District Court of New South Wales 2019 Annual Conference

Criminal Law Review

The Honourable Justice R A Hulme

23 April 2019

CONTENTS

SCOPE OF PAPER

The purpose of this paper is to provide brief notes concerning the range of issues that have been considered in appellate criminal decisions in the past 12 months. Where reference is made to the author of a judgment in the Court of Criminal Appeal it should be taken that the other members of the Court agreed unless otherwise indicated.

I am most grateful for the assistance in the compilation of this paper provided by Mr William Bruffey BA LLB (Hons 1) and Ms Kirsten Gan BIGS LLB (Hons I).

COSTS

Power to award costs to a third party recipient of a subpoena to produce documents

In the course of pending criminal trial proceedings, the legal representatives for the accused issued subpoenas to KEPCO Bylong Australia Pty Ltd. KEPCO filed a Notice of Motion seeking to have the subpoena set aside but also began preparing documents in order to comply with the terms of the subpoena. Eventually the subpoena was set aside by consent and KEPCO sought an order for costs. There were two issues for consideration: first, whether there was power to order costs upon the setting aside of a subpoena; and second, whether there was power to order costs in respect of a recipient's efforts to comply with the subpoena.

Beech-Jones J held in ***R v Obeid*** **[2018] NSWSC 1024** that the only power in the court was to make an order for costs in respect of compliance with the subpoena. His Honour held that on its face Part 75 r 3 of the *Supreme Court Rules* empowers the court to make costs orders in respect of reasonable loss and expense incurred in complying with the subpoena but not the costs of any application made to set the subpoena aside. His Honour held that an application to set aside a subpoena issued at the behest of the accused in criminal proceedings on indictment is not governed by either the *Criminal Procedure Act* or the Uniform Civil Procedure Rules. His Honour considered such a conclusion is consistent with the Court of Criminal Appeal's decision in *Stanizzo v Complainant* [2013] NSWCCA 295. Further, the inherent powers of the Court do not extend to making an order requiring an accused facing trial on indictment to pay the costs of setting aside a subpoena issued to a third party.

DEFENCES

Mental illness - drug induced psychosis not a disease of the mind – defence correctly withdrawn from jury

The appellant in ***Fang v R*** **[2018] NSWCCA 210** stabbed a friend to death following an argument while he was intoxicated by alcohol and methamphetamines but raised the defence of mental illness. The trial judge accepted that he was experiencing a drug induced psychosis at the time of the killing but declined to allow the jury to consider the defence of mental illness because the psychosis did not amount to a defect of reason

arising from a disease of the mind. The appellant contended on appeal that the defence should have been left to the jury.

The Court dismissed the appeal. The Court considered *R v Falconer* (1990) 171 CLR 30, which applied the interpretation of the phrase "disease of the mind" adopted by King CJ in *Radford v R* (1985) 42 SASR 266. That is, for there to be a disease of the mind, there has to be an "underlying pathological infirmity of the mind". The Court cited with approval the passage of King CJ (and approved by Toohey J in *Falconer*) that there is a distinction between a reaction of an unsound mind to its own delusions or external stimuli and the reaction of a sound mind to external stimuli such as stress producing factors. Gaudron J in *Falconer* likewise held that a *recurring* state which involves some abnormality will indicate a diseased mind, but that the fundamental distinction is between mental states (albeit those resulting in abnormal behaviour from, for e.g., a blow to the head) and those mental states which are never experienced by normal persons.

In this case, the Court held that there was no evidence of recurrence of the mental state. While experts gave evidence that the appellant had an "underlying susceptibility, vulnerability to develop a psychosis" arising from prolonged methamphetamine use, there was no evidence that the disordered mental state was recurrent or that he was experiencing hallucinations either before or after the stabbing. The Court held that there was no objective evidence of a mental illness and that the evidence taken at its highest indicated behavioural changes and a propensity for the appellant to become enraged. The Court concluded that drug induced psychosis, on its own, is not a mental illness for the purpose of the defence.

EVIDENCE

Admissions – whether to exclude per s 137 of the Evidence Act 1995 *because ambiguous*

The appellant in ***Flood-Smith v R*** **[2018] NSWCCA 103** was found guilty of recklessly causing grievous bodily harm to his two year old daughter. The Crown relied on a number of statements made by the appellant like, "I don't know what happened, I don't know what I've done". They were admitted without objection but it was contended on appeal that the evidence was wrongly admitted in that s 137 of the *Evidence Act* required the evidence to be excluded because of its ambiguity and equivocality.

In dismissing the appeal, Hoeben CJ at CL applied the decision of *R v Burton* [2013] NSWCCA 335 in which Simpson J (as she then was) held that where an item of evidence is capable of different interpretations, its actual probative value will depend upon what interpretation is placed on it by the jury; it is no part of the judge's function to make that assessment when determining admissibility. His Honour also noted that there is considerable authority that s 137 has no application where the impugned evidence was not objected to at trial: *Perish v R* (2016) NSWLR 161; [2016] NSWCCA 89.

Admissibility of expert evidence – errors in translation alleged – translator had not read or agreed to be bound by the Expert Witness Code of Conduct

Chen v R **[2018] NSWCCA 106** concerned a conviction for drug supply where telephone intercepts had been admitted at trial. They had been translated from another language and the appellant had challenged the admissibility of the translations on the basis of the translator's lack of expertise, lack of impartiality, bias, and the inaccuracy of her translations. After they had been ruled admissible, the appellant sought to have them withdrawn from the jury when it emerged that the translator was not familiar with the Expert Witness Code of Conduct. On appeal the appellant contended that the evidence was inadmissible under s 79 of the *Evidence Act*, that it should have been excluded under ss 135 or 137 or that the trial judge should have withdrawn the evidence once it became known that the translator had not agreed to be bound by the Expert Witness Code of Conduct. The appeal was dismissed.

The Court applied *Wood v R* (2012) 84 NSWLR 581, where it was held that while there is no rule that precludes the admissibility of expert evidence which fails to comply with the Code, the Code is relevant when considering the exclusionary rules in ss 135-137 of the Act. That is, the expert witness's failure may result in the probative value of their evidence being substantially outweighed by the danger of unfair prejudice. The Court held in this case that Part 75 r 3J of the *Supreme Court Rules* did not confine the operation of s 79 such that a failure to comply with the Code mandated the exclusion of the witness's evidence. The Court held that the trial judge correctly approached the application for the withdrawal of the evidence as a matter relevant to the determination under ss 135-137. The Court held that the issues surrounding the non-compliance with the Code were not unfairly prejudicial but rather raised questions which properly fell to the jury to determine.

Evidence Act*, s 87 not directed to the admission of evidence in the substantive proceedings*

The accused in ***Decision Restricted*** **[2018] NSWCCA 127** was alleged to have supplied drugs to M on three occasions, who then supplied the drugs to a registered source. The conversations between M and the source were covertly recorded. The Crown tendered the recordings pursuant to s 87(1)(c) of the *Evidence Act* but the trial judge rejected them. The Crown appealed pursuant to s 5F(3A) of the *Criminal Appeal Act*.

Section 87 provides, relevantly:

> "(1) For the purpose of determining whether a previous representation made by a person is also taken to be an admission by a party, the court is to admit the representation if it is reasonably open to find that … (c) the representation was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party or one or more persons including the party".

The appeal was allowed. Simpson AJA observed that at trial, the parties approached the application of s 87 on the assumption that it is directed to the final determination of the admissibility of the evidence in the substantive proceedings. Her Honour held that s 87 is directed to an intermediate question of whether a representation by a third party should be taken to be an admission by a party to the proceedings. If it is, there remains the question of whether it is admissible as such. Her Honour observed that in this case

subsequent questions concerning ss 84, 85 and 86 and ss 135 and 137 may need consideration.

Evidence of indicia of drug supply admissible when an accused is charged with drug supply even though such evidence may also suggest a tendency towards crime

At the trial of the respondent in ***The Queen v Falzon*** **[2018] HCA 29** on charges of cultivating and trafficking cannabis, the respondent objected to the admission of evidence that $120,800 cash was found in his possession on the basis that it was irrelevant or that its prejudicial effect outweighed its probative value. The trial judge ruled the evidence admissible but on appeal the Victorian Court of Appeal (Whelan JA dissenting) held that the evidence should not have been admitted. The Crown appealed.

The High Court allowed the appeal and ordered that the appeal to the Court of Appeal be dismissed. The High Court agreed with Whelan JA that evidence of the cash was admissible as an item of circumstantial evidence that, alongside other indicia of trafficking, was capable of founding an inference that the respondent was carrying on a supply business. The fact that the cash was likely to have come from previous sales logically supported the view that the drugs found at the search were intended for supply. The Court of Appeal was wrong to view the evidence as merely propensity or tendency evidence; rather, the evidence was capable of proving that the accused was carrying on a supply business and that the seized drugs were intended for supply. Authorities supported the proposition that (subject to s 137) circumstantial evidence that the accused was carrying on a business of supply is relevant and admissible to prove that the drugs were possessed for supply.

Tendency evidence – error in having regard to the offence charged in assessing the strength of the evidence establishing the tendency

Two men were alleged to have jointly committed a bank robbery in a Sydney suburb. The Crown relied upon various items of circumstantial evidence including an assertion that they had a tendency to act in a particular way. It asserted that they had a tendency to be involved in the armed robbery of banking institutions; to be involved in such robberies with two nominated co-offenders; to do so whilst armed with dangerous weapons including a sledgehammer and a screwdriver; to threaten the staff within the bank; to do so whilst wearing a disguise; to do so whilst in possession of a stolen high performance luxury motor vehicle and to use same; and to leave the said vehicle in a carpark once the robbery is completed. To prove this, the Crown relied upon evidence that the accused had committed an armed robbery in similar circumstances upon a bank in Melbourne in 2003.

The trial judge found that the evidence of the 2003 robbery had the capacity to reveal the tendency for the three men, when together, to commit an armed bank robbery in the circumstances described in the tendency notice. She said that those circumstances exist between the 2003 robbery and the robbery charged. In ***Decision Restricted*** **[2018] NSWCCA 164**, Bathurst CJ held that such reasoning was erroneous. The judge should have considered whether the 2003 robbery was, without more, sufficient to support the tendency alleged. Secondly, in relying upon the similarities between the two robberies,

she engaged in impermissible reasoning by assuming that the tendency could be established by reliance on the robbery for which the men were charged.

Tendency evidence – probative value of evidence concerning the accused's conduct as an 11-year-old boy acquitted of sexual assault on the basis of doli incapax

When the appellant in ***DS v R*** **[2018] NSWCCA 195** was 11 years old, he was found by a magistrate to have committed a sexual assault against his niece but was acquitted on the basis of *doli incapax*. He later faced trial charged with sexually assaulting his nephew when the appellant was aged 15-18. The trial judge admitted the evidence of the prior charge (and acquittal) and the appellant was found guilty on one count. An appeal against conviction was allowed.

Basten JA held that the question of admissibility of tendency evidence in this case involved three steps. First, the prosecutor cannot rely upon conduct resulting in an acquittal if it would controvert the acquittal, but the scope of that principle depends on the basis of the acquittal; here, the principle of *doli incapax*. Second, the acquittal does not mean the conduct the subject of the charge is not relevant but it is necessary to have careful regard to the basis upon which it is used. Where, as here, it is used for tendency reasoning, it is necessary to consider the operation of ss 97 and 101. Third, the evidence of the conduct leading to the charge and acquittal gives rise to a question whether there is an objective basis to conclude that the way a child of 11 years behaves can reliably indicate a tendency to sexually abuse his niece eight years later. It is also necessary to consider whether it is right to expect a jury to have any experience in such matters so as to draw inferences in the context of a criminal trial.

Basten JA held that there is little basis to conclude that tendency to act in a particular sexual manner at an early age, without the necessary understanding of its wrongfulness, would continue to affect the person's behaviour after attaining an understanding of its wrongfulness. The evidence lacked probative value and attracted a significant risk of prejudicial effect.

Tendency evidence law clarified

The offender in ***R v Bauer (a pseudonym)*** **[2018] HCA 40; 92 ALJR 846** was found guilty at trial in the Victorian County Court of 18 sexual offences committed over an 11 year period against his foster daughter. At trial the Crown led tendency evidence that B had a tendency to have a sexual interest in the victim (RC) and a willingness to act upon it. The offender appealed to the Victorian Court of Appeal contending that the tendency evidence should not have been admitted and that count 2 (which relied on evidence of RC's sister) should have been severed. The appeal was allowed and a retrial ordered. The Crown appealed.

The High Court unanimously allowed the appeal. The Court held that the trial judge was correct to admit the evidence and to refuse to sever charge 2. The Court held (at [48]) that "henceforth" it should be understood that a complainant's evidence of uncharged acts may be admissible as tendency evidence in proof of charged acts whether or not the

uncharged acts have some special , particular or unusual feature of the kind mentioned in *IMM* and *Hughes*. In multiple complainant cases (such as *Hughes*) there must ordinarily be some feature of or about the offending against one complainant links it to the offending against another complainant for it to have significant probative value: [58]. But in single complainant cases such as this there is ordinarily no need for a particular feature of the offending to render the evidence of one offence significantly probative of the others. When a person demonstrates a sexual attraction towards another by the commission of a sexual offence, it is more likely the person will continue to seek to fulfil the attraction by committing further sexual offences as the occasion presents: [60].

The Court then considered the admissibility of the evidence of RC's sister (TB), who gave evidence that she directly witnessed the offence in charge 2. The offender argued that there was such a significant possibility of contamination, concoction or collusion in relation to TB's evidence that it was deprived of significant probative value. The Court held that unless the risk of contamination, concoction or collusion is so great that it would not be open to the jury rationally to accept the evidence, the determination of probative value excludes consideration of credibility and reliability: [69].

The Court also held that proof of the accused's tendency to act in a particular way will not be an indispensable intermediate step in reasoning to guilt (*shepherd v The Queen* (1990) 170 CLR 573 at 585-585) and so proof of uncharged acts to the standard of beyond reasonable is not required: [80], [86].

The Court provided a summary of directions that should be given to a jury in single complainant trials where uncharged acts are relied upon to establish a sexual interest in the complainant and a tendency to act upon it: see [86].

Complaint evidence in sexual assault cases – whether "fresh in the memory" for the purposes of s 66 of the Evidence Act

Another ground of appeal in ***R v Bauer (a pseudonym)*** **[2018] HCA 40; 92 ALJR 846** concerned the admissibility of evidence of disclosure of the alleged assaults by the victim RC to her friend, AF, when she was 15 years old. The Victorian Court of Appeal held the trial judge wrongly admitted the evidence because there was no evidence the relevant fact was "fresh in the memory" of the complainant when the statement was made and that the evidence was generic and non-specific.

The High Court held that there was evidence to infer the facts were fresh in the complainant's memory and that such facts were specific. It was very probable that the events disclosed to AF were vivid in RC's recollection and would remain so for years to come. Further, it was not fatal to the admissibility of the evidence that RC's disclosure was in response to leading questions by AF as to what sex acts the respondent made RC perform; that went to the weight of the evidence which was a matter for the jury.

Tendency evidence – probative value where 10 year gap between unchallenged misconduct and alleged offending

The appellant in ***McPhillamy v The Queen*** **[2018] HCA 52; 92 ALJR 1045** was charged with sexually assaulting A, when A was an 11 year old altar boy. At trial the prosecution was permitted to lead tendency evidence from B and C. Their unchallenged allegations were that the appellant had also indecently and sexually assaulted them as children at a boarding school.

The High Court (Kiefel CJ, Bell, Keane, Nettle JJ, Edelman J agreeing with additional reasons) allowed the appeal. It was held that (per *Hughes*) the assessment of the probative value of tendency evidence requires the court to determine the extent to which the evidence is capable of proving the tendency and the extent to which proof of the tendency increases the likelihood that the offences were committed. In this case the evidence of B and C was capable of establishing that the appellant had a sexual interest in young boys, which may meet the basal test of relevance, but that the prosecution was also required to prove a tendency to act upon that interest. The Court held that in the absence of evidence that the appellant had acted on his sexual interest in young boys in the decade following the incidents with B and C, the inference that he had a tendency to act on his interest was weak.

The Court held that where, as here, the tendency relates to sexual misconduct with a person other than the complainant, it is usually necessary to identify some feature of the other sexual misconduct which serves to link the two together. The Court distinguished the two sets of circumstances in which the alleged offences occurred and held that proof of the offending against B and C was not capable of affecting the assessment of the likelihood that the appellant committed the offences against A to a significant extent.

Coincidence evidence – distinguished from transaction evidence

In ***Haines v R*** **[2018] NSWCCA 269**, the appellant appealed her conviction for two counts of murder. The Crown alleged that the appellant, a registered nurse at an aged care facility, administered insulin to two elderly residents leading to their deaths. On appeal, the appellant submitted that the Crown had relied on tendency and coincidence reasoning but had not sought leave from the judge to rely on the served coincidence notice as it was required to do pursuant to ss 98(1)(b) and 101 of the *Evidence Act 1995*. Therefore, the appellant alleged that the trial judge erred by treating evidence for the two counts as cross-admissible in his summing up, there was a failure to properly direct the jury that evidence for each count must be assessed separately when in returning its verdict, and as a result, the trial miscarried.

The Court (Hoeben CJ at CL, Davies and Button JJ) noted the first and fundamental problem was that this ground was precluded by r 4 of the Criminal Appeal Rules, subject to the leave of the Court, because the appellant had not objected to or made submissions in relation to the admissibility of the evidence at trial. Second, the Court held that the Crown case at trial had not been put forward on the basis of coincidence evidence enlivening s 98 *Evidence Act 1995*, but instead had made its case on the basis that the two murders formed part of a single transaction. The evidence relied upon by the Crown was

transaction evidence (common law), not coincidence evidence. It was "evidence of a connected course of conduct" [224], and was admissible pursuant to s 55 of the *Evidence Act 1995*. Transaction evidence can be distinguished from coincidence evidence because:

> "Transaction evidence is not used to prove that a particular person did a particular act or had a particular state of mind on the basis that it is improbable that two or more related events occurred coincidentally. Where there is one transaction, "two or more related events" do not exist." [226]

Here, the Crown case proceeded on the basis that the two murders were part of a single transaction, "where each murder could not truly be understood without reference to the evidence of the other" [229]. The Crown contended that the elderly residents of the aged care home were murdered by the same person because their deaths were part of the one transaction. The link between the deaths was that both were injected with insulin by the same person. The applicant was linked to the deaths by motive and opportunity and from all the circumstances, was the person who murdered them. A further indication that the two murders could be treated as part of a single transaction was that holding a separate trial for each count would have rendered the Crown unable to explain why each murder was detected, despite the supposed "undetectability" of a death by insulin overdose [229]. Finally, while the Crown's address contained consideration of the probability of coincidence, the Court held that this did not constitute coincidence reasoning but that the Crown was simply rebutting other hypotheses inconsistent with a verdict of guilty. As transaction evidence relating to each count was admissible for the other count, this ground of appeal was not made out.

Coincidence evidence – admissibility in a circumstantial case

Three elderly residents of an aged care home were injected with high doses of insulin without a medical need – two died and the other remained in hospital before dying of unrelated causes. In a judge alone trial, the applicant was found guilty of two counts of murder and one count of administer poison with intent to murder. One of the grounds of appeal against conviction in ***Davis v R*** **[2018] NSWCCA 277** was that the trial judge erred in admitting evidence for a coincidence purpose.

Hoeben CJ at CL (with whom Harrison J and Schmidt J agreed, but with additional reasons) rejected the applicant's submissions on the interpretation of the coincidence rule in s 98 *Evidence Act 1995*, finding it to be unsupported by the wording of the provision and not justified by authority. In essence, His Honour held that *direct evidence* showing that the applicant was responsible for one of the episodes involving the wrongful injection of insulin was not required before coincidence reasoning could be used to infer that because the applicant was guilty on one count, he was guilty on all three counts. There is no requirement for satisfaction to the criminal standard of proof that the applicant was responsible for one of the insulin episodes before admitting coincidence evidence, because ss 98 and 101 only relate to the admissibility of coincidence evidence. Hoeben CJ at CL went on to confirm that the trial judge's approach to coincidence evidence in a circumstantial case, based on the chain of reasoning advanced by the Crown, was correct (and in line with the Court of Criminal Appeal's approach in *R v Ceissman* [2010] NSWCCA

50). It was open for the trial judge to use the similarities surrounding each of the insulin injection episodes as coincidence evidence to infer that the offences were committed by a single offender. It was then open to conclude that the applicant was that single offender established beyond reasonable doubt by the circumstantial evidence.

Tendency evidence – assessment of whether sexual interest in children has significant probative value

The Crown alleged that a man committed certain sexual offences against his daughter. It served a tendency notice referring to evidence establishing the respondent's sexual interest in pre-pubescent children and toddlers over a period of 20 years. The trial judge rejected the evidence as inadmissible and the Crown appealed (successfully) pursuant to s 5F(3A) of the *Criminal Appeal Act* 1912: ***DPP (NSW) v RDT*** **[2018] NSWCCA 293**.

Basten JA held that the trial judge had erred in his reliance on a dissenting judgment in the CCA and a transcript of argument in the High Court in respect of the then reserved decision in *McPhillamy v The Queen* [2018] HCA 52. Just because tendency evidence does not show that the accused had acted on that tendency does not mean it lacks probative value. Rather, the correct approach is that consistent with what the High Court said in *Hughes v The Queen* [2017] HCA 20 at [57] and [60]. While the reasoning "will depend upon the nature of the alleged offending and the nature of the tendency evidence", Basten JA held that the factors in the present case demonstrated the significant probative value of the evidence. Of relevance is that a man's interest in female toddlers is qualitatively different from an interest in teenage boys (as in *McPhillamy*); that the respondent accused had admitted this interest persisted over a period spanning over 20 years during evidence on the voir dire; and that the accused had entered guilty pleas to four relevant charges in 2015. Basten JA concluded that because the accused had accepted the underlying propensity operated over an extended period, "its probative value is likely to be significant, even if the occasions upon which he acted upon the propensity were few and far between".

Tendency evidence – onus and standard of proof for the defence

The issue in ***Decision Restricted*** **[2019] NSWCCA 30** concerned the relevant onus and standard of proof for tendency evidence adduced by an accused in order to establish the opposite of the tendency contended for by the Crown. Adamson J identified two errors of the trial judge. First, citing *R v Bauer* [2018] HCA 40; 92 ALJR 846 at [80] and *Shepherd v The Queen* (1990) 170 CLR 573, she observed that the judge was wrong to direct the jury that they needed to be satisfied beyond reasonable doubt of the acts relied upon by the Crown and of the conclusion that those acts established the tendency the Crown alleged. Secondly, whilst the judge was correct in directing the jury that the standard of proof of beyond reasonable doubt did not apply to the accused, she was wrong in saying, "You only need to be satisfied that it is likely". No particular standard of proof applied to the accused because the accused has no onus of proof at all in a criminal trial.

Sexual assault communications privilege – Criminal Procedure Act, *Ch 6, Pt 5 Div 2*

The appellant in ***Rohan v R*** **[2018] NSWCCA 89** sought leave to issue subpoenas for the production of documents containing protected confidences in relation to sexual assaults he was alleged to have committed. Section 298 of the *Criminal Procedure Act 1986* provides that leave is required before a person can compel someone to produce a document containing a protected confidence. Section 299D sets out the elements necessary before a court can grant an application. Section 299B makes provision for a court to inspect documents in the event "a question arises under this Division relating to a document". The trial judge refused leave, holding in part that s 299B was irrelevant. The appellant appealed pursuant to s 5F(3) of the *Criminal Appeal Act 1912*.

It was held that the judge had erred in disavowing the availability of the power under s 299B to order the production of the documents for inspection. His Honour considered that it was doubtful that Parliament had in mind the "strained logic" that a court may compel a person to produce documents in order to determine whether that person may be compelled to produce the documents but it was clear that *KS v Veitch (No 2)* [2012] NSWCCA 266 held that s 299B(4) could be used to determine a question of leave to issue a subpoena under s 298(1) when the documents were not yet available. However, in this case the trial judge was correct to refuse leave because the documents sought would not have had substantial probative value.

Sexual assault communications privilege – earlier *grant of leave to issue subpoena does not govern an application for access to documents produced*

At first instance, a District Court judge (Yehia DCJ) granted the respondent leave pursuant to s 298(1) *Criminal Procedure Act 1986* (*CP Act*) to issue subpoenas to certain psychologists to produce protected counselling confidences. Once the documents were produced to the Court, Berman DCJ granted the respondent access over the objection of the PPC (the Principal Protected Confider within the meaning of the sexual assault communications privilege regime contained in Ch 6, Pt 5, Div 2 *CP Act*), on the basis that the only obligation of the Court at this point is to simply ascertain that the documents produced are "consistent with" the leave previously granted. Berman DCJ noted, however, that while consistent with the text of the relevant statutory provisions (in particular s 299B(3)), this seemed to be a "strange result" due to its inconsistency with the object of the legislation and the way it obviates the need to consider the matters in s 299D. (His Honour was led to this conclusion by the submissions of counsel very experienced in the criminal law.)

The PPC sought leave to appeal against the access order to the Court of Criminal Appeal, pursuant to s 5F(3AA) of the *Criminal Appeal Act 1912*, arguing that Berman DCJ should have inspected each document by reference to s 299D(1) of the *CP Act* (stipulating a substantial probative value test and a balancing exercise by reference to the competing public interests): ***PPC v Stylianou*** **[2018] NSWCCA 300.**

The appeal was allowed. Macfarlan JA accepted the respondent's construction of s 298(2), thereby rejecting the PPC's first argument. It was held that the respondent's application

for access to the documents was not an application for leave under s 298(2), because "produce" in s 298(1) means production to the Court, a meaning thereby corresponding to that of "produced" in s 298(2). This conclusion is consistent with the Court's construction in *KS v Veitch (No 2)* (2012) 84 NSWLR 172. His Honour, however, accepted the PPC's second argument, finding that it was within the District Court's implied powers "to do what is necessary to enable it to act effectively within its jurisdiction" (per *Bogeta Pty Ltd v Wales* [1977] 1 NSWLR 139 at 148-149) to control access to documents produced on subpoena to the Court. This is a power that has "long been recognised as a necessary part of litigation procedure, both civil and criminal" (at [20]), and relevant common law principles are preserved by s 306(2) of the *CP Act*.

Rejecting the respondent's submissions, Macfarlan JA found that satisfaction of one of the stated conditions in s 299B is not a sufficient condition to entitle access to subpoenaed documents. Rather, the operation of s 299B instead "assumes the existence of a power of the Court to grant or withhold access and engrafts a stricture on the exercise of that power" (at [21]). To construe otherwise would be to leave a "significant gap" in the protection against the disclosure of documents containing protected confidences that is the object of the legislation. Accordingly, it would generally be necessary for the Court to inspect the documents and consider the various matters listed in s 299D.

Evidence of prior sexual experience – s 293 Criminal Procedure Act – *whether evidence of false sexual complaints by complainant admissible*

At trial, the jury found the applicant not guilty of three out of four counts of sexual offences allegedly committed on an intellectually disabled 14 year old girl in his care at a crisis centre for high needs young people. In ***Adams v R* [2018] NSWCCA 303**, the applicant sought leave to appeal his conviction on the remaining count on the basis that the trial judge erred in excluding evidence, pursuant to s 293 *Criminal Procedure Act 1986* ('*CP Act*'), of false complaints of sexual assault made by the complainant over a ten month period leading up to the offences in question. Campbell J held (Hoeben CJ at CL and N Adams J agreeing, each with additional reasons) that the trial judge erred in excluding the complainant's previous false sexual complaint evidence. Here, evidence of the false complaints *did* satisfy the temporal (s 293(4)(a)(i)) and relationship (s 293(4)(a)(ii)) requirements so that it is not inadmissible. As Campbell J clarified (following Basten JA in *GEH v R* (2012) 228 A Crim R 32), the "events" referred to in s 293(4(ii)) may extend to non-events (like false complaints) because of the reference to sexual activity or lack thereof.

Campbell J found that the trial judge erred in separately evaluating the temporal relationship between the events/non-events and the alleged offending. First, His Honour found that when the elements are read together (following what Basten JA said in *GEH v R*) as a series of false complaints over a 10 month period leading up to the alleged offending, with the continuum representing a "connected set of circumstances", the evidence can be treated as having occurred "at or about the time" of the alleged offending. Second, His Honour held the events needed to be "found to be so connected to the circumstances of the offence that it bore on the objective likelihood of the offence

having been committed" (approving Beech-Jones J in *GEH v R* at [82]). Here, His Honour held that the evidence of false complaints showed that three sets of sexual complaints (two non-events plus the alleged offending) were made over four days, finding that the trial judge had erred in not finding that the non-events in question did form part of the "connected set of circumstances", when they were circumstances that were relevant to the likelihood of the offences having been committed. "

N Adams J, though agreeing with Campbell J, made additional comments on this point. She noted that the legislative wording of s 293(4)(a)(ii) requiring that the events forming part of a connected set of circumstances in which the alleged prescribed sexual offending *was committed* means that the events need to relate to the circumstances of the alleged offending, not the complainant's general conduct. In addition, the result of finding that the evidence is admissible under s 293(4) simply means that the evidence is *not inadmissible* and the *Evidence Act* would still apply.

OFFENCES

Child pornography material – whether definition in Criminal Code (Cth) *extends to communications concerning future sexual activity*

In several online messaging exchanges the appellant in ***Innes v R* [2018] NSWCCA 90** described to a person whom he thought was a 30 year old single mother (in fact a police officer) the sexual activities he wanted to engage in with her and her 11-year-old daughter. Three particular chats describing the appellant's fantasies were alleged to constitute child pornography material. The appellant argued the use of present tense verbs in the definition of "child pornography material" in s 473.1 of the Criminal Code suggested that "child pornography material" could not include future imagined activity.

Johnson J held that the use of the present tense verb "describes" in the definition of child pornography material in s 473.1 was used to achieve harmonious interaction with the offence provision in s 474.19. His Honour found that although the words are in the present tense, those words are intended to encompass present descriptions of past, present and future sexual activity. His Honour concluded that a narrow construction would lead to an absurd result in which a description in the present tense would constitute an offence but a description in a future tense would not. The appeal was dismissed.

Procuring a child for unlawful sexual activity – s 66EB(2) Crimes Act 1900 *– meaning of "procure"*

The applicant in ***ZA v R* [2018] NSWCCA 116** arranged for a 26-year-old man, AC, to marry his 12-year-old daughter, MG, in a traditional Islamic marriage. Following the ceremony MG began living with AC and they had sexual intercourse. The applicant was convicted of procuring a child under 14 years of age for unlawful sexual activity with another person contrary to s 66EB(2)(a) and being an accessory before the fact to the offence of sexual intercourse with a child aged 10-14 contrary to ss 66C(1) and 346. In (unsuccessfully)

seeking an extension to appeal out of time it was contended that the trial judge had erred in her interpretation of the word "procure" in s 66EB(2)(a).

The applicant contended that the meaning of "procure" in s 66EB(2) required some positive "care and effort" to bring about the desired end; the Crown argued that the broader meaning of procure was to "effect, cause, or bring about". Adamson J rejected the applicant's interpretation and held that the Court must prefer a construction of the provision which will advance its purpose. Her Honour considered the context of s 66EB(2) and held that the term should be afforded the broader meaning contended by the Crown. In doing so, Adamson J distinguished the case from *Truong v The Queen* (2004) 223 CLR 122, which dealt with the term "procure" in a different statutory provision alongside the words "aids, abets, counsels…" Her Honour held that the trial judge had not erred by finding that the word "procure" in s 66EB(2) meant "to cause or bring about".

Drug supply – large commercial quantity – mental element

The respondent in ***R v Busby*** **[2018] NSWCCA 136** pleaded guilty to two offences contrary to s 25 of the *Drug Misuse and Trafficking Act* for supplying more than 20kg of ecstasy and more than 2kg of cocaine, both being found in a suitcase in his possession. He told police and gave evidence at sentencing that he believed the suitcase actually contained cannabis. The large commercial quantity of ecstasy is 0.5kg and the large commercial quantity for cocaine is 1kg, whereas the large commercial quantity of cannabis leaf is 100kg. Senior counsel for the respondent had advised him that pleas of guilty were appropriate because they were founded upon an intention to involve himself in the supply of drugs and he was aware that the weight was in excess of 1.5kg, which objectively amounted to the large commercial quantity for the drugs that were in fact in the suitcase. On appeal the Crown contended the sentence was manifestly inadequate, but when the appeal was heard an issue arose as to the propriety of the pleas of guilty. In an unusual outcome for a Crown appeal against sentence, the pleas of guilty were rejected, the convictions quashed and the charges were remitted for trial.

Button J set out a number of propositions. First, an offender is guilty of a drug offence even if the drug actually supplied was different from the drug the offender believed the substance to be. Second, in order to prove an offence under the Act that is aggravated by virtue of its quantity being a commercial or large commercial quantity, the prosecution must prove not only an intention to do that act but also an intention to do so with regard to that alleged quantity. Applying *Yousef Jidah v R* [2014] NSWCCA 270, to make out the offence, the drug one intends to supply and the drug the aggravated quantity of which one intends to supply, must be identical. His Honour held that for the respondent to be guilty he needed to believe that the suitcase contained a prohibited drug and for him to believe that it contained not less than the large commercial quantity applicable to the drug that he believed it to be.

Female genital mutilation – meaning of "mutilates"

A2 and another were tried on charges of female genital mutilation contrary to s 45 of the *Crimes Act 1900*. The Crown alleged a joint criminal enterprise to perform a ceremony on

two young girls which involved the cutting or pricking of the clitoris. The trial judge made a pre-trial ruling, and so directed the jury, that "mutilates" in s 45 meant to injure to any extent. The appellant contended on appeal, inter alia, that the pre-trial ruling and direction were in error.

The Court in ***A2 v R; Magennis v R; Vaziri v R*** **[2018] NSWCCA 174**[1] allowed the appeal and quashed the convictions. The Court held that "mutilates" implies injury that is more than superficial and that renders the body part imperfect or irreparably damaged in some way, and that it was wrong to direct the jury that even a minor injury would suffice.

Fail to stop and assist after impact causing grievous bodily harm – s 52AB(2) Crimes Act 1900 – *assessing objective seriousness*

While intoxicated by alcohol and cannabis, the respondent in ***R v Pullen*** **[2018] NSWCCA 264** drove through a roadworks zone in wet conditions at night, colliding with a semi-trailer, causing serious injuries to his passenger in the front seat. The respondent had to be restrained from fleeing the scene by road workers on two occasions. The respondent pleaded guilty to offences of dangerous driving occasioning grievous bodily harm (Count 1) and failing to stop and assist after impact causing grievous bodily harm (Count 2) (contrary to s 52AB(2)). The Crown appealed the aggregate 15 month sentence of imprisonment to be served by way of Intensive Correction Order (ICO) imposed by the primary judge on the ground of manifest inadequacy. The indicative sentences were 13 months (Count 1) and 3 months (Count 2), with the primary judge finding that the objective seriousness of the offending in Count 2 to be "well-below the mid-level".

Harrison J held that it was not open to the primary judge to make this finding having regard to the fact that the respondent attempted to flee the scene on two occasions, that he must have had actual knowledge of his passenger's injuries at the time, and that such actions would have frustrated police attempts to test his blood alcohol concentration. The 3 month indicative sentence failed to reflect the distinct criminality involved and did not give sufficient weight to the purposes of the fail to stop and assist offences under s 52AB, particularly that of general deterrence and denunciation, designed to prevent unnecessary loss of life or suffering, as well as avoiding the frustration of evidence-gathering by police in order to determine cause and fault. The appeal was allowed and the respondent resentenced to an aggregate term of 3 years' imprisonment to be served by way of ICO.

"Prohibited firearm" – no statutory definition for shortened firearms

The appellant in ***Baxter v R*** **[2018] NSWCCA 281** pleaded guilty to four offences, including the attempted supply of a prohibited firearm (s 36(1) *Firearms Act 1996*) and possession of a prohibited firearm (s 7(1) *Firearms Act*). He had initially appealed on the basis that the sentence was manifestly excessive, but the Crown conceded that the convictions for the firearms offences were unsustainable at law. The firearm in issue was a shortened single barrel 12 gauge shotgun measuring 32 cm. The evidence, however, was not capable of establishing that the firearm fell within the meaning of the expression "prohibited

[1] Special leave to appeal was granted by the High Court on 15 February 2019: [2019] HCATrans 16

firearms". This is because "prohibited firearms" are defined under s 4 of the *Firearms Act* by reference to Schedule 1, which lists firearms that are "prohibited firearms". Clause 16 of Schedule 1 extends that definition to include those firearms with dimensions less than that prescribed by the regulations. The only regulation relevant to the minimum dimensions of firearms found was reg 152 of the *Firearms Regulation 2017*, which makes prescriptions for the purposes of s 62(2) *Firearms Act* only, and could not be construed to extend to making prescriptions relevant to cl 16, Sch 1 referred to above.

As there was no relevant definition of a "prohibited firearm" that applied, the Court of Criminal Appeal held that the appellant's convictions for the offences were unsustainable and therefore quashed. The aggregate sentence was also quashed, and the matter was remitted to the District Court for sentencing on the remaining two offences.

Drug manufacture – meaning of "manufacture"

The applicant in ***Cashel v R*** **[2018] NSWCCA 292** pleaded guilty to an offence of manufacturing a commercial quantity of methylamphetamine (Count 2). On appeal he contended that Count 2 should be quashed because it was not supported by the evidence; specifically that while significant quantities of precursor chemicals were found, he had never actually manufactured a commercial quantity of methylamphetamine because of his arrest before achieving that outcome. The issue for the Court was whether the physical element of the offence of manufacturing a prohibited drug centres on the *process* or *outcome* of manufacturing. Button J (Beazley P agreeing, RA Hulme J agreeing with short additional reasons) upheld the appeal, holding that the offence of manufacturing a prohibited drug requires the offender to have actually produced the prohibited drug. A verdict for the offence of knowingly taking part in the manufacture of a commercial quantity of that prohibited drug was substituted.

Button J's reasons primarily took account of the existence of the offence of knowingly taking part in the manufacture of a prohibited drug without actually producing the drug, which encapsulates the criminality in question, a conceptually separate offence reinforced by the structure of the "offences-creating provision" in s 24 of the *Drug Misuse and Trafficking Act 1985* (*DMT Act*). His Honour further considered the reference to "process" in the definition of "manufacture" was not determinative, nor was there any significant distinction between the transitive verbs "manufactures" and "produces", which in this context are included as "catch-all" synonyms. In addition, His Honour found there is no need to stretch the meaning of "manufacture" in s 24 where the common law offence of attempting to commit an offence created by statute is available, nor where there is no evidence of express Parliamentary intention, i.e. expressed in the second reading speech, to create a broad offence. His Honour then held that the most natural meaning of the verb "to manufacture" is where something comes into existence, and found that the Macquarie Dictionary definition of "to manufacture", while not conclusive, tends to support the natural meaning above. His Honour noted that the Crown was unable to provide authorities contradicting the above construction.

Accessory before the fact – directions as to elements of the offence

In ***Decision Restricted*** **[2019] NSWCCA 3**, the appellant appealed against his conviction for the offence of being an accessory before the fact for providing encouragement and assistance through words alone and without being present at the scene, in circumstances where the deceased was murdered by the principal offender (PO) after being beaten with a tomahawk. The appellant's case was that while he had encouraged the PO to engage in anti-social behaviour towards the deceased, this did not extend to the infliction of grievous bodily harm. In addition, the appellant contended that he was not aware of the essential facts that would have made him privy to the PO's intention to cause grievous bodily harm to the deceased at the time of his encouragement, including the nature and timing of the attack. The appellant contended that he could not have foreseen the killing as it was the PO's own spontaneous folly.

N Adams J held that the trial judge's written and oral directions to the jury were deficient in four out of five of the issues raised by the appellant on appeal.

Ground 1(a) contended that the judge erred by directing the jury that it was not necessary to prove that the principal offender was actually encouraged. N Adams J rejected the appellant's submission that the Crown must prove actual encouragement by the accused accessory before the fact, finding that none of the cases supported this proposition – indeed, such a "subjective concept" would be difficult to prove beyond reasonable doubt.

Ground 1(b), however, was upheld, as Her Honour found that the trial judge's directions inadequately explained the fact that the Crown needed to prove that the appellant's words constituted intentional encouragement or assistance, a reference to which includes the doing of an act *capable* of encouraging the principal offender to inflict grievous bodily harm upon the deceased.

N Adams J also accepted the appellant's arguments in respect of Ground 1(c), which impugned the trial judge's directions to the jury that assisting and encouraging is a "continuous act" that persists until the substantive offence is committed. This was an incorrect direction which should not have been given, perhaps at all, because the statement of principle upon which it was based (*R v Robert Millar (Contractors) Pty Ltd* [1970] 2 QB 54 at 73; [1970] 1 All ER 577) was not of general application. Her Honour held the trial judge's direction caused unfairness as it was apt to undermine the defence case that the appellant could not have foreseen that the principal offender would have the opportunities to carry out the acts leading to the killing of the deceased. Her Honour also upheld

Ground 1(d), finding that the trial judge fell into error by directing that the jury must be satisfied beyond reasonable doubt that the appellant knew "all the essential facts and circumstances necessary" to show that the principal offender "intended to assault and inflict upon the victim grievous bodily harm". Rather, N Adams J held that the correct knowledge element is for the Crown to prove the appellant "knew" the principal offender was "going to" intentionally inflict grievous bodily harm on the victim.

Ground 2 was also allowed, with her Honour finding that the trial judge fell into error by including terms such as "enterprise", "design", "participation", "withdrawal" and assault "with a view" to inflicting grievous bodily harm in the directions. This was apt to confuse the jury because the terms form part of the standalone doctrine of (extended) joint criminal enterprise, separate from principles of accessorial liability.

Wilful misconduct in public office – mental element is based on a causative test

On appeal in ***Maitland v R; Macdonald v R*** **[2019] NSWCCA 32,** it was contended that the trial judge had misdirected the jury as to the mental element of the common law offence of wilful misconduct in public office. The misconduct was alleged to have arisen when Macdonald (as Minister for Mineral Resources) granted Doyles Creek Mining (of which Maitland was a shareholder and chairman) consent to apply for an exploration license, and later granting the company said license under the *Mining Act 1992*. Broadly, the applicants disputed the trial judge's formulation of element (4) in the written directions (the formulation of which was explained in *R v Macdonald; R v Maitland* [2017] NSWSC 337), submitting that the appropriate test for the mental element of the offence is a causation test.

A joint judgment was handed down by Bathurst CJ, Beazley P, Ward CJ in Eq, Hamill and N Adams JJ. While acknowledging that authority on the issue of the mental element to be proved is "relatively limited" (see eg *R v Llewellyn-Jones* (1967) 51 Cr App R 4; *R v Dytham* [1979] QB 722; *R v Speechley* [2005] 2 Cr App Rep (S) 75), the Court held that the correct direction on the mental element must be based on a 'but for' or causation test. In reaching this conclusion, the Court identified the purpose of the common law offence as "to prevent public officers (in the case of misfeasance) from exercising their power in a corrupt and partial manner" (at [67]-[71]). It was concluded from a survey of the principles concerning the rationale for the offence in relevant cases that it was not necessary for the improper purpose to be the sole purpose. Therefore, in the circumstances of this case, the correct direction to the jury would be that Mr Macdonald could only be found guilty if the power to grant consent to apply for an exploration licence and the power to grant the exploration licence would not have been exercised, except for the illegitimate purpose of conferring a benefit on Mr Maitland and Doyles Creek Mining. This formulation was considered to be consistent with cases involving breaches of fiduciary duties (*Mills v Mills* (1938) 60 CLR 150; *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285), as well as the approach adopted to determine whether administrative officers had exercised their powers for a purpose foreign to which it was conferred.

The applicants also took issue with the trial judge's use of the concepts of "substantially motivated" (4(a))) and "not motivated by any significant degree" (4(b)) in her written directions. While the Court did not find that the jury were diverted by the trial judge's use of the word motivation, because it had the same meaning as purpose in this context, the Court found that the 4(a) and 4(b) directions potentially led the jury to improperly focus on the task of weighing up the significance of any proper purpose with the improper purpose in decision-making. Furthermore, leaving the issue of what amounts to a "significant degree" to jury judgment is inappropriate because it does not make clear

where the line is to be drawn. Finally, the Court took issue with the oral directions in the trial judge's summing up because it invited the jury to speculate as to the significance of the competing motives". The appeals were allowed and a retrial ordered.

Sexual offences – statutory provisions relating to consent differ as between sexual intercourse without consent and indecent assault offences

A trial judge gave the jury the same direction as to knowledge of the lack of consent in respect of offences of aggravated sexual intercourse without consent and aggravated indecent assault offences. The direction included that the accused may have believed the complainant was consenting but had no reasonable grounds for that belief. It was held on appeal in ***Holt v R*** **[2019] NSWCCA 50** that the direction was erroneous. Section 61HA of the *Crimes Act* 1900 ("Consent in relation to sexual assault offences") specifically applies to offences against ss 61I, 61J and 61JA, and not to indecent assault offences such as in s 61M. For indecent assault offences it is necessary under the common law for the Crown to prove that the accused knew the complainant was not consenting, or at least the accused was indifferent to the absence of consent (e.g. *Greenhalgh v R* [2017] NSWCCA 94 at [5] (Basten JA)).

Dishonestly obtaining a financial advantage by deception on an entity (s 192E Crimes Act 1900 (NSW)): misrepresentation operating on a natural person of the deceived entity not necessary to prove

In **Decision Restricted [2019] NSWCCA 43**, the Court of Criminal Appeal allowed a Crown appeal against the directed acquittal of the respondents, who were charged with offences against s 192E(1)(b) *Crimes Act 1900* (NSW) of dishonestly obtaining a financial advantage by deception. Adamson J held that the trial judge fell into error by requiring the Crown to prove that a misrepresentation actually deceived an entity by calling a natural person (acting as a human agent of the company) who was deceived to give evidence as to their thought processes.

Her Honour said that "[t]he form of the deception influences the mode of its proof". Her Honour noted that commonly deception occurs by way of a misrepresentation proved by direct evidence from the deceived person, but that this mode of proof is "not a universal rule". It can also be proved by circumstantial evidence to exclude hypotheses consistent with an innocent explanation, if "the facts are such that the alleged false pretence is the only reason which could be suggested as having been the operative inducement". It was sufficient in this case that there was evidence capable of establishing that the respondents had obtained a financial advantage by dishonest means and where it could be inferred that the operative cause was deception.

Destroying or damaging property (s 195(1) Crimes Act 1900 (NSW): evidence of conduct that alters the physical integrity required to prove "damage"

The appellant attached himself to a ship loader at a coal terminal by way of a harness, which meant that the ship loader was not safe to operate, and thereby inoperable, for two

hours until he was removed. He was charged under s 195(1) of the *Crimes Act 1900* with destroying or damaging property belonging to another. After he failed in his appeal to the District Court, a question of law was referred to the Court of Criminal Appeal which held that the "destroys or damages" element of the offence could be satisfied by proof of "physical interference causing property to be inoperable".

The High Court in ***Grajewski v Director of Public Prosecutions*** **(NSW) [2019] HCA 8** allowed an appeal, finding that "damage" is something that alters the physical integrity of the object. In the present case, in which the ship loader was rendered inoperable by way of the appellant's attachment by harness, the High Court held "[i]noperability may be a product of damage done to property but it does not, of itself, constitute damage to property". As there was no physical alteration to the integrity of the ship loader, the "damage" element of the offence was not made out.

PRACTICE AND PROCEDURE

Not necessary to make non-publication order concerning offender's name when identification is already prohibited by legislation

The appellant in ***R v AB*** **[2018] NSWCCA 113** pleaded guilty to a number of historical child sex offences, some of which occurred when he was under the age of 18 such that publication of his name was prohibited under s 15A. Despite this the judge made an order under the *Courts Suppression and Non-publication Orders Act 2010* prohibiting the publication of the offender's name. The Crown appealed on the basis that the order was unnecessary for any purposes under the Act. It was held by Meagher JA that the order was not necessary. Section 15A of the *Children (Criminal Proceedings) Act* 1987 (like s 578A of the *Crimes Act* 1900 in relation to complainants in prescribed sexual offence proceedings) automatically prohibits publication of anything that would identify the person.

Whether pre-recorded statement in domestic violence proceedings must be tendered for it to become evidence

The respondent in ***Director of Public Prosecutions (NSW) v Al-Zuhairi*** **[2018] NSWCCA 151** was charged with a domestic violence offence. The alleged victim made a pre-recorded (DVEC) statement pursuant to s 289F of the *Criminal Procedure Act*. In the Local Court the recording was played and marked for identification but not tendered. On appeal to the District Court, a judge held that the recording was not properly before the court and set aside the conviction. The judge stated a case to the Court of Criminal Appeal at the Director's request.

The Court, per Payne JA, quashed the order setting aside the conviction. His Honour held that the playing of the recording in the Local Court was sufficient to make it evidence in those proceedings for the purpose of an appeal to the District Court. His Honour held that the contents of the exhibit, once "viewed" or "heard" in the Local Court, met the description of "evidence given in the original Local Court proceedings" for the purpose of s 18(1) of the *Crimes (Appeal and Review) Act*.

Whether juror should have been removed from jury and whether erroneous removal of juror affected validity of verdicts delivered thereafter

The appellant in ***Hoang v R*** **[2018] NSWCCA 166** was tried in relation to a number of sexual assault offences.

During a trial concerning sexual assaults a Crown witness said that teachers were required to get a clearance under the *Children and Young Persons Protection Act*. After the jury had deliberated for some days they advised the judge they had reached verdicts on some counts. That night, one of the jurors, a former teacher, researched the requirements for a working with children check, she being curious as to why she had not been the subject of such a check. The next morning she told other jurors of her inquiry. This was disclosed to the judge in a note. The judge took the jury's verdicts on the counts upon which there was agreement and then determined that she should discharge the juror who made the inquiry. The balance of the jury continued and ultimately returned unanimous verdicts of guilty on the remaining counts. It was contended on appeal that the judge should not have deferred the discharge of the juror until after some verdicts had been delivered.

N Adams J held there was no basis in s 53A of the *Jury Act* to discharge the juror. First, there was no "misconduct" in that the juror had made the inquiry out of personal curiosity and not *for the purpose of obtaining information relevant to the trial* (s 68C). Secondly, the conduct of the juror did not give rise to a risk of a substantial miscarriage of justice. The validity of the earlier verdicts was not affected by the subsequent decision (albeit erroneous) that there had been misconduct. As to the later verdicts which were given after the juror was discharged, there was no breach of any mandatory provision relating to the constitution and authority of the jury so there was no miscarriage of justice.

Miscarriage of justice when a "preliminary hearing" is held to find facts in relation to an insufficiently particularised indictment for a later sentencing hearing

The applicant in ***Dean v R*** **[2019] NSWCCA 27** was charged with a number of offences including possessing an offensive weapon (a .22 rifle) with intent to commit an indictable offence. The "indictable offence" was not particularised. He pleaded guilty but the sentencing judge was persuaded to determine in a "preliminary hearing" a disputed issue as to what the "indictable offence" was – intimidation according to the applicant or murder according to the Crown. The judge found in the Crown's favour. It was held on appeal that the sentencing proceedings miscarried.

Fullerton J found that even though the charge in its term was technically correct as an offence known to law and a failure to particularise need not be fatal, in this case the indictable offence was an essential fact that should have been particularised. Her Honour found that this deprived the applicant of an opportunity to litigate the factual matters in the offence, and breached the Crown's obligation of fairness by failing to afford the applicant natural justice by knowing what case he needed to meet. Her Honour held this was compounded by the method of dealing with a disputed fact as a preliminary issue" as

at the "preliminary hearing", in which the sentencing judge did not have access to material relevant to the applicant's intention that later emerged at the sentencing hearing.

Non-publication orders: when is an order "necessary" to protect a person's safety?

Following negative publicity after the applicant was sentenced for historical sexual offences, the applicant applied to the District Court for a non-publication order pursuant to s 7 of the *Court Suppression and Non-Publication Orders Act 2010* (NSW). The applicant appealed to the Court of Criminal Appeal after a District Court judge refused to make the order. The Court allowed the appeal in ***AB (A pseudonym) v R* (No 3) [2019] NCSWCCA 46**. Part of the Court's reasons dealt with the proper test for determining whether the making of an order is "*necessary* to protect the safety of any person" under s 8(1)(c). The Court rejected the "probable harm" approach taken by the District Court judge, preferring the "calculus of risk" approach.

To reach this conclusion, the Court approved the approach to the meaning of "necessary" taken by Basten JA in *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52; [2012] NSWCCA 125 at [46] in which the word "is used to describe the connection between the proposed order and an identified purpose", and where its meaning "depends on the context in which it is used". The Court approved Basten JA's approach in *Fairfax v Ibrahim* as consistent with the approved "calculus of risk" approach. This approach effectively advanced the "evident purpose" of s 8(1)(c) which was found to "provide a mechanism to protect the safety of persons who would otherwise be endangered by publication of proceedings in accordance with the principles of open justice" and approved what was said by Nettle J in *AB (A Pseudonym) v CD (A Pseudonym)* [2019] HCA 6 at [15].

Thus, the Court held that the correct approach to the making of an application with reliance upon s 8(1)(c) required the Court to "consider the nature, imminence and degree of likelihood of harm occurring to the relevant person", which means an order may still be made if the risk isn't more than a mere possibility but that the prospective harm is very serious. In the present case, the Court held that the primary judge erred by adopting the "probable harm" approach by requiring the applicant to prove that a real risk to physical safety was probable, as well as by not taking account of evidence of the possibility of harm flowing from the applicant's and applicant's wife's mental conditions. The Court held that there was no intention in the statutory wording in s 8(1)(c) that it be limited to physical safety but includes psychological safety. On this basis, the Court considered that evidence of the risks to the applicant's psychological safety meant that it could potentially affect his physical safety and should have been taken into account by the District Court judge.

Character evidence: loss of opportunity to present favourable character evidence amounts to miscarriage of justice

In a District Court trial for two counts of drug supply the defence case commenced with the presentation of character evidence through a witness. The identity of the witness's

wife (a public servant in a medium-sized country town) was disclosed at an early stage of his evidence. The trial judge expressed concern and proposed enquiring with the jury if any of them knew the wife, stating "if the answer to that is yes, this witness will have to stop". An enquiry was made and the jury returned a note in the affirmative. The trial judge declined the defence counsel's request to make an *Elomar* enquiry asking the jury as to whether the jury's knowledge of the witness's wife would affect their verdict (see *Elomar v R* [2014] NSWCCA 303; (2014) 316 ALR 206 at [304]).

The character witness was not recalled and the offender was subsequently convicted. One ground in an appeal against conviction was that the trial judge's actions in relation to the character evidence caused a miscarriage of justice. In ***Decision Restricted*** **[2019] NSWCCA 6**, Bathurst CJ allowed the ground finding that the trial judge's actions triggered a miscarriage of justice that deprived the appellant of a fair trial. This arose because of the trial judge's actions – first making the remark about the fact that the witness's evidence "will have to stop", second raising the issue with the jury, and then finally not clarifying the impact of the issue with the jury – caused unfairness to the appellant.

Prasad *direction contrary to law and should not be given*

The Crown appealed to the High Court from a decision of the Victorian Court of Appeal in which a majority (Weinberg and Beach JJ, Maxwell P dissenting) answered a referred question of law by finding that a *Prasad* direction is not contrary to law. In ***Director of Public Prosecutions Reference No 1 of 2017*** [2019] HCA 9, the High Court allowed the appeal. A *Prasad* direction is taken to mean that at any time after the close of the prosecution case, the trial judge can direct the jury to acquit the accused if it considers the evidence insufficient to support a conviction. It is a direction commonly sourced in what was said by King CJ in *R v Prasad* (1979) 23 SASR 161 at 163 in obiter:

> "It is, of course, open to the jury at any time after the close of the case for the prosecution to inform the judge that the evidence which they have heard is insufficient to justify a conviction and to bring in a verdict of not guilty without hearing more. It is within the *discretion* of the judge to inform the jury of this *right* ..." (emphasis added)

The High Court framed the legal question for determination as: "whether the trial judge possesses the power to give a *Prasad* direction under the common law of Australia". The Court rejected the considerations adopted by the Court of Appeal in favour of retaining the *Prasad* direction, including efficiency and restoring the liberty of the accused at the earliest point, finding it is unsuitable for complex or multi-defendant trials, and that its value is limited even in uncomplicated single accused trials. The Court then approved what was said by Maxwell P, finding he was right to hold that the obiter dictum conferring to the trial judge a discretion to inform that jury of their right to return an acquittal without more "does not cohere" with the High Court's decision in *Doney*, in which the practice of directed acquittals based on the judge's assessment of the evidence was rejected because of the way it infringed on the jury's function.

Even though the jury ultimately makes the decision, the Court considered that it could not "exclude the possibility" that juries are unduly influenced by the imprimatur of the judge on the capacity of the evidence to support the conviction. In this way, the *Prasad* direction "is inconsistent with the division of functions between judge and jury and, when given over objection, with the essential features of an adversarial trial." Finally, the Court found that the direction prevents the jury from making a decision based on the evidence, final addresses of the prosecution and understanding of the law based on the judge's summing up – and "[a]nything less falls short of the trial according to law".

SENTENCING – GENERAL ISSUES

General principles relating to the sentencing of children

The appellant in ***Paul Campbell v R*** **[2018] NSWCCA 87** was a 13 year old child who pleaded guilty to very serious sexual offences against younger relatives. At sentencing he did not rely on the defence of *doli incapax*. He was sentenced to 16 months' imprisonment with a non-parole period of 8 months. He appealed on four specific grounds and a general manifest excess ground.

The Court allowed the appeal and remitted the matter to the District Court for resentencing. Hamill J held that the sentencing judge erred by rejecting a concession by the Crown that a sentence other than full-time custody was in range; by failing to consider an alternative to full-time custody; in his assessment of the seriousness of the offences; by finding that the appellant abused his position of trust; and by taking into account an offence listed on a Form 1 that carried a maximum penalty of imprisonment for life.

This case is notable for Hamill J providing a useful collection of principles that apply to the sentencing of children (at [20]-[32]).

Parity principle does not apply where relevant offence appears on Form 1 for co-offender

The appellant in ***Dunn v R*** **[2018] NSWCCA 108** pleaded guilty to seven counts relating to drug supply. The seventh count was for knowingly taking part in the supply of a prohibited drug. For the appellant's co-offenders, the only offence in common was that in Count 7 but for them it was an offence taken into account on a Form 1. The sole ground of appeal was that there was "a legitimate sense of grievance when comparing the sentence imposed upon him to the sentences imposed upon his co-offenders".

Leave to appeal was refused. Adamson J held that the parity principle had no application because of the inclusion of the corresponding charges on a Form 1; there could be no relevant comparison between a sentence for an offence and an unspecified increase in a principal sentence incorporating a Form 1 offence.

Aggregate sentence imposed in District Court which includes a sentence imposed on appeal from the Local Court cannot exceed the jurisdictional limit of the Local Court

The appellant in ***Firth v R*** **[2018] NSWCCA 144** pleaded guilty on three charges before the District Court. Also before the sentencing judge was a sentence appeal from the Local Court. The sentencing judge upheld those appeals, set aside the Local Court sentences, announced new indicative sentences and included them in the overall aggregate sentence. Each of the indicative sentences was within the jurisdictional limits of the Local Court but the overall sentence of 8 years was not.

Wilson J held that the approach of the sentencing judge was contrary to the powers available to deal with an appeal from the Local Court. Her Honour held that the District Court may exercise any power that the Local Court could have exercised in determining an appeal but is confined to that Court's jurisdictional limit of 5 years for an aggregate sentence.

Parity – different views of judges of CCA as to correct terminology

In ***Fenech v R*** **[2018] NSWCCA 160** the applicant took the Court to what was said in *Miles v R*. In response, it was said (at [30]-[32]) that the better course is to confine discussion of the parity principle to the terms used in judgments of the High Court. These included "marked disparity", "marked and unjustified disparity" and that for interference to be justified the difference between the sentences must be "manifestly excessive", an expression well known to mean "unreasonable or plainly unjust".

Hardship to third parties

New and a co-offender were sentenced for drug supply offences. At sentencing the judge took into account that New was living with and caring for her invalid partner as well as her two dependent children aged 16 and 18. On appeal in ***Matthews v R; New v R*** **[2018] NSWCCA 186** an issue arose on the hearing of an appeal against the severity of the sentence that there was fresh evidence to establish exceptional hardship to the children.

Fagan J noted that the sentencing judge had taken into account New's living situation with her children prior to sentence, but that no specific submission was made as to the position the children would find themselves in if New was imprisoned. His Honour cited *R v Wirth* in which Wells J (endorsed by Gleeson CJ in *R v Edwards* (1996) 90 A Crim R 510) held that hardship likely to be caused by third parties ought to be taken into account only "where it would be, in effect, inhuman to refuse to do so". Fagan J held that this high standard has been endorsed in subsequent cases. His Honour held that the effects of imprisonment on third parties, while not exceptional enough to warrant a discrete component of leniency, can be taken into account as part of the offender's subjective case. In this case, his Honour held that the children's hardship was not so exceptional as to warrant a reduction in New's non-parole period.

Relevance of likely deportation of offender when determining appropriate sentence

During a severity appeal in a matter concerning the offence of using a carriage service to send indecent material to a child it was contended that the applicant's concern that he may be deported when released from prison was relevant to his state of mind as he served his sentence of imprisonment.

The appeal in ***Kristensen v R*** **[2018] NSWCCA 189** was allowed but not on this ground. Payne JA considered the decisions of *Mirzaee*, *Pham*, and *AC*, in which the court held that the risk or likelihood of deportation was irrelevant when determining sentence, and held that he saw no reason to adopt a different approach. His Honour held that although the amendments to the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) mandated deportation in cases such as this (subject to exceptions and review), the applicant's likely deportation did not rise above mere speculation.

No denial of procedural fairness in rejecting second hand claim of remorse

The appellant in ***Newman v R*** **[2018] NSWCCA 208** pleaded guilty to seven charges of possessing child abuse material. At sentencing, the appellant did not give evidence but tendered a report by a forensic psychologist which referred to the appellant seeking treatment following his arrest. The sentencing judge rejected his claim that he was remorseful, finding that if he was genuinely remorseful he would have sought treatment much earlier. On appeal, the appellant argued that the sentencing judge denied him procedural fairness because the prosecutor did not make submissions opposing a finding of remorse and the judge gave no indication that he would not accept the claim.

Payne JA held that the sentencing judge was entitled to exercise considerable caution in relying on untested assertions in the psychologist's report in the absence of sworn evidence. His Honour held that the sentencing judge had not led the offender to believe that a finding of remorse would be made, but rather was a case where the offender had not given direct evidence of remorse. His Honour held that it is for the accused to prove on the balance of probabilities any mitigating circumstances relied upon, and that it was not incumbent upon the judge to forewarn the applicant that he may not accept untested and indirect evidence of remorse.

Participation in a residential rehabilitation program does not have to be compulsorily required by court order before it may be taken into account as "quasi-custody"

The appellant in ***Reddy v R*** **[2018] NSWCCA 212** pleaded guilty and was sentenced to imprisonment for aggravated dangerous driving occasioning grievous bodily harm. The aggravating factor was that the applicant had a blood alcohol concentration of 0.27. He had an alcohol abuse problem. Prior to sentencing, he voluntarily participated in 10 months of residential rehabilitation programs which satisfied the description of "quasi-custody". On appeal against severity it was contended that notwithstanding that the judge had not been asked to, the judge nonetheless erred by not backdating the sentence to take into account time spent in rehabilitation.

Campbell J allowed the appeal and backdated the sentence. First, his Honour cited the decision of Hoeben JA in *Renshaw*; in which a sentencing judge erred when recognizing an offender's rehabilitation but failing to take into account that time upon sentence. His Honour then considered *Bonett v R*, where Adamson J likewise held that a sentencing judge may, in some circumstances, be obliged to take into account time spent in rehabilitation even when not specifically asked to.

His Honour held that there was evidence that the applicant had spent some 10 months in quasi-custody but that it makes no difference that participation in a residential rehabilitation program was voluntary rather than by compulsion of a court order.

Assistance to authorities – extent of reasons required to explain discount

The appellant in ***Greentree v R*** **[2018] NSWCCA 227** was sentenced for two drug manufacture offences and a firearms offence. At sentencing, the appellant relied on some assistance which he had provided authorities and he received a discount to reflect that. The sentencing judge said in his remarks that he had considered two exhibits relevant to that point, but made general conclusions about the usefulness and veracity of those exhibits and applied a 30% discount. The appellant contended on appeal that the judge had failed to properly apply s 23(2) *Crimes (Sentencing Procedure) Act*.

The appeal was allowed on the basis of another error. In the course of his judgment, Beech-Jones J noted that there is an obvious tension between the objectives of s 23(2) and a sentencing judge's obligation to provide reasons in open court. In some cases, revealing the details of the assistance provided can risk the offender's safety and undermine the purpose of the assistance and defeat the purpose of the provision. His Honour held that in this case the sentencing judge was clearly conscious of the tension and did not err in his reasons.

Bugmy v The Queen - *judge's failure to refer to Aboriginality of offender does not mean that Bugmy considerations were ignored*

The appellant in ***Judge v R*** **[2018] NSWCCA 203** pleaded guilty to robbery in company. He relied on his deprived upbringing but did not give evidence as to his aboriginality, nor did the sentencing judge refer to it when sentencing him. On appeal the appellant contended that the judge erred by failing to advert to or apply the *Bugmy* principles, in particular by not referring to the appellant's aboriginality.

White JA held that the *Bugmy* principles, applying *Fernando*, are not about sentencing Aboriginals but are about the recognition of social disadvantage, which the sentencing judge had taken into account. His Honour held that the sentencing judge did consider the appellant's dysfunctional upbringing, including violence and sexual abuse as a child and so was not in error.

Bugmy v The Queen – *no error for judge to reject submission that* Bugmy *factors apply*

The appellant in ***Egan v R*** **[2018] NSWCCA 235** was sentenced for supplying a prohibited drug and dealing with property suspected to be the proceeds of crime. At sentencing, the appellant relied on evidence of his upbringing and background to argue that the principles in *Bugmy v The Queen* (2013) 249 CLR 571 applied. The sentencing judge rejected the submission.

The appeal was dismissed. Campbell J reviewed the sentencing judge's remarks that the alleged social deprivation of the appellant (as explained by a psychologist) was not a mitigating factor on sentence. His Honour held that this case was very different from *Bugmy* or *Fernando* in that the circumstances which led the appellant into drug dealing arose in his adulthood and had nothing whatsoever to do with childhood deprivation.

Applying the 2013 statutory amendments in relation to standard non-parole periods following Muldrock v The Queen

When sentencing the appellant in ***Tepania v R*** **[2018] NSWCCA 247** for recklessly causing grievous bodily harm to a 10 month old baby, the sentencing judge took into account that the appellant had a dysfunctional background and an intellectual impairment. The judge found that the offences were within the "broad midrange of objective seriousness". On appeal the appellant contended that the judge failed to take into account his reduced moral culpability and thereby erred in his assessment of objective seriousness.

Johnson J held that the finding as to objective seriousness was open to be made. His Honour's judgment includes a detailed analysis of the effect of the 2013 amendments on sentencing for standard non-parole offences. He first considered the text of ss 54A and 54B of the *Crimes (Sentencing Procedure) Act*, in that the amendments removed the concept of "an offence in the middle of the range of objective seriousness" and in its place inserted a definition that the standard non-parole period represents an offence "that, taking into account only the objective factors affecting the relative seriousness of the offence, is in the middle of the range of objective seriousness". In doing so, his Honour held that the amendments give effect to the High Court's characterisation in *Muldrock*. Johnson J stated a number of propositions relevant to standard non-parole period offences, including that the judge is not required to list the features of the offence which were or were not taken into account in considering the role of the standard non-parole period.

His Honour held that in sentencing for an offence, a court should make an assessment of the objective gravity of the offence including motive, provocation, and personal factors that are causally connected with or materially contributed to the commission of the offence. He held that taking into account an offender's moral culpability may be seen as a consideration of one of the many factors which bear on sentence as part of the process of instinctive synthesis. His Honour considered the sentencing judgment and concluded that it had not been demonstrated that the judge had not taken into account the appellant's profound deprivation and impairment.

Double counting re "under authority" and "breach of trust"

The appellant in ***Beavis v R*** **[2018] NSWCCA 248** was convicted of child sexual assault offences, three counts of which included an element where the victim was "under the authority" of the offender. On sentencing, the primary judge said that the offences were aggravated by "a significant breach of trust" because the offences occurred when the complainant was staying at the appellant's home, and was entitled to feel safe and secure. One of the grounds of appeal was to the effect that the finding of breach of trust was "double dipping" because an element of the offences was that the complainant was "under the authority" of the appellant. As the sentencing judge had not adverted to any distinction between a breach of authority or breach of trust, the Court of Criminal Appeal upheld the ground of appeal finding that "the sentencing judge treated a breach of trust as aggravating an offence, when as a matter of substance that breach was an element of the offence" [255].

Requirements of remarks on sentence

The appellant in ***Taylor v R*** **[2018] NSWCCA 255** appealed against the severity of his sentence on two grounds, one contending that the sentencing judge did not take into account that he did not have any significant record of previous convictions.

Wilson J held that the judge was not specifically asked to take that into account but that a consideration of his sentencing remarks showed that he did give it favourable regard. In so doing, her Honour explained a number of principles relevant to the requirement to give remarks on sentence. Her Honour held that the requirement does not dictate a need for the recitation of all applicable law by first instance judges. Rather, it is enough if the appellate court is able to determine what the sentencing court did and why so that it can determine whether law and principle have been applied correctly. Her Honour concluded that in this case it is difficult for the appellant to rely on a contention not put at sentencing, but that nonetheless it was clear from the judge's remarks that the appellant's lack of significant prior convictions was viewed favourably.

Application of reforms to ICO sentencing scheme in Court of Criminal Appeal

The Crown was successful in its appeal on the manifest inadequacy of the aggregate sentence imposed in ***R v Pullen*** **[2018] NSWCCA 264** (discussed above). Harrison J then resentenced the offender, which required consideration of the sentencing reforms in the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017*. His Honour treated an assessment report prepared two and a half months earlier under the old scheme (s 70) as sufficient to satisfy the conditions under the new scheme (ss 17B-17D), finding that to require a new report because of the law reforms would be a "statutory absurdity". In addition, his Honour held that the only relevant limitation to the making of an ICO where the Court imposes an aggregate sentence is that the relevant term of sentence does not exceed three years (s 68(2).

Finally, his Honour discussed the amendments in s 66 providing that the paramount consideration when imposing an ICO is "community safety" (s 66(1)). Harrison J noted that

this assessment is “inextricably linked with considerations of rehabilitation” and its paramountcy means that those other considerations, including the s 3A purposes of sentencing, are secondary to the assessment process, an approach supported by statements in the second reading speech. This means that an ICO may be available even if it was not available under the old scheme. The issue for the Court in imposing an ICO is whether community protection is best served by incarceration, if a person poses a serious risk to the community, or if the offender avoids gaol in order to facilitate medium to long term behavioural change through community supervision, stable employment and treatment.

Youth – relevance when immaturity and impulsivity did not contribute to the offending

In ***Abdul v R*** **[2019] NSWCCA 18**, it was contended that a sentencing judge erred in not taking the applicant's youth into account when determining the sentence and in not having regard to the importance of rehabilitation when determining the proportions between non-parole and parole periods. The applicant was aged 20-21 at the time of the offences and 22 when sentenced. Bathurst CJ said that it was well-established that youth and comparative immaturity were less relevant in a case where immaturity and impulsivity were not contributing factors to the offending. In this case the sentencing judge correctly assessed the applicant as the “entrepreneurial force” and played a “senior controlling role” in the organisation of distributing commercial quantities of a number of prohibited drugs. His Honour noted that the judge had taken into account that there was a "reasonable prospect of rehabilitation" and there was no error in the discretionary assessment of non-parole/parole period proportions.

Objective seriousness assessment – need not be made by reference to a scale

In ***McDowall v R*** **[2019] NSWCCA 29**, the applicant sought leave to appeal the aggregate sentence imposed on him for a series of offences, one of which was taking a motor vehicle with assault in circumstances of aggravation (armed with offensive weapon). Adamson J rejected the applicant’s submissions under Ground 1, in which it had been argued that the trial judge failed to make an assessment of the objective seriousness of the offence. Her Honour held that the statement of principle in *Muldrock v The Queen* (2011) 244 CLR 120; [2011] HCA 39 at [29] means that a sentencing judge does not need to “classify” the objective seriousness by reference to some sort of scale (eg low, mid-range, high), but must simply “identify fully the facts, matters and circumstances which the judge concludes bear upon the judgement that is reached about the appropriate sentence to be imposed”. While there was no reference to scale in the sentencing remarks, Adamson J held that the trial judge had adequately fulfilled the statutory requirement to assess objective seriousness by identifying the “facts” (by way of a detailed description of events), the “matters and circumstances” (that is, the offence and its effect on the victims).

Extra-curial punishment - loss of contact with children due to length of sentence does not qualify

An offender was sentenced to 16 years imprisonment, with a non-parole period of 11 years for participating in a joint criminal enterprise with her partner to sexually abuse her daughter. The offender had 7 children and conceded at sentencing that she would not have contact with those children until they turned 18 at least. On appeal against the severity of her sentence to the Court of Criminal Appeal, it was contended that the sentencing judge erred by not accounting for the way the loss of the offender's children imposed an extra-curial punishment, which should have mitigated her sentence.

In ***RH v R*** **[2019] NCSWCCA 64**, Schmidt J dismissed this ground and the appeal overall. Her Honour defined extra-curial punishment as "loss or detriment" imposed for the purpose of punishing, or by reason of the commission of the offence, by some person other than the sentencing judge. Her Honour went on to dismiss the applicant's submissions finding there are no authorities to support the contention that removing children from a dangerous offender involved punishment to that offender – indeed, "to conclude that it did…would be perverse". The removal was not extra-curial punishment but the "natural consequence" of the offending.

Form 1 offences - taking account of maximum penalty and SNPP for such offences when sentencing for a main offence

The applicant was sentenced for serious sexual offences committed against his 4- 5 year old daughter to an aggregate sentence of 20 years imprisonment with a non-parole period of 13 years. One of the grounds of appeal alleged that there was a failure to have proper regard to the maximum penalties for a set of Form 1 offences because the Crown had provided the sentencing judge with a table of Form 1 offences identifying the penalties for ss 61M(2) and 61O(2A) offences as 10 years, when they should have been 2. This was submitted to be incorrect because, following ss 165, 166 and 167 of the *Criminal Procedure Act 1986*, those indictable offences were being summarily dealt with by the District Court.

In ***CH v R*** **[2019] NSWCCA 68**, Schmidt J dismissed this ground of appeal. Her Honour noted that at sentence, admissions of guilt to other offences listed on a Form 1 were taken account. They had previously been listed on a s 166 certificate as related offences. If they had have been dealt with by that procedure, the jurisdictional limit of the Local Court would have applied. But when the judge was asked by the offender to take the offences into account by the Form 1 procedure, this limitation was no longer applicable.

Totality – criminality of proceeds of crime offence not subsumed by drug manufacturing and supply offences

A ground of appeal against an aggregate sentence imposed for three offences including drug manufacturing, drug supply, and knowingly deal with the proceeds of crime contended that the sentencing judge erred by implicitly accumulating the sentence for the

proceeds of crime offence upon the sentences for the other offences in order to reflect additional criminality. The applicant relied on what was said in *Brent Redfern v* R (2012) 228 A Crim R 56 by Adams J where "the possession of the drug and the proceeds of sale are part and parcel of the primary offence" so that separate punishment would amount to impermissible double counting.

In ***Grogan v R* [2019] NSWCCA 51**, Harrison J rejected this submission, finding that the applicant failed to establish that the criminality of the proceeds of crime offence could be comprehended by that in the other two offences. Rather, in this case the money the subject of the proceeds of crime offence did not just arise from the supply of drugs but was being used to purchase materials for further drug manufacturing, meaning the offences were "temporally and factually distinct". No double-counting error was made out.

Totality – no fixed principle that proceeds of crime and drug supply sentences should be concurrent

The offender was sentenced to an aggregate sentence of 3 years and 6 months with a non-parole period of 2 years imprisonment, following pleas of guilty to one offence of ongoing supply of prohibited drugs between 5 August 2014 and 21 August 2014 and dealing with the proceeds of crime on 21 August 2014, and an additional supply offence while out on bail. In ***Connell v R* [2019] NSWCCA 70**, the applicant appealed to the Court of Criminal Appeal against the severity of the sentence. One of the grounds contended that the sentencing judge erred by failing to order the indicative sentence of the offence of proceeds of crime be served completely concurrently with the indicative sentence for the ongoing drug supply offence.

Bellew J rejected the submissions of the applicant, which erroneously sought to rely upon the Court of Criminal Appeal's decision in *Jadron v R* [2015] NSWCCA 217 as authority for the proposition that sentencing for such offences should be served by wholly concurrent sentences. His Honour held that there are no generally applicable sentencing principles defining when offences are to be served cumulatively or concurrently. Whether a judge considers that sentences should be served concurrently is an issue of fact and context in each case, and his Honour noted that there may be cases in which concurrency is appropriate if the proceeds of crime are clearly derived from the supply of drugs. Bellew J noted that the issue on appeal was not pressed before the sentencing judge, who made no express finding as to connection between the offences. His Honour held the role of the appellate judge in reviewing aggregate sentencing is limited because the sentencing judge is not required to justify how accumulation and concurrence operated in the ultimate sentence. Bellew J held that the aggregate sentence imposed reflected the overall criminality of the offences and was not manifestly excessive – the ground of appeal was dismissed.

Intensive correction order: maximum term for an individual offence where an aggregate sentence imposed

The Crown appealed against the adequacy of the sentence imposed after the offender pleaded guilty to supplying a large commercial quantity of methylamphetamine contrary to s 25(2) of the *Drug Misuse and Trafficking Act 1985* (NSW). The sentencing judge imposed a sentence of imprisonment for 2 years and 6 months to be served by way of an intensive correctional order (ICO), taking into account a 25% guilty plea discount and 61 days served in custody. There was a dispute as to whether the sentencing judge had also sentenced for a related summary offence of resisting arrest that was not explicitly dealt with by the sentencing judge. Ground 1 turned on the asserted inadequacy of the sentence. Ground 2 was a jurisdictional argument querying the judge's power to impose an ICO on a sentence over 2 years.

In ***R v Qi*** **[2019] NSWCCA 73**, the Court of Criminal Appeal allowed the appeal on Ground 1, holding that the sentence was manifestly inadequate and it was necessary to resentence to a term of imprisonment. In relation to Ground 2, Button J considered he did not have to decide the issue but went on to discuss it anyway. The issue was whether the sentencing judge had indeed sentenced the offender for two offences, the result of which would be that her Honour would have been entitled to impose an ICO under s 68(2) (to a maximum period of 3 years); but if not, then her Honour would have been acting beyond jurisdiction by imposing an ICO for a single offence for more than two years in breach of s 68(1). Button J noted that the sentencing remarks were an amalgam, reflecting a slip by the judge who initially noted but did not subsequently impose a sentence for the resist arrest charge, and also did not even implicitly impose an aggregate sentence. This slip was not picked up or brought to the sentencing judge's attention. Button J went on to conclude that if required to consider Ground 2, he would uphold it, correct the wrongly entered acquittal on the resist arrest charge and then re-impose an ICO now within jurisdiction – and refuse to impose a greater sentence on the basis of the error regarding the second offence.

Comment In this case, and in *Pullen v R* [2018] NSWCCA 284, seemingly without submissions being made on the point, s 68 was construed as meaning that if a sentence was being imposed for an individual offence, s 68(1) limited the term for which an ICO could be imposed to 2 years, but if the offence was a component of an aggregate sentence, that restriction did not apply in that s 68(2) simply provided for a maximum term of an aggregate sentence that could be served by way of an ICO of 3 years. Parliament's evident intention to restrict an ICO for a single offence to 2 years does not sit easily with the prospect that (using an extreme example) an aggregate sentence of 3 years could be imposed for two offences, one for which there is an indicative sentence of 3 years and the other for which there is an indicative sentence of some trivial length, implicitly regarded as appropriately concurrent with the former.

SENTENCING - SPECIFIC OFFENCES

Domestic violence offences

The appellant in ***Patsan v R*** **[2018] NSWCCA 129** assaulted the victim with whom he was in a domestic relationship, causing grazing and bruising to her torso. The morning after the assault the victim told the appellant she was moving out, at which point the appellant grabbed her and punched her in the face, fracturing her jaw in two places. The sentencing judge assessed the objective seriousness of the offence as "just below the middle of the range" and the appellant was sentenced to full-time imprisonment. He contended on appeal that the judge erred in her assessment of the seriousness of the offence and that he should have received a suspended sentence. Leave to appeal was refused.

Adamson J rejected a submission that the sentencing judge had used the offender as a scapegoat for the prevalence of domestic violence. She held that there was no error in the manner in which the judge assessed the seriousness of the offence in its domestic violence context. She noted that the Court's experience and statistics relied upon by the Crown indicated that domestic violence offences not infrequently conform to a pattern, as the offence at hand did:

> "[A] male attacks (or kills) a woman with whom he is, or has been, in an intimate relationship when she expresses a wish to leave that relationship. Typically, the male is physically stronger than the female. The male is thus generally in a position to inflict considerable harm to the female and there is no real prospect of spontaneous physical retaliation because of the disparity between their respective strengths."

Her Honour applied *Munda v Western Australia* (2013) 249 CLR 600; [2013] HCA 38 and *R v Edigarov* [2001] NSWCCA 436 and held that the judge correctly characterised the offences as domestic violence and properly regarded that fact as a matter of real significance for the purposes of specific and general deterrence.

Child abuse material and child pornography offences – factors affecting objective seriousness

In *Minehan v R* [2010] NSWCCA 140; 201 A Crim R 243 a non-exhaustive list of factors that may bear upon the assessment of the objective seriousness of offences concerning the possession, dissemination or transmission of child pornography and child abuse material was provided which has been (apparently) cited regularly. In ***R v Hutchinson*** **[2018] NSWCCA 152** the Commonwealth Director asked the Court to consider augmenting the list with two further features that were evident in the case at hand. It was a feature of Mr Hutchinson's offending that he had persuaded pubescent males to send pornographic images of themselves to him while he pretended to be a young person of about the same or a slightly older age (he was in fact 29). The Court obliged and amended item 9 and inserted a new item 10:

> 9. The degree of planning, organisation, sophistication and/or deception employed by the offender in acquiring, storing, disseminating or transmitting the material.

10. The age of any person with whom the offender was in communication in connection with the acquisition or dissemination of the material relative to the age of the offender.

The complete list, as amended, may be found in *R v Hutchinson* at [45].

Supply drug – extended definition of "supply" applies to supplying on an ongoing basis

The *Drug Misuse and Trafficking Act 1985* defines supply as including "sell and distribute, and also includes agreeing to supply". The appellant in ***Nguyen v R* [2018] NSWCCA 176** pleaded guilty to two offences of supplying a prohibited drug on three or more occasions during a 30 day period for material gain contrary to s 25A(1). On sentence the judge took into account that he had agreed to supply drugs well in excess of the minimum three separate occasions required under s 25A(1). On appeal against the severity of the sentence the appellant contended the judge had erroneously taken into account occasions when he had not in fact supplied drugs for financial or material reward.

Price J held that the extended definition of "supply" in s 3 applies to the offence in s 25A(1) so that the provision operates in the same way for agreements to supply as it does to actual supplies. His Honour held that s 25A must be read in context alongside s 3, and that the words "for financial or material reward" in s 25A do not displace the extended definition.

Money laundering – relevant matters to take into account

The appellant in ***Fung v R* [2018] NSWCCA 216** was sentenced for an offence of dealing with money in excess of $1,000,000 with the intention it would become the instrument of crime, contrary to s 400.3(1) of the Criminal Code (Cth). He was resentenced following the decision in *Xiao v R* (2018) 96 NSWLR 1, it being accepted that he was not given credit for the utilitarian value of his guilty plea. In resentencing, the Court of Criminal Appeal made reference to relevant factors when sentencing for offences of this kind.

Price J held that in addition to the maximum penalty, other important considerations are the offender's belief that the money was the proceeds of crime; precisely what the offender did; the period of time over which the offence was carried out; the amount involved and the offender's role; whether the money or property was beneficially the offender's or not; and the value of any reward. His Honour also held that general deterrence was an important consideration. The Court concluded that no lesser sentence was warranted in the circumstances.

Cultivation of cannabis by enhanced indoor means – sentencing standards

The appellant in ***Tran v R* [2018] NSWCCA 220** was sentenced to an aggregate sentence of 13 years 4 months for five offences of knowingly taking part in the cultivation by enhanced indoor means of not less than the large commercial quantity of cannabis plants and one offence relating to the commercial quantity. When assessing the sentence for one of the large commercial quantity offences the judge took into account the appellant's guilt in respect of charges of enhanced indoor cultivation which exposed a child to the cultivation

process, and using electricity without authority. The trial judge found that each of the six offences approached the midrange of objective seriousness and that he had high moral culpability. The appellant appealed on the grounds the sentence was manifest excessive.

Johnson J, with whom Hoeben CJ at CL agreed (N Adams J dissenting) dismissed the appeal. His Honour held first that an examination of past sentencing practices does not reveal offending of the magnitude (by reference to the number of premises involved) of that of the applicant; his Honour described it as "virtually unprecedented in nature". His Honour considered the legislative history of the offence provisions, noting the legislative intention of increasing sentences for the offence of cultivation by enhanced indoor means. His Honour concluded that the applicant committed offences of a number and magnitude which required the imposition of a very substantial sentence and dismissed the appeal.

Drug supply – assessment of objective seriousness includes having regard to quantity

In ***Daher v R*** **[2018] NSWCCA 287**, the applicant applied for leave to appeal the sentence imposed after pleading guilty to two offences of drug supply (ss 25(1) and 25A of the *Drug Misuse and Trafficking Act 1985*) and a third offence under the *Poisons and Therapeutic Goods Act 1966*. Payne JA held that a proper assessment of the objective seriousness of the drug supply offences must include consideration of the quantity involved. This is the case even where the objective criminality of an ongoing supply offence against s 25A is directed at the business operation of drug supply. In the assessment of objective criminality for such an offence, the repetition, system and organisation of drug supply sits alongside the number and quantities of individual incidences of supply. Here the judge had only made findings about the applicant's "network" and role as a "wholesaler". The appeal was allowed.

Child sexual assault offences – both general and specific matters relevant to assessment of objective seriousness of multiple offences

In ***Bray v R*** **[2018] NSWCCA 301**, the applicant had been sentenced for five offences of aggravated indecent assault against his stepchildren, who were aged 11-12 and 10-11 at the time. He submitted on appeal that the trial judge had made a "global assessment" rather than having regard to the seriousness of the individual offences. It was held that the judge (correctly) had regard to the *general* matters bearing on the assessment of objective seriousness of each of the offences as well as the *specific matters* pertaining to the individual offences. His Honour noted that the assessment of the objective seriousness of an offence is not something that can be described with absolute precision but that in this case, the trial judge's findings were open to her. General matters affecting each offence and making them significantly serious included the age of the victims, the position of authority held by the applicant, and the location of the offences (the victims' bedroom). These factors all supported the trial judge's finding, notwithstanding the applicant's submissions that the nature of the physical acts (whether or not the touching included the victim's vagina) affects the objective seriousness of the offences.

Drug manufacturing and supply offences – criminality does not coincide – need for some accumulation to reflect totality of criminality

In ***R v Campbell; R v Smith*** **[2019] NSWCCA 1**, Crown appeals were allowed upon the Court finding the sentences imposed on the respondents for offences of drug manufacturing and supply were manifestly inadequate. The Court accepted the primary judge's assessment of the objective seriousness of the offences, but found error in the failure to reflect this assessment in the indicative sentences imposed. In addition, drug supply and precursor offences represented distinct criminality beyond the manufacturing offences which should have been reflected in the aggregate sentences.

Dealing in identification information with intent to facilitate fraud – financial gain is not an inherent characteristic

In ***Lee v R*** **[2019] NSWCCA 15**, the applicant appealed his sentence for offences related to his involvement in a criminal group making false ID cards to perpetrate frauds against financial institutions. The sentencing judge took account of the fact that the offences were committed for financial gain as an aggravating factor. On appeal, it was submitted that because financial gain was an inherent characteristic of the class of office (dealing in identification information contrary to s 192J *Crimes Act 1900*), the trial judge erred. Price J found that there are a number of examples of offences under s 192J where financial gain is absent. As a result, His Honour held that the sentencing judge did not err in finding that the offence was aggravated by financial gain.

Domestic sexual assault compared to sexual assault by a stranger – generalisations as to relative seriousness cannot be made

The applicant in ***SC v R*** **[2019] NSWCCA 25** was sentenced for three offences: aggravated sexual intercourse without consent and two of assault occasioning actual bodily harm. They were committed in the context of a relationship where the applicant and his victim lived under the same roof. The sentencing judge imposed an aggregate sentence of 10 years imprisonment with a non-parole period of 7 years, 6 months. On appeal it was contended that the sentencing judge erred in his assessment of the gravity of Count 6 (aggravated sexual intercourse without consent), because domestic sexual violence was not of itself as serious as sexual violence committed by a stranger, and the offence was less serious because it occurred after consensual sexual intercourse. Adamson J rejected both propositions. Her Honour held that "the proposition that domestic violence, of itself, is less serious than sexual assault by a stranger only has to be stated to be rejected". Further, generalisations about seriousness by reference to whether the victim knew the offender or not cannot be made, as the consequences of both kinds of offending can be extremely significant for the victim either way. In addition, earlier consent to intercourse cannot be taken into account to mitigate the seriousness of the subsequent offending.

Solicit to murder – objective seriousness assessment

In ***R v Baker*** **[2019] NSWCCA 58**, the Crown appealed against the leniency of the sentence imposed on the respondent after pleading guilty to two counts of soliciting to murder and three counts of sexual intercourse with a 14 year old child. The respondent, having been charged and remanded for the sexual offences, had recruited his estranged wife to act as an agent and meet with a hitman (actually an undercover agent) in order to make arrangements to kill the complainant and his natural son (who was another victim in the sexual offences case). The Crown contended that the sentencing judge's assessment of the objective seriousness of the solicit to murder offences as "just above middle range" was in error. Hoeben CJ at CL agreed, finding that the objective seriousness of the criminality of the offences was "significantly higher" due to the respondent's role in instigating the plan, in persuading and directing his estranged wife to assist him in procuring the intended murders, the fact that the intended victims were children (including his own son), and that the murders were an attempt to interfere with evidence in his case and frustrate the criminal justice system, and having regard to the many opportunities the accused had to withdraw from the plan. His Honour revised the assessment of objective seriousness to "well above the middle of the range and approaching the higher range".

SUMMING UP

Whether judge was required to direct himself concerning forensic disadvantage suffered by accused on trial by judge alone

The appellant in ***Crickitt v R*** **[2018] NSWCCA 240**[2] was a general medical practitioner convicted of murdering his wife by way of a lethal injection of insulin. The Crown case was circumstantial, and did not rely on direct evidence that the appellant had administered the insulin or that an insulin overdose caused death. At a judge alone trial the appellant argued that the central fact in issue was the cause of the death. Blood samples taken from the deceased had been destroyed by the time the matter came to trial. At trial the sentencing judge did not give himself a warning about what was said to be a loss of forensic opportunity due to the destruction of the blood samples. This was the basis of one of the appellant's grounds of appeal.

The Court of Criminal Appeal dismissed the appeal. The Court considered the provisions in s 133 of the *Criminal Procedure Act* that a judge is required to give his or herself a warning that would normally be given to a jury. The applicant contended that a finding that the applicant had killed his wife with insulin may be unreliable because he had lost a forensic opportunity because of the destruction of the samples. The Court considered the transcript of the proceedings at first instance, in which the Crown resisted the applicant's suggestion that a warning should be given. The Court concluded that this was not a case, as the appellant contended, in which there was an absence of evidence capable of proving the Crown's case. Moreover, it was not a case where a finding that insulin caused death was unreliable because it was not capable of proof by direct evidence. Rather, it was a

[2] Special leave to appeal was refused by the High Court on 20 March 2019: [2019] HCASL 88

circumstantial case in which the judge was required to determine whether the elements of the case were capable of proving the offence beyond reasonable doubt.

Summing up unfair/unbalanced

A jury found the applicant guilty of two sexual assault offences. The applicant then appealed his conviction to the Court of Criminal Appeal in ***Decision Restricted*** **[2018] NSWCCA 299**. One of the grounds of appeal submitted that the trial judge's summing up was unbalanced because the trial judge had offered a counterpoint to rebut all the defence case propositions, sometimes not based on the Crown case or evidence.

Payne JA commenced his analysis of the ground by reviewing the legal principles relevant to a miscarriage of justice due to an unfair and unbalanced summing up. In view of those principles, Payne JA analysed the impugned passages of the summing up to conclude that it did not exhibit a "judicial balance" and was not rescued by the recognition that the jury is the arbiter of fact. The effect of the summing up and the possibilities suggested in the judge's counterpoint arguments was to deprive the jury of the opportunity to consider the applicant's defence, to urge a "particular mode of thought" on the jury including explanations of gaps, deficiencies and inconsistencies that while making sense to a legal mind are not required of a jury, and to direct the jury's collective mind to reason in a particular way. In addition, the summing up included matters not part of the Crown's address that did not need to be addressed in the context of the case.

As a result, the Court (Payne JA, Schmidt J agreeing, Fagan J dissenting) allowed the appeal, finding that the unbalanced summing up had caused a miscarriage of justice; the applicant had lost a chance fairly open to him of being acquitted, notwithstanding the strength of the Crown's case. This outcome was necessary because "[i]t is fundamental to our system of justice that the trial judge should not descend into the forensic arena".

Summing up unfair/unbalanced – trial judge should be reticent to express opinions on disputed questions of fact

In ***McKell v R*** **[2019] HCA 5; 93 ALJR 309**, the High Court upheld an appeal on the ground that a judge's summing up was unfair; the appellant's conviction for drug-related offences was a miscarriage of justice. The Court made two main points. The first was that in this case, the trial judge's statements in his summing up "were so lacking in balance as to be seen as an exercise in persuading the jury of the appellant's guilt". The High Court expressly approved Beech-Jones J (dissenting in the earlier Court of Criminal Appeal decision) who found that the summing up was so unbalanced and thereby unfair that a miscarriage of justice occurred. The second point was that the risk of unfairness "is such that a trial judge should refrain from comments which convey his or her opinion as to the proper determination of a disputed issue of fact to be determined by the jury".

The High Court accepted that there is always scope for judicial comment, but went on to discuss the degree to which trial judges should express an opinion on the facts of a case. It was held that trial judges should be reticent to express an opinion as to the determination

of disputed questions of fact because it does not advance the performance of the trial judge's duty to give fair and accurate jury instructions, especially in a context in where the jury is the constitutional tribunal of fact. Further, the Court said (at [50]) "there is no little tension between suggesting to the jury what they 'might think' about an aspect of the facts of a case and then directing them that they should feel free to ignore the suggestion if they think differently". It is "hollow and unconvincing" to say that a judge may not go so far as creating a risk the jury may be overawed, but it is permissible for a judge to use language that makes him/her appear a decided partisan.

Despite this, the Court was careful to note (at [53]) that there are cases where "judicial comment, but not an expression of opinion on the determination of a matter of disputed fact, may be necessary to maintain the balance of fairness between the parties". There was an example in this case where fairness required the judge to correct an impression mistakenly left by an untenable suggestion on a particular topic made during the closing address of the appellant's counsel.

Unanimity – where discrete acts each capable of proving an essential element

A drug supply offence was based upon a person's alleged possession of bags of drugs in a variety of quantities in premises he controlled. On appeal it was contended that the trial judge had erred in giving a direction that the jury needed to be unanimous in finding that the accused possessed the drug, but not unanimous as to which bags he possessed. The contention was made good: ***Direction Restricted*** **[2019] NSWCCA 6**. Bathurst CJ held that the effect of the trial judge's direction was to leave open to the jury the power to convict even if they could not be unanimously satisfied that a specific bag of drugs was in the appellant's possession – it was sufficient if one juror was satisfied as to possession of one bag, and another juror was satisfied as to possession of a different bag. This was an erroneous direction.

Bathurst CJ referred to the correct approach to jury unanimity set out by Maxwell P in *The Queen v Klamo* (2008) 18 VR 644; [2008] VASCA 75 citing with approval *The Queen v Walsh* [2002] VSCA 98; (2002) 131 A Crim R 299 at [75]. There were two distinct types of cases. In one type of case, alternative legal bases of guilt are proposed by the Crown but depend substantially upon the same facts and unanimity about the basis of guilt is not required. The other type of case could involve an offence where "a number of discrete acts is relied upon as proof and any one of them would entitle the jury to convict"; if the discrete acts go to proof of an essential ingredient of the crime, the jury must agree upon the act which in their opinion does constitute the ingredient. The present case was in the latter category.

Adequacy of summary of the defence case

Two boys disclosed offences committed by the appellant to their grandmother after she had overheard them discussing the offending. The appellant was convicted following trial of nine counts of aggravated indecent assault on a person under the age of 16 years contrary to s 61M(2) on two boys aged under 10 years. The appellant's case at trial was

that the offences did not occur and that the grandmother was motivated to lie because of animosity towards him. In Ground 2(e) on appeal in ***Roos v R*** **[2019] NSWCCA 67** it was contended that the trial judge erred by failing to adequately summarise the submissions made on behalf of the appellant; it was "so brief and general in its terms as to be almost purposeless". The contention was rejected.

The trial judge had observed early in his summing up that the trial had been relatively short, the evidence would be fresh in the jury's memory and they had heard detailed references to the evidence in the closing addresses. He told the jury that he did not propose to refer to the evidence in great detail but they were required to consider all of the evidence nonetheless. Later, after giving various legal directions, he summarised the respective cases over three paragraphs of transcript.

Gleeson JA observed that a trial judge does not have to summarise the evidence in every case, and found that this case was one that did not require such a summary for the reasons the judge gave. As to whether the appellant's case was not fairly put before the jury, Gleeson JA noted that it was necessary to explain any basis upon which a verdict in favour of the accused could be returned. Here, the judge's brief and concise summary reflected the case put in counsel's closing address. The summing up was "sufficient and appropriate", a conclusion supported by the fact that counsel declined to ask for anything more.

*"*Murray *direction" – need for direction determined by reference to unreliable evidence warning*

Counsel who appeared at trial for the appellant in ***Laughton v R*** **[2019] NSWCCA 74** sought a *Murray* direction (often given where the Crown case depended upon the acceptance of a single witness in accordance with *R v Murray* (1987) 11 NSWLR 12 at 19). Counsel did not press the request after the judge pointed out that this would require him to also inform the jury of evidence independent of the witness which supported his evidence. However, different counsel sought leave under r 4 of the Criminal Appeal Rules to contend on appeal that the judge erred by not giving the direction.

Meagher JA and Schmidt J engaged in an analysis of the quality of the witness' evidence and referred to cases, some of which were concerned with whether an unreliable evidence warning should be given in order to avoid a perceptible risk of a miscarriage of justice. Button J agreed with Meagher JA that leave under r 4 should be refused but declined to consider whether a "qualitative analysis" of the evidence was appropriate in the context of an application for a *Murray* direction.

Comment: the engagement of two members of the Court in a qualitative analysis of the potential unreliability of a witness' evidence in determining whether a *Murray* direction was required appears to conflate the question whether such a direction was required with whether it is necessary to give a warning in relation to evidence that may be unreliable for reasons that might not be fully appreciated by the jury. In this case, the only aspect of the witness' evidence that was identified where the jury may not have been aware of reasons why the evidence may be unreliable was his purported recognition of the accused as his

assailant. The trial judge gave a specific warning to the jury about that evidence. Other bases for potential unreliability were recognised as being matters readily apparent to the jury such that an unreliable evidence direction would not normally be required: *R v Stewart* (2001) 52 NSWLR 301; [2001] NSWCCA 260 at [38], [98]-[101].

The fact that a *Murray* direction was not designed to warn about potential unreliability was made plain by Lee J in the oft-quoted passage of his judgment set out below. The direction was clearly intended to bring home to the jury the high standard of proof required of the Crown and the fact that its case depended upon the word of a single witness. Lee J said (at 19):

> "In all cases of serious crime it is customary for judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in; but a direction of that kind does not of itself imply that the witness' evidence is unreliable."