LOCAL COURT OF NSW ANNUAL CONFERENCE 2012

CRIMINAL LAW UPDATE 2012

A Year of Legislative Activity and Appellate Decisions Concerning the Criminal Law Relevant to the Local Court

The Honourable Justice Robert Hulme

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SCOPE OF PAPER

The purpose of this paper is to provide brief notes concerning legislative activity concerning the criminal law and 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.

BAIL

A condition of bail requiring a person to submit to an alcohol breath test when requested by a police officer is unlawful

The plaintiff in ***Lawson v Dunlevy*** **[2012] NSWSC 48** had as a condition of his bail that he was "not to consume alcohol for any reason, and is to submit to a breath test when requested by a police officer." Garling J declared (at [48]) that the condition was not supported by the *Bail Act* 1978 and was unlawful. The Act provides that bail should be granted unconditionally, unless conditions should be imposed for one the purposes set out in s 37(1).

It was submitted that the purpose of the condition was two-fold: a ready means to detect a breach of the condition to refrain from consuming alcohol, and to deter a breach of the condition. Garling J (at [36]-[41]) held that the obligation to abide by a bail condition is not enforceable by the criminal law; rather a bail condition forms part of an agreement, a breach of which may be addressed by revocation of bail. A condition to assist the detection or deterrence of a breach of such an agreement could not therefore be for the purpose of "promoting effective law enforcement" (s 37(1)(a)). Further, it was held (at [42]-[48]) the condition was not one for the protection and welfare of the community, or any specifically affected person (s 37(1)(b) and (c)) as it was not directed at mitigating the threat or likelihood of future offences. It was a condition related only to the deterrence and detection of a breach of a bail condition, that is, refraining from the consumption of alcohol, and so did not fall within one of the purposes in s 37(1) and was invalid. The decision casts doubt over another commonly imposed bail condition that a person under a curfew condition must present themselves at any time for a compliance check.

Bail may be granted in order to allow an accused to prepare for trial

Although bail pending an appeal to the Court of Criminal Appeal was refused in ***Miles v R*** **[2012] NSWCCA 88**, the Court considered the difficulties faced by accused and appellants in custody when preparing for their appearance in Court and in obtaining legal advice. Both are matters to be taken into account under s 32 of the *Bail Act* 1978 when determining whether bail should be granted. RS Hulme J cast doubt on the ability of an accused person on remand or a convicted person in custody awaiting the determination of an appeal in NSW to adequately prepare their case. His Honour stated:

> [4] … what I have seen does tend to reinforce the impression I have derived in other cases that the Corrective Services Department do not provide what an outsider would regard as reasonable facilities for someone such as the applicant in the circumstances that he is in.

> [5] The Department must realise that if the only way that an accused person or appellant can prepare his case is by being granted liberty then that is the course which the Court might have to take.

DRUGS

Obligation to leave "Carey defence" where it was possible for the jury to conclude the intention was to return drugs

The appellant in ***Alliston v R*** **[2011] NSWCCA 281** had been travelling in a motor vehicle with her partners when police found 129 g of methylamphetamine in her handbag and a further 973.5 g under the vehicle's back seat. At trial, A denied knowledge of the larger quantity and did not directly give evidence about to her intentions for the quantity in her bag. She was charged with supplying a large commercial quantity of the drug (i.e. both quantities), but convicted on the alternative of supplying a commercial quantity. It was argued by counsel at trial that the "*Carey* defence" should be left to the jury in relation to the smaller amount but the trial judge declined on the basis that there was an absence of evidence that she intended to return the drugs to her partner. On appeal, it was contended that the judge had erred in this respect because the relevant inference was available from her testimony.

McClellan CJ at CL held (Fullerton J agreeing, Simpson J disagreeing as to whether the defence should have been left) that the defence should have been left but that no miscarriage of justice had occurred. Pursuant to the decision in *R v Carey* (1990) 20 NSWLR 292, before the appellant could be guilty of supply the jury must have been satisfied that she both had possession of the drugs and had them for the purpose of supply. She had been asked at trial, "You knew you were going to be stopped at Glen Innes?" She replied, "Well, I didn't know. I didn't know what he was doing with them. I didn't know if he was taking them back to Peter or who, where." It was contended that it was implicit in this that the drugs belonged to the partner and the inference was available that she intended to return them to him. McClellan CJ at CL found that the inference was open to the jury to conclude that she had the intention to return the drugs to her partner and the "*Carey* defence" should have been left. However, the Court concluded that the jury must have found that the appellant was in possession of the larger quantity of the drug (for which no *Carey* defence was claimed) so no miscarriage of justice had occurred.

EVIDENCE

Strict compliance with s 13 of the Evidence Act required before a witness can give unsworn evidence

In ***SH v R*** **[2012] NSWCCA 79** it was held by Basten JA that before a witness is competent to give unsworn evidence it is necessary that s 13(5) of the *Evidence Act* 1995 is strictly complied with. The case concerned a charge of sexual intercourse with a child under 10 years and the trial judge permitted the complainant to give unsworn evidence. However, the judge failed to tell her that she should feel no pressure to agree with statements that she believed were untrue as required by s 13(5)(c).

Basten JA stated (at [13]) that the basis for s 13(5)(c) is a concern that a witness without the capacity to give sworn evidence may "feel under pressure to agree with statements put by adults in wigs and robes", regardless of whether they are correct. The section is not directed at the form of instruction to be given to the witness, but rather to its effect. There was no error in trial judge giving the other required instructions by way of questions put to the witness (at [33]). However, his Honour held (at [35]) that it was necessary that the directions required by s 13(5) be given in full, regardless of whether there was any substantial miscarriage of justice. The error in failing to give the instruction pursuant to paragraph (c) could not be rectified by the prosecutor telling the witness that she should not feel under any pressure "because we are grown-ups in funny clothes".

Discretion to admit unlawfully obtained evidence

The respondent in ***DPP v Langford*** **[2012] NSWSC 310** was a driver involved in a serious road accident. Despite her demonstrating heavy intoxication, alcohol was not registered by two roadside breath tests. She was taken for blood and urine sample tests by police, who (mistakenly) believed that they were acting pursuant to the *Road Transport (Safety and Traffic Management) Act* 1999, and she was subsequently charged with high range drink driving after testing positive to alcohol. However, a magistrate ruled that the Act did not authorise her detention and compulsory testing, and that the evidence from the tests was unlawfully obtained. The magistrate refused to admit the evidence and dismissed the charge.

Fullerton J, allowing the DPP's appeal, found (at [32]) that the magistrate had erred by placing undue weight on broad policy considerations, at the expense of those factors which are required to be taken into account pursuant to s 138(3) when determining whether to admit unlawfully obtained evidence. The magistrate was entitled to consider the need for police to adhere strictly to the statutory limits of their powers. However, her Honour failed to consider the gravity of the breach as required by s 138(3)(d). Citing McClellan CJ at CL in *R v Camilleri* [2007] NSWCCA 36 at [28]-[31], Fullerton J held that the intention of the arresting authorities was relevant in determine the seriousness of the contravention. In this case, the senior officer who directed the samples be taken had formed a genuine but mistaken belief about his authority to do so. Her Honour stated (at [38]) that where a contravention of the law is innocent and alleged offence is serious, there would need to be "powerful countervailing considerations before the evidence is rejected".

DNA evidence: admissibility of interpretation of by way of exclusion percentage

The appellant in ***Aytugrul v R*** **[2102] NSWCCA 272** was convicted of murder. The prosecution at trial had linked him to the killing with a hair found under the deceased's thumbnail that matched his DNA. An expert interpreted the results of the DNA analysis in two ways: first, 1 in 1600 people had the same DNA profile as that found in the hair (a frequency ratio); and second, 99.9% of people would not have a matching DNA profile (an exclusion percentage). On appeal, it was argued that the DNA evidence was presented in a prejudicial way because of the use of the exclusion percentage. There was no question that the evidence of the DNA analysis was correct. Simpson J (Fullerton J agreeing) held that the interpretation of the DNA evidence was appropriately put before the jury. McClellan CJ at CL, dissenting, regarded (at [99]) the expression of the interpretation of the evidence by way of exclusion percentages as being "too compelling". In his Honour's view this involved prejudice that substantially outweighed the probative value of the evidence, and it should have been excluded.

Mr Aytugrul appealed to the High Court, submitting that the DNA analysis expressed as an exclusion percentage should have been rejected pursuant to either s 135 or s 137 of the *Evidence Act* 1995. The appeal was dismissed: ***Aytugrul v The Queen*** **[2012] HCA 15** French CJ, Hayne, Crennan and Bell JJ (Heydon J agreeing with separate reasons). Their Honours held (at [20]-[22]) that there was not a sufficient basis for a general rule that DNA evidence expressed as an exclusion percentage should always be inadmissible because its probative value is always outweighed by unfair prejudice to the defendant. There was research identified by McClellan CJ at CL in his Court of Criminal Appeal judgment demonstrating that some formulations of DNA results could be more persuasive than others. However, the Court found that those results had not attained general acceptance to a level that would permit judicial notice pursuant to s 144 of the *Evidence Act* and no proof was put forward to support the proposed general principle.

Their Honours (at [23]) also rejected the more specific question of whether the exclusion percentage in this case, accompanied as it was by a frequency ratio, should have been excluded pursuant to s 135 or s 137. It was noted that the argument that unfairness may derive from "the subliminal impact of raw percentage figures" would carry some weight if the exclusion percentage had been considered in isolation. There are some circumstances where reliance on an exclusion percentage to express DNA analysis may demand consideration of the application of s 135 or s 137. However in this case, where the percentage was accompanied with the frequency ratio and there was an explanation of the relationship between them, there was no error in allowing the evidence.

Tendency evidence: assessment of admissibility

The appellants in ***DSJ v R; NS v R*** **[2012] NSWCCA 9** were charged with a number of insider trading offences. The Crown had sought to rely on the evidence relating to each offence as coincidence evidence to support the other counts, pursuant to s 98 of the *Evidence Act* 1995. The trial judge dismissed an application on behalf of the appellants that the charges be tried separately, and before a five judge bench of the Court of Criminal Appeal it was argued that the trial judge had erred in his approach to determining the probative value of the coincidence evidence. Whealy JA (McClellan CJ at CL and McCallum J agreeing, Bathurst CJ and Allsop P agreeing with additional comments) held (at [130]) that the decision should be set aside as the trial judge had fallen into error by "rejecting altogether the need to recognise, in the evaluation process, the existence of alternative inferences inconsistent with guilt arising from the Crown evidence."

Bathurst CJ (at [5]-[9]) set out the process of inquiry required of a trial judge by s 98. Once the judge has determined that coincidence evidence is relevant, the judge must determine whether the evidence "could rationally affect the assessment of the probability of the existence of a fact in issue to a significant extent." That determination is to be made considering the evidence on its own or having regard to the other evidence adduced by the party seeking to tender it.

The Court was asked to reconsider the judgment of Simpson J in *R v Zhang* [2005] NSWCCA 437. It was held that her Honour's approach to s 98 was the right one. However, Whealy JA clarified (at [71]-[72]) that the appropriate interpretation of that judgment was not that a trial judge is required to "second-guess a jury", but rather that the judge is to take the coincidence

evidence at its highest and determine if it could be of importance in establishing a fact in issue. Whealy JA admitted that there was a tension between Simpson J's formulation and that of Allsop P in *DAO* [2011] NSWCA 63. However, he found that in substance the two approaches to s 98 were the same: the task of the trial judge is to rule on the capacity of the evidence to be important in establishing a fact in issue.

Whealy JA noted (at [78]-[81]) that when deciding whether the coincidence evidence has significant probative value, by reference to the evidence itself or with regard to other evidence adduced by the tendering party, the trial judge must consider whether there is a real possibility of an alternative explanation arising on the evidence other than the guilt of the accused. It must then be asked whether that possibility alters the assessment of the probative value of the evidence. However, at no stage may the judge assess the actual probability of the alternative theory, or make any comparison between the Crown's theory and the alternative one. The duty of weighing the evidence rests solely with the jury.

Admissibility of admissions by 15 year old to community support person

The appellant in ***JB v R*** **[2012] NSWCCA 12** was a convicted of murder. He was 15 years old at the time of the offence and of Sudanese background. At the police station after his arrest J told Mr Clayton, a Sudanese youth liaison officer, that he had stabbed someone. At trial, the judge allowed evidence of that admission to be led by the Crown after it was determined that there was no unfairness in admitting the evidence pursuant to s 90 of the *Evidence Act* 1995. On appeal, Whealy JA rejected (at [29]) an argument that it was unfair to admit the evidence of admissions made to someone in the "unique position" of a support person. The relationship between a young accused and support person does not fall in any of categories of relationship protected by legislation. His Honour held (at [30]) that it could be distinguished from those special relationships, such as between lawyer and client, that receive "legislative protection because it is central to the function of those relationships that free and frank disclosure exist between the two persons involved." Whealy JA noted (at [37]) that there may be certain circumstances where s 90 would prevent an admission made to a support person being admitted, for example where the accused had been "cajoled or tricked" into giving the admission. However, in dismissing the appeal his Honour held that the trial judge was correct in finding the admission was an unguarded incriminating statement and his Honour was correct in allowing the Crown to lead the evidence.

Search warrants and s 138 of the Evidence Act 1995

The prosecution of the accused in ***R v Sibraa*** **[2012] NSWCCA 19** for child pornography style offences depended upon materials seized when his home was searched pursuant to a search warrant. The search warrant turned out to be invalid because the issuing magistrate had neglected to date it. The trial judge excluded the evidence pursuant to s 138 of the *Evidence Act* 1995. He was critical of the police officers involved in the search for failing to satisfy themselves that the warrant was valid. He regarded their conduct as "reckless". The prosecution appealed.

It was held by R S Hulme J ([18] – [26]) that the judge's findings in relation to the officers were erroneous. It was the purported execution of an invalid warrant that constituted the impropriety, not the failure of the officers to check it. It was not insignificant that the origin of the impropriety was the accidental omission of the issuing magistrate. Had the omission been

detected, it could easily have been rectified. But for the defect in the warrant, the intrusion into the respondent's home would have been legal. There was no deliberate or conscious undertaking of a risk by the officers. It was not necessarily unreasonable for the officers to expect that the magistrate would have carried out the simple task of signing, sealing and dating the warrant without the need for any oversight. It was unrealistic to expect that each of the police officers involved in the search should have checked to ensure that all "i"s had been dotted and "t"s crossed as some of the trial judge's remarks suggest. The finding of "recklessness" was unwarranted.

Consciousness of guilt: silence in the face of an allegation of child sexual assault

The appellant in ***McKey v R*** **[2012] NSWCCA 1** was found guilty of a child sexual assault offence. The complainant was the younger sister of a woman (KN) who was about to marry the appellant's good friend (N). The complainant disclosed the offence to KN who repeated it to N. That night, KN tried to call the appellant but was unsuccessful. A few days later, the appellant rang N who said, *"we've been given some information about a few days before our wedding that involved [the complainant]"*. The appellant said he was driving but would call N soon. He did not. In the ensuing days, KN sent the appellant text messages but he did not reply. N gave evidence that he had sent a text message to the appellant saying *"I want to know both sides of the story"*. About a month later the appellant sent a text in which he said that they (N and KN) would not believe him and would only believe the complainant. There was no further contact.

The appellant gave evidence that he became aware of the allegation when he received the call from KN. He claimed that he had said, *"I don't know what you're talking about"* before the call dropped out. He agreed that he received some text messages but had been advised by his sister, who was a police officer, and a friend that he should not respond.

The Crown Prosecutor suggested in cross-examination that if the allegations were untrue, the appellant would have wanted to protest his innocence "long and loud". It was suggested that he did not do so because the allegations were in fact true. The prosecutor put to the jury in address that they might think that the appellant would be "protesting his innocence from the rooftops" if the allegations were untrue. Defence counsel put alternative arguments. The trial judge simply reminded the jury of the competing submissions and said that it was a matter for them to evaluate.

It was contended on appeal that the Crown had invited the jury to infer that the appellant's silence was because of consciousness of guilt and the trial judge had erred by failing to properly deal with this issue. The Crown submitted that the issue was only relevant to credibility and this is how the prosecutor had approached the issue at trial.

It was held by Latham J (at [31] – [44]) that the cross-examination had invited consciousness of guilt reasoning. At the very least, there should have been a direction as to the care with which the jury should approach such an issue before drawing an inference adverse to the appellant. There was the obvious alternative inference that his silence was not as a result of consciousness of guilt but was because he was acting on the advice of his sister that he should not respond to the allegations.

Admissibility of "body mapping" evidence

In ***Morgan v R*** **[2011] NSWCCA 257** the prosecution sought to rely upon the evidence of a "biological anthropologist and anatomist", Dr Maciej Henneberg. Through a process he described as a "morphological approach to anatomical examination" he expressed the opinion that "there is a high level of anatomical similarity between the offender [depicted in CCTV images] and the suspect". The trial judge admitted the evidence over objection and after a voir dire in which the defence called 3 experts who were critical of Dr Henneberg's approach. It was held on appeal that the doctor's comparison of the images was a task which the jury could have undertaken for themselves. The opinion evidence was dressed up in technical jargon but when stripped of this it was simplistic. Hidden J concluded on the subject by saying that, "it tended to cloak evidence of similarity in a mantle of expertise, described by Mr Stratton [SC] as a 'white coat effect', which it did not deserve."

Compellability of a parent to give evidence against their child

In ***LS v DPP (NSW)*** **[2011] NSWSC 1016**, a 15 year old boy was charged with having damaged household property belonging to his mother during the course of an argument. The charges were heard in the Children's Court. The mother applied to be excused from being required to give evidence for the prosecution pursuant to s 18 of the Evidence Act 1995, to which the prosecutor objected. The prosecutor contended that section 19 of the *Evidence Act* 1995 applied as an exception to s 18 as the offence fell within the definition of a domestic violence offence under the *Crimes (Domestic and Personal Violence) Act* 2007. Section 19 provides that, inter alia, the exception to compellability in s 18 of the *Evidence Act* 1995 does not apply to proceedings for an offence against or referred to in, inter alia, s 279 of the *Criminal Procedure Act* 1986 (the provision is headed "Compellability of spouses to give evidence in certain proceedings"). Subsection 279(1)(b) makes reference to domestic violence offences. The magistrate accepted the prosecutor's submission and ruled that it was not open to the mother to object to being required to give evidence.

On appeal, Johnson J quashed the magistrate's ruling. His Honour held (at [54] and following) that the reference in s 19 of the *Evidence Act* 1995 to s 279 of the *Criminal Procedure Act* 1986 is a reference to a domestic violence offence committed by a spouse, and not a domestic violence offence generally within the meaning of the *Crimes (Domestic and Personal Violence) Act* 2007.

Admissibility of admissions in a summary hearing in the Children's Court where no electronic recording made

In ***CL v DPP (NSW)*** **[2011] NSWSC 943**, the accused was charged with aggravated break, enter and steal (s 112(2) *Crimes Act* 1900). The prosecution relied upon admissions made by the accused during an interview with a police officer at his home that were recorded in the officer's notebook. There was an opportunity to electronically record the interview but the officer elected not to. CL objected to the tender of the admissions on the basis that there was no recording and no reasonable excuse as to why there was not (s 281 *Criminal Procedure Act* 1986). The magistrate, however, allowed the evidence on the basis that s 281 only applies to admissions that relate to an indictable offence, "other than an indictable offence that can be dealt with summarily without the consent of the accused": s 281(1)(c). While the offence is

strictly indictable in the case of an adult, it is an offence that pursuant to the *Children (Criminal Proceedings) Act* 1987 is ordinarily dealt with summarily in the Children's Court.

Fullerton J allowed the appeal and quashed the orders of the magistrate. Resolution of the issue turned upon the proper construction of s 281(1)(c) of the *Criminal Procedure Act* 1986. Her Honour held (at [16]), "that the qualification in s 281(1)(c) is to the type of offence to which the admission relates (namely an indictable offence that can be prosecuted without the accused's consent under Tables 1 and 2 of Schedule 1 of the *Criminal Procedure Act*) and not the nature of the proceedings where the admission is sought to be led as might have been the case were the exception in s 28(1)(c) to read 'other than an indictable offence that *is* dealt with summarily without the consent of the accused'."

LEGISLATION

Summary Offences Amendment (Intoxicated and Disorderly Conduct) Act 2011

A new s 9 was inserted in the *Summary Offences Act* 1988 to provide for an offence of being a person who is given a move on direction for being intoxicated and disorderly in a public place where the person had been intoxicated and disorderly in the same, or another, public place in the previous six hours. The provision was proclaimed to commence on 30 September 2011.

Criminal Case Conferencing Trial Amendment Regulation 2011

The criminal case conferencing trial scheme was brought to an end by an amendment to cl 6 of the principal Regulation. The scheme continues to apply where a court attendance notice was filed on or after 1 May 2008 and before 8 October 2011.

Criminal Case Conferencing Trial Repeal Act 2012

Notwithstanding the amended Regulation above, the Act itself was repealed on 14 March 2012. A new Part 22 of Schedule 2 of the *Criminal (Sentencing Procedure) Act* 1999 contains savings and transitional provisions. The repealed Act ceases to apply to proceedings to which it applied before the repeal date unless otherwise provided. The regime for sentence discounts in Part 4 of the Act is continued except if an offender pleaded guilty after committal for trial.

Crimes (Sentencing Procedure) Amendment (Children in Vehicles) Act 2011

A new subpara (2)(p) was inserted in s 21A to provide that it is an aggravating factor if an offence was "a prescribed traffic offence" and was committed while a child under 16 years of age was a passenger in the offender's vehicle. "Prescribed traffic offence" is defined in new subs 21A(6). The amendment took effect on 16 November 2011.

Director of Public Prosecutions Amendment (Disclosures) Act 2011

This Act was passed rapidly following the decision in *R v Lipton* [2011] NSWCCA 247. It amends s 15A of the principal Act by adding s 15A(6) to provide that police officers do not have to

disclose to the DPP any information, documents or other things that are the subject of a bona fide claim of privilege, public interest immunity or statutory immunity. Officers do, however, have to inform the DPP that they have obtained information, documents or other things of that kind. The amendment has retrospective operation and it took effect on 25 November 2011. New s 15A(7) provides that s 15A(6) ceases to have effect on 1 January 2013.

Crimes (Sentencing Procedure) Amendment (Certificates) Regulation 2011

Amendments to the principal Regulation which took effect on 2 December 2011 permit staff of the Department of Finance and Services, the Department of Health, and the Compensation Authorities Staff Division of the Government Service to sign Form 1 documents. Also, in relation to certificates concerning consultation with victims regarding charge negotiations, provision was made for them to be signed by police officers, the Commissioner of Fair Trading, and staff of the Department of Finance and Services.

Crimes Amendment (Consorting and Organised Crime) Act 2012

Several new offences were inserted in the *Crimes Act* 1900. They included firing at a house or building with reckless disregard for the safety of any person in the course of organised criminal activity (s 93GA(1B)). Offences of participating in criminal groups of graduated seriousness were created (s 93T(1), (1A) and (4A) as well as an offence of receiving a material benefit derived from criminal activities of criminal groups (s 93TA). The old consorting offence in s 546A was deleted and replaced with a new one in s 93X with an increased penalty. All the new offences may be dealt with summarily. These provisions took effect on 9 April 2012.

Courts and Crimes Legislation Amendment Act 2012

The amendments made by this Act included some to the *Criminal Procedure Act* 1986. A uniform maximum penalty of imprisonment for 2 years may be imposed by the Local Court for any indictable offence dealt with summarily. There were amendments to ss 289A and 289B to simplify the procedure for random samples of child abuse material to be used in child abuse material prosecutions. S 299B was amended to confirm that a court may examine documents in order to determine whether they include a protected confidence in relation to sexual assault communications privilege, despite ss 297 and 298 which provide constraints in relation to the production of such documents to a court. These amendments took effect on 21 March 2012.

Crimes Amendment (Reckless Infliction of Harm) Act 2012

The *Crimes Amendment Act* 2007 removed "malice" and "maliciously" from the principal Act. The offence in s 35 of malicious inflicting grievous bodily harm was regarded as requiring proof that the accused intended to inflict some harm. It was replaced with an offence of recklessly causing grievous bodily harm. A consequence of the amendment identified in *Blackwell v Regina* [2011] NSWCCA 93 was that it had become necessary to prove that the accused foresaw the possibility of grievous bodily harm being caused. This was regarded as a consequence Parliament had not intended. The *Crimes Amendment (Reckless Infliction of Harm) Act* 2012 amended s 35 (and ss 60, 60A and 60E) to provide that reckless causing of harm (and wounding) is established if the person is reckless to causing actual bodily harm. It took effect on 21 June 2012 and does not apply to offences committed previously.

OFFENCES

Can a de facto partner of a child's parent be a "foster parent"?

JAD was charged with a number of aggravated sexual offences under s 73 of the *Crimes Act* 1900 and was the de facto partner of the complainant's mother. He was convicted on the basis that he fell within the definition of the child's "foster parent/father". He appealed on the ground that the relationship was not one capable of being described as one of foster parent and foster child: ***JAD v R* [2012] NSWCCA 73**. It had been held in *R v Miller* 127 A Crim 344 that the de facto partner of a child's mother was not the child's "step-father".

Simpson J (with Hoeben J agreeing, allowing the appeal on another ground) held (at [166]) that the term "foster parent" may include the de facto of a natural parent of the child for the purposes of s 73, where the de facto is shown to play a role in the child's upbringing. Having recourse to a purposive approach to statutory construction, her Honour stated (at [148]) that a construction of s 73 that excluded a de facto in the position of JAD from the definition of "foster parent" would result in an interpretation that "failed to remedy the mischief that Parliament intended to deal with". In response to the argument that this may stretch the definition of "foster parent", she stated that this was a case where such a construction was justified. The failure to include persons in the position of the appellant in s 73 was the result of inadvertence and should be rectified by reading "foster parent" as extending to include that class of person (at [164]). Regardless, her Honour found that even on a literal approach a de facto, living in a familial relationship and shown to play a role in the child's upbringing, would fall within the definition (at [145]).

The definition of knuckle-dusters in the Weapons Prohibition Act 1998

While being screened on arrival at Sydney Airport, the respondent in ***DPP v Starr* [2012] NSWSC 315** was found with a belt buckle in the shape of knuckle-dusters. Knuckle-dusters are defined by cl 2(19), sch 1 of the *Weapons Prohibition Act* 1998:

> "**Knuckle-dusters** or any other similar article that is made of any hard substance and that can be fitted over 2 or more knuckles of the hand of *the user* to protect the knuckles and increase the effect of a punch or other blow or that is adapted for use as such." (Emphasis added.)

Starr was charged with possessing a prohibited weapon in contravention of s 7 of the Act. At trial, the magistrate found that the item likely fell within the definition but there was doubt whether the item would actually fit the hand of the defendant, being "*the user*". On that basis, the charge was dismissed and the Director of Public Prosecutions appealed to the Supreme Court.

Adamson J (allowing the appeal) held it was not necessary to satisfy s 7 that a knuckle-duster in possession of a defendant actually fit the defendant's hand. Her Honour found (at [47]) that in a possession case, "*the user*" in the definition at cl 2(19) "must, as a matter of construction, refer to a notional user or members of a notional class of user rather than to a specific user, there being no actual user who is subject of the operative provision in s 7." An alternative construction, which permitted the possession of knuckle-dusters by large-handed individuals

whom they did not fit, would frustrate the underlying purpose of the Act to improve public safety and strictly control the possession of such weapons.

Reckless and negligent navigation offences against the Marine Safety Act 1998

The respondent in ***Maritime Authority of New South Wales v Rofe*** **[2012] NSWSC 5** was responsible for conducting exercises on Lake Burrinjuck with officer cadets of the Australian Defence Force Academy, using an inflatable boat with an unguarded propeller motor. On a joy ride after a day's exercises, a cadet fell from the boat and suffered horrific injuries from the propeller. A magistrate dismissed two charges brought under the *Marine Safety Act* 1998 of operating a commercial vessel negligently occasioning grievous bodily harm (s 13(1)(a)), and of operating a commercial vessel recklessly occasioning grievous bodily harm (s 13(1)(b)).

The appellant argued that the magistrate had erred in holding, first, that the existence of a possibility of serious harm was insufficient to sustain a finding of negligence or recklessness; and secondly, the degree of negligence required to contravene s 13(1)(a) was one of significant culpability, and higher than the civil law standard. Brereton J rejected the first ground, holding (at [122]) that regardless of how serious the potential consequences of an action, the risk of those consequences occurring must be "at least real, obvious and serious". Similarly, mere foreseeability was an insufficient ground for a finding of criminal negligence under the Act.

Conversely, his Honour found that the second ground was made out and that the magistrate had misdirected herself by demanding a higher degree of negligence to satisfy s 13(1)(a) than in a civil case. However, this point was not taken in the court below and, dismissing the appeal, Brereton J held that it would not be in the interests of justice for the appeal to be upheld on that ground alone.

Possession of a prohibited weapon – mental element

The DPP appealed against a magistrate's dismissal of a charge of possessing a prohibited weapon, namely a flick knife, contrary to s 7(1) of the *Weapons Prohibition Act* 1998: ***DPP (NSW) v Fairbanks*** **[2012] NSWSC 150**. The defendant was found to have the flick knife in a backpack when he attended an airport to catch a flight. He knew that he owned a flick knife but had packed hurriedly when his travel plans were changed at short notice and he had forgotten that it was in the backpack. That explanation was accepted.

"Possession of a prohibited weapon" is defined in s 4(1) to include any case in which a person knowingly (a) has custody of the weapon, or (b) has the weapon in the custody of another person, or (c) has the weapon in or on any premises, place, vehicle, vessel or aircraft, whether or not belonging to or occupied by the person.

Rothman J referred to *He Kaw Teh v The Queen* (1985) 157 CLR 523 for the proposition that knowledge of the accused is necessary in proof of possession; although the *Weapons Prohibition Act* definition itself has that requirement by the use of "knowingly". In this case, the defendant knew that he owned and possessed the knife; albeit that he did not know that it was in his bag at the airport. His Honour also referred to *R v Martindale* [1986] 3 All ER 25 which held that possession does not depend upon the alleged possessor's powers of memory and nor does possession come and go as memory revives or fails. It was observed that if that were the case, a person with a poor memory would be acquitted whereas the person with a

good memory would be convicted. Here, the defendant was knowingly in possession of the weapon, even if he thought that the weapon was at home and not in his bag at the airport. The magistrate had wrongly applied a test that required the prosecutor to prove that the defendant knew that the knife was in the bag.

Causing another person to take a poison or other destructive or noxious thing so as to endanger life – meaning of "cause to be taken"

Two of the offences for which the appellant in ***Riley v R*** **[2011] NSWCCA 238** was convicted were against s 39 *Crimes Act* 1900. (The terms of the offence were recast in 2008 but the concept of causing another person to take remains). The allegation was that the appellant had provided prescription drugs to the victims which had dangerous effects when they were taken in combination. There was also a manslaughter charge in relation to another victim which also required consideration of the concept of "cause to be taken". The trial judge directed the jury that the victim must have been "substantially influenced" by the accused in taking the substances. This was held to have been erroneous. The reasoning of Howie J in *R v Wilhelm* [2010] NSWSC 334 was accepted as being correct. That is, there is a difference between a person being in a position of influence over a person and a person influencing the other person. "Cause to be taken" is to cover a situation where a person in authority over another (e.g. an adult over a child) orders, commands, or directs the other person to take the substance.

POLICE POWERS

Exercise of a police officer's powers of arrest

Section 99 of the *Law Enforcement (Powers and Responsibilities) Act* 2002 provides for the power of police officers to arrest without a warrant. Section 99(2) provides a general power to arrest without warrant if an officer suspects on reasonable grounds that a person has committed an offence, while s 99(3) provides that a police officer must not arrest a person unless the officer suspects on reasonable grounds that it is necessary to achieve one or more of the purposes set out in (a) – (f). In ***Williams v DPP (NSW)*** **[2011] NSWSC 1085** the issue arose as to whether a magistrate, in considering the question of whether police officers had acted in the execution of their duty when arresting a man without a warrant for a shoplifting offence allegedly committed three weeks earlier, was required to have regard to s 99(3). It raised the question as to the interplay between ss 99(2) and 99(3). Associate Justice Harrison held (at [23]) that s 99(3) restricts the circumstances in which the power under s 99(2) may be exercised. Consequently, the magistrate erred in failing to apply s 99(3) when determining the whether the police officers had acted in the execution of their duty.

PRACTICE AND PROCEDURE

Non-publication order in the nature of an internet take down direction

A District Court judge made an order pursuant to the *Court Suppression and Non-publication Orders Act* 2010 prohibiting publication within the Commonwealth of Australia of material containing any reference to other criminal proceedings or unlawful conduct with which three

accused men had been involved. Section 8 of the Act provides the grounds upon which orders may be made with each expressed in terms of whether they are "necessary" to achieve a certain purpose; for example, "necessary to prevent prejudice to the proper administration of justice" (s 8(1)(a)). An appeal was brought by media companies: ***Fairfax Digital Australia and New Zealand Pty Ibrahim*** **[2012] NSWCCA 125**. Basten J (at [71] ff) identified a number of problems with the order, not limited to but including the terms in which it was expressed. One of the problems was that the order was ineffective and so, could not be said to be "necessary". The order was set aside.

Subpoenas and public interest immunity

In the context of a prosecution for cocaine supply a subpoena was issued to the registrar of the Local Court for production of documents to the District Court, including an application for a search warrant. The Commissioner of Police raised a claim of public interest immunity. The claim was rejected and the Commissioner appealed: ***Derbas v R*** **[2012] NSWCCA 14**. Meagher JA held (at [31]-[32]) that the primary judge was correct in finding that it was "on the cards" that the search warrant application would set out why the police believed that the respondent had cocaine and firearms and the circumstances in which he had come into possession of them. However, the judge erred in only considering whether the identity of a confidential informer identified in the application would be relevant to defences raised, and not in considering the significance of this and other confidential information to the respondent's ability to pursue those defences. The primary judge also erred in taking into account the potential consequences of disclosing the informer's identity. It was held (at [36]) that this was not relevant to balancing the interests of the respondent and the public interest. After analysing the evidence, his Honour (at [44]) determined that the disclosure of the informer's identity "might" be of "some assistance", depending on what happened at trial, but that this was not sufficient to justify disclosure. The appeal was allowed.

Denial of procedural fairness

In a defended hearing on the charge of disobeying a red traffic light, the prosecutor indicated to the magistrate that he intended to call four police witnesses. When her Honour was informed that only two of the officers witnessed the offence, she indicated that she did not want to hear from the other two, although they were able give evidence to resolve an issue about whether it was the defendant's vehicle that was involved in the offence. She said that calling the additional officers would not assist and that she believed the first two officers were not credible. The charge was dismissed and the DPP appealed.

In ***DPP (NSW) v Elskaf*** **[2012] NSWSC 21**, Garling J found that the prosecution had been denied procedural fairness by the magistrate peremptorily refusing to admit the evidence of the two officers. His Honour held (at [44]) that the magistrate should have permitted the witnesses to be called and, if the evidence was not relevant, it could have been objected to. Alternatively, its relevance could have been tested on a voir dire. At [42], Garling J stated:

> It is no part of the a presiding judicial officer's function to take over the conduct of the case of one or other party and, in effect, summarily to prevent the calling by the prosecutor of any evidence where the prosecutor considered the evidence to be relevant to making out the charge: see *Director of Public Prosecutions v Wunderland* [2004] NSWSC 182 at [21] per Sully J.

Correct procedure for determining a criminal case by a magistrate or judge sitting alone

The judgment of Johnson J in ***Director of Public Prosecutions (NSW) v Wililo and Anor*** **[2012] NSWSC 713** includes a comprehensive review of the requirements for the proper conduct of a criminal case by a magistrate or by a judge sitting alone (at [35] – [65]). In this particular case it was found that there was a failure of a magistrate to accord to the prosecutor procedural fairness, to properly consider whether there was a prima facie case, and to provide sufficient reasons for dismissing the charge. Strong comment was also made about the importance of complying with the doctrine of precedent in the context of the same magistrate having had similar errors she had made identified in a number of previous Supreme Court judgments.

Judge-alone trial - extent to which a trial judge can ask questions of witnesses

In ***FB v R; R v FB*** **[2011] NSWCCA 217**, a ground of appeal concerned the trial judge's questioning of certain witnesses. It was contended that this was excessive; at times inappropriate, in that it bolstered the prosecution's case; and that it created a real danger that the trial was unfair. Whealy JA rejected the ground, finding (at [110]) that the trial judge's interventions were "moderate, balanced, necessary and proper in every respect". His Honour observed:

> [90] Most of the authorities which underline the caution to be properly exercised by the trial judge during a criminal trial relate to trials where there is a jury. On the other hand, as might be expected, there are cases that recognise the greater latitude to be afforded to the questions asked by a trial judge in the context of a civil trial. […] In view of the statutory framework now surrounding criminal trials in New South Wales, it may be appropriate to restate the accepted principles, but with particular emphasis on the fact that it may be expected that henceforth more criminal trials will be conducted without the benefit of a jury. This may underline the proposition that, in appropriate circumstances, a judge sitting on a criminal trial without a jury will be entitled, within reasonable limits, to explore issues of fact with both Crown and defence witnesses.

ROAD TRAFFIC

Driving with the special range prescribed concentration of alcohol by a special category driver

A man was charged with driving while his license was suspended and for driving with a blood alcohol concentration between 0.02 and 0.05, a proscribed range applying by reason of his suspended license. A magistrate dismissed the second charge of special range drink driving on the basis that his liability for this offence was dependent on his liability for the first charge. Fullerton J in ***DPP v Sukhera*** **[2012] NSWSC 311** upheld the Crown's appeal on the basis that the magistrate did not give sufficient reasons for his decision. Her Honour also found (at [19]-[21]) that the magistrate had erred in suggesting some form of double jeopardy would occur if both offences were charged. Distinct offences can arise from the same facts. The critical point is that the constituent elements of each offence were not wholly included in the other. Further, laying both charges could not amount to an abuse of process. Given the distinct conduct relied on to prove each offence, there could be no unfairness in charging the respondent with both.

SENTENCING – GENERAL ISSUES

Order that a sentence be served in a juvenile detention centre past offender's 18th birthday

In ***JM v R* [2012] NSWCCA 83** the appellant had committed a number of violent offences as a minor and was sentenced to 7 years imprisonment with a non-parole period of 4 years. The judge made a recommendation that the sentence be served in juvenile detention until he was 21 years and 6 months, purportedly under s 19 of the *Children (Criminal Proceedings) Act* 1987. Whealy JA (with whom Hoeben J agreed) held that the sentencing judge should have made an order pursuant to s 19 rather than a recommendation. His Honour also stated (at [23]) that it would be contrary to the principle set down by Howie J in *TG v R* [2010] NSWCCA 28 to impose "a sentence which has in contemplation a statute which prohibited a person from remaining in a juvenile detention centre unless the non-parole period is below a certain figure… even where that is merely one consideration and the sole determinant". A sentence cannot be structured in order to avoid a statutory outcome: *R v Zamagias* [2002] NSWCCA 17.

Distinction between legal responsibility and moral culpability

The appellant in ***KR v R* [2012] NSWCCA 32** pleaded guilty to a murder that occurred when he and another (LR) had kicked a man to death during a robbery. In the course of sentencing KR the judge stated that he was satisfied that "both offenders were equally responsible for the death" but proceeded to impose a longer sentence on KR than on his co-offender. KR appealed arguing the finding that they were "equally responsible" should have resulted in an equal or relevantly similar sentence.

Latham J, dismissing the appeal, discussed the difference in law between criminal responsibility and culpability (at [15]-[22]). In the case of a joint criminal enterprise each participant will bear equal *legal responsibility* for the acts carried out by all participants to the joint enterprise. However, the conduct of the individual participant to a joint criminal enterprise will be relevant to the level of *culpability* for which an offender is to be sentenced, culpability being the moral responsibility for an offence (at [19]-[21]). Latham J held that the sentencing judge's finding that the co-offenders were "equally responsible" related to their legal responsibility, while it was clear that the judge found KR was more morally culpable than LR for the offence (at [24]-[25]).

Parity - offenders not engaged in a common enterprise

The appellant in ***Henderson v R* [2012] NSWCCA 65** had been sentenced for possessing an unauthorised firearm and supplying ecstasy. Other firearm offences had also been taken into account. He contended that the sentencing judge erred in not applying the parity principle in relation to the sentence imposed on a man who had been convicted of possessing an unauthorised firearm based on his having secreted it for a few days for the appellant. R A Hulme J referred to the principle in cases such as *Jimmy v R* [2010] NSWCCA 60 that the parity principle will be applied to offenders engaged in the "same criminal enterprise" or a "common criminal enterprise". It was contended on behalf of the appellant that the effect of the decision in *Green v R; Quinn v R* [2011] HCA 49 was that strictures of the parity principle had been relaxed, and the approach was one of substance over form. However, R A Hume J found (at [60]) that as a matter of "substance" it was doubtful whether a "criminal enterprise"

existed at all in the circumstances of the case, let alone one common to both the appellant and the other man.

Impact of a conviction upon an offender's employment and ability to travel overseas

In ***R v Mauger*** **[2012] NSWCCA 51** the respondent to a Crown appeal was a senior analyst at an Australian investment company who travelled to the United States for work. He was found guilty of drug supply and possession, and the judge made an order pursuant to s 10 of the *Crimes (Sentencing Procedure) Act* 1999 that no conviction be recorded on the condition of him entering into 2 year good behaviour bond. Harrison J stated (at [18]) that the power available under s 10 to not record a conviction demonstrated a willingness on the part of the legislature to allow an offender to maintain their reputation and "avoid the otherwise rigid application of inexorable laws" in appropriate circumstances.

In this case, the sentencing judge appeared to be influenced in her decision to make a s 10 order by the consequences that the respondent might otherwise have lost his job and been prevented from travelling oversees (at [26]). There was no evidence led at sentence about restrictions that are placed on those with drug-related convictions travelling to the US, nor is it a matter appropriate for judicial notice: *United States Surgical v Hospital Products International* [1982] 2 NSWLR 766 at 801. Harrison J found (at [32]) that the judge had erred in relying on these unsupported considerations, although he noted that it may be different where actual evidence was led about loss of livelihood or inability to visit family due to travel restrictions in foreign countries. Regardless, the sentence was not regarded as manifestly inadequate and the Crown appeal was dismissed.

Intensive correction orders inappropriate where rehabilitation is irrelevant

In ***R v Boughen; R v Cameron*** **[2012] NSWCCA 17** the Crown appealed against sentences imposed against B and C for tax evasion, to be served by way of Intensive Correction Orders. The appeal was allowed. Simpson J held (at [110]) that the new Intensive Correction Order regime should not be used as a substitute for the no longer available option of periodic detention. The orders are targeted at rehabilitation and were inappropriate in this case where there was little risk of reoffending. Further, her Honour found that inherent leniency of such orders was contrary to the sentencing principles to be applied in cases of tax evasion.

Hardship for a foreign national on a criminal justice visa

In ***Van Eeden v R*** **[2012] NSWCCA 18** it was argued that the sentencing judge had failed to give due weight to the appellant's circumstances as a foreign national who had been placed on a criminal justice visa. The result was that while he was on bail he had been unable to obtain employment or receive social security, and his family had been unable to visit him. Schmidt J, dismissing the appeal, referred (at [37]-[38]) to the decisions in *R v Hinton* [2002] NSWCCA 405 and *R v Togias* [2001] NSWCCA 522, where it was held that the effect of a sentence on an offender's family could only be considered where the hardship was "exceptional". Similarly, her Honour held (at [40]-[42]) that there was no error in the sentencing judge giving little weight to consequences flowing from being a foreign national convicted of a crime in Australia.

No requirement for a judge to mechanically consider alternatives to full time imprisonment in every case

In *R v Zamagias* [2002] NSWCCA 17 at [24]-[28], Howie J set out the process to be followed when determining a sentence to be imposed pursuant to the *Crimes (Sentencing Procedure) Act* 1999. His Honour stated at [25]:

> The preliminary question to be asked and answered is whether there are any alternatives to the imposition of a sentence imprisonment. Section 5 of the Act prohibits the court from imposing a sentence of imprisonment unless the court is satisfied, having considered all the alternatives, that no other penalty other than imprisonment is appropriate.

In ***Hardie v R; Phillipsen v R*** **[2012] NSWCCA 6** the appellants argued that the sentencing judge had failed to consider this preliminary question. Basten JA, dismissing the appeal, held (at [6]) that while Howie J had accurately expressed process as set out by the Act, it was not encumbered on a sentencing judge to expressly state each step in the judge's reasoning. A failure to advert to one of the steps referred to by Howie J may increase the risk of error, but there were cases where a sentence of imprisonment was so obviously demanded that a consideration of the alternatives was not required.

Dysfunctional upbringing a mitigating factor

In sentencing for aggravated dangerous driving causing death and grievous bodily harm, a judge referred at length to the offender's severely dysfunctional upbringing. The Crown appealed against the sentence: ***R v Millwood*** **[2012] NSWCCA 2**. It argued that the sentencing judge had given excessive weight to the respondent's personal circumstances where they provided little ground for mitigation for this offence. Simpson J rejected the argument and dismissed the appeal. Her Honour stated at [69]:

> I am not prepared to accept that an offender who has the start of life that the respondent had bears equal moral responsibility with one who has had a "normal" or "advantaged" upbringing. […] I consider that the DPP's submission significantly underestimates the impact of a dysfunctional childhood.

She held that this was consistent with the approach of Wood J in *R v Fernando* (1992)76 A Crim R 58.

Abuse of trust and abuse of a position of authority – distinct concepts

The offender in ***MRW v R*** **[2011] NSWCCA 260** was convicted of having sexual intercourse with a child (his daughter) aged over 10 and under 16 who was under his authority. The sentencing judge took into account as an aggravating feature that the offender had abused a position of trust. It was contended that this was to double count a matter that was an element of the offence ("under authority"). Bathurst CJ held (at [77] – [78]) that abuse of trust and abuse of authority are distinct concepts but his Honour indicated that caution is necessary where they arise from the same facts.

Backdating commencement of sentence

McClellan CJ at CL held in ***Aiken v R*** **[2011] NSWCCA 208** that it was erroneous to backdate an offender's sentence to commence after the expiry of an earlier parole period where no

decision had been made to deny release on parole. In this situation the offender was being punished twice for the latter offence. On re-sentence, the commencement date was put back to the date of expiry of the earlier non-parole period.

Comparable cases and statistics

Whilst caution has often been expressed about the use of comparable cases and statistics in assessing the appropriateness of a sentence, Blanch J explained (at [13] – [23]), with considerable reference to authority, in ***Smith v R*** **[2011] NSWCCA 290** that it is in the context of the principle of consistency of approach than an analysis of past decisions is useful. This concept was acknowledged in a judgment delivered 2 days later by Hoeben J in ***Papworth v R*** **[2011] NSWCCA 253**. However, while consistency in sentence is an important consideration and a desirable goal, his Honour reminded (at [54]) that the relevant question on appeal is whether the sentences are within a proper range. It is not a question of whether other sentences can be said to be more or less lenient.

However, in ***Ritter v Regina*** **[2012] NSWCCA 121** there was firm criticism of the submissions made on behalf of the appellant in an attempt to establish that a sentence was manifestly excessive. Counsel relied upon sentencing statistics and eight cases which were said to be comparable. R S Hulme J, with whom Hoeben J agreed, Fullerton J dissenting, was critical of reliance upon such material with no attempt to put the argument in the context of the maximum penalty prescribed for the offence and the purposes of sentencing specified in s 3A *Crimes (Sentencing Procedure) Act* 1999. His Honour also noted that there was rarely an incentive for counsel making submissions in support of such a ground to identify a fair or representative sample of comparable cases and "rarely is such a sample produced". The sample produced in this particular case was described as "positively misleading".

Duress as a mitigating factor in sentencing

In ***Tiknius v R*** **[2011] NSWCCA 215**, the offender was a foreign national who came to Australia to facilitate the recovery and distribution of imported drugs. The sentencing judge found that the offender was motivated by a need to settle a substantial debt owed by him to his cocaine dealer, and that the cocaine dealer had threatened him and his girlfriend with serious harm unless he performed the "job". On appeal, it was contended that the sentencing judge, whilst finding that the offences were committed under duress, had not taken it into account in assessing the objective seriousness of the offences and had given it inadequate weight in allowing an appropriate reduction in the sentences imposed. The Court allowed the appeal. Johnson J held that the findings of the sentencing judge as to duress should have resulted in a significant reduction in the moral culpability of the offender and a corresponding reduction in the objective seriousness of the offences. His Honour provided a succinct distillation of the principles concerning offences committed under duress at [31] – [54] of his Honour's judgment.

Muldrock v The Queen – are matters personal to an offender relevant to the objective seriousness?

In ***Yang v R*** **[2012] NSWCCA 49**, a question arose as to the relevance of Y's mental condition to the assessment of the objective serious of a drug supply offence. R A Hulme J stated (at [28]) that the High Court decision in *Muldrock v The Queen* [2011] HCA 29 appears to overturn the

position in *R v Way* [2004] NSWCCA 131 that personal characteristics, such as mental illness, affect the objective seriousness of the offence. However, his Honour noted that this interpretation had not been universally accepted and cited a number of decisions that reach the opposite conclusion, including *MDZ v R* [2011] NSWCCA 243 and *Ayshow v R* [2011] NSWCCA 240. The present case did not call for determination of the issue.

Non-parole periods and special circumstances – risk of institutionalisation

In ***Barrett v R* [2011] NSWCCA 213**, the offender committed a number of offences, some of which were committed while on parole. The offender was also still subject to suspended sentences imposed by the Drug Court. In addition to finding that the sentencing judge had erred in imposing a sentence with an effective non-parole period in excess of 75 per cent of the total term without providing reasons, Hidden J held that the risk of institutionalisation warranted a finding of special circumstances to assist in the rehabilitation of the offender.

Plea of guilty – discount when a previous offer to plead guilty to the same offence was rejected by the prosecution under the Criminal Case Conferencing Act 2008

Section 17 of the *Criminal Case Conferencing Act* 2008 provides that pleas entered before committal entitle the offender to a 25% discount, whilst pleas after committal are entitled to a maximum of 12.5%. A court has the discretion to allow a greater discount than 12.5% if there are "substantial grounds", and these can include where "the compulsory certificate records an offer by the offender to plead guilty to an alternative offence that was refused by the prosecutor at any time before committal for trial and accepted by the prosecutor after committal for trial": s 17(5)(b). In ***Passaris v R* [2011] NSWCCA 216**, the offender participated in a compulsory conference under the Act and offered to plead guilty to an offence, putting forward a set of facts that he submitted would form the basis of the plea. The prosecution did not accept the facts and rejected the offer. On the day of the trial, the offender pleaded guilty to the offence but on different agreed facts.

The Court unanimously dismissed the appeal but the bench was divided in its reasons. Harrison J accepted (at [104]) the offender's submission that where the charge for which the offender offers to plead remains the same as the charge which the Crown is willing to accept, there is no basis for preventing the offender from establishing the "substantial grounds" under s 17(5)(b) merely because the facts which are in dispute are not particularised on the compulsory conference certificate. Hall J was of the view that the offenders offer to plead guilty was not captured by s 17(5) because the compulsory conference certificate had not been signed by the prosecution and the offender, and because the offer was not an unequivocal one. Bathurst CJ agreed in large part with Harrison J but provided separate reasons considering, inter alia, the construction of s 12 of the Act, which sets out the procedure in respect of compulsory conference certificates.

Plea of guilty – erosion of discount after disputed facts hearing

The Court in ***R v AB* [2011] NSWCCA 229**, determined that "as a matter of general principle … the utilitarian value flowing from a plea of guilty is not a fixed element, and is capable of erosion as a result of the manner in which the sentencing hearing is conducted": at [33] per Johnson J. The circumstances were that the offender had pleaded guilty, but then put the Crown to proof on certain facts, which resulted in the matter being heard in the District Court

on multiple occasions and led to the calling of evidence under rather trying circumstances. His Honour drew a comparison with the situation faced by a person on trial, who may not be penalised for the manner in which the defence is conducted but who is not entitled to mitigation for a plea of guilty. His Honour concluded (at [32]) that a person who pleads guilty but puts the Crown to proof on certain factual issues and loses is not entitled to the same discount for a plea, on utilitarian grounds, as a person who does not require a contested hearing.

Plea of guilty – no discount in a Commonwealth case

The applicant in ***Lee v R*** **[2012] NSWCCA 123** complained that the sentencing judge had erred by failing to indicate that a discount had been allowed on account of his pleas of guilty. Hoeben JA held (at [56] – [60]) that there was no such error. It is *Cameron v R* [2002] HCA 6; 209 CLR 339 that applies to Commonwealth offences, not *R v Thomson, R v Houlton* [2000] NSWCCA 309; 49 NSWLR 383. The plea is taken into account as reflecting the offender's willingness to facilitate the course of justice, not on the basis that it had saved the cost of a contested hearing. In this case, the plea was not indicative of a willingness to facilitate the course of justice because it was simply recognition of the strength of the Crown case and the inevitability of conviction. The plea was not indicative of remorse either; it was entered late and the applicant still tried to downplay his role.

Procedural fairness

The offender in ***Ng v R*** **[2011] NSWCCA 227** was convicted of offences of murder and aggravated armed robbery. The offences were committed in the company of a co-offender who had pleaded guilty and assisted the prosecution. When sentencing the co-offender, the sentencing judge calculated a starting point of 30 years for the offences. During the offender's sentencing proceedings, the judge proposed to use the same 30 year starting point. The Crown agreed with that approach and the offender's counsel was invited to make submissions as to why a lesser sentence should be imposed. Ultimately, a sentence of 35 years was imposed, based partly on a finding that the offender was a "markedly more dangerous man" than the co-offender.

The appeal was allowed. In a joint judgment, Bathurst CJ, James and Johnson JJ held (at [48] – [50]) that practical injustice had occurred for two reasons: first, by the sentencing judge having imposed a sentence longer than that which had been indicated during the course of submissions, without providing an opportunity for submissions; and secondly, the judge's finding as to the dangerousness of the offender had not emanated from the parties' submissions or from the judge's provisional thought process conveyed throughout the proceedings.

Provocation – relevance of

The facts in ***Dwayne William Smith v R*** **[2011] NSWCCA 209** were that the offender's mother had received "anonymous" late night phone calls from a work colleague of a highly offensive nature. After having obtained the identity of the caller, the offender was alerted to the situation. The following morning the offender attended the caller's address in the company of his brother and mother. He broke into the house, searched the bedrooms for the caller (who he did not know), found the caller's brother in a bedroom and proceeded to give him a severe

beating. The sentencing judge held that the offender's motive underscored the importance of specific and general deterrence, alluding to the condoning of vigilantism.

On appeal, the offender contended, inter alia, that the sentencing judge had given inadequate weight to provocation as a mitigating factor. The Court allowed the appeal and held that the sentencing judge had erred in his conclusions on personal deterrence and objective gravity. As to objective gravity, Hidden J found that the offender's motive lessened his culpability, despite it being misguided. As to personal deterrence, his Honour concluded that the offence was the product of unusual circumstances and out of character such that the community is unlikely to be at risk of his violent conduct, and thus the need for personal deterrence was overemphasised.

Remorse - assessment in a case of "gross moral culpability"

A woman drove a vehicle which was involved in a collision where two of the passengers were killed and three others suffered serious injury. She pleaded guilty to two counts of manslaughter and three counts of dangerous driving occasioning grievous bodily harm in circumstances of aggravation. In ***Duncan v R*** **[2012] NSWCCA 78** it was argued that the sentencing judge erred in the manner in which he dealt with evidence of the applicant's remorse. Basten JA dismissed the appeal and held (at [22) that trial judge's decision to place little weight on remorse in a case of "gross moral culpability" was in line the approach set down in *R v Dhanhoa* [2000] NSWCCA 256; *R v Koosmen* [2004] NSWCCA 359. His Honour did not find (at [23]) that the approach was inconsistent with the statement of Murphy J in *Neal v R* [1982] HCA 55 at [12], nor that Murphy J's general statement was applicable in the circumstances of the case.

Restitution – a promise to repay is entitled to some mitigating weight

The appellant in ***Job v R*** **[2011] NSWCCA 267** pleaded guilty to fraud type offences which caused a substantial loss to his employer. He gave evidence that he would repay the proceeds that he had received. This would necessitate the sale of the family home as well as an investment property. The sentencing judge declined to accept that this was a matter of mitigation. He did not consider the sale of the investment property has a hardship but he did note that selling the family home meant that his wife and children would have to live in rented accommodation; this the judge described as a hardship that was not "in any way unusual". Hidden J referred (at [36]ff) to a number of authorities concerning the relevance of an offender having made reparation, or having undertaken to do so. He concluded (at [48] - [49]) that the judge in this case had been wrong to dismiss the matter out of hand. It was entitled to "some weight" in the appellant's favour.

Totality - concurrence and accumulation of sentences

In ***R v Cutrale*** **[2011] NSWCCA 214**, the offender pleaded guilty to two offences: attempting to choke or strangle with intent to commit an indictable offence, and sexual intercourse without consent. The offender had placed his hand across the victim's mouth and nose causing her to lose consciousness, and then had sexual intercourse with her. The sentencing judge imposed wholly concurrent sentences on the basis that the offences comprised "one course of criminal conduct". The Crown successfully appealed, contending that the concurrency of the sentences failed to reflect the totality of criminality.

Hidden J held that partial accumulation was warranted. His Honour referred to a passage from the judgment of Howie J in *Cahyadi v R*]2007] NSWCCA 1 at [27] which posed the question in the following terms: "can the sentence for one offence comprehend and reflect the criminality for the other offence?". His Honour answered the question in the negative, finding (at [33]) that the attempt to choke the victim involved a measure of criminality separate from the sexual intercourse.

In ***R v Hendricks*** **[2011] NSWCCA 203**, the offender pleaded guilty to two offences of sexual assault against a person with whom he had been in a relationship, the offences having occurred some two months apart. The sentencing judge imposed sentences whereby the two non-parole periods were entirely accumulated, finding that the two offences were entirely discrete and separate by a period of time. On appeal it was successfully contended that the judge had failed to consider the principle of totality, resulting in a sentence that was manifestly excessive. Garling J held that the sentencing judge fell into error in only taking into account the fact that the offences were discrete and separate in time. There is a useful discussion of the principle of totality at [68] – [72] of his Honour's judgment.

Totality - no error in non-parole period for offence of perverting the course of justice being subsumed within sentences for disqualified driving

In ***R v Moore*** **[2012] NSWCCA 3**, the respondent to a Crown appeal had been sentenced for a number of offences of driving while disqualified and for having perverted the course of justice. The commencement dates of the sentences were such that the non-parole period, and most of the parole period, for the pervert the course of justice offence was to be served concurrently with the sentences for the driving offences. It was argued that by wholly subsuming the non-parole period for the pervert the course of justice offence there had been no real penalty imposed. Simpson J found (at [35]) that the offence was at the lower end of the range for offences of this type, though some punishment additional to the sentence for the driving offences was called for. However, the Crown had focused too narrowly on the non-parole period without recognising an additional four month parole period exclusively referable to the pervert the course of justice offence. Her Honour stated that a parole period is a sentence in itself and it could not be said that there was no additional penalty imposed for the offence.

SENTENCING - SPECIFIC OFFENCES

Driving offences: inability to backdate and postdate disqualification periods

In ***RTA of NSW v O'Sullivan*** **[2011] NSWSC 1258**, the offender was convicted of two offences: driving at a speed 45 kilometres per hour above the speed limit, and a high range PCA offence. The magistrate disqualified the offender from driving for 12 months from the date of her arrest for the PCA offence, and for 6 months from the expiry of the PCA disqualification for the speeding offence. On appeal, James J held, inter alia, that the magistrate did not have the power to backdate or postdate the disqualification periods as the relevant provisions of the *New South Wales Road Rules* 2008 require that the disqualification period commence on the date of conviction.

Drug supply: relevance that drugs supplied to an undercover officer and not disseminated into the community

In ***R v DW*** **[2012] NSWCCA 66** the respondent had pleaded guilty to conspiracy to manufacture amphetamines. An undercover police officer had prevented the drugs from being disseminated into the community. RS Hulme J considered (at [107-[114]) a number of Court of Criminal Appeal cases that held no diminution, or only very limited diminution, of criminal culpability could result from the fact that drugs were not ultimately disseminated into the community. His Honour stated:

> [115] With due respect to the authors of these statements, a number of them appear to be inconsistent with the long-standing principle that the criminal law is concerned with the consequences of offending. Thus is *Savvas v R* [1995] 183 CLR 1 at 6 the High Court embraced the proposition that, "A considerable number of more recently reported cases illustrate the imposition of sentences by reference to what was actually done in the transition of the conspiracy"…
>
> [117] … if the involvement of authorities prevents the transaction from resulting in harm, it is illogical not to afford appropriate weight just as in the converse situation one would take account of any damage that was a consequence of the offending.

Escape from custody: consideration of mandated accumulation of sentences on question of special circumstances

In ***Mattar v R*** **[2012] NSWCCA** 98 the offender had escaped from custody while serving a sentence for drug supply of 5 years with a non-parole period of 3 years. A sentence of a further 2 years with an 18 month non-parole period was imposed. Pursuant to s 57(2) of the *Crimes (Sentencing Procedure) Act* 1999 the sentence for escape commenced at the end of the non-parole period for the principal offence. The result was a total sentence of 4.5 years imprisonment without parole, with only a 6 month non-parole period. The appeal was upheld, Harrison J finding that the judge had failed to take in account the mandatory accumulation of the sentence for escape when determining that the appellant's circumstances did not warrant special consideration. The trial judge had also erred in not accounting for other circumstances that translated in harsher than normal custodial conditions(at [24]).

Sexual assault: no need for specific evidence before judge can find that victim will would suffer as a result

The appellant in ***Enriquez v R*** **[2012] NSWCCA 60** pleaded guilty to sexually assaulting a girl under the age of 16. At sentencing, the judge remarked that, "this young girl will suffer for the rest of her life. … The impact upon her in later life is likely to be an inability to trust men, to form satisfactory relationships and it may well impact upon her ability to bond with her own children." It was contended on appeal that there was no evidence to support this finding. McClellan CJ at CL held (at [48]-[49]) that although there was no specific evidence provided to the Court on this point, the consequences of offences of this nature on teenagers and young women is well known and it was open to the sentencing judge to draw on her general experience in these matters. That approach was supported by the decision of *R v Scott* [2003] NSWCCA 28.

SUMMING UP

Being together does not constitute being "in company"

The appellant in ***Markou v R*** **[2012] NSWCCA 64** had been convicted at a judge alone trial of assault occasioning actual bodily harm in company. He and another man had approached the victim and others in a nightclub. He hit the victim while the other man punched someone standing next to victim. The trial judge found that the appellant was accompanied by the other man when he struck the accused and therefore held that the offence was "in company". The appeal was allowed and a verdict substituted for assault occasioning actual bodily harm. Referring to Kirby J in *R v Button; R v Griffen* [2002] NSWCCA 159 at [120], Macfarlan JA held (at [26]-[27]) that for an offence to be committed "in company" there must be some relevant common purpose. This could not exist without some express or implied arrangement or understanding between accused and the others accompanying him or her. The trial judge did not recognise that this element needed to be proved to establish the charged offence, and the evidence did not establish beyond reasonable doubt an agreement between the appellant and the other man.

Whether witnesses have an interest in the subject matter of their evidence

In ***Hargraves and Stoten v The Queen*** **[2011] HCA 44**, the appellants were charged with offences involving tax avoidance schemes and the only issue in dispute was whether they acted dishonestly. Both gave evidence at trial. The trial judge directed the jury as to how to assess the credibility of a witness, referring to whether they had an interest in the subject matter of the evidence, citing as examples "friendship, self protection, protection of the witness' own ego". On appeal to the Queensland Court of Appeal, it was held that the trial judge had misdirected the jury about how to assess the evidence of each accused, but dismissed the appeal on the basis that no substantial miscarriage of just transpired.

The High Court of Australia dismissed the appeal but held that the trial judge had not misdirected the jury, overturning the finding of the Queensland Court of Appeal. The Court considered its earlier decision in *Robinson v The Queen* (1991) 180 CLR 531, principally whether it created a new or a pre-existing principle. The plurality held that the principal in *Robinson* formed part of a broader over-arching principle relating to a trial judge's instructions, namely that "[t]he instructions which a trial judge gives to a jury must not, whether by way of legal direction or judicial comment on the facts, deflect the jury from its fundamental task of deciding whether the prosecution has proved the elements of the charged offence beyond reasonable doubt": at [45]. The plurality went on to find that the trial judge's directions, as a whole, did not do so.