

# **A Year of Criminal Appellate Decisions**

**The Honourable Justice R A Hulme**

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## 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 I) and Ms Kirsten Gan BIGS LLB (Hons I).

## APPEALS

*Tendency evidence – determination of whether there is significant probative value is a matter for the appellate court*

In *DAO v R* (2011) 81 NSWLR 568 the Court of Criminal Appeal held that review of a decision to admit tendency evidence under s 97 was to be made in accordance with *House v R* (1936) 55 CLR 499 and not by the appellate court's own judgment. In ***The Queen v Bauer (a pseudonym) [2018] HCA 40; 92 ALJR 846***, the unanimous members of the High Court held (at [61]) to the contrary:

“... in an appeal against conviction to an intermediate court of appeal, or on a subsequent appeal to this Court, it is for the court itself to determine whether evidence is of significant probative value, as opposed to deciding whether it was open to the trial judge to conclude that it was.”

*The Court of Criminal Appeal does not have jurisdiction under s 5F of the Criminal Appeal Act 1912 to entertain an appeal against a judge's refusal to disqualify him/herself*

During sentence proceedings for drug supply offences, the appellant in ***Chamoun v DPP (NSW) [2018] NSWCCA 182*** made an application that the judge disqualify herself because of comments she had made during the proceedings. The application was refused and the appellant appealed both to the Court of Appeal seeking judicial review and to the Court of Criminal Appeal under s 5F of the *Criminal Appeal Act 1912*.

Gleeson JA held that the Court of Criminal Appeal had no jurisdiction to hear the appeal and refused leave to appeal. His Honour cited a number of authorities for the proposition that the Court does not have jurisdiction to hear the appeal because the refusal of a recusal application is not an interlocutory order. His Honour held that a similar view has been reached in relation to an appeal under s 127 of the *District Court Act 1973* concerning a judge's “judgment or order in an action”. His Honour held that even if the refusal of the recusal application was an interlocutory order, the appellant had failed to demonstrate that a fair-minded observer might think that the judge might not have approached the hearing with objectivity.

*Overcoming the principle of double jeopardy by overturning an acquittal*

Clinton Speedy, Evelyn Greenup, and Colleen Walker were three children who went missing from Bowraville over a 5-month period in 1990 and 1991. The respondent in **Attorney General for New South Wales v XX [2018] NSWCCA 198<sup>1</sup>** was tried for the murder of Clinton Speedy in 1994 but acquitted. He was tried for the murder of Evelyn Greenup in 2006 but was also acquitted. In 2006 the *Crimes (Appeal and Review) Act 2001* was amended by the insertion of ss 99-106, allowing the retrial of persons acquitted for certain offences. Under s 100(1), the Court of Criminal Appeal may order an acquitted person to be retried if there is “fresh and compelling evidence against the acquitted person” and “in all the circumstances it is in the interests of justice for the order to be made”. Evidence is “fresh” under s 102(2) if it was not adduced in the original proceedings and it could not have been adduced with the exercise of reasonable diligence. Evidence is “compelling” under s 102(3) if it is reliable, substantial, and it is highly probative of the case against the acquitted person. The Attorney General sought to set aside the acquittals in order for there to be a joint trial of XX for the murder of all three victims.

The Court dismissed the application. The Court held that the evidence relating to Colleen Walker, as well as most other categories of evidence relied on, was available prior to the trial for the murder of Evelyn Greenup. The Court held that it was therefore not fresh evidence within the meaning of s 102(2). The applicant contended that the word “adduced” in the definition of “fresh” in s 102(2) meant “admitted”. The Court rejected that interpretation and held that “adduced” in the context of the provision means “tendered” or “brought forward”. The Court held that s 102(2)(a) looks to whether the evidence was in fact “tendered” irrespective of its admissibility and that s 102(2)(b) looks to whether it could have been tendered or brought forward “with the exercise of reasonable diligence”. Accordingly, evidence that was available but was not tendered due to its likely inadmissibility would not fall within the provision.

As a fallback position, the applicant contended that if “adduced” meant “tendered” or “brought forward”, then the evidence upon which the applicant relied could not have been tendered “with the exercise of reasonable diligence” because it was likely inadmissible. The Court rejected that interpretation on the basis that it would lead to incongruous and anomalous results and that it does not accord with the rest of s 102.

*“Conviction” in s 5(1) Criminal Appeal Act 1912 includes where a guilty verdict has been returned but no formal conviction has been entered*

In **Cabot (a pseudonym) v R [2018] NSWCCA 265**, the appellant was tried for offences of aggravated indecent assaults contrary to s 61M(2) (nine counts) and sexual intercourse with a child contrary to s 66A(2) (two counts) committed against his stepson. The jury acquitted the applicant of three counts, returned a guilty verdict for two counts, and could not reach a verdict for the remaining counts. The appellant appealed to the Court of Criminal Appeal under s 5(1) *Criminal Appeal Act 1912*, which provides that “a person *convicted* on indictment may appeal under this Act to the court: (a) against the person's conviction ...”. As the appellant had not yet been sentenced, the Court was required to be satisfied of its jurisdiction to hear and determine the appeal.

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<sup>1</sup> Special leave to appeal was refused by the High Court on 22 March 2019: [2019] HCATrans 52

Leeming JA followed the approach applied in *R v MAJW* [2007] NSWCCA 145; (2007) 171 A Crim R 407. First, His Honour accepted that a jury's verdict is not the judgment of the court and imposes no liability, but does have the legal consequence of a judgment of conviction, and that the word "conviction" has multiple meanings that turn on the context in which it is used. His Honour was, however, concerned to avoid producing improbable or capricious results as a matter of the statutory construction of the word "conviction" in this context. To this end, His Honour noted the close correlation between the right of appeal "against the person's conviction" in s 5(1)(a) and the judge's power to refer a question of law to the Court of Criminal Appeal in s 5A(1) to be dealt with as a s 5 appeal, and held that it would be a strange result if s 5A(1) but not s 5(1)(a) were available in the absence of a formal conviction. Similarly, it would be strange if it were held that a jury's verdict is sufficient for s 5(1)(a) but not for s 5(1)(b), where the two paragraphs are intended to cover the field. Therefore, Leeming JA concluded that the appellant had a right to appeal under s 5(1) following a guilty verdict, even if no formal conviction or sentence has taken place.

*A principal protected confider has standing to appeal to the Court of Criminal Appeal in relation to the sexual assault communications privilege*

The respondent in ***PPC v Stylianou* [2018] NSWCCA 300** challenged the standing of the applicant (the Principal Protected Confider (PPC)) to apply for leave to appeal the decision of Berman DCJ, who had granted the respondent access to subpoenaed documents containing protected confidences to which sexual assault communications privilege attached. Macfarlan JA held that the PPC had standing to appeal as her application satisfied s 5F(3AA)(a) – she is a "person who is not a party" – and, although Berman DCJ was not strictly considering an application for leave under Ch 6 Pt 5 Div 2 of the *Criminal Procedure Act* 1986, he was considering access to documents subpoenaed pursuant to those provisions and the provisions were relevant to his determination.

In addition, His Honour found that the applicant also had standing under s 5F(3), as Berman DCJ's order was "interlocutory" and a "judgment and order" within the meaning of the section and – affirming the approach in *Tran v R* [2017] NSWCCA 93 – as the PPC was a "party to proceedings to which this section applies" because she had participated in the relevant hearing of those proceedings, and was formally recorded as a party on the Notice of Motion seeking access to the subpoenaed documents.

*s 6(1) Criminal Appeal Act – proviso applies in context where Crown Prosecutor referred to evidence inadmissible against the accused*

Two brothers stood trial with a third co-accused on charges of murder. The Crown Prosecutor submitted in closing that evidence only admissible against the co-accused could be used against the brothers. The trial judge immediately gave a corrective direction in which his Honour informed the jury that the Crown Prosecutor should not have referred to the evidence and directed that, except for a small amount of material relevant to one of the brothers, it could not be used against them. The brothers appealed to the Court of

Criminal Appeal arguing that there was a miscarriage of justice: **Charbaji v R [2019] NSWCCA 28**. The appeal was dismissed.

The Court (Beazley P, Price and Wilson JJ) acknowledged that the Crown Prosecutor's reference was "impermissible". The issue was whether the proviso in the third limb of s 6(1) *Criminal Appeal Act* could be rightfully applied; whether notwithstanding a point being decided in an appellant's favour, the Court can dismiss the appeal if there is "no substantial miscarriage of justice". The Court examined the authorities on the meaning of "substantial miscarriage of justice", relying on the approach in *Kalbasi v Western Australia* (2018) 352 ALR 1; [2018] HCA 7 in which the High Court rejected approaching this assessment based on the outcome of a "hypothetical error-free trial", because the effect of error was an unknowable unknown. The Court referred to what the High Court said in *Weiss v The Queen* (2005) 224 CLR 300; [2005] HCA 81, in which error needed to be considered in every case as its nature and effect which may affect whether an appellate court can assess whether guilt has been proved beyond reasonable doubt.

Based on this approach, the Court held that its task required them to "consider each of the impermissible statements made by the Crown Prosecutor, their importance in the trial overall having regard to the other evidence in the trial, the corrective direction given by the trial judge and the other directions given to the jury". In the present case, the Court held that the trial judge's directions were sufficiently clear in explaining to the jury how they should deal with the evidence, and that having regard to the evidence admitted in the trial as a whole, the guilt of the brothers had been proven beyond reasonable doubt. The Court concluded there was no substantial miscarriage of justice.

*Resentencing – the correct approach to follow after the establishment of a Kentwell v The Queen error*

In **Turnbull v R [2019] NSWCCA 97**, the Court of Criminal Appeal upheld a ground of appeal in which the sentencing judge erroneously asserted that the objective seriousness of the offence was aggravated because the offender was "on conditional liberty". This error required the fresh exercise of the sentencing direction: *Criminal Appeal Act 1912*, s 6(3); *Kentwell v The Queen* (2014) 252 CLR 601; [2014] HCA 37.

Simpson AJA remarked on the correct approach to be taken on resentencing. Her Honour characterised the error in this case as "all but inconsequential", but noted that it could not be said not to have affected the assessment of the sentencing discretion. The authorities, namely *Baxter v R* [2007] NSWCCA 237, *Kentwell v The Queen* and *Lehn v R* (2016) 93 NSWLR 205; [2016] NSWCCA 255 required that the Court exercise "an independent sentencing discretion" (at [40]). This means that "it is necessary to put aside the sentence imposed a first instance". In other words, it is wrong to start with the sentence imposed at first instance, then see if something different should be imposed – or otherwise that "no lesser sentence is warranted in law". The original sentence should be put out of mind, and the Court must take fresh account of the purposes of sentencing, legal requirements, agreed facts, assessment of criminality, the offender's personal factors, admissible post-sentencing factors, as well as any assessments and evaluations.

*Appellate discretion – following quashed conviction, whether to order retrial or verdicts of acquittal*

The appellants in ***Castagna v R; Agius v R* [2019] NSWCCA 114** had been convicted of conspiracy to defraud or cause financial loss to the Commonwealth, and conspiracy to deal with money which was the proceeds of crime. The charges arose out of the failure to declare payments made by Macquarie Bank to a company controlled by one of the appellants, which provided the consultancy services of the other appellant, as “assessable income”. The Court of Criminal Appeal allowed the appeal and quashed the convictions on the basis that the trial judge had made errors in relation to the appellants’ applications for a directed verdict, and in directing the jury that it could consider the circumstances surrounding the agreements when assessing if the payments qualified as “ordinary income” which should have been declared as “assessable income”.

The Court went on to consider whether to order a new trial or to direct the entry of verdicts of acquittal. Cases in which a similar question was discussed were referred to, including *King v The Queen* (1986) 161 CLR 423, *Jiminez v The Queen* (1992) 173 CLR 572; [1992] HCA 14, *Parker v The Queen* (1997) 186 CLR 494; [1997] HCA 15 and *The Queen v Taufahema* (2007) 228 CLR 232; [2007] HCA 11. In its reasons for directing a verdict of acquittal, the Court discussed the competing considerations. On the one hand, there is the potentially strong case (although the Court noted that it is difficult to form such an assessment when a different case is proposed to be led in a new trial) and the desirability of a jury determining a verdict. However, the stronger countervailing factors in this case included the fact that the appellants were entitled to a directed verdict, that the new trial would proceed on a “new case” (a circumstance which Dawson J in *King* suggested should not be permitted), the passage of time since the events in question (10-20 years), the burden of having already undergone an eight week trial with the listing of a new trial not expected until 2020, the time already served by one of the appellants, and their advanced age (69 and 71).

*Further appeal to Supreme Court incompetent if appeal from Local Court already determined by District Court*

A Local Court Magistrate imposed sentence for two offences of stalking or intimidating with intent to cause fear of physical or mental harm. On appeal to the District Court, one conviction was set aside for duplicity and the other was confirmed. The offender then sought to appeal from the Local Court to the Supreme Court pursuant to s 52 of the *Crimes (Appeal and Review) Act 2001 (CAR Act)*: ***Stephens v Director of Public Prosecutions (NSW)* [2019] NSWSC 761**. No appeal or application for judicial review was sought from the District Court. The DPP sought summary dismissal of the proceedings pursuant to r 13.4 of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR).

On the basis of incompetence, Bell P dismissed the appeal because no reasonable cause of action was disclosed (r 13.4 UCPR). Applying the principle in *Wishart v Fraser* (1941) 64 CLR 470; [1941] HCA 8, approved in *Jamal v Director of Public Prosecutions (NSW)* [2019] NSWCA 121, his Honour found that “the orders challenged by the plaintiff are no longer

operative, as they have been on one count, dismissed, and on the other, confirmed by the District Court” (at [29]). To proceed otherwise would cause an “extraordinary result ... of two orders in existence at the same time” (per Rich ACJ in *Wishart v Fraser* at 477). In addition, Bell P held that there is no relevant distinction between appeals pursuant to s 52 and 53 of the *CAR Act* in determining the competence of the appeal. Furthermore, sections 29 and 60 of the *CAR Act* do not alter the common law principle.

*Findings of fact – proper approach to challenge on appeal – (does “mistakes the facts” mean “makes a mistaken finding on the facts”?)*

In ***Hordern v R* [2019] NSWCCA 138**, the applicant pleaded guilty to indecently assaulting two young girls in circumstances of aggravation and breaching an extended supervision order. The primary judge made a finding of fact in relation to pre-planning of the offence which was challenged on appeal. The Court of Criminal Appeal (Basten JA, Hamill and Lonergan JJ) agreed that the finding of fact was not open to be made by the sentencing judge. There was, however, a discussion of the principles relevant to the proper approach to challenges to findings of fact on appeal.

Basten JA (with whom Hamill J specifically agreed) noted the differing views of the members of the Court on this issue. He noted that in his earlier judgment of *Clarke v R* [2015] NSWCCA 232 (again with the in principle agreement of Hamill J), he rejected the approach taken by previous authorities (including *O’Donoghue*) that “factual error can only be found where there is error of law or something very close to it” (at [6]). His Honour extracted the relevant points from his judgment in *Clarke v R*, in which it was said that such a “constrained approach” is not supported by authorities in *Kyriakou* (where appeal courts should examine issues of fact for themselves), *House v The King* (where appellable errors include a primary judge having “mistaken the facts”) and *Kentwell* (where the sentencing discretion miscarries if the judge “mistakes the facts or does not take into account some material consideration”). Basten JA then went on to provide additional points in support of the proposition that “if the court is satisfied that the sentencing judge made a mistake with respect to a particular factual finding, which was material to the exercise of the discretionary power, the court should identify error and then enter upon its own consideration of the appropriate sentence” (at [36] in *Clarke*).

First, Basten JA said that the jurisdiction of the Court comes from the *Criminal Appeal Act 1912* (NSW), in which s 6(3) does not constrain the grounds on which a court may intervene. Further, the Court is not limited to the evidence before the sentencing judge, but has the specific powers conferred in s 12(1). Second, the principles of statutory interpretation preclude an approach that implies limitations where they are not clearly manifested in the express words of the statute; particularly where such a limitation would restrict personal liberty. Third, it would be anomalous in view of the executive powers of the court to reconsider a sentence on the basis of factual error under Part 7 of the *Crimes (Appeal and Review) Act 2001* (NSW), that it could not do so under a conventional appeal in s 5(1) of the *Criminal Appeal Act 1912* (NSW). Fourth, the judgment of Barton ACJ in *Skinner v The King* (subsequently referred to with approval in *Lacey*, *Kentwell* and *Betts*), is authority for the proposition that “[t]o give weight to a fact not proved in evidence must be a material error” (at [13]). Fifth, and finally, Basten JA noted the approach in *O’Donoghue* followed *Kyriakou*, which the High Court had said “does not accurately

express the role of an appellate court when a challenge is made to such a finding of fact by a trial judge". Basten JA noted that other decisions have preferred the more constrained approach, but that those decisions could be distinguished because "none provides a reasoned justification for such a position by reference to principles of statutory interpretation or general law principles underlying the administration of criminal justice" (at [15]).

On this issue, Lonergan J declined to express a view on the principles on the basis that it was not necessary to decide in the circumstances of the case. Her Honour did, however, observe that at [90]:

"[90] Analyses by Simpson JA in *AB v R* [2014] NSWCCA 339 at [44]-[59] and Button J in *Turnbull v Chief Executive of the Office of the Environment and Heritage* [2015] NSWCCA 278 at [26]-[36] provide cogently reasoned support for the orthodox view."

OBSERVATIONS: The issue was discussed and decided by the majority of the Court without having been raised by the parties. *AB v R* [2014] NSWCCA 339, decided prior to *Clarke v R*, involved an applicant directly challenging the authority on this issue. The applicant and the Crown were each represented by senior counsel. Simpson JA provided a considered (and unanimous) decision in support of the longstanding authority.

Similarly, in *Turnbull v Chief Executive of the Office of Environment and Heritage* [2015] NSWCCA 278, decided after *Clarke v R*, Button J (Meagher JA agreeing, McCallum J declining to express a view) preferred the longstanding authority ("if it be the case that there is a real difference between the two formulations"). The five-judge bench in *Xiao v R* (2018) 96 NSWLR 1; [2018] NSWCCA 4 did not determine the issue, but said the preferable approach was one that is "consistent with the preponderance of authority in this Court".

## **BAIL**

*Construction of s 66(1) Bail Act 2013 (NSW) – power of Supreme Court to hear release application after granting detention application*

The applicant's release application in ***Decision Restricted* [2019] NSWCCA 31** came before the Court of Criminal Appeal (CCA) by a somewhat longwinded route. He had been charged with several offences and initially refused bail. His first bail application to the Local Court was refused, but the second was granted. Subsequently, the Supreme Court granted a detention application made by the prosecutor. The applicant then made a release application to the Supreme Court. In correspondence with the applicant's legal representatives, the Registrar raised a jurisdictional question under s 66(1) *Bail Act 2013* (NSW) in which the Court "may hear a release application for an offence if bail for the offence has been refused by *another* court ...". The most recent court to refuse bail was the Supreme Court itself; therefore, it would not have jurisdiction under s 66(1). As a result, the applicant filed a release application under s 67(2) to the Court of Criminal Appeal.

The Court refused the application on its merits. Basten JA considered the construction of s 66. His Honour found that “the operation of this provision is obscure in a critical respect”, and noted that the provision could be read in two ways. The strict reading means that as bail had been refused in another court (the Local Court), then the Supreme Court has jurisdiction, but with the consequence that s 74 – which provides rules for courts hearing multiple bail applications – did not apply. The alternative reading, which was in his Honour’s view more attractive, considered the condition in s 66 to be addressed to the cause of the current status of the bail-refused applicant. This alternative reading was, however, complicated because in this matter, it would deny the Supreme Court power to hear the application, as bail had last been refused by the Supreme Court and not another court. Basten JA declined to consider the matter further, noting finally that it would be desirable if the CCA’s jurisdiction under s 67(1)(e) to hear bail matters be infrequently invoked, as it might otherwise affect its swift discharge of appellate work.

*s 22 Bail Act 2013 – “special or exceptional circumstances” requirement applies where bail applicant pursuing an appeal against Crown appeal against sentence*

The applicant in ***HT v Direction of Public Prosecutions (NSW) [2019] NSWCCA 141*** was sentenced for dishonesty offences. A Crown appeal was upheld on the basis that the original sentence was inadequate. The applicant was then granted special leave to appeal to the High Court and made a release application to the Court of Criminal Appeal, pending the hearing and determination of the High Court appeal. The issue was whether s 22 of the *Bail Act 2013* (NSW) applied. Originally, the applicant’s written submissions addressed the ss 17-19 questions in relation to unacceptable risk. Later, the submissions in reply accepted that s 22 applied.

Hamill J (Bathurst CJ and Bell P agreeing) found that neither s 67 nor s 22 of the *Bail Act 2013* distinguishes between appeals brought by an offender or prosecuting authority. The requirement that the applicant had to meet was whether there were “special or exceptional circumstances” to justify a decision to grant bail. Hamill J went on to approach the application on the basis of the principles set out in *El-Hilli & Melville v R [2015] NSWCCA 146*. Further, his Honour set out some relevant considerations noting that s 22 is a “significant hurdle”; that s 22 incorporates the exhaustive list of unacceptable risk factors in s 18; that “special or exceptional circumstances” may involve a combination of features not necessarily including that the appeal is “certain” to succeed; that it is relevant if the appeal is “arguable or enjoys reasonable prospects of success” and whether the sentence is likely to expire prior to the appeal being determined. Hamill J also noted that while special leave – granted on the basis of “reasonable prospects of success” – does not mean that the appealed decision should be seen as “provisional”, it does give content to the concept of “special or exceptional circumstances”.

## **COSTS**

*Suitors’ Fund Act 1951 – unsuccessful respondent’s application for certificate refused for discretionary reasons*

A respondent was unsuccessful in a Crown appeal against a trial judge's ruling to exclude tendency evidence. The Court of Criminal Appeal had held that the trial judge had impermissibly relied on High Court transcripts of the arguments in *McPhillamy v The Queen* [2018] HCA 52 (at that time reserved) to make the ruling. The respondent subsequently made an application for a certificate under s 6 of the *Suitors' Fund Act 1951*. In ***Director of Public Prosecutions (NSW) v RDT (No 2)* [2019] NSWCCA 66**, it was held that while the Court had power to grant the application in the circumstances, it would not do so for discretionary reasons. Basten JA relied on *R v King* (2003) 59 NSWLR 472; [2003] NSWCCA 399 in which it was held that it has not been the practice of the Court of Criminal Appeal to grant certificates, and that this general rule should not be varied. His Honour held that because there was no fee agreement between the respondent and his lawyers, who did not expect to be paid, and where there was "nothing unusual or exceptional" about the facts of the case, the certificate should not be granted. To do otherwise, Basten JA held, "would not assist the respondent and would not establish a desirable precedent with respect to the administration of the criminal justice system".

## 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

*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 – 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 ***The Queen 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 ***The Queen 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”.

*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.

#### *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.

#### *Criminal Procedure Act 1986 (NSW), Ch 6, Pt 4B does not eliminate application of s 65 Evidence Act 1995 (NSW)*

In ***Director of Public Prosecutions (NSW) v Banks [2019] NSWSC 363***, a Magistrate excluded a recorded statement given by the complainant in a domestic violence matter because the complainant did not attend to give evidence and her unavailability for cross examination was regarded by the Magistrate to be procedurally unfair. The police prosecutor then sought to have the recorded statement admitted under s 65(2) *Evidence Act 1995* (NSW), however the Magistrate accepted the respondent's argument that this provision was overridden by Pt 4B of Ch 6 of the *Criminal Procedure Act 1986* (NSW) (*CPA*). The issue on appeal was the proper construction of s 289F(1), the operative provision in Pt 4B *CPA*. The plaintiff submitted that s 289F(1) only concerned "the form of evidence in chief by a complainant", and that s 65(2) of the *Evidence Act* continues to apply. The respondent submitted that s 289F(1) determined the circumstances in which such a statement could be tendered in evidence, to the exclusion of s 65(2) of the *Evidence Act*.

The appeal was upheld. Ierace J referred to *DPP v Al-Zuhairi* [2018] NSWCCA 151 in support of finding that s 289F is concerned only with the form of evidence. In addition, his Honour noted that s 289E preserves the application of the *Evidence Act*. With reference to the Second Reading Speech, Ierace J noted that the purpose of Pt 4B is to enable evidence of complainants in a different form, and that it contained nothing that supported the respondent's submission that it was intended to effectively eliminate the use of maker unavailable hearsay evidence. In addition, his Honour was wary of the illogical consequences of the construction submitted by the respondent, which would permit prior representations in *written* form, but exclude video or sound recordings. Finally, it was considered that the issue of unfairness could be addressed by existing *Evidence Act* provisions, such as the conditions in s 65(2), as well as ss 135 and 137.

## OFFENCES

### *“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 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.

OBSERVATION: It does not necessarily follow that the quashing of an aggregate sentence that follows the quashing of a conviction for one of the component offences will mean that the matter needs to be remitted to the original sentencing court: *JM v R [2014] NSWCCA 297* at [40](10).

### *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 to murder – 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.

*Perverting the course of justice contrary to s 319 Crimes Act 1900 (NSW) – elements of the statutory offence differ from the common law offence*

The appellant in ***Johnston v R [2019] NSWCCA 108*** was an off-duty police officer who, following a jury trial, had been convicted of an offence of doing an act intended to pervert the course of justice, contrary to s 319 of the *Crimes Act 1900* (NSW). After being pulled over for an RBT, the appellant dissuaded a probationary constable from administering a breath test by telling him that because they worked at the same station, to do so would involve a "conflict of interest". Ground 1 asserted that the trial judge had made an error of law because he had omitted an element of the offence – that the act or omission had a *tendency to pervert the course of justice* – from his directions to the jury.

The issue was whether a tendency to pervert the course of justice was an element of an offence contrary to s 319 of the Crimes Act. To begin with, Simpson AJA noted that the common law offence of perverting the course of justice had been abolished by s 341 of the *Crimes (Public Justice) Amendment Act 1990* (NSW), which also introduced the offence in question under s 319. Having regard to the deliberate omission of tendency from the statutory formulation of the offence, in a context where the drafters would have been aware of the history, inadequacies, and deficiencies of the common law regime, Simpson AJA rejected the appellant's contention that s 319 required proof that the relevant conduct has a tendency to pervert the course of justice. Notwithstanding that there are

some authorities against this view (including the three judgments in *R v Charles* (Court of Criminal Appeal (NSW), 23 March 1998, unrep) and *Beckett v R* (2015) 256 CLR 305; [2015] HCA 38 per Nettle J), Simpson AJA held that the approach of the plurality in *Beckett* (which were the terms which the trial judge used in his directions) should be followed. Therefore, tendency is not an element of the s 319 offence, and what must be proved is 1) that the accused did the act or omission, and 2) the accused had an intention to obstruct, prevent, pervert or defeat the course of justice.

*Aggravated break and enter and commit serious indictable offence – “break” in s 112 Crimes Act 1900 encompasses constructive breaking at common law*

In ***Singh v R* [2019] NSWCCA 110**, an appeal against conviction for aggravated break and enter and commit serious indictable was dismissed. The applicant had pleaded guilty to knocking on the door of a residence occupied by the 95 year old victim, then when the door was opened, pushing the victim inside onto a milk crate and robbing him of \$6,250 in cash.

A ground of appeal asserted that as the applicant had not committed an actual break on the basis of the agreed facts, the charge was not supported causing a miscarriage of justice. This ground was withdrawn by counsel for the applicant at the start of the hearing. The basis for this decision was, as Payne JA discussed, in the face of the fact that it is well settled that s 112 of the *Crimes Act 1900* (NSW) uses “break” in the same sense as used at common law. “Break” encompasses “constructive breaking”, which includes the circumstances set out in the agreed facts: that is, “to knock at a door of a house with intent to rob its occupants and, upon the door being opened, to rush into the house”. Payne JA noted that the rationale for a concept of “constructive break” at common law is because “the law will not suffer itself to be trifled with” (at [31]).

*Perjury – whether principle of incontrovertibility applied to prosecution of a perjury charge related to evidence given in earlier trial resulting in an acquittal*

The applicant was acquitted of offences in the Local Court. Evidence later emerged which led to the applicant being charged with four further offences, including a perjury charge related to his allegedly false evidence in the Local Court proceedings. Relevantly, the evidence the subject of the perjury charge was material but not determinative of the acquittal. The applicant filed a notice of motion for a permanent stay of the perjury charge on the basis that by the charge, the Crown was seeking to controvert the applicant’s acquittal. In ***Decision Restricted* [2019] NSWCCA 124**, Macfarlan JA (Harrison and Hamill JJ agreeing with additional reasons) granted leave pursuant to s 5F(3)(a) *Criminal Appeal Act 1912* (NSW), but dismissed the appeal. The applicant contended that there had been error in not asking “whether the perjury charge, or the evidence called in support of it, would “call into question” or “tend to overturn” the applicant’s acquittal”, following Barwick CJ in *Garrett v The Queen* (1977) 139 CLR 437 at 445; [1977] HCA 67. The additional issue was “that the primary judge erred in rejecting the applicant’s submission that ‘the findings of the magistrate ... are inextricably linked to the acquittal

such that to relitigate those findings constitutes an abuse of the process of the District Court”.

In dismissing both grounds, Macfarlan JA first reviewed the principles relevant to the issue, holding that the “extended principle” stated by Barwick CJ in *Garrett* was not authoritative. Second, his Honour held that even if it were to be accepted as authoritative, when applied to the facts, the principle does not assist the applicant because at its highest, the “perjury charge might cause a reasonable person to wonder or even doubt whether the earlier acquittal was correct”. The impeachment of “material, but not necessarily decisive evidence” is not sufficient to attract the incontrovertibility principle. It follows then, as his Honour held, that proceeding on the charge and adducing the relevant evidence would not be an abuse of process. Harrison J agreed, stating also that while the evidence in the perjury charge contradicted the earlier evidence, it did not necessarily contradict the acquittal because the acquittal “did not depend solely or even importantly upon what is now alleged to be his untruthful evidence”. Hamill J also agreed with Macfarlan JA and Harrison J’s additional comments. His Honour said that while there was a factual connection between the Local Court evidence and the perjury charge, “that evidence neither disproved an element of the offence nor proved to be critical to the Magistrate’s reasoning” – thus not attracting the principle of incontrovertibility nor the general principle of double jeopardy. Hamill J also emphasised that a permanent stay of proceedings “is an exceptional remedy granted only in extreme cases”.

## **PRACTICE AND PROCEDURE**

*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”.

*Non-publication orders – desirability of acting quickly and parties’ obligation to assist the Court*

The applicant was heard in the Court of Criminal Appeal on 26 September 2018, judgment allowing the appeal and remitting the matter for resentence in the District Court was handed down on 21 November 2018, but the Court was only alerted to non-publication and suppression order issues involving the applicant on 18 December 2018. Subsequently, the published judgment was taken down from Caselaw and a relevant Notice of Motion filed on 25 January 2019. On 31 January 2019, Culver DCJ resentedenced the applicant and imposed non-publication and suppression orders. In ***Darren Brown (a pseudonym) v R (No 2) [2019] NSWCCA 69***, the Court of Criminal Appeal asserted that the kind of practice at the NSW Police and DPP which led to this matter’s particular procedural history should not happen again. The Court emphasized that it relies on the parties to bring applications for non-publication or suppression orders as well as relevant lower court orders or decisions to its attention prior to or at the hearing. The Court expressed concern as to the way Culver DCJ was placed in the “invidious” position of making orders affecting the present matter heard in the Court of Criminal Appeal, as well as the fact that the parties did not alert the Court to the fact that her Honour’s orders had been made.

*Discharge of juror – considerations relevant to whether to discharge balance of jury or continue trial*

On the second day of the trial in ***R v Khan (No 5) [2019] NSWSC 56***, a juror provided the trial judge with a medical certificate indicating unfitness for jury duty due to anxiety and depression. This occurred despite the trial judge having given the usual direction to the jury panel to bring any matter to his attention which would affect their ability to act as a jury member. With some frustration, the trial judge discharged the juror, and then continued to consider the question of whether to continue with eleven jurors or discharge the balance of the jury. Bellew J noted that the *Jury Act 1977* (NSW) reflected the right of a person to a trial by a jury of twelve persons, referring to *R v Wu* (1998) 103 A Crim R 416 in support of this proposition. On this basis the judge said that the s 53C power to discharge the rest of the jury should be exercised.

OBSERVATION: his Honour’s observations need to be treated carefully because *R v Wu* (and *Wu v The Queen* (1999) 199 CLR 99; [1999] HCA 52) were decided prior to the 2008 amendment to the *Jury Act*, which requires a trial judge to consider the question of whether continuing with a reduced jury would risk a “substantial miscarriage of justice”.

*Magistrate’s duty to give reasons and consider s 10 procedure continues even if defendant is absent*

The applicant in ***Hayes v Office of the Director of Public Prosecutions [2019] NSWSC 378*** was caught with a small amount of cocaine in Barangaroo. He elected to lodge a written plea of guilty under s 182 *Criminal Procedure Act* and sought leniency. He did not appear in court when the matter was mentioned. The Magistrate adjourned the matter saying that if the applicant wanted leniency then he would have to appear in court. A Registrar failed to mention to the applicant that he had the opportunity of being afforded leniency if he appeared in court. When the matter was heard, a different Magistrate noted the applicant's absence, then convicted and fined him \$250 without providing reasons. This decision was appealed to the Supreme Court.

Campbell J allowed the appeal and remitted the matter to the Local Court. Referring to Bellew J's judgment in *Roylance v Director of Public Prosecutions [2018] NSWSC 933*, his Honour reiterated that it is the duty of a magistrate to give reasons; "succinct reasons" can be given, but they need to meet a certain "legal standard". Here, the Magistrate's decision to convict and fine without more did not "engage with the issues put forward for determination by the parties and explain, shortly, why a decision is made one way rather than the other". Furthermore, Campbell J noted that reading the provisions of the *Criminal Procedure Act 1986* (NSW) together in its context requires the Court to consider the issue of whether a conviction should be recorded, even if that person has lodged a written plea through the s 182 procedure. For that reason, his Honour noted that the Local Court "practice" of not considering s 10 in the physical absence of a defendant – despite the fact that they are "taken" to have attended by way of s 182(3) – should no longer be followed.

*No miscarriage of justice – irregular provision to jury of a prior recording of complainant's evidence*

In a retrial following a successful conviction appeal, the Crown tendered a recording of the complainant's evidence in the first trial as an exhibit. The trial judge later acceded to the jury's request for access to the DVD during their deliberations. A ground of the further (unsuccessful) conviction appeal in ***AB (a pseudonym) v R [2019] NSWCCA 82*** was that the trial judge erred in providing the jury with the DVD in an unsupervised and unrestricted form.

Macfarlan JA noted that it was an error for the complainant's recorded evidence to be marked as an exhibit, and its default availability for the jury's deliberations. The judge took the wrong considerations into account. Rather, the correct approach should have been that it will "seldom, if ever" be appropriate to permit a jury unrestricted access to evidence in this form. His Honour referred to *CF v R [2017] NSWCCA 318*, handed down after the events of the second trial, in support of this proposition. Despite the irregularity, Macfarlan JA did not consider that it had caused a miscarriage of justice because the issue of disproportionate weight was negated by the fact that the applicant had not called evidence, the fact that the DVD contained the complainant's evidence-in-chief and cross-examination, and that the fact in issue in the trial was the complainant's credibility which had been adequately dealt with in address by the Crown Prosecutor and Defence, as well as in the trial judge's summing up. There was therefore no miscarriage of justice; and in

particular, no issue in relation to the unbalanced consideration of evidence (with his Honour referring to *Gately v The Queen* (2007) 232 CLR 208; [2007] HCA 55).

#### *Disqualification of license removal orders – importance of giving adequate reasons*

In ***Roads and Maritime Services v Farrell* [2019] NSWSC 552**, Roads and Maritime Services (RMS) brought six cases in which it asserted that the Local Court did not have jurisdiction to entertain applications purportedly brought under a scheme contained in Ch 7, Pt 7.4, Div 3A of *Road Transport Act 2013* (NSW), in which certain eligible disqualified drivers could apply to have disqualification periods removed under s 221B. The applicants in the six cases identified by the RMS in these proceedings were ineligible either because they had a certain serious offence on their record or because they had not served out the relevant offence-free period.

One of the issues in each of the six separate matters giving rise to Schmidt J's decision to quash the orders was that the magistrates had given inadequate reasons for the making of the orders. Referring to *DL v The Queen* [2018] HCA 26, her Honour noted that reasons will be inadequate "if a necessary step to the final conclusion is not explained". Because it is "an incident of the judicial process" (referring to *Housing Commission (NSW) v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 per Mahoney JA), this duty arises even when an application is uncontested. In relation to a s 221B application, Schmidt J held that a magistrate's reasons must include the basis of satisfaction of the Local Court's jurisdiction, consideration of the mandatory considerations under s 221B(2), and an explanation of why the Court's discretion has been exercised in the particular circumstance.

#### *Doli incapax – nature of evidence capable of rebutting the presumption*

In ***BC v R* [2019] NSWCCA 111**, the applicant was found guilty at trial of 20 counts of child sexual assault committed between 1994 and 2011 against four different complainants. Ground 1 on appeal asserted that the verdicts in relation to counts 1-3 (which occurred when the applicant was aged about 12) were unreasonable on the basis that the Crown had not rebutted the presumption of *doli incapax*.

In its consideration of the issues, the Court relied on the recent decision of the High Court in *RP v The Queen* (2016) 259 CLR 641; [2016] HCA 53. In that case, the joint judgment of Kiefel, Bell, Keane and Gordon JJ affirmed that the principle presumes that a child under 14 "is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong and thus lacks the capacity for mens rea", but that this presumption can be rebutted by "evidence that the child knew that it was morally wrong to engage in the conduct" (or "seriously wrong" or "gravely wrong") as distinguished from an "awareness that his or her conduct is merely naughty or mischievous". As to the quality or nature of the evidence which would satisfy this, the members of the joint judgment favoured adducing "evidence of the child's education and the environment in which the child has been raised" (at [9]), while in a separate judgement Gageler J said that the

presumption could be rebutted with evidence of “circumstances of the acts that constituted the offence” (at [41]).

The Crown in the present case sought to rely on three matters – the age of the complainant, the applicant’s reaction when he heard the adult come home, and the applicant’s warning to the complainant not to say anything otherwise the complainant would get in trouble – as evidence of the “circumstances of the acts that constituted the offence”. The Court rejected the first matter on the basis that the relevant age between the complainant and applicant reveals nothing in the absence of evidence as to the applicant’s contemporaneous maturity; the second matter because it was not probative to whether the applicant knew that it was “seriously wrong” as opposed to “naughty or mischievous”; and the final matter because it was insufficient to satisfy a jury beyond reasonable doubt that the presumption could be rebutted. It was held that the Crown had failed to rebut the presumption of *doli incapax*.

## **SENTENCING – GENERAL ISSUES**

### *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 below). 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.

NOTE: This decision has been considered in *R v Fangaloka* [2019] NSWCCA 173 (see below).

*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 *Muldock 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).

*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.

*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] NSWCCA 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*

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

An 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, 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.

*“Conditional liberty” – encompasses being “at large” after parole is revoked*

All of the domestic violence offences for which an offender was sentenced occurred at a time when he was “at large” in the community after his parole was revoked, with some offences committed prior to the date at which his sentence was due to expire and the balance committed afterwards. The operation of s 171(4) of the *Crimes (Administration of Sentences) Act 1999* means that a person's sentence is extended by the number of days at large if they are not taken back into custody on the day their parole is revoked. In sentencing the applicant, the sentencing judge took into account the fact that the applicant was at “conditional liberty”, namely parole (which was a mistake because he was in fact “at large”), when assessing the objective seriousness of one of the offences, and also when he was explaining the individual sentences and principle of totality. The applicant in ***Turnbull v R* [2019] NSWCCA 97** relied on two grounds of appeal in relation to this issue.

The Crown conceded Ground 1. Simpson AJA (with whom Ierace J agreed, Wilson J dissenting on this point) accepted this concession, explaining that the trial judge erred in taking account of the applicant's conditional liberty status as a factor aggravating the objective seriousness of one of the offences, because personal circumstances are not relevant at this stage. Ground 2 was a broader ground directed at the sentencing judge's error in saying that the applicant was on parole. Simpson AJA accepted this mistake, but noted that it doesn't necessarily follow that the applicant was not "on conditional liberty" for the purposes of s 21A(2)(j); the phrase is not defined in the section and has a broad meaning. Simpson AJA held that it was open to the sentencing judge to take account of the applicant's conditional liberty status (even if its nature was mistaken). Her Honour found that the error was not established because it did not make a material difference to the outcome; in fact, it may be against the applicant's interests because the commission of offences at large as opposed to on parole is arguably more serious.

*Section 23 Crimes (Sentencing Procedure) Act 1999 – assistance to law enforcement authorities includes admissions to police*

The applicant in **Howard v R [2019] NSWCCA 109** was part of a confrontation between two gangs at a railway station. He was charged with throwing a Molotov Cocktail with intent to burn a unidentified person, contrary to s 47 *Crimes Act 1900*. Upon arrest, he made admissions to police. At sentencing, submissions were made that account should be taken of the "full and frank admissions in the interview to police about his role". The judge said that that "he still gets the benefit of those admissions" despite earlier saying that police had strong evidence implicating the applicant in the form of CCTV footage. Following a 25% discount for his guilty plea, the applicant was sentenced to 9 years, 6 months with a non-parole period of 6 years.

A ground of appeal asserted that the judge erred by not having regard to the applicant's admissions. In the course of rejecting this ground, Bellew J (with whom Fullerton J and Macfarlan JA agreed on this point) said that admissions to police constituted assistance of the kind contemplated by s 23 of the *Crimes (Sentencing Procedure) Act 1999*. However, His Honour noted that a difficulty was that submissions on his point were never made before the sentencing judge. In addition, Bellew J disagreed that the admissions were pivotal to the prosecution's case because of the existence of, in his Honour's view, compelling and unequivocal CCTV footage. The appeal was ultimately allowed by majority (Fullerton J and Macfarlan JA agreeing, Bellew J dissenting) on the basis of that the sentence imposed was manifestly excessive.

OBSERVATION: The proposition that an offender's admissions to police falls within the concept of assistance to law enforcement for the purposes of s 23 was not supported by any citation of authorities, and there is no known precedent for this approach (apart from admissions of unknown guilt, as considered in *CMB v Attorney General (NSW)* (2015) 256 CLR 346). The potential effect of this decision is to open up a new area of dispute in sentencing at first instance and on appeal – where assistance to authorities may permit a quantified reduction on sentence by way of s 23. In a subsequent judgment of a differently constituted bench, the Court held that an offender's admissions to police upon arrest did

not constitute assistance to authorities within s 23: **Le v Regina** [2019] NSWCCA 181 at [54] (N Adams J, Bathurst CJ and Price J agreeing).

*Sentencing – the requirement to give reasons*

An offender committed offences of aggravated sexual assault in January 2002. The offences were reported but he was not identified as the offender until 2015. He was sentenced in 2018. He had been sentenced in 2002 and 2003 for similar serious sexual assaults committed a year before and a month after the incident in question. One of the grounds of appeal in **Porter v R** [2019] NSWCCA 117 was that the judge erred in his approach to the principle of totality. Other grounds alleged failures to make determinations on the applicant’s prospect of rehabilitation and likelihood of reoffending.

The grounds of appeal were upheld but the appeal was dismissed on the basis that no lesser sentence was warranted. Error in relation to each ground was based upon the primary judge’s lack of reasoning; each issue having been raised during submissions on sentence. At [67], R A Hulme J said that the appeal could have been avoided if “the primary judge had not just simply adverted to the issues to some relevant case law and legislative requirements. The judge should have provided some insight into his determination. The accused and the community are “entitled to know *why* a judge had determined to imprison the person and *how* a particular period of imprisonment has been assessed”.

*Form 1 matters – correct approach is to take Form 1 matters into account prior to discounting the sentence term for a plea of guilty*

A judge took account offences listed on a Form 1 in the following way: “in respect of the supply prohibited drug, I impose a head sentence of 14 years from which I take 25% for the plea of guilty and to that I add one year which is to represent the matters on the Form 1 document”. An appeal was upheld in **Huang v R** [2019] NSWCCA 144. Bell P said that Form 1 matters are not to be taken account of as a “separate sentencing exercise”. The 25% discount for the early guilty pleas should have been applied following the taking to account of the Form 1 matters, rather than before it.

*Bugmy principles – no discretion not to apply principles where a finding of a background of social deprivation is established*

In **R v Irwin** [2019] NSWCCA 133, the Court of Criminal Appeal (Walton J, Simpson AJA and Adamson J agreeing) allowed a Crown appeal and increased the sentence in question. However, in doing so the Court noted that the primary judge had made an error which favoured the offender in the reassessment of sentence. The error was to decline to “apply the *Bugmy* principles and reduce [the] offender’s moral culpabilities”. Simpson AJA, held that the primary judge was in error because “[a]pplication of the *Bugmy* principles is not discretionary”. Walton J held that the primary judge’s findings in relation to the absence of a link between the respondent’s upbringing and the nature of his offending, or the fact

that “the circumstances are not so compelling as to be a relevant factor” were not adequately explained. His Honour considered that they were clearly erroneous findings to be made in light of the expert evidence which established the respondent’s background of social deprivation. His Honour also considered that it was open on the evidence to establish a causal connection (or at least a contribution) to the offending.

*Bugmy principles – not inconsistent to make finding of disadvantaged background and also give weight to specific and general deterrence*

An offender pleaded guilty and was sentenced for various sexual assault offences against a 4 year old girl. ON appeal he contended that the sentencing judge erred by not applying the *Bugmy* principles: **BT v R [2019] NSWCCA 147**.

It was submitted that the judge’s finding that he had a “dysfunctional upbringing and, with it, a reduced moral culpability for his offending” was later negated by the finding that “considerations of both specific and general deterrence are fully engaged”. Hidden AJ rejected this, holding “there is no inconsistency between his Honour’s finding that the applicant’s background raised a *Bugmy* issue, on the one hand, and that weight should be given to specific and general deterrence, on the other”. Rather, his Honour held that background is “one of a number of competing sentencing considerations”. It was therefore “open” for specific and general deterrence to be reflected in the sentence.

*ICO sentencing scheme reforms – clarification of principles*

In **R v Fangaloka [2019] NSWCCA 173**, the Crown appealed the sentence imposed on Mr Fangaloka in the District Court. He had received 2 years imprisonment for the offence of robbery in company and 12 months for assault occasioning actual bodily harm, to be served concurrently and by way of intensive correction order. The Court of Criminal Appeal found that the sentencing judge had made factual sentencing errors, and had imposed a sentence that was manifestly inadequate. Despite the findings of error, the Court had to consider whether to exercise its discretion to intervene. The Court favoured intervention on the basis of an important issue of principle that arose in relation to the imposition of the intensive correction order – specifically, whether the District Court judge was correct in her approach to the 2018 amendments to the statutory scheme for ICOs in Pt 5 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA). The issue was if a judge considers the imposition of an ICO, whether this immediately renders the purposes of sentencing set out in s 3A “subordinate” because of the operation of s 66.

Basten JA considered the earlier decision of *R v Pullen* [2018] NSWCCA 264 (discussed above), in which the sentencing judge said that he was obliged to consider the appropriateness of an ICO in circumstances where the sentence was less than two years, and applied s 66 on the basis that community safety was the paramount consideration. However, Basten JA held that the *R v Pullen* approach to ICOs was not supported by the statute. This was so first because this would mean that the Local Court would be required to consider imposing an ICO in every case where it was determined that imprisonment was

appropriate, and second because the effect would be that as soon as a court gives consideration to making an ICO, the broader considerations that would have fed into the issue of whether there is no alternative to a sentence of imprisonment would be reduced to a subordinate role, which Basten JA considered was an inflexible and artificial result. Instead, Basten JA held (Johnson and Price JJ agreeing):

“[t]he paramount consideration in considering whether to make an ICO is the assessment of whether such an order, or fulltime detention, is more likely to address the offender’s risk of reoffending. That is, unless a favourable opinion is reached in making that assessment, an ICO should not be imposed. At the same time, the other purposes of sentencing must all be considered and given due weight.”

Of the other purposes of sentencing, Basten JA held that the most fundamental is whether an ICO reflects the imposition of an adequate punishment proportionate to the offending, which is not displaced by the 2018 amendments. His Honour held that s 66(1) identifies community safety as a mandatory element for consideration in relation to the risk of reoffending. The s 3A purposes expressly identified by s 66(3) are similarly mandatory – not subordinate to s 66(1). Applied to the present circumstances, Basten JA held that fulltime imprisonment was required because there was no finding that imprisonment would not adversely affect the offender’s advances in rehabilitation. In other words, “in assessing ‘community safety’ there was no evidence to support the view that one form of imprisonment was more likely to reduce the risk of reoffending than another”. The offender was resentenced to 2 years 6 months imprisonment with a non-parole period of 20 months.

## **SENTENCING - SPECIFIC OFFENCES**

### *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.

#### *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 resented to an aggregate term of 3 years' imprisonment to be served by way of ICO.

*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. R A Hulme J 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 offence (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”.

*Procure a person under 16 to engage in sexual activity – not all cases involve “grooming”*

In ***Clarke-Jeffries v R* [2019] NSWCCA 56**, the applicant had pleaded guilty to Commonwealth Criminal Code offences of using a carriage service to procure a person under the age of 16 years to engage in sexual activity (s 474.26(1)) and using a carriage service to solicit child pornography material (s 474.19(1)(a)(iv)) and a State offence of making an unwarranted demand with menaces with the intention of making a gain (s *Crimes Act*, 249K(1)(a)). The offending concerned the 18-year-old applicant and 15-year-old victim exchanging thousands of messages in which he her to send him naked photographs (which she sent), and to meet with him to have sex. He also sent messages detailing the explicit sexual acts he wanted to engage in, and used his possession of the photographs as a threat in order to demand money from her.

The appeal against a 4 year sentence was allowed. Bellew J noted that in sentencing, there was “displacement” between the judge’s positive findings in relation to the applicant’s youth, the victim’s age and the applicant’s mental state, and the ultimate sentences imposed. The judge should have found that the applicant’s immaturity materially contributed to the offences, thereby lessening their criminality; that the case did not involve the grooming of a younger victim by a mature person; and the applicant’s mental state meant he was an inappropriate vehicle for general deterrence. The cases relied upon by the Crown for the proposition that the sentence was not manifestly excessive each involved far more serious offending.

*Possess loaded firearm in a public place – non-criminal purpose of self-protection reduces gravity of offending*

The applicant in ***Sumrein v R* [2019] NSWCCA 83** was arrested by police in Redfern after he had alighted from a car and ran, attempting to hide a fully loaded Ruger .357 magnum pistol behind a car tyre while fleeing. It was contended that the sentencing judge erred in the assessment of the objective seriousness of the offence. The appeal was allowed and the sentence reduced with the effect that the applicant was immediately released.

Hidden AJ (Ierace J agreeing, with Leeming JA agreeing overall, although not expressing a view on a certain point) held that the sentencing judge had erred in characterising the absence of a common feature of such offending – possession in connection with a criminal enterprise – as being “of minor consequence”. In addition, he held that the failure to take the applicant’s motive of self and family protection (there was evidence that the applicant’s home had recently been the subject of a drive-by shooting) should have been taken into account, despite a concession by senior counsel during sentencing that it was not a mitigating factor. His Honour said that the fact that the applicant was motivated by fear was relevant to the offence’s objective gravity and moral culpability; although it was considered that the risks of carrying a firearm involved a real danger to the public.

*Offences contrary to s 66EB(2) and (2A) of the Crimes Act 1900 (NSW) – accumulation required to reflect totality of criminality*

The applicant in ***Miliner v R* [2019] NSWCCA 127** sent messages to a mother who he believed had an 11 year old daughter. The “mother” was actually an undercover police officer and the “daughter” was fictitious. The messages contained details of graphic sexual acts he wanted to engage in with the “mother” and “daughter”. After five months of messaging, the applicant then attempted to meet them for the purpose of engaging in unlawful sexual activity. Upon arrival, he was arrested by police. The applicant pleaded guilty to two offences contrary to the *Crimes Act 1900*, ss 66EB(2) and 66EB(2A).

On appeal it was contended that the level of accumulation of the sentences was erroneous and the total sentence was manifestly excessive having regard to the totality of criminality. N Adams J noted that although the facts overlapped between counts 1 and 2, there was no double-counting error with respect to the element of “grooming”. The primary judge did not err in accumulating the sentence for the offences which arose from an “ongoing episode of criminality with common factors”, because her Honour was “not satisfied that the criminality of each offence comprehends and reflects the criminality of the other”. N Adams J did, however, find that the degree of accumulation was excessive having regard to the principles of accumulation and concurrence, the fact that the police had encouraged messaging through the fantasy website, the common factors between the counts, the ongoing course of conduct, and the single “victim”. The degree of accumulation was reduced from 2 years to 1 year, the overall sentence being 7 years with 4 years NPP.

*Child sexual assault offences – assessment of objective gravity*

A four year old boy was sexually assaulted on two occasions by his father (the applicant), once involving penile penetration of the boy's mouth and once involving penile penetration of the boy's anus causing bleeding. Following a trial, the applicant was convicted of two counts of aggravated sexual intercourse with a child under the age of ten years. The applicant received a sentence of 30 years with a non-parole period of 22 years, 6 months. In *Gibbons (a pseudonym) v R* [2019] NSWCCA 150, Simpson AJA (Loneragan J agreeing, Button J dissenting), dismissed the applicant's appeal against the severity of the sentence. One of the issues on appeal raised by the applicant was to do with the primary judge's assessment of objective seriousness.

One error asserted was that the primary judge characterised the offence as "objectively within the most serious category of offending". The applicant relied on *The Queen v Kilic* (2016) 259 CLR 256; [2016] HCA 48 where the High Court warned against describing an offence as "within the worst category" if it does not warrant the maximum prescribed penalty. Simpson AJA rejected this, finding that the primary judge did not make a characterisation "akin" to a finding of "worst category", but that she was placing the offence on a scale of objective gravity as she was obliged to do. Even if it was a "worst category" finding, it did not lead to any error because, as Simpson AJA held, "[t]he ultimate findings made by the sentencing judge were well within the boundaries available to her".

The second asserted error concerned the placement of the offences on a scale of objective gravity. It was said for the applicant that the absence of aggravating factors made the offence less serious. Simpson AJA cited authorities when rejecting this, including Grove J in *Saddler v R* [2009] NSWCCA 83; (2009) 194 A Crim R 452 who said at [3]: "it does not make what has been done by an offender less serious because it could have been worse".

Relying on *MRW v R* [2011] NSWCCA 260, the applicant also submitted that the primary judge gave undue weight to "abuse of trust" when an element of the offence was that the victim was "under the authority" of the applicant. Simpson AJA rejected this as well, finding that the primary judge used the term to evaluate the magnitude of the abuse of authority in this case – which was constituted by the "trust" between a parent and child.

## 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<sup>2</sup> 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

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

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 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*

In ***Decision Restricted* [2018] NSWCCA 299**, the jury found the applicant guilty of two sexual assault offences. One of the grounds of appeal was that the trial judge's summing up was unbalanced because he 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."

*Leaving alternate verdicts to the jury – error if judge fails to leave manslaughter where such a verdict is open on the evidence*

A man was discovered lying in a driveway with fatal stab wounds. Two men were charged with murder. From the nature of the stabbing, it was evident that there was an intention to kill or inflict grievous bodily harm upon the deceased, but there was no decisive evidence as to which accused did the stabbing. Each contended that he was not directly present when it occurred. The way in which the evidence in the Crown case was put to the jury was that each accused was liable by way of a joint criminal enterprise to inflict GBH or kill the deceased. The trial judge left manslaughter to the jury only on the possibility that the stabbing was an unlawful and dangerous act, but that the person who was responsible "did not intend to kill or really seriously injure [the deceased], maybe because of intoxication". The jury returned verdicts of murder for both accused. Their appeals against conviction were upheld: ***Decision Restricted v R* [2019] NSWCCA 153.**

A ground of appeal was that the trial judge erred by "failing to leave to the jury the possibility of an alternative verdict of manslaughter on the basis of a joint criminal

enterprise involving an agreement falling short of intentional infliction of grievous bodily harm". After a thorough review of the authorities and principles relevant to the issue, Macfarlan JA held that a verdict of manslaughter should be left to the jury if it is "reasonably open on the evidence"; that the Crown on appeal cannot use the jury's verdict of murder as a basis to refute a ground of appeal of this type; the trial judge has a duty to leave the verdict of manslaughter even if the accused's counsel fails to make a request; and that an appeal of this type is not precluded by the fact that manslaughter was left on one particular basis if the contention is that it should have been left on another basis.

His Honour was not convinced that "it was not open to the jury to conclude that the Crown had not excluded as a reasonable possibility that any agreement between [the accused] was for the infliction of a lower level of violence on [the deceased] than grievous bodily harm". This meant that the verdict of manslaughter on this wider basis was open on the evidence and should have been left to the jury.

*"Edwards direction" – fundamental error not to give full jury direction to clarify the use of consciousness of guilt evidence*

Also in that case (***Decision Restricted [2019] NSWCCA 153***) the Crown-led evidence from a witness that one of the accused had threatened her, telling her that she should not tell anyone what she had seen. The trial judge referred to this evidence in her summing up, saying that it could be used as evidence that the accused "had a consciousness of his own guilt at that time in relation to the events". She declined the Crown's request to give a fuller *Edwards* direction. This ground was upheld as well.

Macfarlan JA concluded that "[w]hilst *Zoneff* makes it clear that there is no rigid rule as to when and in what terms directions of the type described in *Edwards* should be given, the general position established by *Edwards* and subsequent cases is that, in the absence of reasons to do otherwise, those directions should be given". His Honour rejected the Crown's submissions that "the direction 'would simply have emphasised the suggested threat'", finding it to be an insufficient reason not to have given the direction. His Honour considered that there were a number of features justifying a full *Edwards* direction; particularly that without a direction, the jury may have impermissibly reasoned from the threat to a finding of guilt without regard for which offences the threats related to, or whether there were innocent explanations for the threat.