procedure) Act 1999* (NSW).

In dissent, Brereton JA found the judge used the accused's intoxication to rebut the Crown submission that the accused engaged in deception. In other words, it merely negated an aggravating factor relied on by the Crown which was not prohibited by s 21A(5AA).

Murder – two-stage approach to mandatory life sentence approved

Section 61(1) *Crimes (Sentencing Procedure) Act 1999* (NSW) states:

> "A court is to impose a sentence of imprisonment for life on a person who is convicted of murder if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence."

In ***Rogerson v R; McNamara v R*** **[2021] NSWCCA 160**, the Court settled a controversy in the authorities by holding that a two-stage approach to s 61(1) is appropriate. This two-stage approach to s 61(1) is different to the more general two-stage approach to sentencing which was rejected by the High Court in favour of the "instinctive synthesis" approach. In the first stage, the sentencing judge is to assess whether the offence warrants a life sentence because of the circumstances surrounding or causally connected to the offence. Second is an assessment of whether other matters such as remorse, confessions, pleas of guilty and prospects of rehabilitation warrant a lesser sentence. Ultimately, the Court upheld Mr McNamara's life sentence for what was a premeditated and cold-blooded execution.

Breach of interim and extended supervision orders by a high-risk offender

***Monteiro v R* [2022] NSWCCA 37** concerned an appeal by a high-risk offender against the severity of sentence imposed for ten offences of failing to comply with requirements of an extended supervision order and an interim supervision order.

The appeal was allowed on the Court considering that where breaches do not give rise to an increased risk of offending for which a supervision order has been imposed, the offences may be at a lower order of seriousness. Mr Monteiro's breaches did not point to him planning or preparing for the commission of serious sexual or violent offences. Rather, they were breaches of conditions that were imposed to facilitate supervision and fell below the mid-range level of objective seriousness.

SUMMING UP

Consciousness of guilt – alternative innocent hypotheses need a basis in the evidence

***Xie v R* [2021] NSWCCA 1** was concerned with the brutal murder of five family members in their own home. The Crown told the jury that two pieces of evidence were suggestive of the applicant's consciousness of guilt. First, he destroyed his shoes when he learned that footprints were left at the crime scene. Second, the applicant engaged an informant to fabricate exculpatory material. On appeal, the applicant argued that the trial judge's summing up should have referred to possible alternative explanations for his conduct such as panic and the desire to escape an unjust conviction. The Court of Criminal Appeal rejected this argument, stating that hypothetical explanations put to the jury by the judge should have a reasonable basis in the evidence. Without a basis in the evidence, hypothetical explanations would invite speculation or undermine any actual explanation given by the accused.

A non-Murray direction was in fact a Murray direction

The applicant in ***Williams v R* [2021] NSWCCA 25** was convicted by judge alone of two counts of sexual assault which occurred on a couch at the conclusion of a house party. The only evidence of the sexual intercourse having occurred was given by the complainant. The judge warned himself that he must "examine carefully her evidence and be satisfied… beyond reasonable doubt that the complainant is an honest and reliable witness". The judge referred to the warning as a "reliability warning". Adamson J held that this warning amounted to an appropriate *Murray* direction which omitted any reference to the evidence being uncorroborated and, therefore, complied with s 294AA of the *Criminal Procedure Act 1986* (NSW).

Right to silence exercised upon arrest - no need for direction

When he was arrested for robbery and wounding, the applicant exercised his right to silence. He gave evidence at trial that he used a machete to wound the victim because the victim hit him in the head with a toy bat. The Crown questioned why the applicant did not tell police

of the offence with the bat while he was at the police station for other reasons just before he was arrested. Adamson J held that the trial judge made no error by not directing the jury that the applicant exercising his right to silence could not be used against him: ***Taylor-Joycey v R*** **[2021] NSWCCA 29**. This was mainly because: (a) the prosecutor made no suggestion that his silence should be used against him and (b) the judge was entitled to rely on the judgment of the applicant's trial counsel who, justifiably, did not object to the evidence nor seek a direction about his silence.

Limit of judge's role in summing up a child sexual abuse case

At the end of the child sexual abuse trial in ***Decision Restricted*** **[2021] NSWCCA 47**, the trial judge made comments which Johnson J found: (a) effectively expressed expert opinion on the credibility issues in the trial; (b) attributed arguments to the Crown regarding the credibility of the complainants which were not made by the Crown; and (c) were too frequent in referencing the generalisations about the quality of evidence from child complainants. These irregularities in the summing up caused a miscarriage of justice and a new trial was ordered. To take one example where the judge stepped outside the limits of a summing up, the judge said to the jury: "Remember their [the complainants'] age, their emotional states, the frequency of events and that that would provide you with some understanding of why there would be some memory and some confusion as between events and perhaps loose language."

Complaint evidence not "independent" from complainant's evidence in court

When summing up a trial for child sexual offences against two complainants in ***BS v R*** **[2021] NSWCCA 39**, the trial judge said: "you can use [the initial complaints] as some evidence independent of… their evidence here in Court". The judge then went on to say: "A false or inaccurate statement does not become more reliable just because it is repeated on one or more occasions." Although Davies J held that it was wrong to use the word "independent" because the complaint came from the same person as the evidence in Court, he dismissed the appeal because the later qualification tempered the error. Fagan J agreed but added that, even without the qualification, it was obvious to the jury that the expression "independent of" did not mean the complaints came from a source separate from the complainants themselves.

NOTE: The Criminal Trial Courts Bench Book has been amended by substituting the words "additional to" for "independent of" to avoid future misconstruction.

Jury directions must be delivered orally even if there are written directions

The appellant in ***Trevascus v R*** **[2021] NSWCCA 104** was charged with robbery and attempted carjacking. When summing up, the trial judge provided the jury with two documents called "Jury Question Trails" which set out the questions which the jury needed to be satisfied of beyond reasonable doubt to reach a verdict of guilty. The trial judge then took a short adjournment to allow the jury to read the documents in the jury room. No further oral directions were given about the question trails. Bellew J agreed with the

appellant that the trial judge's failure to orally explain the documents caused a miscarriage of justice. The appeal was allowed, and a retrial was ordered. His Honour also set out some guiding propositions relating to jury directions:

- oral directions are always necessary;
- written directions may be an aide to, but not a substitute for, oral directions;
- it is always necessary to emphasise to the jury that any written directions provided are not a substitute for the oral directions. It is also prudent to reiterate this distinction in the written direction; and
- judges should not allow the jury to retire to the jury room and read the document to themselves.

Inculpatory conversation relied on by the Crown needed explanation by the trial judge

There was evidence in the applicant's trial for historic child sexual offences of a recorded conversation between one of the complainants and the applicant. In the recording the complainant accused the applicant of abusing them many times. In response, the applicant said "Did I?" and "Was I?". The Crown, without further explanation, referred to the applicant's recorded responses in closing to the jury as one of the reasons to find the applicant guilty. The trial judge's summing up also lacked any explanation of how the jury might use the recorded conversation. Price J found that a miscarriage of justice and breach of the trial judge's overriding obligation to secure a fair trial was caused by the lack of explanation: ***Decision Restricted*** **[2021] NSWCCA 124**. The trial judge needed to ask the Crown precisely how the conversation inculpated the accused and, if the answer was unsatisfactory, direct the Crown to withdraw the submission before the jury. If a satisfactory answer was given, then an appropriate direction should have also been given.

Summing up too critical of defence closing address

The closing address by Mr Kayirici's counsel was misleading and his attempt at explaining the inculpatory evidence farcical, but the response by the trial judge was contended on appeal to have occasioned a miscarriage of justice. Ierace J commented that the trial judge's criticisms were individually justified and that the Crown case on at least one count was strong, if not overwhelming. However, Ierace J found that the summing up by the trial judge was too critical and sceptical of the defence, especially in the context of a strong Crown case, such that it was so lacking in balance and caused a miscarriage of justice: ***Kayirici v R*** **[2021] NSWCCA 127**.

Zoneff direction not required where prosecutor did not rely on lies

Holt v R **[2021] NSWCCA 140**: N Adams J rejected an argument by the applicant that a *Zoneff* direction, to the effect that lies allegedly told by him could not be used as evidence of guilt, needed to be given to the jury in his trial. The applicant was charged with having non-consensual sexual intercourse with his friend one morning after a house party. His version of events over time was said by the Crown to be inconsistent. He had also deleted a photo,

which was taken at the time of the offence, the next day. A *Zoneff* direction was not needed for either of these aspects of the evidence because it would have been the first suggestion to the jury that the applicant had lied. Leave under r 4 of the Criminal Appeal Rules was refused because no issue was taken by counsel at trial.

No need to explain "beyond reasonable doubt" to jury

One of the grounds in Mr Croft's appeal against conviction for child sexual offences was that the trial judge erred by failing to explain the meaning of "beyond reasonable doubt": ***Croft v R* [2021] NSWCCA 146**. The various complaints, and the response by Basten JA to each, were:

- Instead of declining to explain the term "beyond reasonable doubt", it should have been contrasted with the civil standard of proof – rejected because such an explanation is not always helpful and there is no obligation to contrast the two standards.
- The trial judge should not have directed the jury that "beyond reasonable doubt" is a question of fact for the jury to decide – rejected because all the trial judge did was make clear that determining the standard involves a question of fact finding.
- The direction should not have been referred to as a "rather longwinded apology" – rejected because it is obscure to suggest the reference to an apology caused any prejudice to the applicant.

Liberato direction not required where defence bore an onus of proof

Mr Yacoub was charged with dealing with the proceeds of crime under s 193C(1) *Crimes Act 1900*. The only issue in the trial was whether there were reasonable grounds to suspect that the property is proceeds of crime. Mr Yacoub sought to rely on the defence in s 193C(4) by establishing on the balance of probabilities that he had no reasonable grounds to suspect the property was the proceeds of crime. On appeal in ***Yacoub v R* [2021] NSWCCA 166**, Basten JA held that the jury direction given by the trial judge was appropriate. After discussing the issue with counsel, the trial judge explained to the jury that it needed to be satisfied of the elements of the offence *before* it considered whether Mr Yacoub had made out his defence on the balance of probabilities. That was sufficient. This was not an appropriate case for a *Liberato* direction to the effect that even if the jury did not believe, on the probabilities, the applicant's defence the obligation on the prosecution to prove its case beyond reasonable doubt remained and it was not necessary that the jury believe his defence before finding a reasonable doubt as to his guilt.

Complaint evidence direction – technical legal error did not cause a miscarriage of justice

***Long (a pseudonym) v R* [2021] NSWCCA 212** was another case (see *BS v R* [2021] NSWCCA 39 above) in which it was contended that when a judge told a jury in accordance with a suggested direction in the Criminal Trial Courts Bench Book that complaint evidence could be used as "some evidence independent of the evidence given by the complainant in the trial", the judge was saying it was evidence "independent of the complainant" (which of

course it was not). The contention found favour with Basten JA and Adamson J who considered that use of the word "independent" was a technical legal error because both the initial complaint and the allegation of sexual offending at trial came from the same source, the complainants. However, their Honours refused to grant leave on this issue, first because no objection was taken at trial (unsurprisingly). Second, the jury would have understood use of the word "independent" as meaning "separate to" in the context of the direction, rather than in the technical legal sense attributed to the word by a punctilious lawyer.

Reversal of onus and burden of proof in jury note

In the applicant's trial for multiple sexual offences, the jury were given an unimpeachable summing up by the trial judge which reiterated many times that it was for the Crown to prove the elements of the offences beyond reasonable doubt and the accused did not have to prove anything. Nevertheless, at the end of the trial, the jury sent a note saying:

> "There is vast disagreement in the room about whether consent has been granted by [the complainant]. Some in the group *are not satisfied beyond reasonable doubt that consent was granted*" (emphasis added)

The trial judge subsequently read the note back to the jury, told the jury that he would re-direct them on the law if they asked, and gave them a *Black* direction. Bathurst CJ and Beech-Jones J held the failure to correct the reversal of both the burden and onus of proof (emphasised in the note above) caused a substantial miscarriage of justice and ordered a retrial. Their Honours found there was a real potential the jury had laboured under a fundamental misconception on an important aspect of the trial. On the other hand, Fagan J would have dismissed the ground because of how unlikely it was the jury had a misunderstanding given how many times the correct position was restated to them during the trial: ***Gage v R* [2021] NSWCCA 222**.

Importance of failure to give evidence warning in a case where the accused bears an onus of proof

In ***Ahmed v R* [2021] NSWCCA 280** an appeal was allowed against a conviction in a judge-alone murder trial in which the judge rejected a defence of substantial impairment by abnormality of mind. The judge had failed to warn herself against drawing an adverse inference from the accused's failure to give evidence. The Court found that such a warning is of heightened importance in a case where the onus lay on the accused to establish the defence.

The Crown contended that the express warning was not required because the right to silence direction carried with it a warning against an unfavourable inference for failure to give evidence by necessary implication. This submission was rejected. Although the warning is not a "mandatory direction", it is required in most cases, and is of "particular importance" where the onus of proof lay with the accused, as was the case here. The trial judge had noted that the accused's accounts could not be tested in cross examination, and while she was entitled to conclude that some of his earlier assertions were untrue, it was important

to indicate that no adverse inference could be drawn from his failure to give evidence in the trial.

Intoxication in a murder trial relied upon by both Crown and defence

***Beatie v R* [2021] NSWCCA 291** concerned an appeal against conviction for murder on the basis of the intoxication direction given to the jury. The trial judge directed the jury (correctly) to consider whether having regard to the accused's intoxication the Crown had proved beyond reasonable doubt that he acted with the specific intent required. However, a written direction noted that "intoxication can be taken into account both for and against the Crown case."

This was a case in which the defence relied upon intoxication as raising doubt about whether the accused intended to cause really serious bodily harm, while the Crown relied upon it, for example, for the proposition that the consumption of amphetamines was a factor contributing to the accused's aggression. The Court rejected the contention that there was a miscarriage of justice caused by the direction. The words "against the Crown case" did not indicate to the jury that the applicant bore an onus of proof on the issue.

Anti-tendency direction not required where not sought nor necessary to ensure fair trial

***Faraj v R* [2022] NSWCCA 31** was an appeal against conviction for offences relating to drug supply. Mr Faraj relied on the failure of the trial judge to give a direction that the evidence of intercepted telephone conversations could not be used to establish a propensity to commit crimes. That evidence was tendered to establish a course of conduct, namely that Mr Faraj was in the business of dealing drugs. The fact that the evidence might also bear on the accused's character did not impact its relevance or admissibility for non-tendency purposes. The evidence did not meet the criteria to be used as tendency evidence (s 97 of the *Evidence Act 1995*) but could nevertheless be used to establish a course of conduct. It was not necessary to draw this distinction to the jury's attention to ensure the trial was fair.

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