LOCAL COURT OF NEW SOUTH WALES 2015 ANNUAL CONFERENCE

Criminal Law Update

The Honourable Justice R A Hulme

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CONTENTS

SCOPE OF PAPER

The purpose of this paper is to provide brief notes concerning the range of issues that have been considered in appellate criminal decisions in the past 12 months. Some of the judgments referred to were handed down more than 12 months ago but they are included because they only became available by being published on Caselaw within that period.

Where reference is made to the author of a judgment in the Court of Criminal Appeal it should be taken that the other members of the Court agreed unless otherwise indicated.

I am most grateful for the assistance in the compilation of this paper provided by Mr Nicholas Mabbitt BA (Hons) JD and Ms Roisin McCarthy BA LLB.

BAIL

Show cause and unacceptable risk tests under the Bail Act 2013 as amended

In ***Director of Public Prosecutions (NSW) v Tikomaimaleya*** **[2015] NSWCA 83** an offender had been found guilty after a trial of an offence listed in s 16B of the *Bail Act 2013* as a "show cause" offence. Bail was granted pending sentence but the DPP made a detention application to the Supreme Court which was referred to the Court of Appeal. An issue was whether the "show cause" and "unacceptable risk" tests in the *Bail Act* as amended early in 2015 are separate tests. It was held that the two tests should not be conflated. A particular reason for that in the case at hand was that the unacceptable risk test requires consideration of only the matters listed in s 18. A particular matter of significance in this case was that the respondent had been found guilty by a jury, thereby losing the presumption of innocence, and was facing an inevitable custodial sentence. Such matters are not permitted to be considered in relation to the unacceptable risk test because they are not listed in s 18. The Court did however accept that in many cases it may well be that matters that are relevant to the unacceptable risk test will also be relevant to the show cause test and that, if there is nothing else that appears to the bail authority to be relevant to either test, the consideration of the show cause requirement will, if resolved in favour of the accused person, necessarily resolve the unacceptable risk test in his or her favour as well.

EVIDENCE

Significant probative value of tendency and coincidence evidence

Saoud v R **[2014] NSWCCA 136** provided something of an opportunity for the New South Wales Court of Criminal Appeal to respond to the decision of the Victorian Court of Appeal in *Velkoski v The Queen* [2014] VSCA 121. In that case it was asserted that there had been a divergence between the two States as to what is required to establish "significant probative value" for the purposes of tendency and coincidence evidence under ss 97 and 98 of Uniform Evidence Law. The Victorian approach was characterised as requiring "some degree of similarity in the acts or surrounding circumstances", whereas the Court of Appeal asserted that the NSW approach has "emphasised that tendency reasoning is not based on similarities and evidence of such a character need not be present". The NSW

approach was regarded as having lowered the threshold to admissibility. (*Velkoski* at [163]-[164]).

Basten JA observed that the Courts in each State had cited judgments of the other over a number of years without major points of departure being noted. Without considering whether the opinions expressed in *Velkoski* were correct, his Honour noted a number of basic propositions "which are not in doubt". Although the common law language of "striking similarities" has been universally rejected, there was no necessary harm in using the common law concepts of "unusual features", "underlying unity", "system", or "pattern". (*Velkoski* holds (at [171] that "it remains apposite and desirable" to assess whether the evidence demonstrates such features.) But "reliance upon such language may distract (by creating a mindset derived from common law experience) and may provide little guidance in applying the current statutory test".

> "[42] … [A]ttention to the language of s 97 (and s 98) has the practical advantage of focusing attention on the precise logical connection between the evidence proffered and the elements of the offence charged. Thus, rather than asking whether there is 'underlying unity' or 'a modus operandi' or a 'pattern of conduct' the judge can focus on the particular connection between the evidence and one or more elements of the offence charged."

Determination of admissibility of coincidence evidence and tendency evidence does not require assessment of credibility of evidence

JG was charged with sexually assaulting a number of young boys. Tendency and coincidence evidence based on evidence of two complainants was ruled admissible. A trial was held and the jury was unable to agree on a verdict. Upon being re-tried, JG argued that, in determining whether to admit the evidence, the judge should make an assessment of its credibility. It was argued that since the complainants had given evidence in the first trial and had been cross-examined, the new judge was in a better position to assess their credibility. Moreover, because the appellant also gave evidence, it was now possible to discern "an alternative explanation" for conduct of the appellant of which the two complainants gave evidence. The judge declined and Simpson J dismissed an appeal against the decision in ***JG v R* [2014] NSWCCA 138**. In determining the admissibility of evidence under s 97 or s 98 the judge must first determine whether it would have "significant probative value". This assessment is not informed by an assessment of credibility. That is within the province of the jury: *R v Fletcher* [2005] NSWCCA 338.

Assessing competence of a child witness to give unsworn evidence

In ***MK v R* [2014] NSWCCA 274** there was an issue about a trial judge's approach to determining whether child witnesses were competent to give sworn evidence. It appeared to be accepted that the children (they were 6 years old) were not competent to give sworn evidence so the judge was then required to determine whether unsworn evidence could be given. The *Evidence Act* 1995 in s 13(5) authorises the giving of such evidence provided the court has told the person that (a) it is important to tell the truth; (b) if the person does not know the answer to a question or cannot remember they should say so; and (c) that if things are suggested to the person they should feel free to indicate that they agree with

things they believe to be true but should feel no pressure to agree with things they believe are untrue. The trial judge in this case had omitted to tell the children that they should agree with statements put to them which they believed were true. Convictions were quashed and the matter was remitted for retrial.

Evidence given by a cognitively impaired person

A cognitively impaired person may give evidence by way of pre-recorded police interview and from a remote room via CCTV in the same way a child may give evidence: Ch 6 Pt 6 of the *Criminal Procedure Act* 1986. In ***Panchal v R; R v Panchal*** **[2014] NSWCCA 275** it was contended that in a judge-alone trial there was error in the judge not having expressed satisfaction of the requirement in s 306P(2) that the provisions apply "only if the court is satisfied that the facts of the case may be better ascertained if the person's evidence is given in" the manner provided for in Ch 6 Pt 6. Although there was no dispute about it, on appeal it was asserted to have been a "fundamental defect" requiring the verdict to be quashed. It was held by the Court (Leeming JA, Fullerton and Bellew JJ) that there was no requirement for the judge to have expressly recorded satisfaction of this matter. But the appeal was dismissed on the basis of another section within Ch 6 Pt 6, namely s 306ZJ, which provides that "the failure of a vulnerable person to give evidence in accordance with this Part does not affect the validity of any proceeding or any decision made in connection with that proceeding". (Query whether a "failure of a vulnerable person to give evidence in accordance with this Part" encompasses a vulnerable person giving evidence in accordance with the Part as the complainant did in this case.)

Admissibility of hearsay evidence if maker is unavailable – s 65

Mr Sio was convicted of aggravated robbery in company, having been acquitted of the primary charge of murder. Mr Filihia pleaded guilty to murder and agreed to give evidence for the prosecution at the trial of Mr Sio (he had participated in a number of police interviews). However, when called at the trial Mr Filihia refused to give evidence, refused to make an oath or affirmation and maintained his refusal when threatened with contempt. The trial judge ruled that the police recordings of interviews with Mr Filihia were admissible as an exception to the hearsay rule pursuant to s 65 *Evidence Act* on the basis that the statements were evidence of previous representations made against Mr Filihia's interests and were made in circumstances that made it likely the representations were reliable. In an appeal against conviction, Mr Sio contended the statements were inadmissible. The primary issue in ***Sio v R*** **[2015] NSWCCA 42** was whether the statements were made in circumstances that made it likely that they were reliable: s 65(2)(d)(ii).

Leeming JA (at [24]-[30]) made the following points about s 65(2)(d) in light of the 2009 amendments following *R v Suteski* [2002] NSWCCA 509; 56 NSWLR 182.

> The assessment of reliability in s 65(2)(d)(ii) adds an additional hurdle to the prima facie admissibility of firsthand hearsay evidence of a representation against interest whose maker is unavailable.

> The test in subs (d)(ii), "make it likely" is less onerous than the "make it highly probable" threshold in subs (c).
>
> Subsections (b), (c) and (d) are directed to the reliability of the representation as a whole and the circumstances of the making of the representation extend to later statements or conduct.
>
> While subsections (b) and (d) contain examples of circumstances which may increase the likely reliability of a representation (contemporaneity and against interest), they should not be read as exhausting the circumstances to which regard might be had.
>
> Even if s 65(2) is satisfied, it is open to a judge to exclude the evidence under ss 135 and 137. Additionally, it may be that a direction to the jury will be sufficient to address any prejudice arising from the admissibility of the evidence.
>
> Appellate review of a ruling on evidence made pursuant to s 65(2)(d)(ii) requires the court to determine for itself whether the circumstances are such as to make the representation reliable. It is a binary question.

Leeming JA was satisfied that in the present case all of the circumstances indicated likely reliability and dismissed the appeal.

Admissibility of a recording of the evidence of a witness who was not a complainant in an aborted trial in a subsequent trial

In an aborted child sexual assault trial the complainant's sister gave evidence of having witnessed an event which was the subject of one of the counts. At a subsequent trial which led to the offender being found guilty the Crown tendered without objection the recording of the evidence of the sister. However it was complained on appeal in ***WC v R* [2015] NSWCCA 52** that the recording of the evidence was not admissible and that a substantial miscarriage of justice had resulted. (The provisions of Ch 6 Pt 5 Div 4 of the *Criminal Procedure Act* concerning subsequent trials of sexual offence proceedings are only concerned with the admissibility of evidence previously given by a complainant.) It was held by Meagher JA that there was no miscarriage of justice because "not admissible" (as the evidence was per the hearsay rule in s 59 of the *Evidence Act 1995*) meant, "not admissible over objection".

Admissibility of evidence relating to sexual experience – s 293 Criminal Procedure Act

A 17 year-old woman alleged that a man committed sexual offences against her in a park. A medical examination the following day, in which swabs were taken, revealed bruising said to be consistent with the complaint. Unidentified male DNA was found on a bra provided some days later to the police and in one of the swabs. There was also evidence in the trial of text messages exchanged between the complainant and other men on the night of the assault and in the following days, some of which were sexually explicit and/or flirtatious. A ground of appeal against conviction asserted that evidence of other sexual activity engaged in by the complainant was wrongly excluded. In ***Taleb v R* [2015]**

NSWCCA 105, the Court considered the circumstances in which evidence relating to a complainant's sexual experience or activity might be admissible. Davies J, in dismissing the appeal, made the following observations regarding those circumstances and their application to these facts.

> The reference to "sexual intercourse alleged" in s 293(4)(c)(i) refers to the physical act of intercourse, the issue of consent having no relevance. Mr Taleb conceded that that act took place and could therefore not rely on s 293(4)(c)(i) which provides an exception where the sexual intercourse so alleged is not conceded.
>
> Section 293(4)(a) provides for an exception in circumstances where there is other sexual activity that took place "at or about the time of the commission" of the offence charged and that the evidence of such activity formed part of a "connected set of circumstances" in which the offence charged was committed. Mr Taleb relied upon DNA evidence and the text messages to suggest the complainant was involved in other sexual activity. However, in respect of the temporal requirement, the evidence was purely speculative, and it was not established that there was any connection between other sexual activity and the events associated with the assault.
>
> There is a further exception in s 293(6) where it can be shown that the prosecution case disclosed or implied that the complainant had or had not taken part in sexual activity and that the accused might be unfairly prejudiced if the complainant could not be cross-examined in relation to that disclosure. When questioned by a doctor, the complainant had said that she had not had sexual intercourse within 7 days of the examination. The Crown said that it would not be relying upon that statement. This is distinct from the Crown disclosing that the material would be led in court, and thus s 293(6) was not engaged.

OFFENCES

Defence of honest and reasonable but mistaken belief - accused must discharge evidentiary onus

The appellant in ***Ibrahim v R*** **[2014] NSWCCA 160** argued that the trial judge had incorrectly directed the jury as to the elements of honest and reasonable but mistaken belief. The belief related to the age of the complainant in a kidnapping. Simpson J held that the Crown concession at trial that such a belief was actually held was misplaced. The evidence merely disclosed that the appellant thought the complainant looked "like 17, 18" and that he did not really give any thought to the complainant's age.

The meaning of the element "corruptly" for an offence against s 249B of the Crimes Act 1900

Mr Mehajer was accused of various financial crimes, including an offence contrary to s 249B(2)(a)(i), corruptly giving an agent of a bank a benefit as an inducement to grant a loan. It emerged on the hearing of an appeal that the trial judge erroneously directed the

jury as to the elements of the wrong offence, being s 249B(2)(b). The Court in ***Mehajer v R* [2014] NSWCCA 167** had to consider the meaning of the word "corruptly". Bathurst CJ held that the term is to be considered according to normally received standards of conduct. This means that the requisite mental element for the offence is that the corrupt benefit is received (s 249B(1)(a)) or given (s 249B(2)(a)) as an inducement or reward on account of one of the purposes set out in that section.

Riot – the meaning of the element "present together"

A question arose in ***Parhizkar v R* [2014] NSWCCA 240** as to meaning of "present together", one of the elements of the offence of riot that requires proof that there were 12 or more persons present together using or threatening unlawful violence for a common purpose. The case concerned a disturbance at the Villawood Immigration Detention Centre. A number of detainees, including Mr Parhizkar, were on a roof of a building, some of whom were using or threatening violence (he was involved in vigorously throwing roof tiles). Many other detainees were on the ground of the compound using or threatening violence. For Mr Parhizkar to be one of "12 or more persons" it had to be proved that he was present together with those on the ground as there were insufficient detainees on the roof. Price J (McCallum J agreeing; Basten JA dissenting) held that the phrase "present together" should be given its ordinary meaning. There was no requirement for persons to be within a certain distance of each other. The concept was directed to people being in the same place as each other.

The elements of the offence of supplying a prohibited drug are not wholly contained in the offence of attempt to possess the same drug

Mr Yousef Jidah was convicted of an offence of possession of a precursor and an offence of supplying a prohibited drug under ss 24A and 25(2) *Drugs Misuse and Trafficking Act 1985*, respectively. In circumstances where the precursor and the prohibited drug were the same drug, in this case pseudoephedrine, a question arose on appeal as to whether the prosecution of both offences occasioned a miscarriage of justice by reason of the elements of one offence being contained in the other: ***Yousef Jidah v R* [2014] NSWCCA 270**. In dismissing the appeal, the Court identified the critical differences in the offences: first, proof that the drug was of a commercial quantity was only required for the supply offence, and secondly, it is possible, although unlikely, that a person charged with possession of a precursor may be unaware that the substance was a prohibited drug, knowing only that the substance was a precursor. It was also noted by the Crown that there may be a defence available to the s 25(2) offence that is not available to s 24A. Accordingly, it was unanimously held that while there were similarities in the elements of each offence, the whole criminality of the supply offence was not entirely captured in the possession offence.

"Import" – meaning of in s 300.2 of the Criminal Code (Cth)

A new meaning for the concept of "import" was introduced into the *Criminal Code* after the decision of the Court of Criminal Appeal in *R v Campbell* [2008] NSWCCA 214. That

case held that the importation ceased when the consignment cleared customs and was delivered to the consignee's warehouse. The new definition provides that "import" means import the substance into Australia and includes (a) bring the substance into Australia and (b) deal with the substance in connection with its importation.

In ***El-Haddad v R*** **[2015] NSWCCA 10** the trial judge adopted too broad an approach by regarding "any dealing in a substance once it has reached this country" including re-exporting it or distributing it. Leeming JA held that paragraph (b) of the definition could include physical processes and legal processes such as a sale by payment and physical delivery or a merely sale by deed. In this case, involvement of the appellant in the freight forwarder being directed to hold the goods for another entity was sufficient in that it caused there to be a change in the character of the actual possession such that a different entity had the right to delivery of the goods. An inquiry about what was required to release a package from a bond warehouse was not sufficient.

PRACTICE AND PROCEDURE

Whether the Evidence Act applies to an application under the Crimes (Forensic Procedure) Act 2000

TS was suspected of committing offences of break and enter and take and drive conveyance. A police officer applied to the Children's Court for an order that he undergo a self-administered buccal swab. TS appealed to the Supreme Court. One of the grounds related to a finding by the Magistrate that the *Evidence Act 1995* did not apply to the application under the *Crimes (Forensic Procedure) Act 2000*. The appeal was allowed by Adamson J: ***TS v Constable Courtney James*** **[2014] NSWSC 984**. Section 4(1) of the *Evidence Act* provides that the Act applies to *all* proceedings in a NSW court. This includes the Children's Court.

Eligibility for certificate under Costs in Criminal Cases Act after DPP terminates proceedings

JC and others were charged with a number of sexual offences. They were committed for trial and upon arraignment entered pleas of not guilty. However, the matter never came on for trial as the charges were no-billed. Certificates under the *Costs in Criminal Cases Act 1967* were sought but a District Court judge held that the court did not have jurisdiction to grant them. In ***JC v Director of Public Prosecutions (NSW)*** **[2014] NSWCA 228** Basten JA set aside the District Court judgment. A certificate may only be granted "after the commencement of a trial in the proceedings" (s 2 *Costs in Criminal Cases Act*). His Honour concluded that by virtue of s 130 of the *Criminal Procedure Act 1986* (NSW), taking a plea and fixing a date for trial are encapsulated by the term "proceedings", and so the District Court judge was wrong to conclude that there was no jurisdiction to make the order.

Apprehended bias where judge expresses personal opinion

B was found guilty of an offence of having sexual intercourse with a person whilst knowing that he suffered from a sexually transmissible medical condition and failing to inform the other person of the risk of contracting the condition. His appeal to the District Court was dismissed. One of the things said by the judge was that "no normal woman in her right mind would have unprotected sexual intercourse with a man she knew to be HIV positive". Beazley P, Tobias AJA agreeing, Barrett JA contra, remitted the matter to the District Court for redetermination: ***B v Director of Public Prosecutions*** **[2014] NSWCA 232**. A fair minded lay observer might reasonably apprehend that the judge's remark revealed a preconception as to how a reasonable woman would act. It was not premised upon the evidence in the case and was an integral part of his Honour's decision. Barrett JA held that in context, the words indicated no more than a permissible testing, against common experience, of a conclusion independently reached. Barrett JA provided numerous examples whereby common experience was taken into account by courts in considering human behaviour. It was only at the conclusion of his Honour's reasoning that the opinion was expressed.

Court of Criminal Appeal grants a permanent stay of proceedings

TS was to undergo a special hearing under the *Mental Health (Forensic Provisions) Act 1990* in respect of offences alleged committed in 1973. The complainant did not come forward to police until 2010, after having received therapy. TS claimed to have no memory of the complainant and suffered from a range of medical conditions. He sought a permanent stay but this was refused at first instance. Bellew J in ***TS v R*** **[2014] NSWCCA 174** found that the trial judge made a number of errors in approaching the matter. Based on evidence before the trial judge as well as further evidence placed before the court, Bellew J held that it was appropriate that the "extreme remedy" of a permanent stay was granted. Matters that led to that conclusion included that the judge had misconstrued evidence that suggested that certain documents had become unavailable; further evidence that undermined the Crown case; the applicant's physical and mental health issues; and the lack of corroborating evidence.

Change in law during period alleged in indictment

On 16 September 2010 the provisions in the *Crimes Act 1900* dealing with "child pornography" were recast so as to use the term "child abuse material". The former was defined more narrowly than the latter. The indictment in ***NW v R*** **[2014] NSWCCA 217** alleged offences under the new provisions but in periods that extended either side of the amendment date. The problem was only identified during sentence proceedings. Bail was granting pending an appeal against conviction. The Court (Garling J, with the other members of the court agreeing, although McCallum J with different reasoning) held that there had been a miscarriage of justice. The offences did not exist for the entire period charged. Although there were analogous offences, there were significant differences in the definitions and in the elements of the offences.

Construction of s 29 Children and Young Persons (Care and Protection) Act 1998

In ***Re Application of the Attorney General for New South Wales Dated 4 April 2014*** **[2014] NSWCCA 251** the Court held that s 29 *Children and Young Persons (Care and Protection) Act 1998* should not be construed so as to interfere with an accused's right to a fair trial. Pursuant to section 29(e) a person cannot be compelled to produce a report made to the Director-General which concerns a child or young person. In this case, the trial judge ordered the Department of Family and Community Services to produce various reports following the issue of subpoenas to the Department on behalf of an accused on trial for murder. The Attorney-General submitted for determination three questions of law to the Court of Criminal Appeal (at [3]). Each question was answered in the negative (at [33]). Macfarlan JA acknowledged that the purpose of s 29 is to provide protections to persons who make reports under s 29. However, his Honour found that s 29 is not intended to preclude a person, in particular an accused on trial for murder, from ever accessing relevant reports made to the Director-General. It was held that as a matter of construction, the principle of legality operates to protect an accused person's right to a fair trial. This right includes the right to require third parties to produce relevant documents on subpoena.

Permanent stay of proceedings not warranted notwithstanding an illegal compulsory examination of an accused by a Crime Commission after having been charged

The accused person known as "X7" will finally have to undergo trial after lengthy pre-trial litigation. The High Court held that his compulsory examination by the Australian Crime Commission after he was charged with a number of drug offences was illegal. He then sought a permanent stay of proceedings in the District Court but failed. He returned to the Court of Criminal Appeal but again failed. In a 5-judge bench decision in ***X7 v R*** **[2014] NSWCCA 273** it was held by Bathurst CJ (the others agreeing but Beazley P with additional comments) that no actual unfairness had been demonstrated in that the actual content of the ACC examination of X7 was unknown. Continuing the criminal proceedings would not bring the administration of justice into disrepute and a stay was not required to protect the court process from abuse.

On 15 May 2015 an application for special leave was refused in the High Court: ***X7 v The Queen*** **[2015] HCATrans 109**. French CJ found that, "In our view, the absence of practical unfairness arising at trial is always a relevant consideration in the exercise of the discretion to refuse a permanent stay. We are of the view that no grounds have been disclosed which would warrant the grant of special leave".

Prosecution witness excluded because of having had access to compulsorily acquired material during an ACC examination

A financial analyst from the ATO was seconded to the ACC and was present during the examinations of Messrs Seller and McCarthy prior to them having been charged in relation to an alleged tax minimisation scheme. After they were charged the examination evidence and related documents were disseminated to the Commonwealth DPP. It was held in *R v Seller; R v McCarthy* [2013] NSWCCA 42 that such dissemination should not have taken

place. However, in that case a permanent stay of proceedings that had been granted was quashed and the matter was remitted for trial. The accused then sought various orders including that the financial analyst be prohibited from giving evidence in the proceedings and the application in that respect was upheld. The Crown appealed. In ***R v Seller; R v McCarthy*** **[2015] NSWCCA 76** it was held that if the analyst was to give evidence after having become aware of the compulsorily acquired material there would be an alteration of the accusatorial process inherent in a criminal trial in the fundamental sense described in *X7 v Australian Crime Commission* [2013] HCA 29; 248 CLR 92 and *Lee v R* [2014] HCA 20; 88 ALJR 65.

SENTENCING – GENERAL ISSUES

Importance of assessment of objective seriousness on sentence

The offender in ***R v Campbell*** **[2014] NSWCCA 102** pleaded guilty to one offence of break and entering a dwelling house and committing a serious indictable offence in circumstances of special aggravation, and an offence of assault occasion actual bodily harm. Wholly concurrent sentences were imposed, with an effective sentence of 3 years and 11 months with a non-parole period of 1 year and 10 months. The Crown appealed. One of the issues was the importance of the assessment of the objective seriousness in formulating an appropriate sentence. Harrison J reached a different conclusion to Simpson J, with whom Hall J agreed. Harrison J wrote that he doubted the utility, for appellate purposes, of dissecting the extent to which a sentencing judge has referred to objective seriousness in passing sentence. "The nature of judicial discretion means that there is both a wide range of circumstances capable of supporting the same conclusion, and a narrow range of circumstances capable of supporting different conclusions" (at [86]). Therefore, statements regarding objective seriousness must be approached with circumspection. Simpson J emphasised that the assessment of objective seriousness is a critical component of the sentencing process. Nothing in *Muldrock* derogates from that principle. The sentencing judge did no more state that offences under s 112(3) are serious and then enumerate the features of aggravation in this case. An assessment of the objective seriousness of this particular offence was called for. Had that been done, it would have been clear that a harsher sentence was warranted.

Seriousness of offences committed by a Customs Officer

Lamella was a Customs Officer and pleaded guilty to offences of corruption and conspiracy to import a controlled precursor substance, namely cold and flu tablets. He was sentenced to a total term of 8 years with a non-parole period of 4 years. In ***R v Lamella*** **[2014] NSWCCA 122** Price J found that the non-parole period was inadequate but dismissed the appeal in the exercise of the residual discretion. The non-parole period failed to appropriately reflect the criminality involved and the need for general deterrence. General deterrence was a matter of fundamental importance in this case. "These offences undermine the very core of our Nation's border protection and other Customs officers must be deterred from engaging in similar conduct" (at [57]).

Credit for time served in custody on unrelated matter

Whilst Mr Hampton was being sentenced for offences of robbery in company and stealing from the person, it became apparent that there was a period of 3 months which he had spent in custody for being bail refused on a charge for which he was eventually found not guilty. On appeal it was argued that the sentencing judge should have taken this into account, and that the line of authority based on *R v Niass* (NSWCCA, 16/11/88, unrep) was wrong. Johnson and Bellew JJ in ***Hampton v R*** **[2014] NSWCCA 131** held that the judge did not err and that the line of authority should not be overturned. A period of custody for an unrelated matter leading to acquittal or discharge is not, in and of itself, relevant to sentencing. It is, however, possible to take into account subjective matters related to the period, such as marital breakdown or loss of employment.

Judge makes error regarding what normal street purity of a prohibited drug is

Mr Farkas pleaded guilty to supply prohibited drugs on an ongoing basis. The sentencing judge found that the drug involved was higher than "normal street purity", but did not base this finding on any evidence before him. Basten JA, R A Hulme J agreeing, Campbell J contra on this point, allowed the appeal: ***Farkas v R*** **[2014] NSWCCA 141**. The judge impermissibly based his finding on two previous decisions of the Court. Facts found in previous cases are relevant to precedent value, such as legal principle or a range of sentences, but facts found in later cases "must generally be based on the evidence before the later court". Nor was the judge entitled to treat the finding as "common knowledge" (s 144 *Evidence Act*).

Date of expiry of non-parole period should not be specified

In ***R v BA*** **[2014] NSWCCA 148** McCallum J held that in making parole orders pursuant to s 50 of the *Crimes (Sentencing Procedure) Act* the Court should simply direct that the "offender be released on parole at the end of the non-parole period", instead of specifying a date. Although it is not impermissible to direct that an offender be released on the last day of the non-parole period, many frustrated associates find that upon entering such orders into JusticeLink, it appears that the offender is not eligible to be released until the day after the last day of the non-parole period. (Confusion also arises when BOSCAR audits sentencing outcomes by comparing the terms of the order made against the court's computer record.) This can be avoided by not specifying a date.

Fine may be imposed despite paucity of material regarding offender's financial circumstances

Mr Jahandideh pleaded guilty to an offence of importing a marketable quantity of opium. A component of his sentence was a fine of $100,000. Brief submissions were made on sentence but no evidence was adduced relating to the offender's financial circumstances. On appeal it was argued that the judge was in error by imposing the fine without first establishing that the offender had the means to pay the fine. Rothman J in ***Mahdi Jahandideh*** **[2014] NSWCCA 178** refused leave to appeal on the basis that a fine may still

be imposed where financial circumstances cannot be ascertained. Financial circumstances are mandatory to consider but not determinative. A sentencing court is not in a position to investigate financial circumstances or to call evidence, and no evidence was provided by trial counsel to that end. In the absence of complaint about procedural fairness, lack of reasons or prejudice, Rothman J held that it was inappropriate for the Court to intervene.

Violence towards the elderly will not be tolerated

In ***R v Wood*** **[2014] NSWCCA 184** the Court allowed a Crown appeal against the inadequacy of the sentence imposed for the manslaughter of a 71 year old woman. Mr Wood pleaded guilty to the offence, which involved him pushing the deceased to the ground after riding past her on his bicycle. She struck her head on the ground and died shortly after. In re-sentencing, the Court emphasised the need for general deterrence in these types of offences, particularly given the increase in the number of aged and vulnerable persons in the community, and also the need for the specific deterrence of Mr Wood, given his poor subjective case.

Erroneous regard to a "comparable case" in determining sentence

RCW pleaded guilty to drug offences. The prosecutor provided 3 comparable cases at the sentencing proceedings and the judge engaged in a discussion with the prosecutor about the similarity of one in particular where there had been a starting point of 12 years. The judge thought the criminality in the case at hand was more serious so that meant it warranted 13 years. He then "knocked off" 2 years for RCW having come forward to the police, thereby arriving at a starting point of 11 years which was then reduced for the plea and assistance. R A Hulme J held that the judge placed too much emphasis on the so-called comparable case: ***RCW v R (No 2)*** **[2014] NSWCCA 190**. It was wrong to compare the objective criminality of the offences to the comparable case, and then indicate what the starting point would be and apply the discount. Instead, the judge was required to instinctively synthesise all the relevant material and then treat the outcomes of the other cases as a check or yardstick.

Relevance of victim impact statements in establishing substantial emotional harm in child sex offences

MJB was convicted of various child sex offences and the Crown appealed the sentence on the basis that there was inadequate accumulation. Victim impact statements were provided but the sentencing judge rejected the Crown's contention that substantial emotional harm had been established, referring to *R v Slack* [2004] NSWCCA 128. Adamson J allowed the appeal in ***R v MJB*** **[2014] NSWCCA 195** and remarked that it was "difficult to understand why her Honour was not prepared to infer, on the basis of the statements, that the victims suffered substantial emotional harm as a result of the offending conduct". Although there are limits to which victim impact statements can be put, it is important to have regards to the content and purpose of the relevant statutory provisions e.g. s 21A(2)(g) *Crimes (Sentencing Procedure) Act 1999*.
(NOTE: *R v Slack* was disapproved of in *R v Aguirre* [2010] NSWCCA 115.)

Motive does not bear on moral culpability or objective seriousness in offence of make explosive device with intent to injure

Mr Carr constructed a parcel bomb and caused it to be delivered to his victim, who opened it and received minor injuries. The trial judge held that the objective seriousness of the offence would be "significantly elevated" if he accepted that Mr Carr was motivated to send the bomb to punish the victim for what he perceived were inappropriate advances on his daughter. In ***Carr v R*** **[2014] NSWCCA 202** Fullerton J dismissed the appeal but held that Mr Carr's motives did not elevate his moral culpability nor increase the objective seriousness of the offence. Objective seriousness is arrived at through an assessment of the nature of the offending and its consequences as well as the offender's appreciation of those consequences. An assessment of moral culpability is relevant but care must be taken that this does not overwhelm considerations of the offending conduct itself.

Parity - no justifiable sense of grievance where different approach taken by prosecution regarding offender and co-offender

Mr Gaggioli pleaded guilty to three counts of aggravated robbery. After he was sentenced, a co-offender pleaded guilty to offences with a lower maximum penalty, because the classification of the weapon was less serious. Fullerton J dismissed the appeal in ***Gaggioli v R*** **[2014] NSWCCA 246** that was brought based on parity. Prosecutorial discretion is unreviewable and furthermore, the decision to accept pleas to less serious charges could not be criticised in this case.

Judge manipulates legislation to achieve a desired result

In ***R v West*** **[2014] NSWCCA 250** a judge wanted to impose an intensive corrections order but to do so needed to impose a sentence of imprisonment of 2 years or less. To achieve this he unilaterally remanded the offender, who had been on bail, in custody for 3 months. He did so on the basis that on the resumed hearing date he would assess a sentence of 3 years, reduce it by 25 per cent because of the early plea of guilty, then take off 3 months for presentence custody, thereby being within the jurisdictional ceiling for the imposition of his desired sentencing option. Such an approach was censured. Hoeben CJ at CL said "there is no place in the sentencing process for idiosyncratic manipulation" of legislation and sentencing principles. Adamson J described the approach as subverting the need to comply with the legislation.

Aggregate sentencing

The Court was prompted to review the correct approach to aggregate sentencing because of some unnecessary steps taken by the sentencing judge in ***JM v R*** **[2014] NSWCCA 297**. In the judgment of R A Hulme J at [34]-[40] there is an exhaustive review of the legislation and the case law to date. Some of the points made included the following.

It remains necessary to comply with the requirements of *Pearce v The Queen* [1998] HCA 57; 194 CLR 610.

The criminality of each offence needs to be assessed individually. And each indicative sentence must be assessed by taking into account such matters in Part 3 or elsewhere in the *Crimes (Sentencing Procedure) Act* as are relevant: s 53A(2)(b). Commonly encountered ones in Part 3 include aggravating, mitigating and other factors (s 21A); reductions for guilty pleas, facilitation of the administration of justice and assistance to law enforcement authorities (ss 22, 22A and 23); and offences on a Form1 taken into account (Pt 3 Div 3). Commonly encountered matters elsewhere in the Act are the purposes of sentencing in s 3A, and the requirements of s 5 as to not imposing a sentence of imprisonment unless a court is satisfied that there is no alternative and giving a further explanation for the imposition of any sentence of 6 months or less.

Non-parole periods need not be specified in relation to indicative sentences except if they relate to an offence for which a standard non-parole period is prescribed: ss 44(2C) and s 54B(4).

Specification of commencement dates for indicative sentences is unnecessary and is contrary to the benefits conferred by the aggregate sentencing provisions.

If a non-custodial sentence is appropriate for an offence that is the subject of the multiple offence sentencing task, it should be separately imposed.

Being "in company" does not aggravate an aid and abet offence

The sentencing judge in ***Kukovec v R*** **[2014] NSWCCA 308** was found to have erred by taking into account that an offence was committed in company when the offence was one of aiding and abetting an aggravated (corporal violence) robbery. It was an element of the offence when the offender was a principal in the second degree that it was committed "in company".

Failure to warn of a disagreement with Crown concession is not a denial of procedural fairness

The offenders pleaded guilty to offences of drug supply and proceeds of crime. The Crown conceded, in written submissions, that concurrent sentences could be imposed. The offenders' counsel indicated agreement with the Crown submissions. The sentencing judge, however, imposed partially accumulated sentences. In ***Toole, Kurt v R; Toole, Joshua v R*** **[2014] NSWCCA 318** Joshua Toole argued that the trial judge's failure to warn his counsel that she intended to accumulate the sentences was procedurally unfair. In dismissing the appeal, R S Hulme AJ held that in light of the demands on District Court judges, it would be "an intolerable burden" to require judges, when reserving, to be well acquainted with every detail of a matter so as to identify any concessions and raise any disagreement with defence counsel. An obligation would only arise in circumstances where the judge has given a positive indication that a particular approach or argument will be adopted and then has a change of view.

Failure to plead guilty does not limit amount of discount for assistance to authorities

The applicant was sentenced for three offences relating to the manufacture and supply of drugs. He pleaded guilty to one offence (supply cannabis) and, following a trial, was convicted of two charges of manufacturing. The applicant provided assistance to the police of "the highest quality and usefulness". He received a total discount of 37.5% for the supply charge (25% for assistance and 12.5% for a late guilty plea) and 25% for each manufacturing charge, that discount being solely referable to assistance. The applicant appealed, arguing that the sentencing judge failed to adequately discount his sentence in light of the level of assistance provided. In ***Z v R*** **[2014] NSWCCA 323** McCallum J allowed the appeal, finding that the sentencing judge was wrongly constrained by the view that a discount for assistance can never exceed 25%. "To construe the [Crimes (Sentencing Procedure)] Act with that level of mathematical rigidity would come close to punishing some offenders who offer assistance for not pleading guilty" (at [34]). Her Honour observed that the only constraint in the Act is the s 23(3) imperative that the resulting sentence be not unreasonably disproportionate to the nature and circumstances of the offence.

Re-opening sentence proceedings to correct error is not an opportunity to present fresh evidence

A judge imposed aggregate sentences upon two offenders but it was later realised when an appeal in the Court of Criminal Appeal was pending that there was no power to do so. The Crown went back to the District Court with an application pursuant to s 43 of the *Crimes (Sentencing Procedure) Act* 1999 to re-open the proceedings and impose sentences according to law. The offenders sought to present additional material relevant to sentence but the judge rejected it. The appeal was continued with an additional complaint about the judge's refusal. It was held in ***Bungie, Scott v R; Bungie, Robert v R*** **[2015] NSWCCA 9** that s 43 does not afford an opportunity to re-litigate what has already been litigated, or to seek a different outcome on different evidence. Section 43 was held by the High Court in *Achurch v The Queen* [2014] HCA 10; 306 ALR 566 to have very narrow scope.

Aggregate sentencing – no power to suspend and no power to impose a single bond for multiple offences

RM v R **[2015] NSWCCA 4** was a Crown appeal against sentence in respect of various child sexual assault offences. It was common ground that the sentencing judge had erred in two respects. For the more serious offences the judge had imposed an aggregate sentence but then suspended it pursuant to s 12 of the *Crimes (Sentencing Procedure) Act* 1999. There is no power to do this as the imposition of an aggregate sentence is enabled by s 53A which is with Pt 4 of the Act which by virtue of s 12(3) does not apply when a sentence is suspended. The judge also erred in imposing a single s 9 good behaviour bond for five less serious offences.

Approach to consideration of Victim Impact Statements

Mr Tuala was sentenced for a number of shooting and firearm possession offences. The shooting offences occurred in circumstances where the victim was indebted to Mr Tuala and repeated demands for payment had not been fulfilled. The victim was shot several times and sustained significant injury. At the sentence hearing, a victim impact statement was tendered which complained of substantial physical and emotional harm. ***R v Tuala*** **[2015] NSWCCA 8** was a Crown appeal against the asserted inadequacy of the sentence. It was contended that the shooting offence was aggravated by the level of physical and emotional harm suffered by the victim. Simpson J, in dismissing the appeal, considered the extent to which victim impact statements may be used to prove an aggravating factor in s 21A(2) of the *Crimes (Sentencing Procedure) Act*. Her Honour considered that in circumstances where the victim impact statement is not objected to; there is no question about the weight to be attributed to it; no attempt is made to limit its use; it is confirmatory of other evidence; or it attests to the kind of harm to be expected, the statement may be more readily accepted as evidence of substantial harm. However, she noted that "considerable caution" should be exercised in using the victim impact statement to establish an aggravating factor if: the statement attests to facts that are in question, the victim's credibility is in question, the harm asserted in the statement exceeds what might be expected in the circumstances or the statement itself provides the only evidence of harm. Her Honour was not satisfied that injury, loss or damage beyond what is encompassed in offences of this kind was proven beyond reasonable doubt by the contents of the victim impact statement.

Sentencing following revocation of a s 12 bond

The applicant in ***Lambert v R*** **[2015] NSWCCA 22** was sentenced to a 2 year suspended sentence for a drug supply offence. She breached the good behaviour bond, was called up, and the suspension was revoked. Section 99(2) enables a court in such circumstances to impose an intensive correction order or home detention instead of full-time imprisonment but the judge gave no apparent consideration to those options. It was held that the sentence proceedings miscarried. Despite nothing being placed before the judge concerning the making of an intensive correction order, it was a realistic potential sentencing outcome in the circumstances. Insufficient material was before the Court to consider resentencing for itself so the matter was remitted to the District Court for reconsideration.

Error in giving too much weight to victim impact statement

In ***EG v R*** **[2015] NSWCCA 21** it was held that a child sexual assault offence was at the bottom of the range of seriousness for offences of its kind but the consequences described in a victim impact statement, in relation to their effect on the complainant and the family, went beyond that which would normally be expected. For full weight to be given to the matters described there needed to be more than just uncritical acceptance of the victim impact statement. Some additional support of the kind discussed in *RP v R* [2013] NSWCCA 192 and *R v Tuala* [2015] NSWCCA 8 was required.

Errors in imposing an aggregate sentence

***R v Cahill* [2015] NSWCCA 53** highlights a range of errors that are encountered with District Court judges imposing aggregate sentences. The principles applicable to aggregate sentencing were summarised in *JM v R* [2014] NSWCCA 297. In this case the errors included not specifying a non-parole period for an indicative sentence where the offence carried a standard non-parole period; discounting the aggregate sentence for the offender's plea of guilty (discounts should be applied to indicative sentences); and one indicative sentences exceeding and two indicative sentences equally the aggregate sentence. Finally, it was held that the aggregate sentence did not reflect the totality of the criminality involved.

No requirement for a judge to foreshadow that he will reject unchallenged evidence of remorse

In ***Tweedie v R* [2015] NSWCCA 71** a sentencing judge received oral evidence from an offender that he was ashamed of himself and other expressions of purported remorse. There was also tendered a letter from the offender's partner in which she conveyed that he had expressed remorse. The Crown did not in direct terms challenge such evidence. In his reserved sentencing judgment the judge rejected that the offender was remorseful. It was complained on appeal that there was a denial of procedural fairness. It was held by R A Hulme J that it was unreal to expect a judge to consider and reflect upon all that was placed before him or her during a sentence hearing and indicate before delivering or reserving judgment any possibility of disagreement or non-acceptance of such matters even where they were not challenged by the opposing party. The judge did not do anything to foreclose or discourage any evidence or submission on the subject of remorse.

Judge should have disqualified himself after stating that offender was guilty in respect of another offence for which he had been acquitted

The sentencing judge in ***Murray v R* [2015] NSWCCA 75** had presided over an earlier trial at which the appellant was acquitted. However during the course of the sentencing proceedings, in considering issues of whether appellant had been on conditional liberty at the time of the offence in question and whether there was an issue of future dangerousness, the judge made statements to the effect that despite the jury's verdict he was satisfied beyond reasonable doubt of the appellant's guilt in the other matter. He also made statements to the effect that it was appropriate that he put such a matter out of his mind. Mr Murray however made an application for the judge to disqualify himself which the judge refused. On appeal it was held that he should have stepped aside on the basis that there was a reasonable apprehension of bias.

Problems with aggregate sentencing

In ***Miller v R* [2015] NSWCCA 86** the Court allowed an appeal against the asserted severity of an aggregate sentence imposed for offences of aggravated break enter and steal and specially aggravated break enter and steal. It was held that the aggregate sentence was

manifestly excessive. The sentencing judge had applied a discount for the offender's pleas of guilty to the aggregate term, not to the indicative sentences. In an analysis of the indicative terms, Simpson J compared them to the standard non-parole periods prescribed and found them to be excessive given a finding of less than mid-range seriousness. In doing so she took into account a discount for the pleas.

Note: it is unfortunate that the Court made no comment about the correct approach to aggregate sentencing, particularly in light of the observations in *JM v R* [2014] NSWCCA 297 at [39](3). It was wrong of the judge not to apply the discount for pleas of guilty to the indicative sentences. Section 53A(2)(b) of the *Crimes (Sentencing Procedure) Act* requires that indicative sentences must take into account "such matters as are relevant under Part 3 or any other provision of" the *Crimes (Sentencing Procedure) Act*. Part 3 includes s 22 (taking guilty pleas into account). Had the sentencing judge complied with this requirement, the excessiveness of the indicative terms might have been apparent to him.

A range of errors at first instance and in re-sentencing on appeal

The applicant was sentenced for seven counts involving child sexual assault offences relating to three victims between 1981 and 1986. On appeal against sentence in ***RL v R* [2015] NSWCCA 106**, three errors were alleged to have infected the sentencing process: a finding that the offences were aggravated by planning; sentencing the applicant as if he were an adult for offences committed when he was 14 to 16 and finally, having regard to matters improperly included in a victim impact statement. The appeal was allowed, the Court finding that each of the alleged errors were made out. It was held that in order for planning to constitute a circumstance of aggravation, the offence must be "part of a more extensive criminal undertaking" (see *Williams v R* [2010] NSWCCA 15 at [20]) and not a spontaneous or opportunistic exercise as was evident in this case. The sentencing judge erroneously imposed lengthy sentences notwithstanding his own observations that the applicant' s age was particularly relevant and that he might have been dealt with under legislation relating to juveniles. In relation to the victim impact statement, the court was satisfied that it included matters "which went beyond the limits of legitimate content" (at [54]). The sentencing judge erroneously used the statement as a basis for finding that the impact of the offending extended beyond the victim and extended to the victim's family.

The approach taken by the Court in re-sentencing the applicant was problematic. The Court precisely specified the extent of notional accumulation of indicative sentences (at [69]) which is tantamount to expressing commencement dates for each sentence: Cf *JM v R* [2014] NSWCCA 297 at [39](8). The Court said that the outcome was "an overall period of six years" but, in fact, the accumulation specified yielded only 5 years 6 months. It also led to the final indicative sentence being entirely subsumed within longer indicative sentences upon which it was partially accumulated. Further, in dealing with Form 1 offences, the observations of the court, at [59], are likely to be interpreted in a way that suggests that a sentencing court can exercise discretion as to which primary offence it might assign Form 1 offences to. This is impermissible under Pt 3 Div 3 *Crimes (Sentencing Procedure) Act 1999* and is contrary to the signed request of an offender which nominates a primary offence in respect of which offences on the form are to be taken into account.

SENTENCING - SPECIFIC OFFENCES

Break enter and commit serious indictable offence may be aggravated if offence occurs in home of victim

Mr Bennett was charged with an offence under s 112(2) *Crimes Act*, break enter and commit serious indictable offence in circumstances of aggravation. The circumstance of aggravation was that he knew there were persons in the house. An aggravating factor on sentence under s 21A *Crimes (Sentencing Procedure) Act 1999* is that the offence was committed in the home of the victim. The trial judge found that this did not apply because it was an element of the offence. Simpson J, with whom Harrison J agreed, Hall disagreeing on this point, held in ***R v Bennett*** **[2014] NSWCCA 197** that this was incorrect. That the building the subject of the break and enter was the home of the victim is not an element of the offence.

De Simoni error in relation to money laundering offences under the Commonwealth Criminal Code

The Commonwealth Criminal Code provides for various money laundering offences on a scale of seriousness in terms of maximum penalty. The offences in s 400.3 to s 400.8 are differentiated by an offender's mental state ranging from actual belief, reckless or negligence as to whether the money or property is the proceeds of crime. Then there is the offence in s 400.9 in which the only requirement is that it may be reasonable to suspect that the money or property is the proceeds of crime, something to which absolute liability applies. In ***Shi v R*** **[2014] NSWCCA 276** a judge was found to have committed a *De Simoni* error in taking into account in sentencing for a s 400.9 offence that the offender had known that the money was the proceeds of crime.

Clarification of principle in R v Clark – substantial involvement in supply of drugs

In ***Youssef v R*** **[2014] NSWCCA 285** the Court of Criminal Appeal was given the opportunity to clarify the principle espoused in *R v Clark* that in drug trafficking offences the judge must find exceptional circumstances before non-custodial sentences may be considered. Mr Youssef pleaded guilty to an offence of supplying cocaine. 29.86 grams of the drug were found in his car after a stop and search by police. The sentencing judge rejected Mr Youssef's explanation that he had purchased the cocaine for use at his birthday party. Rather, he found Mr Youssef to be a person "substantially involved in supply". There was no finding of exceptional circumstances so Mr Youssef was sentenced to imprisonment. McCallum J held that it was not open to the sentencing judge to be satisfied beyond reasonable doubt that the applicant was "substantially involved in supply". Noting the constraint that *Clark* imposes on the sentencing discretion of judges, her Honour observed that the decision "may warrant reconsideration in light of the remarks of the High Court (in a different context) in *Hili v R; Jones v R* [2010] HCA 45 at [36]-[38]" (at [32]).

Judge errs in failing to consider alternatives to full-time custody for drug trafficking offences

The applicant in ***EF v R*** **[2015] NSWCCA 36** was sentenced for an offence of supply methylamphetamine. His car was searched following a random breath test and an amount of ice and other drug paraphernalia was found. Despite a powerful subjective case being advanced on his behalf at the sentence hearing, his lawyer conceded that a full-time custodial sentence would be imposed. Counsel for the applicant, appearing on appeal at short notice, argued that the judge should have considered imposing an intensive correction order (ICO). The Court allowed the appeal finding that the sentencing judge erred in failing to consider an ICO for the applicant. Schmidt J observed that while no submissions were made in the court below regarding the applicant's suitability for an ICO, "considerations of justice require that this important oversight be addressed on appeal" (at [60]). Simpson J held that the need for legal representatives to consider alternatives to full-time custody is not obviated by the authorities which indicate that full-time custodial sentences must be imposed for supply offences unless there is a finding of exceptional circumstances (see, eg. *R v Gu* [2006] NSWCCA 104).

It should be noted that it is unclear from the judgment whether exceptional circumstances were found to exist. But, a finding by the Court that the imposition of an alternative to full-time custody may be considered regardless whether exceptional circumstances exist would be contrary to a long line of authority.

Good character in sentencing for child sexual assault offences

It was held in ***AH v R*** **[2015] NSWCCA 51** that there was error in a judge rejecting as a mitigating factor an offender's good character on the basis that it was a factor which had assisted him in the commission of child sexual assault offences (s 21A(5A) Crimes (Sentencing Procedure) Act 1999). The victim of the offences was the daughter of the offender's de facto partner. It was submitted on appeal that the applicant's good character played no part in his obtaining access to the victim and was not exercising a role in the community (such as a teacher, sports coach or pastor) which might have afforded him access to children. The submission was accepted but the appeal was dismissed on the basis that no lessor sentence was warranted.

Error in imposing less than full-time custodial sentence for drug trafficking when no exceptional circumstances identified

In ***R v Cahill*** **[2015] NSWCCA 53**, a judge was held to have erred by imposing a sentence of 2 years to be served by way of intensive correction order for 3 offences of supplying commercial quantities of prohibited drugs and 13 offences of supplying prohibited drugs, with 4 further offences on a Form 1. In observations, with which the other judges of the Court agreed, Leeming JA said that any sentencing judge will be attuned to the possibility that a particular case is wholly exceptional, as well as to the possibility that it is merely claimed to be, but is not in fact exceptional. In such a case it will be essential for the judge to make appropriate findings of fact which will involve more than a mere recitation of undisputed facts and the parties' submissions. It will ordinarily require an express

acknowledgement that the case is exceptional and an explanation of why what would otherwise be a distortion of the ordinary principles of sentencing is in fact an expression of their flexibility.

No error in taking into account a risk of pregnancy in an offence involving sexual intercourse

In ***KAB v R*** **[2015] NSWCCA 55** it was held by Wilson J, Ward JA agreeing, Simpson J contra, that there was no denial of procedural fairness for a judge to take into account that there was a "high risk of pregnancy" when the agreed facts included that the offender had had penile/vaginal intercourse with his stepdaughter and had ejaculated into her vagina. Neither party had raised the issue and it was an inference unilaterally drawn by the sentencing judge when she came to sentence. The offender complained on appeal that if he had known the judge was going to take it into account he would have brought forward evidence that he had undergone a vasectomy. In dissent on this issue, Simpson J considered that the risk of pregnancy was not an agreed fact and so it was wrong for the judge to have taken it into account as a matter elevating the seriousness of the offence. However, she also considered that the impact of the error was almost non-existent given the sentence for the offence in question was ordered to be served entirely concurrently with other sentences.

SUMMING UP

Directions on joint criminal enterprise

Mr Youkhana was tried and convicted of robbery in company. He was part of a group of three men who sat in front or behind the victim on a train, punched him and stole his iPad. The men then fled from the train. In circumstances where the Crown relied upon the doctrine of joint criminal enterprise, the trial judge directed the jury that the case against Mr Youkhana only required proof that he was party to the agreement to rob the victim. Mr Youkhana argued on appeal that, in addition, the judge should have directed the jury that he participated by assisting or encouraging the other men to commit the robbery. In ***Youkhana v R*** **[2015] NSWCCA 41,** Meagher JA explained that the doctrine of joint criminal enterprise operates to attach liability to all parties to an agreement to commit a crime, regardless of their role in its execution. Thus the court was satisfied that there was no error in the trial judge's directions. It was sufficient that Mr Youkhana was present when the robbery was committed. It was not necessary to separately establish that he assisted or encouraged the other men in the commission of the offence.