Local Courts of New South Wales

2011 Annual Conference

CRIMINAL LAW UPDATE [1]

Whilst I expect that many, if not all, magistrates are voracious readers of judgments of the High Court of Australia, the Court of Criminal Appeal, and single judges of the Common Law Division of the Supreme Court, as well as what comes out of Macquarie Street, I also expect that recalling all that has been consumed can be somewhat taxing. The purpose of this paper is to provide brief notes to serve as a reminder of appellate decisions and some of the more significant legislative changes in the past 12 months that may have a bearing upon criminal practice and procedure in the Local Court.

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.

DEFENCES

Automatism and unsound minds

Woodbridge v R **[2010] NSWCCA 185** raised for consideration the meaning of sane, as opposed to insane, automatism and what constitutes an unsound mind, a disease of the mind, or insanity. As such issues do not commonly arise I will not dwell on the facts and the arguments but simply alert you to the existence of the case.

In short, the difference between sane and insane automatism is that the latter is the reaction of an unsound mind to either its own delusions or to external stimuli, whereas the former is the reaction of a sound mind to external stimuli, including stress producing factors. An unsound mind can include one experiencing psychotic disturbances, but also a temporary mental disorder or disturbance prone to recur. The distinction is between minds which are healthy and those suffering from an underlying pathological infirmity.

[1] Presented at the Local Court Annual Conference on 1 June 2011 by the Honourable Justice R A Hulme, Supreme Court of New South Wales.

EVIDENCE

Admissions to custody manager not "official questioning"

Section 281 of the *Criminal Procedure Act* 1986 is concerned with the general requirement that there be an audio and/or video recording of any admission made "in the course of official questioning" in order that it be admissible in evidence. In ***Bryant v R*** **[2011] NSWCCA 26**, the appellant had been formally interviewed about a number of armed robberies. He admitted to one and had previously admitted another. He refused to say anything about other alleged robberies. He was then placed in the dock at the police station where he was spoken to by the custody manager. She told him that he was going to be charged and would be refused bail. When she asked whether he understood, his response included an admission to a third robbery. It was contended on appeal that the trial judge erred in admitting this evidence. Howie AJ held, however, that it was not only open to the judge to have determined that the admission was not made "in the course of official questioning" but it was the only finding that could have been made. Howie AJ also doubted that the custody manager had been involved in "questioning" at all. She was merely providing information and asking if the appellant understood what he was being told.

"Fresh in the memory" in s 66 of the Evidence Act 1995

Sub-section (2A) was inserted in s 66 of the *Evidence Act* (maker available hearsay) and took effect on 1 January 2009. It provides:

> (2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including:
> (a) the nature of the event concerned, and
> (b) the age and health of the person, and
> (c) the period of time between the occurrence of the asserted fact and the making of the representation.

In ***R v XY*** **[2010] NSWCCA 181** it was alleged that the accused committed 4 offences of sexual intercourse with a child under the age of 10 in a period from June 2003 to September 2005. Evidence of complaints by the complainant to a friend in late 2007 and to his parents in June 2009 was held to be inadmissible as they were not made at a time when the occurrence of the asserted fact was fresh in his memory. The trial judge referred to discrepancies as to when the offences occurred, and the period over which they occurred and held that for reasons of such "inexactness" it was difficult to know how much time elapsed from the occurrence of the alleged offences and the making of the complaints. Accordingly, there was uncertainty as to whether the incidents were "fresh in the memory".

The Crown successfully appealed, contending that the judge had misconstrued s 66(2A). Whealy J held that the phrase "fresh in the memory" is no longer to be taken as meaning "recent" or "immediate" (as was the position in *Graham v R* (1998) 195 CLR 606, prior to the insertion of s 66(2A)). The "nature of the event concerned" is now an important consideration in the factors to be considered. In this case the representations to the friend and to the complainant's parents were sufficiently detailed and consistent with the account he had provided to the police shortly after the latter to indicate that the events were indeed "fresh in the memory" on both occasions.

Privilege against self-incrimination when party giving evidence in chief

Section 128(1) of the *Evidence Act* 1995 commences:

> "This section applies if a witness objects to giving particular evidence …"

In ***Song v Ying*** **[2010] NSWCA 237**, Hodgson JA held that a party to proceedings, who gives evidence in chief in response to questions from that person's lawyer, and who wishes to give that evidence but only after a certificate under s 128 of the *Evidence Act* 1995 has been granted, does not "object" to giving that evidence within the meaning of s 128(1). This is because there is no element of compulsion or potential compulsion which makes the expression "objects" apposite. It follows that s 128 cannot be relied upon in such circumstances to obtain a certificate against self-incrimination.

Context and tendency evidence issues

Uncharged indecent acts occurring a short time before alleged offences

The appellant in ***LJW v R*** **[2010] NSWCCA 114** was charged with having committed acts of anal intercourse and fellatio upon a 12 year old boy one night in Muswellbrook. There was also evidence that during the car trip to Muswellbrook that day he had masturbated whilst driving and the complainant had seen this from the back seat. Hodgson JA held (at [45] – [53]) that the evidence was admissible as it could rationally support an inference that on the day of the trip to Muswellbrook the appellant was in a state of mind such that he had an interest in, and lack of inhibition from, engaging in sexual activity in the presence of the complainant, and that there was a probability that this state of mind continued. The evidence was also admissible as tendency evidence in relation to alleged offences occurring on other occasions.

In ***Jiang v R*** **[2010] NSWCCA 277**, there was evidence of inappropriate touching by the appellant during the course of giving the complainant a massage. Some, but not all, of this touching was relied upon as supporting various sexual assault charges. It was raised for the first time on appeal that the judge should have warned the jury against substitution or

tendency reasoning. It was concluded that there was no possibility of the jury having adopted any form of impermissible reasoning. The evidence was relevant as to the appellant's state of mind at the time of the offences.

Issues about whether evidence is led to establish "context" or "tendency"

RG v R **[2010] NSWCCA 173** concerned a trial for aggravated indecent assault. The 11 year old daughter of the appellant alleged that he slept in the same bed with her during an access visit and that during the night he touched her indecently. She also gave evidence that he regularly touched her indecently when they slept together. The trial judge gave appropriate directions for "context" evidence and warned against the use of the evidence as establishing a "tendency" on the part of the accused to commit an offence of the type charged. No exception was taken to this approach but on appeal it was contended that the evidence was, in reality, tendency evidence and so subject to s 97 of the *Evidence Act* 1995.

Simpson J held (at [26] – [44]) that the evidence was admitted, not to establish a tendency on the part of the appellant, but to establish the context in which the event occurred. So much was made clear in the atmosphere of the trial where the Crown's express purpose for tendering the evidence (being as contextual or relationship evidence) was made manifestly clear. While it is open to a court to test the true purpose of the evidence (that is, whether it is indeed adduced to establish a tendency), there was no reason to do so in this case. The evidence, if believed, established a pattern of behaviour in which the complainant was relatively unsurprised by the conduct the subject of the charge, and made no response, nor any subsequent report. In that respect, it explained the complainant's behaviour, which may otherwise have appeared surprising and therefore implausible to the jury.

ES v R (No 1) **[2010] NSWCCA 197** involved alleged sexual assaults upon the daughter of the appellant's partner. The prosecutor had said at the start of the trial that the Crown was not relying upon tendency evidence. However, the complainant's sister gave evidence of an occasion when she saw something likely to have been sexual conduct occurring between the appellant and the complainant. Trial counsel objected to the evidence. The judge considered that the evidence was relevant in corroborating the complainant and its probative value was not outweighed by a danger of unfair prejudice. No mention was made of s 97. Hodgson JA was of the view that the probative force of the sister's evidence was considerable if it was regarded as tendency evidence, but the failure to comply with s 97 meant that it was not admissible as such. If it was regarded as context evidence, then its probative value was, at best, extremely modest and was outweighed by the danger of unfair prejudice.

Hodgson JA considered that evidence of uncharged inappropriate sexual contact between the accused and a child can have probative value, at least theoretically, in three broad

ways: as context evidence; motive evidence; and tendency evidence. Whilst he felt there was a theoretical distinction between the 2nd and 3rd categories, it was not practical to maintain the distinction in the case of sexual interest of an adult in a child. The existence of such an interest can itself manifest a tendency to have a particular state of mind; the uncharged acts will by themselves show a tendency to act on that interest; and the very powerful effect of tendency reasoning would likely swamp any effect of motive reasoning.

In ***RWC v R*** **[2010] NSWCCA 332** the appellant was convicted of three counts of aggravated sexual intercourse without consent and one of aggravated act of indecency against the complainant, being his daughter aged 9-11 at the time. Evidence was tendered from the complainant's sister, older by 18 months, of the appellant favouring the complainant over herself and that there was inappropriate physical conduct between the two, such as holding hands, cuddling on the couch, his touching of her thighs affectionately and kissing her on the lips. During the trial, the Crown did not identify the purpose for which the evidence was tendered. The appeal was allowed. Simpson J held (at [130]) that the evidence was tendered for a tendency purpose, that being the only relevance the evidence could have had in the circumstances.

Her Honour referred to authorities, going back to *Qualtieri v R* [2006] NSWCCA 95; 171 A Crim R 463 where McClellan CJ at CL had stressed the importance of identifying the purpose for which such evidence is sought to be placed before the court. In this context she said:

> [116] The starting point in respect to the admission of any evidence is its relevance to the issues in the proceedings. Once relevance is established, where the evidence is properly seen as tendency evidence, it is not admissible if:
>
> > (i) reasonable notice in writing has not been given to the party against whom it is tendered of the intention to adduce the evidence;
> >
> > (ii) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

BP v R **[2010] NSWCCA 303** provides an interesting and useful analysis of the probative value and prejudicial effect of tendency evidence that was said to establish that the appellant had a sexual interest in young children. See particularly the judgment of Hodgson JA at [106] - [115].

Proof beyond reasonable doubt of incidents relied upon to establish a tendency

In ***DJS v R*** **[2010] NSWCCA 200** the appellant was charged with various sexual assault offences against the complainant, his step daughter. The Crown relied on tendency evidence to support a finding that the appellant had a sexual interest in the complainant. The trial judge did not direct the jury that, before they could use that tendency evidence

to support the Crown case, they must be satisfied of those matters beyond reasonable doubt. An appeal against conviction was dismissed by application of the proviso in s 6 of the *Criminal Appeal Act* 1912. In respect of the tendency direction, Hodgson JA held (at [55]) that where particular incidents are relied on by the Crown to establish a sexual interest of an accused in the complainant, the jury should be directed that they cannot treat those incidents as supporting such a finding unless they are satisfied beyond reasonable doubt that those incidents occurred.

OFFENCES

Evidence of surrounding circumstances is relevant to whether an act is indecent

In ***Eades v Director of Public Prosecutions (NSW)*** **[2010] NSWCA 241**, the appellant was the subject of a charge of inciting a person under the age of 16 years to an act of indecency. The circumstances were that the appellant had exchanged text messages with a 13 year old girl. In the course of doing so he incited her to send him a nude photograph of herself. The issue on appeal was whether the act of indecency (the sending of the nude photograph) should be considered in isolation from its context. Campbell JA held that there may be surrounding circumstances that are relevant to the determination of whether an act is indecent (that is, whether it is contrary to community standards of decency), and that it is the task of the fact-finder to assess whether a right-minded person would take such circumstances into account. His Honour proceeded to identify in a non-exhaustive way some circumstances that could be relevant where an act is performed in response to a request, such as the terms of the request; the identities of the addresser and addressee of the request; their respective ages; their relationship or social roles; and the like.

Not keeping a firearm safely and the exemption for police officers

A police officer, at the end of his shift, failed to secure his firearm. He left it in the rear seat of the police vehicle, which was parked in a secure compound at the station. He was tried for an offence of not keeping a firearm safely: s 39 (1)(a) of the *Firearms Act* 1986. A magistrate dismissed the charge, finding that the officer's conduct fell within the exemption provided by s 6(2) of the Act (which applies to certain persons, including police officers, whilst acting in the ordinary course of their duties). The prosecutor appealed: ***Director of Public Prosecutions (NSW) v Weinstein*** **[2010] NSWSC 1123**. Schmidt J allowed the appeal, holding that the magistrate erred by failing to consider as a preliminary issue whether s 39 had been breached, because it was only if there was such a breach, that the s 6(2) exemption arose for consideration.

POLICE POWERS

Arrest for breach of the peace and the Law Enforcement (Powers and Responsibilities) Act 2002

Police retain a power outside of Section 99 of the *Law Enforcement (Powers and Responsibilities) Act* 2002 to arrest a person for a breach of the peace. In ***Director of Public Prosecutions (DPP) v Armstrong*** **[2010] NSWSC 885** the respondent was charged with four offences which were dismissed by a magistrate on the basis that the arrest was unlawful pursuant to s 99 of the Act. On appeal, Davies J held (at [23] – [26]) that if the unlawfulness of the arrest justified the dismissal of the charges, it was incumbent upon the magistrate to determine whether the arrest was lawful at common law and, in particular, for breach of the peace.

PRACTICE AND PROCEDURE

Consequences of breach of the rule in Browne v Dunn

The issue of the proper approach to the rule in *Browne v Dunn* (1894) 6 R 67 in criminal trials was examined by the High Court of Australia in *MWJ v The Queen* [2005] HCA 74; [2005] 80 ALJR 329. Gleeson CJ and Heydon J stated:

> [18] … Fairness ordinarily requires that if a challenge is to be made to the evidence of a witness, the ground of the challenge be put to the witness in cross-examination. This requirement is accepted, and applied day by day, in criminal trials. However, the consequences of a failure to cross-examine on a certain issue may need to be considered in the light of the nature and course of the proceedings.

In ***Khamis v R*** **[2010] NSWCCA 179**, the accused was tried before a jury in respect of an alleged sexual assault. During his evidence in chief he attempted to give evidence about a matter that had not been put in cross-examination to the complainant or to members of her family. The trial judge upheld an objection by the Crown and refused to allow the accused to give such evidence. Issues relating to this ruling comprised grounds of appeal against conviction. Whealy J (at [42] – [46]) discussed various consequences of a breach of the rule in *Browne v Dunn* [1893] 6 R 67. He held (at [53]) that the rule is not a preclusive rule of evidence. Its breach does not necessarily dictate that evidence may not be called in contradiction. It should not be used, except as a last resort, to exclude evidence going to the question of a person's guilt of a criminal charge. In this case the trial judge erred in failing to consider any option other than exclusion of the evidence.

Crown re-opening its case after close of defence case

The appellant in ***Morris v R*** **[2010] NSWCCA 152** was tried before a jury for various sexual assault offences. When the complainant was being cross-examined, she was shown a video of her performing a sexual act upon the accused. An issue arose as to the correct date upon which the recording took place as well as to the device that made the recording. There was reference during the course of discussion between the trial judge and counsel of the need for the Crown to call some expert evidence but no expert witness was called before the close of the Crown case. After the defence case was closed the trial judge permitted the Crown to re-open its case, to adduce expert evidence. On appeal, McClellan CJ at CL held that the trial judge erred in permitting the Crown to reopen its case. Reference was made to the joint judgment of Dixon, McTiernan, Webb and Kitto JJ in *Shaw v R* (1952) 85 CLR 365 at 380 where their Honours said "the occasion must be very special or exceptional to warrant a departure from the principle that the prosecution must offer all its proofs during the progress of the Crown case and before the prisoner is called upon for his defence." Applying this principle, his Honour held (at [31]) that the prosecutor should have realised the need for the Crown to call expert evidence. There was nothing "very special or exceptional" about either the evidence or the circumstances in which it became relevant.

Procedural fairness

Director of Public Prosecutions (DPP) v Gramelis **[2010] NSWSC 787** provides an example of a prosecutor not being accorded procedural fairness. It involved a prosecution for speeding through a school zone. A police officer using radar detected the defendant's truck travelling at 62 km/h. The court attendance notice alleged that the offence occurred at 2.58pm. The officer gave evidence that the offence occurred "at about" that time. However, the in-car video showed the defendant's truck in the school zone at 3.01pm. The magistrate said that this caused her to doubt whether the radar device was accurate with respect to time. The defendant's experienced counsel (Mr Conomos) had not raised any issue about this. The magistrate also referred to the defendant's evidence that his speedometer was not working but he knew he was not exceeding 40 km/h because his loaded truck was in 2nd gear. The magistrate said she took judicial notice that an average car in 2nd gear "cannot generally get to the limit of sixty kilometres per hour". She did not mention that she proposed to take such judicial notice until giving her reasons for dismissing the charge.

The DPP appealed to the Supreme Court. One ground of appeal was that the magistrate failed to accord to the prosecution procedural fairness by giving notice of these two aspects of her reasoning. Price J allowed the appeal and remitted the matter to be dealt with according to law. He said that if the magistrate had raised her concern about the time of the offence, the prosecutor would have had the options of either recalling the officer to give further evidence or to amend the time in the court attendance notice to

"about 2.58pm". Giving notice of her proposal to take judicial notice as to the speed of an average vehicle in second gear would have provided the prosecutor with the opportunity to submit that it would be inappropriate to compare the speed of different vehicles in second gear.

Dismissal of prosecution because brief not served in time

Director of Public Prosecutions (DPP) (NSW) v Fungavaka **[2010] NSWSC 917** dealt with an appeal from the dismissal of charges on the basis that the police brief was not served by the relevant date; namely at least 14 days before the hearing as per s 183 of the *Criminal Procedure Act* 1986. On appeal, Hidden J held (at [39] – [43]) that the magistrate erred by simply relying upon the failure of the police to serve the brief in time as opposed to weighing the competing policy considerations bearing upon the discretionary decision to grant an adjournment. His Honour opined that the power conferred by s 187(4) to adjourn proceedings because the brief had not been served in time was the only course reasonably available to the magistrate.

Adjournments generally

In ***Director of Public Prosecutions (DPP) (NSW) v Chaouk*** **[2010] NSWSC 1418**, Johnson J provided (at [47] – [54]) a most useful summary of matters that may be taken into account in the exercise of a courts discretion to adjourn proceedings. This was another case involving an appeal against the dismissal of a prosecution after a magistrate refused an adjournment when the prosecutor failed to comply with requirements relating to a brief of evidence.

Adequacy of reasons for judgment

In ***Director of Public Prosecutions v Abouali*** **[2011] NSWSC 110** a magistrate upheld a no case submission in a prosecution for not stopping at a stop line at a red light (*Road Rule* 56(1)(a)). She held, in effect, that the defendant had committed the offence of entering an intersection against a red light (*Road Rule* 59) and had been charged under the wrong rule. On appeal, Schmidt J held that the two rules were not mutually exclusive and that the defendant could be guilty of a breach of either of them. One of the grounds of appeal was that the magistrate had failed to give adequate reasons for her determination. There was no judgment as such; the magistrate had indicated her view of the matter in exchanges with the prosecutor and the defendant's solicitor during their submissions.

For the purpose of this paper it is unnecessary to refer to Schmidt J's analysis of whether this constituted an error of law. On the requirement to give reasons, her Honour noted the observation of Johnson J in *Director of Public Prosecutions (NSW) v Illawarra Cashmart Pty Ltd* [2006] NSWSC 343; (2006) 67 NSWLR 402 at [15] that ex tempore remarks in a busy magistrate's court should not be picked over and appropriate allowance should be given to

the pressures under which magistrates are placed. Johnson J referred to *Adecco v Gemvale Constructions Pty Limited* [2004] NSWCA 449 in which Santow JA spoke of the duty to give reasons as being a necessary incident of the judicial process, without which justice will not be seen to be done. He added that this does not require spelling out in minute detail every step in the reasoning process, or reference to every single piece of evidence. It is sufficient if the reasons adequately reveal the basis of the decision, with expression of the specific findings that are critical to the determination of the proceedings. In *Abouali*, the magistrate had not given reasons for stating "this matter does not fit clearly under road rule 56(1)" and did not explain why she concluded that one of the essential elements of the offence was missing. What element she had in mind was not identified.

SENTENCE

General issues in sentencing

Concurrence, accumulation and totality

In ***Hinchcliffe v R* [2010] NSWCCA 306** Simpson J noted (at [59]) that the question of currency or accumulation of sentences is very much a matter within the discretion of the sentencing judge, although it has to be exercised in the light of the relevant facts and circumstances of the individual case. She listed the following factors that may be relevant:

> [60] Factors pointing to accumulation include sequential offending (as distinct from a number of offences committed in a single episode of criminality); that the offences involve multiple victims; and that concurrency would, when the principles stated by the High Court in *Pearce* are correctly applied, result in a total sentence that is inadequate to reflect the total criminality.
>
> [61] Factors pointing to concurrency include that the offences were committed as part of a single episode of criminality (*R v Lansdell* (NSWCCA, 22 May 2005, unreported); *R v Weldon; R v Carberry* [2002] NSWCCA 475; 136 A Crim R 55 (although this is not "an inflexible rule"): *Nguyen v R* [2007] NSWCCA 14; *Vaovasa v R* [2007] NSWCCA 253; 174 A Crim R 116); and that the sentence for an offence "can comprehend and reflect the criminality for the other offence[s]": *Cahyadi v R* [2007] NSWCCA 1; 168 A Crim R 41.

The appellant had been sentenced for receiving stolen property (i.e. various drugs stolen from a pharmacy) as well as the (deemed) supply of the drugs, with separate charges for each drug. Simpson J concluded that the interests of justice did not call for any accumulation of the drug supply sentences, although it was otherwise in respect of the receiving offence for which the criminality was different. All the drug offences ought to have been treated as part of a single enterprise, that is the sentence for each offence could comprehend and reflect the criminality of each other offence.

The offender in ***Vaughan v R* [2011] NSWCCA 4** was sentenced for multiple counts of dishonestly obtaining a financial advantage. The offending involved 417 separate transactions over a period of about 7 years. It was contended that the offences

constituted a "continuous course of criminal conduct" warranting total concurrency of sentences rather than the partial accumulation ordered by the sentencing judge. Buddin J rejected the submission:

> [12] …In the present case, as has been observed, there were 5 separate offences which were committed over different periods of time. The sum of money obtained as a result of each offence was, on each occasion, substantial ranging as it did from $267,450.25 to $807,592.39. The offending behaviour may have been of the same kind but the charges reflected separate acts of criminality which each called for an appropriate sentence.

Family hardship

It is well settled that hardship to members of an offender's family is generally irrelevant and can only be taken into account in "highly exceptional circumstances": *R v Edwards* (1996) 90 A Crim R 510. Following the sentencing of the appellant in ***Mokhaiber v R* [2011] NSWCCA 10** his 3 year old daughter was diagnosed with metachromatic leukodystrophy, a deteriorative condition requiring increasingly intensive care with death likely before the age of 7. The Court received fresh evidence that the appellant's wife, as full-time carer for the daughter in addition to caring for their other two children, would suffer overwhelming hardship as a result of his incarceration and concluded that this could be regarded as exceptional circumstances. Modest weight was also given to the appellant's distress at being unable to assist his wife. Together these justified a reduction in the appellant's sentence. (The head sentence of 6 years and the non-parole period of 4 years were each reduced by 6 months).

Ill-health

The offender in **Leighton v R [2010] NSWCCA 280** was 72 years old at the time he was sentenced for social security fraud offences. He suffered from a variety of medical conditions that had significant effects upon everyday activities. The sentencing judge expressed the view that this did not provide a special or extenuating circumstance that would warrant a sentence other than full-time imprisonment. Reference was made to evidence that Justice Health would be able to provide necessary care. Price J referred to various authorities, including *R v Smith* (1987) 27 A Crim R 315, where there was discussion about the relevance of ill-health. Generally, they are to the effect that punishment may be mitigated only where it appears that imprisonment will be a greater burden or it would have a gravely adverse effect on the offender's health. Reference was also made to *R v Badanjak* [2004] NSWCCA 395 where Wood CJ at CL referred to such cases as being "relatively rare". Price J held that the judge in this case erred by not giving any weight at all to the evidence of ill-health and the effect it would have in making custody more onerous.

Joint enterprises - should the getaway car driver get less than the bank robber?

In ***Johnson v R; Moody v R*** **[2010] NSWCCA 124**, there was a divergence of views as to whether any differentiation should be made in assessing the culpability of participants in an armed robbery. Johnson argued that as his role was as driver of the getaway car he was less culpable than Moody who entered premises and threatened people whilst armed with a firearm. Barr AJ was of the view (at [94]) that it was more serious to enter premises and threaten people's lives with a firearm. Simpson J (at [11] – [21]) was of the view that some caution needs to be exercised in drawing fine distinctions between what the participants of a joint criminal enterprise actually did. Her Honour did not think that Moody's offence was more serious than Johnson's because he was the actual perpetrator. His participation made Moody's offence possible. James J (at [3] – [7]) noted that in sentencing participants in the same joint criminal enterprise a judge should "begin with" and "not lose sight of" the fact that they were all participants in the commission of the same crime but added that it is not the case that the offenders are necessarily to be regarded as having had the same objective criminality. It was open to the sentencing judge to decide to give some limited significance to the different roles played by the two offenders. However, drivers of getaway vehicles should not necessarily receive a lesser sentence.

Motive and its relevance to moral culpability

In ***Quealey v R*** **[2010] NSWCCA 116** the offender discharged a firearm at a house in which her former partner was an occupant on two occasions on the one night. It was contended on appeal that the judge should have found that her moral culpability was reduced for the reason that she was motivated by the recent disclosure of her daughter's alleged sexual abuse at the hands of the former partner. Latham J held (at [23] – [29]) that the motive explained the conduct but did not reduce the offender's moral culpability to any significant degree.

Non-parole proportions

In ***Flynn v R*** **[2010] NSWCCA 171** a sentencing judge expressly found that there were "special circumstances" but ordered that the sentences be partially accumulated. The result was that the non-parole period exceeded 75% of the total term. On appeal the appellant argued, inter alia, that the finding of special circumstances was not reflected in the total effective sentence. Price J held that it was apparent that the judge overlooked the effect of accumulation on the ratio of the effective non-parole period to the total term of the sentence.

This case is but one illustration of a situation that has been commonly encountered in the Court of Criminal Appeal since the *Sentencing Act* 1989 introduced the notion of what is sometimes referred to as a "statutory norm" or "statutory ratio" and the need for there to

be “special circumstances” for imposing an additional term, now the “balance of the term of the sentence”, that exceeds one-third of the non-parole period. Another commonly encountered situation is where there is no finding of special circumstances and individual sentences conform with the statutory ratio but accumulation results in an effective non-parole period that exceeds three quarters of the total term.

The offender in ***Russell v R*** **[2010] NSWCCA 248** was sentenced for multiple sexual assault offences to a term of imprisonment that resulted from a partial accumulation of individual sentences. The effective non-parole period was 79 per cent of the total term. It was argued on appeal that the sentencing judge had erred by failing to give reasons justifying the departure from the statutory ratio. Price J held that there was no such error. The sentencing judge had intended to set a non-parole period that was more than three quarters of the sentence. Section 44 of the *Crimes (Sentencing Procedure) Act* 1999 does not require the giving of reasons for setting a parole period that is less than one third of the non-parole period.

By way of contrast, in ***Maglis v R*** **[2010] NSWCCA 247** there was found to be error when a sentencing judge imposed an effective non-parole period which was 77 per cent of the total term of the sentence. Again this followed the partial accumulation of individual sentences. The error was more pronounced when regard was had to another sentence earlier imposed by another judge upon which these sentences were accumulated. The effect was to have a non-parole period which was 80 per cent of the combined total. Error was found in this case because it had been the intention of the sentencing judge to find special circumstances and to reflect that in the overall period of custody for all of the offences. This, of course, was not reflected in the final result.

A slightly different situation to that in the above cases arose in ***Thorpe v R*** **[2010] NSWCCA 261**. The offender committed two offences in April 2007 for which he was sentenced in January 2008. While serving that sentence she was charged with a further offence that she had committed in May 2007. She was not sentenced for that matter, however, until August 2009. The judge on that occasion was aware of the earlier offences and sentences. Reference was made to the principal of totality and a finding of special circumstances was made that went beyond the partial accumulation that he proposed. However with the accumulated term then imposed the overall sentence became one in which the non-parole component was just under 82 per cent of the total term.

In this case it was the delay in charging the offender with the May 2007 offence which created the difficulty. Kirby J referred to authorities concerned with delay in sentencing: *R v Todd* (1982) 2 NSWLR 517 and *Mill v R* (1988) 166 CLR 59. His Honour referred to the fact that that it would have been preferable if the offender had been charged with the May 2007 offence before the sentence hearing in January 2008. If that had been done the sentence under appeal would probably have been dealt with by way of a fixed term with partial accumulation upon the sentences imposed in respect of the other more serious

charges. Obviously that was not possible when it came to sentencing in August 2009. The appeal was allowed and the non-parole period for the May 2007 offence was reduced so as to render the overall non-parole period about 73 per cent of the total term.

Non-parole periods and recognizance release orders for Commonwealth sentences

For some years it has been regarded as the "norm" for the period of mandatory imprisonment under a Commonwealth sentence to be between 60 and 66 per cent of the total term. However in ***Hili v R; Jones v R*** **[2010] HCA 45** the High Court of Australia held (at [44]) that there neither is, nor should be, a judicially determined norm or starting point for the period of imprisonment that a federal offender should actually serve in prison before release.

Parents report child's offending

A rather unusual factor fell for consideration in ***R v Barlow*** **[2010] NSWCCA 215**. The offender's guilt of an offence of supplying a commercial quantity of ecstasy only came to the attention of police when his parents alerted them to their suspicions. Police attended the home and asked the offender if he had anything that he should not have. He disclosed the presence of $120,000 in cash in the boot of his car and subsequently made admissions of involvement in drug supply. The Crown appealed against a sentence of 2½ years to be served by way of periodic detention. One contention was that the sentencing judge had erred by taking into account that parents should not be deterred from bringing attention to illicit behaviour of their children. McCallum J was of the view that the disclosure by parents of criminal conduct on the part of their children ultimately promotes the purposes of sentencing (s 3A *Crimes (Sentencing Procedure) Act* 1999), being conducive to the protection of the community from the offender; it promotes his/her rehabilitation; and potentially makes the offender accountable for his/her actions.

Re-opening sentence proceedings to correct sentencing errors

The power to re-open sentencing proceedings arises under s 43 of the *Crimes (Sentencing Procedure) Act* 1999 in circumstances where a penalty has been imposed that is contrary to law or a court has failed to impose a penalty that is required to be imposed by law (s 43(1)).

The defendant in ***Davis v DPP*** **[2011] NSWSC 153** was convicted of driving with the mid-range PCA, an offence for which the automatic period of disqualification is 12 months and the minimum is 6 months. The charged was disposed of under s 10A *Crimes (Sentencing Procedure) Act*. The magistrate took into account that the defendant's licence had been suspended upon arrest and that he had employed a driver in the intervening 5 months at a cost of $26,000. No order was made concerning disqualification; the licence was returned to the defendant; and the magistrate stated for the benefit of the RTA that his intention

was that there be no disqualification. Regardless of this, the RTA recorded the automatic period of disqualification. Some months later, the defendant was charged with driving whilst disqualified. Over a year later, the magistrate granted a request to re-open the proceedings pursuant to s 43 and imposed a 12 month disqualification period. Later the same day, upon being informed of the driving whilst disqualified charge, he agreed to again re-open the proceedings and imposed this time a 6 month disqualification period. The RTA then applied to have the proceedings re-listed. The magistrate on this occasion purported to again re-open the proceedings and acceded to a submission that he did not have the power to re-open on the earlier occasion. In effect, he reinstated the orders originally made (conviction but no penalty). The defendant appealed and the prosecutor cross-appealed. Hoeben J held that on no occasion was there power to re-open the proceedings because the magistrate had not made an order that was contrary to law. Upon making orders that were valid and within jurisdiction, the magistrate had become functus officio. There was no inherent or general jurisdiction for a Local Court to review, rehear, vary or set aside a judgment or order once formally made.

Section 10 of the Crimes (Sentencing Procedure) Act 1999

An offender pleaded guilty in the Local Court to a charge of intentionally or recklessly damaging property. He had urinated on a door to the premises of "Jews for Jesus". He walked away but then found a brick and returned to smash a window. He submitted that he should be dealt with under s 10 but the magistrate convicted him and placed him on a good behaviour bond for 12 months. On appeal to the District Court the offender again sought disposal under s 10 without success. The matter was taken to the Court of Appeal where it was contended that the decision in the District Court was affected by jurisdictional error in that the judge had applied an incorrect statutory test when exercising the court's "jurisdiction" under s 10: ***Hoffenberg v District Court of New South Wales* [2010] NSWCA 142**. McClellan CJ at CL regarded the submission as misconceived in that it wrongly characterised the judge's reasoning as finding that s 10 disposal was inappropriate solely because he found that the offence was a deliberate act of vandalism. That finding was relevant to a consideration of "the trivial nature of the offence" (s 10(3)(b)). The judge then considered the appellant's personal circumstances referred to in s 10(3), including the impact that conviction would have upon the appellant's future prospects (s 10(3)(d)). He concluded that these circumstances were not such as would make s 10 disposal appropriate in relation to a deliberate act of vandalism. This approach was entirely appropriate.

Statistics

There is a seemingly common misconception about an aspect of the Judicial Commission's sentencing statistics. Error in their interpretation and application has even crept into at least three decisions of the Court of Criminal Appeal in recent times. One of the criteria that may be selected in refining a statistical search is "Number of offences" under which

can be selected "Total", "Multiple offences" or "One offence only". It seems to be thought that selecting "Multiple offences" will yield statistics for the overall total sentence imposed for multiple offences. That is not correct. The Judicial Commission only maintain statistics for each sentencing exercise for what it calls the "principal offence". The following appears in "Explaining the Statistics", a button you can click on at the top of the statistics page:

> The statistics are appearance (or person) based and only the "principal offence" for each finalised matter is used. All secondary offences are excluded from the data. Past data reveals that in just over half of cases the offender has only one proven offence. This constitutes the "principal offence" for the purposes of the statistics.
>
> Where two or more charges are proved against a person, the offence with the most severe penalty is selected as the principal offence. If two or more charges attract the same sentence, the offence which carries the highest maximum penalty is selected as the principal offence. If two or more offences have the same statutory maximum penalty and the same sentence, the offence with a Form 1 attached (see further below) is selected.

Having said that, the use of statistics as a tool in sentencing was seriously brought into question in **Hili v The Queen; Jones v The Queen [2010] HCA 45** in the context of considering the issue of consistency in sentencing for federal offences:

> [48] Consistency is not demonstrated by, and does not require, numerical equivalence. Presentation of the sentences that have been passed on federal offenders in numerical tables, bar charts or graphs is not useful to a sentencing judge. …

Reference was also made to a statement to similar effect in *Wong v The Queen* (2001) 207 CLR 584 at 606 [59]. A basis for considering statistics to be of no utility was explained in the latter portion of the above paragraph:

> [48] …But not only is the number of federal offenders sentenced each year very small, the offences for which they are sentenced, the circumstances attending their offending, and their personal circumstances are so varied that it is not possible to make any useful statistical analysis or graphical depiction of the results.

This appears to leave open the possibility that statistics may be of some utility where the number of offenders is not "very small" and the circumstances of the offences, and the personal circumstances of the offenders, are not "so varied". This appears to have been the approach taken by Adams J in ***McCarthy v R* [2011] NSWCCA 64** in considering a severity appeal which concerned a number of aggravated armed robbery offences. After referring to *Hili v The Queen; Jones v The Queen* he found (at [42]) that "in this area of crime the cases are of such a kind, the experience of the Court in respect of them so extensive and the numbers of cases in the sample so substantial that the statistics are indeed useful."

Victim impact statements

A sentencing judge made reference to victim impacts statements in making a finding that the aggravating circumstance under s 21A(2)(g) (substantial injury, emotional harm, loss or damage) was proved in ***Aguirre v R* [2010] NSWCCA 115**. James J held that in the circumstances it was permissible for the judge to have done so. The circumstances were that the statements were tendered without objection and there was no argument by experienced counsel as to whether there should be any limit on the use made of them by the judge.

Section 21A *Crimes (Sentencing Procedure) Act* 1999

General remarks about s 21A and Ponfield now having limited utility

In ***Mapp v R* [2010] NSWCCA 269**, Simpson J took the opportunity to make some general observations about s 21A and whether the guideline judgment in *R v Ponfield* [1999] NSWCCA 435; 48 NSWLR 327 has any continuing utility. It lists a variety of factors which are suggested to "enhance" the seriousness of an offence of break, enter and steal. Her Honour (at [6] – [8]) made comments about the complexity that s 21A had added to the sentencing task and how it had on many occasions been productive of technical errors which often did not have any perceptible impact upon the sentencing outcome. Her Honour then proceeded (at [9] – [11]) to comment to the effect that *R v Ponfield* appears now to have been "largely overtaken by statute". *Ponfield* was decided before the insertion of s 21A in the *Crimes (Sentencing Procedure) Act* 1999. The section lists more comprehensively the matters that are relevant as both aggravating and mitigating a sentence to be imposed. The combination of *Ponfield* and s 21A can lead to confusion and error. For example the first of the factors listed in the guideline in *Ponfield* is that the offence was committed whilst the offender was on conditional liberty. That has led some judges to include it in an assessment of the objective gravity of an offence, a matter to which it is, of course, not relevant.

S. 21A(2) aggravating factors

Offence committed in the home of the victim or any other person (s 21A(2)(eb))

There was no error in taking into account as an aggravating feature that an offence of break and entering and committing a serious indictable offence (intimidation) in circumstances of aggravation (corporal violence was used) was committed in the home of the victim: ***Palijan v R* [2010] NSWCCA 142** per Barr AJ at [19] – [22]. The element of breaking and entering in s 112(2) of the *Crimes Act* does not require that the premises be

the home of the victim. Law-abiding members of the community are entitled to feel safe in their homes.

Offence committed in company (s21A(2)(e)

In ***Gore v R; Hunter v R*** **[2010] NSWCCA 330**, the two offenders lived together and supplied drugs from their house. Adams J held that it was erroneous for the sentencing judge to have taken into account as an aggravating factor that the drug supply offences were committed "in company". The presence of one offender during the commission of an offence by the other was found not to have added anything of significance in terms of culpability.

Disregard for public safety s 21A(2)(i); planned or organised criminal activity s 21A(2)(n) – aggravating factors in drug supply offences?

The appellant in ***Mansour v R*** **[2010] NSWCCA 35** was sentenced for a number of drug supply offences which including one against s 25A of the *Drugs Misuse and Trafficking Act* 1985 (ongoing supply for financial or material reward). He sold small quantities of drugs to undercover police officers directly and via family members. The issue on appeal was whether the sentencing judge erred in taking into account as aggravating factors that the offences were committed without regard for public safety, and were part of a planned or organised criminal activity. Price J held that ongoing supply of cocaine generally has the inherent aspects of disregarding public safety and planning/organisation. They were not present to a degree greater than expected and so should not have been regarded as aggravating factors.

Section 21A(3) mitigating factors

Remorse (s 21A(3)(i))

Restitution is a powerful way to demonstrate an offender's remorse: ***OH Hyunwook v R*** **[2010] NSWCCA 148** per Kirby J at [32]. In this case the sentencing judge had implicitly found that the offender was remorseful but was critical of legal advice he had received that prevented him making any offer to pay the victim's medical expenses. The judge had said, in part, "I always have a limited acceptance of expressions of remorse unless they are backed up by something concrete".

The offender in ***Pham v R*** **[2010] NSWCCA 208** pleaded guilty to an offence of knowingly taking part in the supply of not less than the large commercial quantity of pseudoephedrine. There was an issue on appeal as to whether the sentencing judge was in error in finding that the offender was "not truly remorseful for his conduct". Simpson J observed (at [29]) that remorse and contrition are taken into account in sentencing because they are thought to be indicative of prospects of rehabilitation. She added (at

[32]) that, ”Despite the often ritual incantation of remorse and contrition as relevant to sentencing, it is seldom that they have any real bearing upon the sentencing outcome except … where they can be taken to indicate good prospects of rehabilitation”.

Plea of guilty (s 21A(3)(k) and s 22)

It was open to a sentencing judge to allow a discount of 20 per cent for a plea of guilty entered 16 months after the offender had been charged and where there had been a dispute as to facts requiring the calling of evidence at the sentence hearing: ***Donaczy v Regina* [2010] NSWCCA 143** per Allsop P at [35] – [41]. The applicant had contended that the judge had wrongly reduced the discount because of the dispute as to the facts. Allsop P did not think the judge had taken the factual dispute into account but said that even if he did, this was not illegitimate.

Assistance to authorities (s 21A(3)(m) and s 23)

Assistance to authorities can be reflected in both reduction of sentence and the type of sentence imposed: ***R v Farrawell-Smith* [2010] NSWCCA 144** per Barr AJ at [17] – [23]. This was a Crown appeal in which it was asserted that the sentencing judge had double counted by allowing combined discounts for the respondent’s pleas of guilty and assistance of 40 per cent on one count and 50 per cent on another count and then suspended the sentences, in part, because of the assistance. It was held that with regard to what was said in *Dinsdale v The Queen* (2000) 202 CLR 231 by Kirby J at [85] and *R v JCE* (2001) 129 A Crim R 18 by Fitzgerald JA at [17], whilst the discounts were excessive, the judge was entitled to take the assistance into account in deciding to suspend the sentences.

Mental condition and s 21A(3)(j)

In ***Watts v R* [2010] NSWCCA 315**, the appellant was sentenced for an offence of maliciously damaging a house owned by the Department of Housing by means of fire. There was evidence that the appellant suffered from at least one mental disorder, albeit there was no consensus between the psychiatric experts on the severity of his mental condition. The sentencing judge gave consideration to the evidence only in respect of the question of mitigation pursuant to s 21A(3)(j) (“the offender was not fully aware of the consequences of his or her actions because of the offender’s age or any disability”).

McClellan CJ at CL and Howie AJ (Schmidt J agreeing) allowed the appeal, finding that the sentencing judge had erred in her consideration of the evidence. Their Honours held that an offender’s mental disorder, which need not amount to a serious psychiatric illness to be relevant to the sentencing process, transcends a matter of mitigation under s 21A(3)(j). Their Honours endorsed the statement of principles set out in the judgment of McClellan CJ at CL in *DPP (Cth) v De La Rosa* [2010] NSWCCA 194 (at [177]):

[177] Where an offender is suffering from a mental illness, intellectual handicap or other mental problems the courts have developed principles to be applied when sentencing: see, eg, *R v Engert* (1995) 84 A Crim R 67;*R v Tsiarias* [1996] 1 VR 398 at 400; *R v Fahda* [1999] NSWCCA 267 at [40] – [48]; *Lauritsen v R* [2000] WASCA 203; (2000) 114 A Crim R 333 at [43] – [51]; *R v Harb* [2001] NSWCCA 249 at [35] – [45]; *R v Israil* [2002] NSWCCA 255; *R v Hemsley* [2004] NSWCCA 228 at [33] – [36]; *R v Verdins* [2007] VSCA 102 at [32]; *Courtney v R* [2007] NSWCCA 195 at [14]-[18]; and *R v Henry* [2007] NSWCCA 90 at [28]. They can be summarised in the following manner:

- Where the state of a person's mental health contributes to the commission of the offence in a material way, the offender's moral culpability may be reduced. Consequently the need to denounce the crime may be reduced with a reduction in the sentence: *R v Henry* [1999] NSWCCA 111; 46 NSWLR 346 at [254]; *Miller v R* [1999] WASCA 66 at [23]; *R v Jiminez* [1999] WASCA 7 at [23], [25]; *Tsiaras* at 400; *Lauritsen* at [51]; *Israil* at [23]; *R v Pearson* [2004] NSWCCA 129 at [43]; *Henry* [2007] NSWCCA 90 at [28].

- It may also have the consequence that an offender is an inappropriate vehicle for general deterrence resulting in a reduction in the sentence which would otherwise have been imposed: *Engert* at 71; *R v Wright* (1997) 93 A Crim R 48 at 50 – 51; *Israil* at [22]; *Pearson* at [42]; *Henry* at [28].

- It may mean that a custodial sentence may weigh more heavily on the person. Because the sentence will be more onerous for that person the length of the prison term or the conditions under which it is served may be reduced: *Tsiaris* at 400; *Jiminez* at [25]; *Israil* at [26]; *Henry* at [28].

- It may reduce or eliminate the significance of specific deterrence: *Courtney* at [14]; *Tsiaras* at 400; *Israil* at [25]; *JW* at [192].

- Conversely, it may be that because of a person's mental illness, they present more of a danger to the community. In those circumstances, considerations of specific deterrence may result in an increased sentence: *Israil* at [24]; *Henry* at [28]. Where a person has been diagnosed with an Antisocial Personality Disorder there may be a particular need to give consideration to the protection of the public: *R v Lawrence* (2005) NSWCCA 91 per Spigelman CJ at [23] - [24].

[178] I should stress that the mental health problems of an offender need not amount to a serious psychiatric illness before they will be relevant to the sentencing process. The circumstances may indicate that when an offender has a mental disorder of modest severity it may nevertheless be appropriate to moderate the need for general or specific deterrence: *R v Skura* [2004] VSCA 53; *R v Verdins* [2007] VSCA 102; (2007) 16 VR 269 at [5].

Specific offences

Child pornography and related offences

In ***Minehan v R*** **[2010] NSWCCA 140** at [94], after a review of cases dealing with sentencing for child pornography offences, I listed 13 factors relevant to the assessment of the objective seriousness of offences of that nature. The judgment also includes (at [96] – [101]) a discussion of the significance of general deterrence, denunciation and prior good character in such cases.

There have since been two very thorough and useful publications dealing with issues pertaining to sentencing for child pornography: P Mizzi, T Gotsis & P Poletti, "*Sentencing offenders convicted of child pornography and child abuse material offences"*, Monograph 34 – September 2010, Judicial Commission of New South Wales and K Warner, *"Sentencing for child pornography"* (2010) 84 ALJ 384.

LEGISLATION

The ***Courts and Crimes Legislation Amendment Act* 2010** amended a variety of Acts but of particular note is an amendment to s 94 of the *Criminal Procedure Act* 1986. Section 93 of that Act provides that a magistrate may not direct the attendance of the alleged victim at committal proceedings in which the accused is charged with an offence involving violence unless satisfied that there are special reasons in the interests of justice for that person to attend to give oral evidence. Section 94 contains a list of offences that are within the meaning of "offences involving violence" for the purposes of s 93. The first six items listed refer to prescribed sexual offences and offences against ss 27–30, 33, 35(b), 86–91 and 94–98 of the Crimes Act 1900. A new item (paragraph (f1)) is added to include "an offence the elements of which include the commission of, or an intention to commit, an offence referred to in any of the above paragraphs". The amendment applies in respect of committal proceedings that a magistrate first starts to hear after the commencement of the amendment, that is, 1 November 2010.

The ***Courts and Crimes Legislation Further Amendment Act* 2010** made a number of amendments to a variety of Acts but included was the increase in the maximum value of property stolen or damaged in a breaking and entering offence in Table 1 of Schedule 1 of the *Criminal Procedure Act* from $15,000 to $60,000. The provisions were proclaimed to commence on 14 January 2011.

The ***Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act* 2010** abolished the concept of periodic detention and creates a regime for "intensive community correction". The provisions were proclaimed to commence on 1 October 2010. The ***Crimes Amendment Regulation* 2010 (No 4) (Cth)** made provision to extend the availability of intensive correction orders to sentencing for Commonwealth offences as from 29 October 2010.

The ***Crimes (Sentencing Procedure) Amendment Act 2010*** resulted in some major changes to sentencing law.

Section 22 of the principal Act was amended so as to include a requirement that the court take into account the "circumstances" in which an offender indicated an intention to plead guilty as well as the existing requirement that the Court take into account that an offender has pleaded guilty and when the plea was entered or was indicated. It is also now

provided in this section that a lesser penalty imposed because of a plea of guilty must not be unreasonably disproportionate to the nature and circumstances of the offence.

Section 23 was amended so as to require a court to indicate that a sentence is being reduced for assistance either in the past, or in the future, or both. The court is required to state the penalty that would otherwise have been imposed and where both past and future assistance is involved, the court is required to state the amount by which it has been reduced for each.

Another amendment of note was the insertion of s 35A which provides restrictions upon a court taking into account any agreed facts or offences listed on a Form 1 that is the result of charge negotiations unless the prosecutor files a certificate verifying that consultation with any victim and the police has taken place, or explaining why it has not. The certificate must also verify that any agreed facts constitute a fair and accurate account of the objective criminality of the offender.

Perhaps the most significant amendment is the creation of a method for a court to impose an "aggregate sentence of imprisonment" when sentencing for multiple offences. New s 53A provides that a court may impose an aggregate sentence of imprisonment and by new s 44(2A) may impose a single non-parole period in respect of that aggregate sentence. There are ancillary provisions, including that if an aggregate sentence is imposed the court must indicate the sentence that would have been imposed for each offence if separate sentences had have been imposed. There is no requirement to indicate the non-parole period of individual sentences. The provisions were proclaimed to commence on 14 March 2011.

His Honour Judge Berman proposed in a paper for the recent District Court judges' annual conference that the following steps be followed:

1. Decide whether to impose an aggregate sentence.
2. State the individual head sentences that you would have imposed had you not decided to impose an aggregate sentence.
3. [Applies only for standard non-parole period offences]
4. State the aggregate head sentence with its commencement date.
5. State the aggregate non-parole period (three quarters of the head sentence unless you find special circumstances) and announce the date of which the offender is eligible for/will be released to parole.
6. Await appellate intervention.

The ***Criminal Case Conferencing Trial Further Amendment (Extension) Regulation*** **2010** extended the trial scheme for a further 6 months so as to apply to a court attendance notice filed before 1 July 2011.

The ***Evidence Amendment Act* 2007** made amendments to ss 128 and 128A of the principal Act as part of a scheme to provide mutual recognition in uniform evidence law jurisdictions of certificates granted to witnesses who object to giving self-incriminatory evidence. An amendment was also made to cl 4 of Pt 2 of the Dictionary to provide that a person is also to be regarded as unavailable to give evidence if the person is "mentally or physically unable to give the evidence and it is not reasonably practicable to overcome that inability". The provisions were proclaimed to commence on 14 January 2011.

Amendments made by the ***Road Transport Legislation Amendment (Unauthorised Vehicle Use) Act* 2010** included that red light, speed, bus lane, transit way and tollway cameras may be used to provide photographic evidence of unregistered and uninsured vehicle offences and offences involving prohibited use of a vehicle. The Act received assent on 28 April 2010 and was proclaimed to commence on 1 July 2010.