

**The Law Society of New South Wales  
Young Lawyers  
Annual One Day Seminar**

**CRIMINAL LAW UPDATE <sup>1</sup>**

The purpose of this paper is to provide brief notes concerning the range of issues that have been considered in appellate criminal decisions and some of the more significant legislative changes 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.

## **APPEAL**

### *Double jeopardy in Crown sentence appeals*

Section 68A of the *Crimes (Appeal and Review) Act 2001* took effect on 24 September 2009. It provides that “an appeal court” must not take “double jeopardy involved in the respondent being sentenced again” when either dismissing a prosecution appeal against sentence or when imposing a less severe sentence than the court would otherwise consider appropriate.

A five judge bench was convened to consider the effect of this provision in ***R v JW [2010] NSWCCA 49***. It was held, per Spigelman CJ:

[141] The following propositions emerge from the above analysis:

- (i) The words “double jeopardy” in s 68A refer to the circumstance that an offender is, subject to the identification of error on the part of the sentencing judge, liable to be sentenced twice.
- (ii) Section 68A removes from consideration on the part of the Court of Criminal Appeal the element of distress and anxiety to which all respondents to a Crown appeal are presumed to be subject.
- (iii) Section 68A prevents the appellate court exercising its discretion not to intervene on the basis of such distress and anxiety.
- (iv) Section 68A also prevents the appellate court from reducing the sentence which it otherwise believes to be appropriate on the basis of such distress and anxiety.
- (v) Section 68A prevents the Court from having regard to the frequency of Crown appeals as a sentencing principle applicable to an individual case by taking either step referred to in (iii) or (iv), or otherwise.

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It was further held (at [146]) that the Court retained a discretion as to whether to intervene, a submission by the Crown that once error has been identified the Court was obliged to embark on a re-sentencing exercise being rejected.

#### *Specification of grounds of Crown appeals*

Spigelman CJ also noted in ***R v JW* [2010] NSWCCA 49** that there was nothing in the *Criminal Appeal Rules* that required grounds to be identified in a notice of appeal under s 5D of the *Criminal Appeal Act* 1912 but there were a number of reasons why “a rule of practice” to this effect was desirable. They included that it would serve to identify the grounds for the respondent and the Court and that it would ensure clarity as to the issues that were before the Court if the matter was to be later considered in another forum.

#### *Extension of time to appeal*

In ***McCall v R* [2010] NSWCCA 174**, the appellant was convicted and sentenced in late 2007. An application for extension of time to appeal against both conviction and sentence was filed on 23 December 2009. McClellan CJ at CJ refused to extend the time to appeal against conviction but granted it in respect of sentence. In relation to conviction, the application was dismissed on the basis of a finding that there was no satisfactory explanation for the delay and a lack of merit in the ground of appeal. Reference was made to *R v Lawrence* (1980) 1 NSWLR 122 in which the Court said (at 148, per Nagle CJ at CL and Yeldham J) “where any considerable delay has occurred, *exceptional circumstances* will be required before the appeal is permitted to proceed (emphasis added)”.

In the subsequent decision of ***Arja v R* [2010] NSWCCA 190**, Basten JA cautioned against reference to “exceptional circumstances”, as it suggested the imposition of a fetter on the exercise of discretion, which is not to be found in the statutory scheme.

#### *Court undertaking its own research*

In ***Director of Public Prosecutions (DPP) (Cth) v De La Rosa* [2010] NSWCCA 194**, the Crown appealed against a sentence for a Commonwealth offence upon a contention that it was manifestly inadequate. During the hearing of the appeal the court requested assistance in identifying cases in which sentences had been imposed for similar offences, in particular those in jurisdictions other than New South Wales. The parties referred the Court to 8 cases. McClellan CJ at CL conducted his own research and located another 78 decisions that related to drug importation offences. The parties were given an opportunity to make submissions regarding the results of that research. Different views were expressed in the judgment regarding the appropriateness of the course taken.

Allsop P (at [71]) said that neither party put any submission against the Court undertaking research and so no specific view need be expressed on the matter. Basten JA expressed caution (at [129]) against an intermediate criminal appeal court inviting parties to conduct further research and said (at [73] and [78]) that it was inappropriate for the Court to have carried out such research as occurred here. However, Simpson J expressed the view (at [283] – [290]) that on occasion it is both appropriate and

desirable that the court undertake its own research and investigation, especially in circumstances where the Court does not receive adequate assistance.

*Constitutional validity of s 68A Crimes (Appeal and Review) Act 2001*

In **Director of Public Prosecutions (DPP) (Cth) v De La Rosa [2010] NSWCCA 194** an issue arose as to whether s 16A of the Crimes Act 1914 (Cth) and s 68A of the Crimes (Appeal and Review) Act 2001 (NSW) were inconsistent for the purposes of s 109 of the Constitution. That is, as s 68A removes any consideration of “double jeopardy” in relation to a Crown appeal against sentence (including consideration of distress and anxiety to which all respondents to a Crown appeal are presumed to be subject: *JW* [2010] NSWCCA 49), the question was whether it was contrary to s 16A(2)(m) which requires the sentencing court to have regard to the “mental condition” of the offender. It was held that there was no such inconsistency because s 68A is not to be construed as operating of its own force to sentencing for Commonwealth offences. McClellan CJ at CL (with Simpson J and Barr AJ agreeing) held (at [174] – [178]) that aside from s 68A, the “mental condition” of an offender must still be considered when re-sentencing as part of a Crown Appeal.

*Conviction appeals from a judge alone trial*

In **Arun v R [2010] NSWCCA 214** consideration was given to the principles to be applied on an appeal against conviction where it is contended that a verdict of guilty is unreasonable or cannot be supported, having regard to the evidence. Hall J (at [50] – [56]) referred to a number of authorities on the point before confirming that the Court can only intervene if, after making its own independent assessment of the evidence, it concludes that it was not open for the trial judge to have been satisfied beyond reasonable doubt of the guilt of the appellant. In undertaking that task, the credibility findings of the trial judge with respect to witnesses remain significant.

*What constitutes a ruling “on the admissibility of evidence” under s 5F(3A) of the Criminal Appeal Act 1912*

**R v Jennings [2010] NSWCCA 193** was a Crown appeal pursuant to s 5F(3A) of the *Criminal Appeal Act 1912* concerning a trial in which the trial judge had ruled that certain evidence was admissible as tendency evidence but then revoked the ruling just prior to closing addresses. A preliminary jurisdictional question arose, namely whether a ruling revoking an earlier ruling was “on the admissibility of evidence” pursuant to s 5F(3A). The appeal was allowed because the trial judge had misconstrued the meaning of “prejudicial effect” in s 101 of the *Evidence Act 1995*. On the preliminary point, Latham J referred (at [18]) to *R v Harker [2004] NSWCCA 427* in which Howie J (at [32]) held that “on the admissibility of evidence” in s 5F(3A) should be construed as including a ruling “in respect of the admissibility of evidence that was not a ruling on admissibility”.

*Does an assertion of manifest inadequacy of a sentence raise a question of law alone*

The prosecutor in **David Morse (Office of State Revenue) v Chan and Anor [2010] NSWSC 1290** brought an appeal to the Supreme Court against a sentences imposed in

the Local Court on the ground that the sentences (s 10 bonds) were manifestly inadequate. Other grounds were that the magistrate failed to have sufficient regard to a potentially aggravating factor and failed to have sufficient regard to the principal of totality. The appeal was brought pursuant to s 56 of the *Crimes (Appeal and Review) Act 2001* which provides for such an appeal to the Supreme Court “but only on a ground that involves a question of law alone”. (There is a general provision for prosecution appeals against inadequate sentences from the Local Court to the District Court in s 23 of the Act). It was common ground between the parties that the appeal raised questions of law alone. Reliance was placed upon *Road and Traffic Authority of New South Wales v Fletcher International Exports Pty Ltd* [2008] NSWSC 936. However, Schmidt J referred to a number of subsequent authorities (*R v PL* (2009) NSWCCA 256; 199 A Crim R 199 and *Kostas v HIA Insurance Services Pty Ltd t/as Home Owners Warranty* [2010] HCA 32) before concluding that none of the grounds of appeal raised a question of law alone.

#### *Stated case procedure under the Criminal Appeal Act 1912*

It is beyond the scope of this paper to refer at any length to ***Talay v R* [2010] NSWCCA 308**. However it should be noted as a useful resource in relation to the correct procedure to be followed in invoking the stated case procedure in s 5B(2) of the *Criminal Appeal Act 1912*.

## **DEFENCES**

#### *Provocation – suddenness and temporariness of loss of control*

In ***Pollock v R* [2010] HCA 35** the appellant was convicted of murder, having unsuccessfully raised the partial defence of provocation. The trial judge directed the jury that the prosecution would have succeeded in excluding provocation if it established any one of seven matters. The fifth was “the loss of self control was not sudden” and the seventh was whether there had been time for the loss of self control to abate by the time of the killing. The directions were consistent with authority in the Queensland Court of Appeal. The High Court held that the directions wrongly invited the jury to exclude provocation if they had found there had been any interval between the deceased’s provocative conduct and the act causing death. It was held (at [54]) that the law requires the killing occur while the accused is in a state of loss of self-control that is caused by the provocative conduct, but this does not necessitate that the provocation is excluded in the event that there is any interval between the provocative conduct and the accused response to it. The explanation provided by the trial judge of the word ‘sudden’ contained within in the fifth direction, erroneously invited the jury to exclude provocation on the basis of there being some delay in the response by the accused. Similarly, the focus on time in the seventh direction had the potential effect of diverting the jury’s attention away from the central determination.

#### *Automatism and unsound minds*

***Woodbridge v R* [2010] NSWCCA 185** raised for consideration the meaning of sane, as imposed to insane, automatism and what constitutes an unsound mind, a disease of the mind, or insanity. The case involved motor manslaughter. The appellant’s version was

that she was intoxicated at the time of driving because she had commenced drinking excessively after receiving distressing telephone calls from her ex husband. Psychiatrists gave evidence for the Crown and the defence.

Professor Quadrio, called by the defence, said the appellant was in a state of dissociation at the time of driving and that this was triggered by her reaction to the phone calls. She opined that the appellant suffered from a major depressive disorder, a dissociative disorder, a post-traumatic stress disorder and a cluster B personality disorder. She was of the view that the appellant had manifested symptoms of these disorders for some time. In her opinion, the case involved *sane automatism*, which she said was generally a product of external stimuli, whereas insane automatism was not. She was also of the view that it was not a case of insane automatism because the mental disorders were not mental illnesses or conditions that constituted insanity. She regarded the latter as encompassing psychotic disturbances such as schizophrenia and bipolar disorders.

On the other hand, Dr Allnutt was of the view that if the appellant was acting in an automatic state at the time of driving, the case was one of *insane automatism*. The trial judge withdrew sane automatism from the jury and that constituted the ground of appeal.

Davies J held that the trial judge was correct to withdraw sane automatism. On the difference between the two forms of automatism he referred to a number of authorities, but most particularly to *Radford v R* (1945) 42 SASR 266 where King CJ, in a passage subsequently approved by the High Court in *R v Falconer* (1990) 171 CLR 30, described the distinction being “the reaction of a unsound mind to its own delusions or to external stimuli on the one hand and the reaction of a sound mind to external stimuli, including stress producing factors, on the other hand”. Adopting that distinction Davies J concluded that Professor Quadrio’s understanding of the concept was incorrect.

Davies J also held that the professor was wrong on the question of whether a mind is sound or unsound. He noted that what constitutes a mental disease or natural mental infirmity is a matter of law: *R v Falconer* per Deane and Dawson JJ at [60]. After referring to other authorities, Davies J (at [92]) concluded that the expression “disease of the mind” is not to be narrowly construed and is not restricted to the psychotic disturbances of which the professor had spoken. “The expression encompasses a temporary mental disorder or disturbance prone to recur. The dichotomy is not between a mind affected by psychotic disturbances and a mind affected by less serious ailments but between those minds which are healthy and those suffering from an underlying pathological infirmity”.

## EVIDENCE

*When evidence is “disclosed ... in the case of the prosecution” for the purpose of s 293(6) of the Criminal Procedure Act 1986*

Section 293 of the *Criminal Procedure Act 1986* is concerned with the admissibility of evidence in prescribed sexual offence proceedings of prior sexual activity or experience of the complainant. Subsection (6) is concerned with whether it has been disclosed or implied in the case for the prosecution that the complainant has, or may have had, sexual experience, or a lack of sexual experience, or had taken part in, or not taken part in, sexual

activity. Cross examination of the complainant may then be permitted in relation to the disclosure or implication if the accused might be otherwise be unfairly prejudiced.

***Spratt v DPP [2010] NSWSC 355*** was a case in which an accused sought relief in the Supreme Court in respect of the refusal of a magistrate to direct the attendance of the complainant for cross-examination in committal proceedings. In statements of the complainant served upon the accused it was said that she was a virgin before having been sexually assaulted. Such references were edited out of the material tendered by the DPP to the magistrate. Nevertheless, the accused contended that the complainant's virginity had been "disclosed" in the case for the prosecution. Hidden J held that the material in question did not become part of the prosecution case simply because it was served.

#### *Admission recorded on police in car video*

It was held in ***Carlton v R [2010] NSWCCA 81*** per Howie J at [14] – [19] that a recording of admissions that were made by a person who had been arrested and cautioned in respect of a drug offence was made in breach of s 108E of the *Law Enforcement (Powers and Responsibilities) Act 2002*. The point was not taken at trial. Section 108E(a) provides that "a conversation between a police officer and a person must not be recorded under this Part after the person has been arrested". Howie J described the provision as "very curious indeed", particularly given that a recording of the conversation made by a separate tape recorder would not only have been lawful but would have been required for the conversation to be admitted into evidence. In the result, the proviso was applied and the appeal dismissed.

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

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 pursuant to s 5F(3A) of the *Criminal Appeal Act 1912*, contending that the judge had misconstrued s 66(2A) of the *Evidence Act 1995*. Whealy J held that the phrase "fresh in the memory" is no longer to be taken as an indication that it means "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.

### *Admissibility of recorded evidence of complainant at special hearing*

In ***EK v R* [2010] NSWCCA 199**, an issue arose as to whether evidence given by a complainant during trial proceedings (which were ultimately aborted) could be tendered in a subsequent special hearing pursuant to s 306I of the *Criminal Procedure Act* 1986. The appellant contended that a special hearing was not a trial, and that the section only enabled the prosecutor to tender the recording in “new trial proceedings”. Simpson J found that the evidence was admissible. Section 21(1) of the *Mental Health (Forensic Provisions) Act* 1990 provides that a special hearing is to be conducted “as nearly as possible as if it were a trial of criminal proceedings”. It follows, in the absence of any compelling reasons to otherwise find, the evidentiary rules applicable to a “new trial” (including s 306I) apply to a special hearing.

### *Accomplice warning*

Complaint was made in ***Chen v R* [2010] NSWCCA 224** that a warning given by a trial judge pursuant to s 165 of the *Evidence Act* 1995 concerning the evidence of a prosecution witness who was criminally concerned in the events giving rise to the proceedings against the accused amounted to a “eulogy” of the practice whereby offenders are encouraged to inform on, and give evidence against, other participants in criminal activity. Trial counsel had characterised the judge’s remarks as “almost akin to giving (the witness) a medal”. The directions were lengthy and are set out in the judgment of R S Hulme J at [15]. It was held that certain of the remarks made by the judge could be characterised as the appellant had submitted. However, his Honour concluded that the remarks did not weaken or overshadow the warning to an unacceptable extent.

### *Privilege against self-incrimination when party giving evidence in chief*

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.

### *Relevance bullets found in a car in which there were drugs alleged to be in the driver’s possession for supply*

The appellant in ***Radi v R* [2010] NSWCCA 265** was charged with an offence of supplying a commercial quantity of a prohibited drug. The drugs had been found in his car together with four mobile phones, \$2800 in cash and a box of bullets. No firearm was found. The appellant denied possession of the drugs and denied knowledge of the presence of the bullets. It was contended on appeal that the evidence concerning the bullets was not relevant and should not have been admitted because it disclosed only a tendency to engage in some irrelevant criminal behaviour. Reliance was placed on *Thompson and Wran v R* [1968] HCA 21; 117 CLR 313. The appeal against conviction was dismissed. Hoeben J held that the evidence of the finding of the box of bullets was relevant because it constituted an indicium of the offence with which the applicant had been charged. It had

been implicitly accepted by the appellant that if a firearm had been found then evidence of such would have been admissible. Hoeben J could not see any real distinction as both a firearm, and bullets which could only be used in a firearm, had the same relevance. In separate judgments, Simpson J and I provided slightly different analyses leading to the same conclusion.

#### *Description of statistical conclusions regarding DNA matches*

The appellant in **Aytugrul v R [2010] NSWCCA 272** was linked to a murder by a strand of hair found on the body of the deceased. DNA recovered from the hair matched the appellant's DNA. The significance of the evidence was explained to the jury in two ways: "random occurrence ratios" and "exclusion percentages". The former involved evidence that 1 in 1600 people had the same DNA profile. The latter involved the description that 99.9 per cent of people would not be expected to have that DNA profile. Simpson J, with whom Fullerton J agreed, referred to the contention that the evidence should have been rejected pursuant to either s 135 or s 137 of the *Evidence Act* 1995. There was no question that the evidence of the DNA analysis was correctly admitted. What was in contention was the interpretation of the evidence. Both of the formulations were mathematically accurate. Accordingly Simpson J held that either forms of interpretation of the evidence were appropriately before the jury.

McClellan CJ at CL was in dissent. He regarded the expression of the interpretation of the evidence by way of exclusion percentage as being "too compelling" (at [99]). In his Honour's view this involved prejudice which substantially outweighed the probative value of the evidence. On the other hand, Simpson J posed the question (at [177]) "how can evidence expressed in one way be such as not to attract the operation of s 135 or s 137 ... but, when expressed in another way, become unfairly prejudicial?"

## **EVIDENCE – Uncharged acts: context and tendency evidence issues**

### *Admissibility of tendency and coincidence evidence*

A trial judge rejected the admissibility of tendency and coincidence evidence in **R v Ceissman [2010] NSWCCA 50**. The trial concerned an allegation that the accused was one of two men who committed offences arising out of five separate criminal enterprises. There was no dispute that the offences were committed, only as to whether the accused was a participant. The Crown called the other man to give evidence and relied upon it as tendency and coincidence evidence. The trial judge was concerned that the related events could be otherwise explained by the fact that they represented the co-offender's "modus operandi". An appeal by the Crown pursuant to s 5F(3A) of the *Criminal Appeal Act* 1912 was allowed. Latham J (at [13] – [18]) described the correct approach that should have been taken in assessing the question of admissibility of such evidence and demonstrated the erroneous approach taken by the trial judge.

### *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 as 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. Rule 4 was applied.

#### *Whether context evidence may be tendency evidence*

***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.

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

In ***DJS v R* [2010] NSWCCA 200** DJS was charged with various sexual assault offences against the complainant, his step daughter. The Crown relied on tendency evidence to support a finding that DJS 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.

*Evaluating the probative value and prejudicial effect of tendency evidence*

**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] to [115].

## OFFENCES

*Using poison et cetera to endanger life or inflict grievous bodily harm - meaning of "cause to be taken"*

In **R v Wilhelm [2010] NSWSC 334**, the accused was due to be further tried on a charge of manslaughter after the jury at his first trial failed to agree upon a verdict. The Crown, however, presented an indictment including an alternative charge under s 39 of the *Crimes Act 1900* that he, "recklessly as to injuring Ms Dianne Brimble, did cause to be taken by Ms Brimble a noxious substance which is known as GHB and the thing caused to be taken inflicted upon Dianne Brimble grievous bodily harm". Wilhelm pleaded not guilty to manslaughter but guilty to this alternative. The Crown accepted this plea.

The evidence was to the effect that Ms Brimble observed Wilhelm preparing to take the drug known as "fantasy". She inquired what it was and he explained. She expressed interest in taking some herself. He provided some for her which she consumed. She subsequently died. Howie J raised a question as to whether the facts made out the offence. Wilhelm then applied to withdraw his plea and the application was granted.

Holding that the facts did not make out the offence, Howie J said that the use of the words "causes another person to take" is to cover a situation where a person in authority over another commands or directs that person to take the substance. In this case, Wilhelm may have offered Ms Brimble the drug and what he did and said may have influenced her to take it, but it was her act in taking the drug. Wilhelm did not cause her to take it.

*Constitutional validity of an offence of supplying a large commercial quantity of pseudoephedrine*

In **R v El Helou [2010] NSWCCA 111**, Allsop P rejected a contention that s 25(2) of the *Drugs Misuse and Trafficking Act 1985* was constitutionally invalid. The appellant had argued that the provision was inconsistent with a law of the Commonwealth (s 306.2 of the *Criminal Code (Cth)* which creates an offence of pre-trafficking commercial quantities of controlled precursors) and also that prosecution of him for the offence

against s 25(2) was incompatible with the District Court's capability to exercise the judicial power of the Commonwealth.

*Conspiracy to commit an offence that has recklessness as its fault element under the Criminal Code (Cth)*

It was contended in the High Court of Australia in ***Ansari v R; Ansari v R* [2010] HCA 18; 266 ALR 466**, on appeal from the NSW Court of Criminal Appeal, that an offence of conspiring to commit a money laundering offence, that being dealing with money and being reckless as to the risk that the money would be used as an instrument of crime, was bad in law. The basis of this contention was that there was an inconsistency inherent in proving that an accused conspirator *intends* that a circumstance will exist (intention being the fault element of conspiracy) and simultaneously intends that he or she would be *reckless* as to the existence of that circumstance. The contention was unanimously rejected with no such inconsistency being found by French CJ (at [26]) and, in a separate joint judgment, by Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ (at [55] – [63]).

In ***R v LK; R v RK* [2010] HCA 17; 266 ALR 399** the issue was whether the offence of conspiracy is committed when there is an agreement to commit the offence of dealing with money that is the proceeds of crime where recklessness as to that fact is an element of the substantive offence. It was held that conspiracy under the *Criminal Code (Cth)* requires the prosecution to prove intention in relation to each physical element of the substantive offence even if the fault element for that offence is a lesser one, such as recklessness: French CJ at [1] and [75] – [79], Gummow, Hayne, Crennan, Kiefel and Bell JJ at [141], and Heydon J agreeing with the plurality at [145].

*Whether an attempt to set fire to a person with intent to murder is an offence known to law*

The appellant in ***Park v R* [2010] NSWCCA 151** was found guilty by a jury in respect of a charge that he did attempt to set fire to his wife with intent to murder her. He contended on appeal that the indictment did not disclose an offence known to law because it did not plead an allegation of "attempt to murder" as required by s 30<sup>2</sup> of the *Crimes Act 1900*. It pleaded an attempt to do an act with the intent of murder.

McClellan CJ at CL held that despite the indictment not specifically alleging an attempt to murder, the offence was sufficiently pleaded. Reference was made (at [39]) to the obligation of the Crown when pleading an indictment to identify the essential factual ingredients of the offence: *John L Pty Ltd v A-G (NSW)* (1987) 163 CLR 508 per Mason CJ, Deane and Dawson JJ at 519; *Lodhi v R* [2006] NSWCCA 121; (2006) 199 FLR 303 per McClellan CJ at CL at [97]. Here the essential ingredients consisted of the elements identified by the definition of murder contained in s 18 of the *Crimes Act 1900*. The indictment satisfied those elements.

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**Attempts to murder by other means**

30 Whoever, by any means other than those specified in sections 27 to 29 both inclusive, attempts to commit murder shall be liable to imprisonment for 25 years.

### *Conflict between state and federal law regarding the offence of conspiracy*

In ***Dickson v R* [2010] HCA 30; 270 ALR 1** the appellant was tried in Victoria on an allegation of conspiracy to steal contrary to s 321(1) of the *Crimes Act 1958* (Vic). It was alleged that he was a party to a conspiracy to steal cigarettes. The cigarettes had been seized by, and were in the possession of, Customs. An appeal to the Victorian Court of Appeal failed. A point was raised for the first time in the High Court where the appellant argued that there was an inconsistency between state and federal law per s 109 of the Constitution in that s 321 renders conduct criminal that was not caught by, and indeed deliberately excluded from, s 11.5 of the *Criminal Code (Cth)*. In short, the common law crime of conspiracy which is picked up by s 321 is broader in scope than is s 11.5. The High Court allowed the appeal, holding (at [30]) that in the present case, in its concurrent field of operation in respect of the conduct (conspiracy to steal), s 321 *Crimes Act* attaches criminal liability to conduct which falls outside of s 11.5 of the *Criminal Code* and in that sense alters, impairs or detracts from the operation of the federal legislation and so directly collides with it.

### *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 by leaving it in the rear seat of the police vehicle, which was parked in a secure compound at the station. W 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 W'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 heard in the Local Court. The magistrate dismissed charges on the basis that the arrest was unlawful pursuant to s99 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

### *Excesses in a prosecutor's closing address*

In **GDD v R; NJC v R [2010] NSWCCA 62**, the majority (Grove and Simpson JJ) concluded that it would be unsafe for convictions to stand in the light of the prosecutor's closing address. She had expressed her personal opinions as to some aspects of the evidence. She had also invited the female members of the jury to use their own life experience in appreciating how much stronger men are than women (the case concerned an allegation that the complainant had been physically overborne and sexually assaulted by GDD). Grove J dealt with the latter aspect at [37] and Simpson J at [106] – [107]; [119] – [122]. In part, Simpson J said (at [121]) that it is wrong to invite juries to determine contested factual issues on the basis of their assessment of how they would feel, how they would react or what they would do.

### *Jurors play word games in court*

In **Li, Wing Cheong Li v R [2010] NSWCCA 40; 265 ALR 445**, there was evidence on appeal that a juror at some unspecified occasion, or occasions, to some extent played the word game "Target" whilst in court. This came to light some months after the trial when an article appeared in a newspaper reporting that one or more jurors had played the game in court at stages during the trial. An inquiry was conducted by the Sheriff. Howie and Hall JJ, in a joint judgment held that the evidence did not establish that any one or more of the jurors were so distracted from due attention to the evidence that a miscarriage of justice occurred. It is notable that the trial was lengthy and the evidence, at times, tedious. It included a day of playing tapes of people speaking in a foreign language despite transcripts of an English translation being provided to the jury. Howie and Hall JJ noted (at [157]) that the game in question did not of its nature indicate that a juror playing it would necessarily be distracted from the evidence to an extent that a miscarriage resulted and that it was of no more concern than a juror who doodles or does some other activity that keeps the mind active and alert. It was also thought (at [159]) to be significant that no-one in the courtroom noticed any jurors being distracted.

### *Permanent stay of proceedings because of adverse publicity*

In **Dupas v R [2010] HCA 20; 267 ALR 1**, the High Court of Australia dismissed an appeal against the refusal of a permanent stay of proceedings which had been sought in relation to the appellants retrial for murder. He had earlier been convicted of two other murders. It was held (in the unanimous joint judgment at [38]) that the unfair consequences of prejudice or prejudgment was capable of being relieved against by the trial judge by appropriate directions to the jury.

### *Consequences of breach of rule in Browne v Dunn by accused*

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 Dunne*. He held (at [53]) that the rule in *Browne v Dunne* 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.

#### *Dismissal of prosecution in Local Court because brief not served in time*

***Director of Public Prosecutions (DPP) (NSW) v Fungavaka [2010] NSWSC 917*** dealt with an appeal from the Local Court in which the magistrate dismissed the 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 a most useful summary of matters that may be taken into account in the exercise of a court's discretion to adjourn proceedings. This was another case involving an appeal against the dismissal of a prosecution in the Local Court after a magistrate refused an adjournment when the prosecutor failed to comply with requirements relating to a brief of evidence.

### *Denial of procedural fairness*

In **Trujillo-Mesa v R [2010] NSWCCA 201** the parties had agreed on a discount of 25% for an early plea of guilty. The trial judge noted that concession; but his Honour said nothing of the prospect that he might not act upon it. In light of this, the defendant made no submissions on the topic. His Honour later determined a discount of 20% was more appropriate. The defendant appealed. Fullerton J, allowing the appeal, held that the defendant had been denied procedural fairness.

## SENTENCE

### **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. 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 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. *Ponfield* lists a variety of factors which are suggested to “enhance” the seriousness of an offence of break, enter and steal. 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, namely intimidation, in circumstances of aggravation, namely that 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.

*Substantial injury, emotional harm, loss or damage caused by the offence (s 21A(2)(g))*

There is no general principle that injuries to a victim should be ignored or discounted because they are no more than would be expected as the result of the crime committed upon that type of victim: **Josefski v R [2010] NSWCCA 41** per Howie J at [44] – [47]. It was contended in a case of aggravated break, enter and steal that the sentencing judge was in error in taking into account that the harm suffered by a female occupant of the premises was substantial because the harm was no more than would be expected of a person in her situation. Although the submission was ultimately withdrawn, Howie J took the opportunity to say something on the subject because he perceived a common misunderstanding of the decisions in *R v Youkhana* [2004] NSWCCA 412 and *R v Solomon* [2005] NSWCCA 158. Those cases were concerned with armed robbery. Caution was expressed about double counting if a sentencing judge applied the *R v Henry* guideline, which took into account the usual effects upon a victim of armed robbery, as well as the effects upon the victim if such effects were no more serious than would generally be expected. Howie J continued:

[46] But there is no general principle that injuries to a victim should be ignored or discounted because they are no more than would be expected as the result of the crime committed upon that type of victim. In a sentencing decision considered by this Court on a Crown appeal, although the Crown did not raise the point, a Judge refused to take into account the injuries suffered by an 80 year old rape victim because they were what would be expected of such a victim who suffered such an attack. The absurdity of such an approach must be apparent. The Court has no knowledge of how a victim of rape of that age might react to the offence. It can be predicted that it is likely to be severe, but why for that reason should the effect on the victim be disregarded?

[47] In this case the Judge was entitled to take into account the emotional injuries suffered by Ms Wickham, even though it could be predicted that any female in her situation, particularly having a young child under her protection, would be traumatised by the events of that evening. The first complaint should be dismissed.

*Victim vulnerability (s 21A(2)(l)) and breach of trust (s 21A(2)(k))*

In **Ali v R [2010] NSWCCA 35** the offender was a taxi driver who sexually assaulted an intoxicated young female passenger. It was contended that the sentencing judge had erred in having regard to her vulnerability as an aggravating feature under s 21A(2)(l). Johnson J held (at [58] – [62]) that it was appropriate for the judge to take into account both the victim’s vulnerability and that the offender breached the position of trust he was in in relation to a passenger in his taxi who was both intoxicated and in ill-health, although he did not specifically refer to provisions of s 21A(2) in saying so.

### **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”.

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

Announcing that a discount for a plea of guilty is to be applied and then imposing a sentence that is the maximum that can be imposed whilst still permitting the sentence to be suspended does not promote transparency in the sentencing process where the unspecified starting point is a curious number: **R v Huang [2010] NSWCCA 68** per Grove J at [6] and R A Hulme J at [86] – [87]. In this case the judge said he would allow a discount of 10 per cent and then imposed a suspended sentence of 2 years. The starting point, which was not specified, must have been one of 2 years and about 3 months which seemed rather unlikely.

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 Farrowell-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.

## **Standard Non-Parole Periods**

#### *Reasons required as to objective seriousness and for departure from the standard*

In respect of offences for which a standard non-parole period is prescribed it is necessary for a sentencing judge to express findings and reasons as to the objective seriousness of an offence and, if there is a departure from the standard non-parole period, the reason for such departure: **Mayall v R [2010] NSWCCA 37** per Howie J at [32] – [32]. In this case the sentencing judge simply observed that the offender had pleaded guilty and so he was not obliged to impose the standard non-parole period but would give consideration to it as a guidepost. He imposed non-parole periods of 3 years for each of two offences that had prescribed standard non-parole periods of 8 years.

See also **R v Parkinson [2010] NSWCCA 89** per McClellan CJ at CL at [32] – [38] where a sentencing judge provided no reasons as to the departure from the standard, or the extent of it.

*The standard is irrelevant to offences committed prior to their introduction*

It was an error for a judge to have regard to standard non-parole periods in sentencing for offences committed prior to their introduction: **McGrath v R [2010] NSWCCA 48** per Macfarlan JA at [35] – [38]. In this case the judge was sentencing for offences committed in 2001 and 2002. Standard non-parole periods took effect from 1 February 2003 for offences committed on and after that date. The judge stated an awareness of this but said, nevertheless, that he would have regard to those that applied to the offences in question.

*The abstract offence in the middle of the range*

It is not necessary for a sentencing judge to articulate the constituents of “an abstract offence in the middle of the range” with which to compare the objective seriousness of the offence in question: **Dunn v R [2010] NSWCCA 128** per Grove J at [12] – [18] and **Hristovski v R [2010] NSWCCA 129** by Johnson J at [37] – [38].

*Objective seriousness assessment*

See below under “Other issues in sentencing” for further cases dealing with the assessment of the objective seriousness of offences for which a standard non-parole period is prescribed.

*The standard is irrelevant in sentencing a child*

Section 54D(3) excludes the operation of Div 1A Pt 4 *Crimes (Sentencing Procedure) Act* 1999 in the case of an offender who was under 18 years of age at the time of the offence. In **AE v R [2010] NSWCCA 203**, the offence in question was robbery in company with wounding for which a standard non-parole period of 7 years is prescribed. The offender, however, was aged 15. The sentencing judge had erred when he used the standard non-parole period as a factor or guidepost *indicating parliament’s intention as to the seriousness of the offence*. Basten JA held (at [26]) that it was erroneous for the sentencing judge, whilst not imposing the standard non-parole period, to have taken it into account by using it “as a factor indicating Parliament’s intention as to the seriousness of (the) offence, thereby justifying a higher sentence than might otherwise have been thought appropriate”.

*Relevance that offence with a standard non-parole period could have been dealt with in the Local Court*

The Court in **Bonwick v R [2010] NSWCCA 177** was required to consider the principle that a judge should take into account in certain circumstances that an offence dealt with in the District Court could have been the subject of sentencing in the Local Court where the offence in question carried a prescribed standard non-parole period. In this case, the offences were aggravated indecent assaults for which the maximum penalty is 10 years

and the standard non-parole period is 8 years. Davies J, applying *Palmer* [2005] NSWCCA 349, held that the prescription of a standard non-parole period does not displace the principle and the fact that a matter could have been dealt with in the Local Court remains a relevant consideration.

## Other issues in sentencing

### *Agreed facts – serious miscarriage where agreed facts inconsistent with offender’s version*

In *Loury v R* [2010] NSWCCA 158 the appellant and his brother were involved in a violent incident outside a hotel. They each pleaded guilty to three charges of using an offensive weapon with intent, in company, to commit the indictable offence of assault occasioning actual bodily harm. The sentencing judge regarded their culpability as being equal participants in a joint criminal enterprise, primarily because he accepted a submission by the prosecutor that the appellant had handed a baseball bat to his brother that was then used by the brother in the course of the incident. The appellant had provided a version of events in a police interview, which he consistently maintained thereafter, which was to the effect that he was not a participant in a joint enterprise with his brother. He admitted culpability for assaults but less in number and of a significantly lesser degree of gravity than those committed by his brother. An agreed statement of facts was tendered by consent and was inconsistent with the appellant’s version. Both brothers were sentenced to identical terms of imprisonment. The appellant’s convictions were quashed on appeal. Whealy J held that a serious miscarriage of justice had occurred in that the pleas of guilty had been entered without the charges having been explained by the appellant’s solicitor and he had no awareness of the details of negotiations between the solicitor and the Crown. The appellant’s evidence as to what transpired with his solicitor was accepted, including that he had never seen the statement of agreed facts or had its contents explained to him.

There are useful remarks in this case by Whealy J (at [107] – [109]) as to various shortcomings in the conduct of both solicitor and counsel who represented the appellant at first instance.

### *Common law offences*

It was a serious error to fetter the sentencing discretion to the maximum penalty for a single offence committed in the course of a conspiracy that involved the commission of numerous criminal offences: *R v Brown* [2010] NSWCCA 73 per Howie J at [57] – [62]. The offender was sentenced for the common law offence of conspiracy to cheat and defraud. The sentencing judge had regard to the maximum penalty provided for the offence in s 178BA of the *Crimes Act* 1900 (now repealed) of imprisonment for 5 years. The conspiracy, however, involved numerous offences including offences contrary to s 178BA and s 300 (maximum 10 years).

### *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.

In *Hinchcliffe* the appellant was sentenced for receiving stolen property (i.e. drugs stolen from a pharmacy) as well as the (deemed) supply of the drugs. 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.

#### *Fact finding*

Sentence proceedings miscarried when a judge rejected evidence of the offender which was untested: ***O’Neil-Shaw v R* [2010] NSWCCA 42** per Basten JA at [23] – [32]. Evidence as to the relationship between the offender and the victim of an offence of maliciously inflicting grievous bodily harm with intent was provided by a number of witnesses in the form of affidavits. The deponents were not required for cross-examination. The offender gave evidence but was not cross-examined on his claim that he had been mistreated by the victim who was his stepfather. This was a consequence of an agreed approach taken by the Crown Prosecutor and senior counsel for the offender. The sentencing judge, however, rejected the offender’s assertions on the subject. The matter was remitted to the District Court pursuant to s 12(2) of the *Criminal Appeal Act* 1912.

#### *Irrelevant considerations*

It is erroneous to reduce a sentence in order to have a juvenile offender released on parole prior to turning 21 when he/she would be transferred to a correctional centre: ***TG v R* [2010] NSWCCA 28** per Howie J at [20] – [26].

The fact that an offender does not have anything in common with other inmates and will find it difficult to relate is an irrelevant consideration. Feelings of personal isolation, discomfort, loss or frustration arising from the normal effects of imprisonment have no part to play in sentencing an offender once it is determined that the only appropriate sentence is a period of full-time custody: ***R v Hunter* [2010] NSWCCA 54** per Howie J at [47] – [50].

### *Joint criminal enterprises and differentiating the roles played by participants*

In ***Johnson v R; Moody v R* [2010] NSWCCA 124**, there was a divergence of view 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.

### *Mental condition of offender*

Finding a causal connection between an offender's mental condition and the commission of an offence is a finding of fact that an appeal court is bound by unless it was not open on the evidence or unless error is demonstrated within *House v R* (1936) 55 CLR 499 at 504-505: ***Mercael v R* [2010] NSWCCA 36** per James J at [66] – [76]. A psychiatrist expressed an opinion in the first of a number of reports that the court might take into account in mitigation the offender's likely severely depressed mood at the time of the incident. He did not reiterate this opinion in the subsequent reports. James J queried (at [73]) whether this could be taken as an opinion that there was a causal connection. If it was, it was a bare assertion without elaboration, inadequate to establish such a connection per *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705. It was open to the sentencing judge to have rejected a submission that there was a causal connection with the commission of the offence.

### *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 periods and special circumstances - accumulation of sentences*

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.

*Non-parole periods and special circumstances - effective non-parole period exceeding 75 per cent of 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.

*Non-parole periods and special circumstances - delay leading to an effective non-parole period that exceeds 75 per cent of the total term*

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.

#### *Objective seriousness assessment*

There have been a number of cases in which it has been held that where a standard non-parole period offence does not fall in the middle of the range of objective seriousness it is necessary for the sentencing judge to make a finding as to the extent to which it is above or below the mid-range. A finding that the offence is simply above or below is insufficient. In *McEvoy v R* [2010] NSWCCA 110, Simpson J said that, despite the use of the words “with precision” by McClellan CJ at CL in *R v Cheh* [2009] NSWCCA 134 at [22], “it would, in my view, be sufficient for a sentencing judge to indicate that a particular offence was significantly above or below mid-range, slightly above or below mid-range, or at the top or bottom of the range”. McClellan CJ at CL subsequently said in *R v Sellars* [2010] NSWCCA 133 at [12] that when he had spoken in *Cheh* of “precision” he was endeavouring to emphasise that if an offence falls outside the mid-range a sentencing judge should identify where it falls rather than merely state that it falls above or below the range.

There was a spate of cases in the middle of 2010 in which the same or similar error was found in *R v Nicholson* [2010] NSWCCA 80, *AWKO v R* [2010] NSWCCA 90, *Dunn v R* [2010] NSWCCA 128, *R v Farrowell-Smith* [2010] NSWCCA 144, *Mitchell v R* [2010] NSWCCA 145, *Corby v R* [2010] NSWCCA 146, *OH Hyunwook v R* [2010] NSWCCA 148 and *R v LP* [2010] NSWCCA 154.

Errors have also been found in matters taken into account by sentencing judges in the assessment of the objective seriousness of an offence such as an offender’s plea of guilty, that he was on conditional liberty at the time of the offence and “other subjective circumstances”: see *R v Nicholson*, supra, and *R v McEvoy*, supra.

### *Specification of the objective seriousness of offences that do not carry standard non-parole periods*

There have been a spate of decisions of the Court of Criminal Appeal, particularly in the latter half of 2010, in which comments have been made that it is unnecessary for a sentencing judge to analyse where an offence lay in the range of objective seriousness where no standard non-parole period is prescribed. One example is ***Dagdanasar v R [2010] NSWCCA 310*** where the sentencing judge held that the offence was “slightly above the mid-range of offending of its type”. Price J commented that the finding was unnecessary and referred to the remark by Howie AJ in *Georgopolous v R [2010] NSWCCA 246* at [30] that making such a finding was, “likely to lead to confusion and misinterpretation when the offence does not carry a standard non-parole period”.

Other cases in which similar criticisms have been made include *Civell v R [2009] NSWCCA 286*; *Okeke v R [2010] NSWCCA 266*; *Gore v R*; *Hunter v R [2010] NSWCCA 330*; and *Black v R [2010] NSWCCA 321*.

### *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 raised 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. In concurring judgments, Allsop P and Price J expressed their agreement with this reasoning.

### *Parity*

Ordinarily, disparity is unlikely to be found in relation to a finding of special circumstances because the personal circumstances of co-offenders will commonly differ but there may be cases where all relevant facts and circumstances being equal, a finding of special circumstances in the case of one offender and not in the other may give rise to a justifiable sense of grievance: ***Lau v R [2010] NSWCCA 43*** per McClellan CJ at CL at [14] – [17]. This was found to be such a case and the offender’s non-parole period was reduced so that it was of the same proportion of the total term as in the case of his co-offender.

It will be a rare case in which an adult offender can invoke the parity principle where the co-offender is a child dealt with in the Children’s Court: ***Ruttley v R [2010] NSWCCA 118*** per Simpson J at [53] – [60]. However, the penalty imposed upon the child is not irrelevant. There remains an issue of proportionality.

There was no legitimate sense of grievance when two offenders sentenced for proceeds of crime offences received markedly different sentences (12 years as opposed to 4 years 6 months) in ***R v Wing Cheong Li; Wing Cheong Li v R [2010] NSWCCA 125***. The co-offender had been dealt with for an offence that carried a maximum penalty of 12 years whereas 25 years was prescribed in respect of the applicant's offence. There were other circumstances which warranted differentiation as well.

#### *Parole orders*

There is no power to make a parole order when a sentence exceeds three years: ***R v Muldrock; Muldrock v R [2010] NSWCCA 106*** per McClellan CJ at CL at [20] – [22]. The sentencing judge imposed a total term of imprisonment for 9 years with a non-parole period of 96 days and purported to make a condition that the offender only be granted parole on the basis that he be taken to a facility that provides a supervised therapeutic environment for sex offenders with an intellectual disability. Section 51 of the *Crimes (Sentencing Procedure) Act 1999* only provides a court the power to impose conditions “on any parole order made by it”. The power to make a parole order provided by s 50 only applies where a sentence is for a term of 3 years or less.

#### *Pre-sentence Custody*

The preferred manner of taking into account pre-sentence custody is to back-date the sentence: ***Wiggins v R [2010] NSWCCA 30*** per Howie J at [3] – [15]. In this case the sentencing judge had back-dated the sentence to a date when the offender returned to custody following conviction and said that he had also taken into account an earlier four month period of custody. This led to argument on appeal as to whether the judge had in fact taken that period into account. Howie J referred to numerous authorities for the proposition that back-dating is the preferable course and said, “this is yet another case where the sentencing judge has not taken that course and yet given no reasons for not having done so”.

There was a different approach to taking pre-sentence custody into account in ***Pulitano v R [2010] NSWCCA 45***. A judge imposed a suspended sentence and there was a question as to whether he had taken into account a four month period of pre-sentence custody. Giles JA referred (at [8]) to the option of back-dating sentences as “generally to be preferred” but noted that such a course was not available when a sentence is suspended, the only option being to reduce the term of the sentence.

#### *Remarks on sentence*

Both the offender and members of the public in court should be able to understand the basis for the sentences from what is said at the time of sentencing: ***R v Hersi and Hersi [2010] NSWCCA 57*** per Howie J at [7]. In this case the judge said that he requested his “comments to be added to the comments I made on the earlier occasion this matter was in court”, something Howie J described as a “somewhat unusual course”. He was also critical of the need for the Court of Criminal Appeal to have to read the transcript of addresses and dialogue between the Bench and counsel in order to understand the reasons for sentence.

## *Remorse*

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”.

## *Statistics*

It is appropriate to take the opportunity to say something about what appears to be a common misunderstanding. I have encountered it in submissions in the Court of Criminal Appeal. 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” ([http://jirs/menus/notices/pens\\_about.php](http://jirs/menus/notices/pens_about.php)):

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.

## *Summary disposal possible*

The applicant in ***Dunn v R [2010] NSWCCA 128*** contended that the sentencing judge failed to have regard to the fact that the offence for which he was sentenced could have been dealt with in the Local Court. Grove J held (at [23] – [29]) that it could not. The applicant had been charged and committed for trial for causing grievous bodily harm with intent, an offence which is triable only on indictment. In the District Court he pleaded not guilty to that charge but guilty to recklessly causing grievous bodily harm. The Crown accepted that plea. In these circumstances, there never was any chance that the applicant could have been dealt with in the Local Court.

## *Suspended sentences*

In ***R v Nicholson [2010] NSWCCA 80*** at [13] – [16], Howie J was critical of the prosecution having taken no action to have an offender dealt in the Local Court with for breaching a suspended sentence bond before he was sentenced in the District Court for an offence

which constituted the breach. It meant that the Local Court had no power to do other than order that the activated sentence be subsumed within the sentence imposed in the District Court.

#### *Victim impact statements*

A sentencing judge made reference to victim impact 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.

#### *Worst case category*

A sentencing judge was found to have erred in characterising aggravated sexual assault offences as being the worst case category in ***Stephens v R [2010] NSWCCA 93***. There is a useful discussion of authorities on the issue in the judgment of Fullerton J at [43] – [65].

## **Specific offences**

#### *Child pornography and related offences*

***Whiley v R [2010] NSWCCA 53*** was a case in which an excessive sentence was imposed for child pornography offences. The offender was sentenced to a total of 4 years for two counts of producing child pornography contrary to s 91H of the *Crimes Act 1900* (maximum penalty 10 years). He was a prisoner with a bad record and one day when his cell was searched there were found 18 sheets of drawings and 24 pages of handwritten text, all of a highly graphic nature describing or depicting child sexual activity. James J determined that the objective gravity of the offences was near the bottom of the range. He had regard to a number of matters: the material was not produced for sale or distribution but was for the offender's own gratification; the images, being drawings and not photographs, and text were produced from imagination and did not involve the exploitation of any actual child; and the quantity of material was nothing like that considered in many other cases. The sentences were reduced to 12 months.

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.

*Using a carriage service to groom a person under the age of 16 for sexual activity*

It was contended in **Rampley v R [2010] NSWCCA 293** that an offence against s 474.27(1) of the *Criminal Code* 1995 of using a carriage service to transmit a communication to another person, the communication containing indecent material, with the intention of making it easier to procure the recipient to engage in sexual activity, with the recipient believed to be under the age of 16, was less serious because the person with whom the offender was communicating was, unbeknown to him, a police officer attached to a “Cyber Predator Team”. The submission was made that sexual activity was neither positively intended nor objectively possible. McClellan CJ at CL rejected the submissions. He regarded (at [37]) the offence as no less reprehensible when the offender is communicating with a fictitious person who they believe to be real than when communicating with a real person. His Honour also noted that the legislature had in mind that the offence could be committed in the manner in which it was in this case and that detection of such offences served an important objective of deterrence.

*Driving offences involving death or grievous bodily harm*

The fact that a single act of driving caused similar injuries to two victims who were in proximity to each other was not a proper basis to order that sentences for two counts of dangerous driving occasioning grievous bodily harm be served concurrently: **R v Read [2010] NSWCCA 78** per Giles JA at [35] – [42]. In the course of dealing with this issue, Giles JA reviewed a number of authorities concerned with the totality principle and the discretion to order sentences be served concurrently or otherwise.

*Drug offences – low quantity and purity not mitigating*

The fact that the quantity of a drug is modestly in excess of the minimum required for the offence and that the purity was minimal were not mitigating factors: **Lorraway v R [2010] NSWCCA 46** per McClellan CJ at CL at [31] – [34]. The challenge on appeal was to the sentencing judge rejecting a submission that this matters operated in mitigation. The judge concluded that they were neither aggravating nor mitigating features. McClellan CJ at CL said they were matters which required consideration but it was inappropriate to speak in terms of aggravation or mitigation.

*Drug offences – Relevance of drug being a precursor in the manufacture of another prohibited drug*

**Pham v R [2010] NSWCCA 208** involved sentencing for an offence of knowingly taking part in the supply of not less than the large commercial quantity of a prohibited drug (pseudoephedrine). It was submitted that the sentencing judge erred, when assessing the objective seriousness of the offence by failing to take into account that the drug was a precursor in the manufacture of another prohibited drug and that there was no evidence to suggest that he was involved in the manufacture of that drug. Simpson J held (at [44] – [45]) that the submission was misconceived. The relative harmfulness of the drug has been taken into account by the legislature in the determination of what constitutes the large commercial quantity of any drug, and is built into the penalties provided. Having so differentiated by reference to harmfulness, the legislature has determined that the

penalty for supply of the relevant quantities shall not vary according to the nature of the drug.

*Drug offences - general principles concerning serious federal drug offences*

In the course of determining a Crown appeal against inadequate sentences imposed in **R v Nguyen; R v Pham [2010] NSWCCA 238** the Court was required to consider general principles applicable to sentencing for serious offences arising from a drug importation. A useful collection of such principles and relevant factors appears in the judgment of Johnson J at [72].

*Drug offences - trafficking in drugs to a substantial degree*

In **Zahrooni v R [2010] NSWCCA 252** the offender was found in possession of 69 grams of opium. The drug was concealed in 48 individual sachets. He was also in possession of just over \$1000 in cash, a small knife, and 2 mobile phones, one of which had received a text message from somebody placing an order for “a quarter of an ounce”. It was argued on appeal that there should not have been a full-time custodial sentence as the judge had not made any finding as to whether or not the offender was involved in “trafficking in drugs to a substantial degree”. However, Simpson J referred to the fact that the judge had made specific mention of the extent of the offender’s involvement in drug supply. He referred to the quantity of the drug, more than double the trafficable quantity, the packaging into individual sachets, the relatively large sum of money in his possession (having regard to his financial circumstances), the possession of two mobile phones and the text message on one of them. Having regard to the judge’s acceptance of those matters it was inevitable that if he had have turned his mind to it he would have concluded that there was “trafficking to a substantial degree”.

*Drug offences - exceptional circumstances permitting a non full-time custodial sentence where there is “trafficking to a substantial degree”*

In **R v Pickett [2010] NSWCCA 273** it was not suggested that there was not “trafficking to a substantial degree” but the issue was whether there were “exceptional circumstances” which could permit a non-fulltime custodial sentence being imposed. The offender in this case was sentenced for an offence of ongoing supply of cocaine which related to the supply of a total of 6.5 grams in three transactions with an undercover police officer. Taken into account were two further offences of supplying cocaine, each involving the supply of about 10 grams to an undercover officer. Mr Pickett was supplying the drug at the behest of another person who was well entrenched in drug supply activity. He owed that person a substantial amount of money and felt beholden to him as a result. The offender’s evidence, which was accepted, was that all of the proceeds of the sales were returned to the other person. The offender became unwilling to continue with this activity and, so as to avoid further importuning by the other person, he went to the Northern Territory. The sentence which was imposed was imprisonment for one year eight months with execution of the sentence suspended. The Crown appealed.

Simpson J referred (at [63]) to the well established principle that drug dealing “to a substantial degree” will, in the absence of exceptional circumstances, demand a sentence of full-time imprisonment. She concluded that the respondent’s voluntary cessation of his

criminal activity prior to arrest along with other circumstances of the case took it into the exceptional category. The Crown appeal was dismissed.

### *Kidnapping*

In **Allen v R [2010] NSWCCA 47**, Latham J (at [21]- [22]) reiterated factors relevant to an assessment of the objective gravity of an offence of kidnapping under s 86 of the *Crimes Act 1900*: the duration of the detention; the extent of fear or terror occasioned; the manner of treatment and what is demanded of the victim; the purpose of the detention; and the extent (if any) to which third parties were subjected to ordeal or anguish by reason of fear for the welfare of the victim.

### *Murder – worst case and life imprisonment where no intent to kill*

A life sentence was imposed in **Tan v R [2010] NSWCCA 207** for engagement in a joint criminal enterprise that resulted in a most heinous murder. On appeal it was submitted that Tan had organised for the infliction of grievous bodily harm upon the victim. He intended that hydrochloric acid would be used to cause grotesque disfigurement of the victim on the victim and that those who carried out the act went beyond the scope of the joint criminal enterprise. The appeal was dismissed. R S Hulme J held (at [56] – [62]) that a lesser sentence was not necessarily warranted where murder is committed with an intention to inflict grievous bodily harm rather than to kill. Other matters such as motivation, the infliction of cruelty or demonstrated criminality going beyond the necessary incidents of the killing are matters also to be taken into account. It follows that there is no blanket rule precluding a finding that a murder falls into the worst case category where the intention is to inflict grievous bodily harm.

### *Proceeds of crime offences*

It is an abuse of process to charge a proceeds of crime offence where the proceeds are from a substantive offence also charged: **Nahlous v R [2010] NSWCCA 58** per McClellan CJ at CL, Howie and Rothman JJ at [13] – [21]. The offender in this case sold decoders (used to receive pay television without payment of a subscription to a service provider). On the last occasion before he was arrested he sold 50 to an undercover police officer and received payment of \$15,000. He was charged with offences against the *Copyright Act 1968* (Cth) as well as with an offence of dealing with the proceeds of crime. The latter related to the \$15,000. He received by far the longest sentence for this offence. It was held that he should never have been charged with it and that if he had applied for a permanent stay of proceedings because of an abuse of process it could not have been refused. The sentence for that offence was quashed and the offence was dismissed pursuant to s 19B(1)(c) of the *Crimes Act 1914* (Cth).

## **SUMMING UP**

### *Elucidation upon “beyond reasonable doubt”*

The trial judge in **RWB v R; R v RWB [2010] NSWCCA 147** fell into error when he attempted to explain to a jury when a doubt is reasonable and when it is not but there was

no miscarriage. The judge said, in part, “If you think it (a doubt) is just a fanciful or merely theoretical doubt that you would not personally call reasonable yourself, then it is not a reasonable doubt”. Simpson J traced the course of authority on the subject in considerable detail and added (at [48]) her “voice to the chorus that has urged trial judges to avoid the temptation to embark upon an explanation of the well known concept of ‘beyond reasonable doubt’”. Her Honour identified (at [49] – [53]) two exceptions to the total prohibition on expanding upon the “formulaic direction”, where counsel’s address is such as to call for some remediation and where the jury seeks additional assistance. In relation to the latter she noted that the response in *R v Southammavong; R v Sihavong* [2003] NSWCCA 312 that, “The words ‘beyond reasonable doubt’ are ordinary everyday words and that is how you should understand them” was held not to have constituted a miscarriage of justice.

Another error of the trial judge in *RWB v R; R v RWB* (above) was to tell the jury that the failure of defence counsel to cross-examine the complainant about a particular topic about which the accused had raised in his evidence would indicate that the accused had failed to tell counsel about it. It was held by Simpson J (at [101] – [102]) that this was erroneous but that no miscarriage resulted. The inference that the accused had failed to include the subject in his instructions was not the only inference available and so trial judges should exercise great caution in directions to the jury concerning the failure of an accused’s counsel to comply with the rule in *Browne v Dunn* (1893) 6 R 67.

#### *Whether a “Shepherd direction” is required in a circumstantial evidence case*

It was contended in *Rees v R* [2010] NSWCCA 84 that a jury should have been directed that one of the circumstances relied upon by the prosecution was an indispensable intermediate fact that they should be satisfied had been proved beyond reasonable doubt. Beazley JA held otherwise and in the course of doing so provided a detailed discussion (at [48] – [55]) of the circumstances in which a direction of the type referred to in *Shepherd v R* [1990] HCA 56; 170 CLR 573 should be given.

#### *Comment upon prosecution evidence which is not challenged*

*Jiang v R* [2010] NSWCCA 277 concerned a sexual assault trial. There was evidence that the complainant was distressed and had made a prompt complaint to a friend. The trial judge in summing up referred to this evidence and commented on the fact that it was not contradicted and had not been challenged in cross-examination. A number of references were made to the evidence to similar effect. On appeal it was contended that the judge was wrong to have made such comments. In the circumstances of the case it was held that no miscarriage of justice occurred. The defence case had embraced the fact that the complainant was distressed and had said the things to her friend that she had claimed. Defence counsel simply argued that there was an alternative explanation for the state she was in and the statements that she made. In my judgment, however, I noted that there was a potential for danger in a judge commenting upon prosecution evidence to the effect that it was unchallenged, uncontradicted, or both. Such a comment carries the implication that it was open to the defence to have done so. It would be a rare case of sexual assault where defence counsel would be in a position to challenge or contradict complaint evidence at all. Such comments may imply to the jury that this was a course available to counsel that was not taken up, and that could involve significant unfairness.

## Majority verdicts

In the Criminal Trials Bench Book the suggested direction in relation to the need for a jury verdict to be unanimous includes mention of the law providing in certain circumstances for a majority verdict. The suggested direction, however, includes that the judge should tell the jury that the circumstances in which a majority verdict can be returned do not yet apply and so that the verdict that they reach must be unanimous. In *Doklu v R* [2010] NSWCCA 309 the trial judge gave a direction in accordance with the Bench Book suggestion. After the jury had been deliberating for six hours a note was received to the effect that a unanimous verdict could not be reached. The judge reiterated to the jury that the circumstances in which a majority verdict could be taken had not yet arisen and that their verdicts must be unanimous. She then proceeded to give the jury a direction in accordance with *Black v R* (1993) 179 CLR 44.

A further note was received from the jury after deliberations had extended for 13 hours, again indicating an inability to reach a unanimous verdict. The judge then followed the procedure set out in s 55F of the *Jury Act* 1977 and directed the jury that a majority verdict could be returned. Majority verdicts of guilty were delivered soon afterwards. On appeal it was contended that the trial judge had erred by telling the jury of the possibility that a majority verdict was an option before the time at which such a verdict could be accepted. Macfarlan JA held that the mention of the possibility at some future time of a majority verdict being taken did not undermine the effect of the *Black* direction. He drew a contrast with the situation in *RJS v R* [2007] NSWCCA 241; 173 A Crim R 100 where it was held that the effect of the *Black* direction had been undermined. In the present case Macfarlan JA held that what the trial judge said could not reasonably be regarded as lessening the encouragement given to the jury to reach a unanimous verdict. However, he then indicated his view that there should be no mention of majority verdicts before the occasion had arrived when such verdicts could be received.

The Bench Book direction was formulated following a consideration by the Bench Book Committee of authorities in other jurisdictions in which majority verdicts are available. Those decisions are referred to in a note at [7-040]. It would seem that none of those decisions were referred to the Court in *Doklu v R*. Nor was the Court, it would seem, referred to *Ngati v R* [2008] NSWCCA 3 which was a case which raised an almost identical issue. It had been submitted in that case that the Court should hold that a miscarriage of justice would follow if a trial judge so much as mentioned the existence of majority verdicts before the time arrived for the delivery of such a verdict. In that case it was held that what the trial judge had said did not undermine the effect of a *Black* direction. No adverse comment was made about the terms of suggested direction in the Bench Book.

## LEGISLATION

The *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* abolished the concept of periodic detention and creates a regime for “intensive community correction”. It is available when an offender has been sentenced to imprisonment for not more than 2 years. Mandatory conditions are prescribed by regulation and a court may order further conditions. Provisions are made for the

suspension, revocation and reinstatement of orders. Revocation results in an offender serving at least one month in full time detention before becoming eligible to apply for reinstatement. The mandatory conditions provided by regulation (cl 175 *Crimes (Administration of Sentences) Regulation* 2008) include that an offender is prohibited from using illicit drugs and must submit to drug and alcohol testing. Surveillance or monitory may be directed by a supervisor. Curfew conditions can be imposed. Community service work of at least 32 hours per month must be performed. Participation in rehabilitation programs may be directed. 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 ***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.

***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 of particular interest are amendments to the *Criminal Procedure Act* 1986 in relation to judge alone trials. New s 132 provides that either party may apply to the court for a “trial by judge order”. An order cannot be made unless the accused agrees. If the prosecution does not agree an order can be made if the court considers that it is in the interests of justice to do so. There is also provision for the court to make a trial by judge order on its own motion if of the opinion that there is a substantial risk of an offence being committed against a juror. Section 132A provides that an application for a trial by judge order must be made not less than 28 days before the date fixed for the trial except with leave of the court.

Another amendment of note 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. These provisions commenced by proclamation on 14 January 2011.

### ***Crimes (Sentencing Procedure) Amendment Act 2010***

Section 22 of the principal Act was amended so as to include a requirement that the court taken 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. If any of the offences the subject of an aggregate sentence attract a standard non-parole period the court must indicate what non-parole period would have been set if a separate sentence had been imposed with the usual indication of whether it would have been the standard non-parole period or something greater or lesser, with reasons given for any departure. These provisions are yet to be proclaimed to commence.

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