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# Significant Developments in Criminal Law

The Honourable Justice R A Hulme  
8 March 2014

## CONTENTS

SCOPE OF PAPER.....	5
APPEALS.....	5
One indictment, one jury, one appeal.....	5
Whether a conviction appeal may be heard on behalf of a deceased offender.....	5
Events subsequent to sentence increasing the significance of mitigating facts.....	6
Misconduct of counsel sufficient to cause a miscarriage of justice.....	6
The principle of finality as a bar to out-of-time Muldrock appeals.....	6
Whether the facts found by a trial court support the legal description given to them by the trial court is a question of law.....	7
Principles applicable to extension of time to appeal.....	7
Refusal to listen to summing up where transcript is uncontested.....	8
Finality principle does not preclude an application under s 78 Crimes (Appeal and Review) Act 2001.....	8
Sufficiency of reasons by appellate court in unreasonable verdict appeal.....	9
Post-conviction admissions may influence issue of retrial or acquittal.....	9
EVIDENCE.....	10
Contemporaneous statements and the presumption of continuance.....	10
Prohibition on cross-examination on credit where based on evidence with little probative value.....	10
Probative value of evidence in relation to s 137.....	10
Relevance of risk of contamination to tendency evidence.....	12
Whether cross examination of accused as to veracity of witness accounts permissible.....	12
Using DNA evidence where analysis reveals relatively common profile.....	12
Expert evidence on shared anatomical features between persons.....	13
Evidence of sexual interest in child sex offence cases requires tendency directions.....	13
Admissibility of prior inconsistent statement as evidence in its own right.....	14
DEFENCES.....	14
Excessive-self defence raised in charge for contract killing.....	14
LEGISLATION.....	15
Road Transport Act 2013 No 18.....	15
Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013 No 78.....	15
Firearms and Criminal Groups Legislation Amendment Act 2013 No 74.....	16
Law Enforcement (Powers and Responsibilities) Amendment (Arrest without Warrant) Act 2013 No 98..	16
Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014 No 2.....	17
Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2013 No 110.....	17
Bail Act 2013 No 26.....	17
MENTAL HEALTH.....	18
Reasons for dismissal under s 32 Mental Health (Forensic Provisions) Act 1990.....	18
Power of Mental Health Review Tribunal to make directions contrary to conditions of release imposed by judge on a person found not guilty by reason of mental illness.....	18
OFFENCES.....	19
Is spitting on a bench “damaging property”?.....	19
Intent to cause harm and “reckless wounding”.....	19
One “demand” may satisfy multiple offences of demand money with menaces.....	19
Dangerous navigation occasioning death: what does “navigate” mean?.....	20
What is “waste” for the offence of unlawful transport of waste.....	20
Knowledge of destination as element of offence of aggravated people smuggling.....	21
Part 9.1 of the Criminal Code Act 1995 (Cth) does not cover the field in regards to supply.....	21

Section 25(2) of the Drug Misuse and Trafficking Act can operate concurrently with s 233B of the Customs Act .....	22
Mens rea for reckless wounding in company by joint criminal enterprise.....	22
Where multiple traffic offences charged, withdrawal of one does not void licence suspension.....	23
Consent to surgery in a medical assault case .....	23
PRACTICE AND PROCEDURE .....	23
Whether availability of Crime Commission transcripts results in fundamental defect in trial for related offences .....	23
Unlawful disclosure of evidence given before NSW Crime Commission before trial for related offences ..	24
Duplicity .....	24
Application for judge-alone trial on basis of “revolting” facts.....	25
Whether ex officio indictment filed after Local Court refuses leave to proceed on indictment is an abuse of process .....	25
Failure to answer outstanding question from jury before delivery of verdict.....	26
Appearance of pregnant prosecution witness by AVL not “unfair” to accused .....	26
Inadequately particularised charges of aggravated sexual assault .....	27
Legislative change did not affect conviction.....	27
District Court has no power to order costs on the setting aside a subpoena.....	28
Undesirable for prosecutor to frame address as questions to be answered by defence .....	28
SENTENCING – GENERAL ISSUES .....	28
Correct calculation of discount for assistance to authorities .....	28
Illicit drug dependence and moral culpability .....	29
Self-induced intoxication and violent offences.....	29
More onerous imprisonment as consequence of assisting authorities.....	29
Hardship to third parties not to be considered unless “exceptional circumstances” present .....	30
Erroneous assessment of objective gravity by reference to Local Court’s jurisdictional limit .....	30
Failing to warn that uncontested evidence will not be accepted amounts to procedural unfairness .....	31
No tinkering with sentences imposed in the District Court.....	31
Form 1 offences and the primary sentence.....	31
“One punch” assaults and drunken violence .....	32
Reflecting Form 1 offences in aggregate sentencing.....	32
Parity does not assist the Crown .....	32
Failure to observe that offence could have been dealt with in the Local Court.....	32
Meaning of offence being committed in the “presence” of a child .....	33
The maximum penalty for a statutory offence serves only as a reference point for the equivalent common law crime.....	33
Aggregate sentences: whether fixed terms indicate head sentence or non-parole period .....	33
Following the rule in Pearce .....	34
Victim impact statement expressing harm far in excess of what might be expected from offence .....	34
Principles applicable to suspended sentences.....	35
Offending the De Simoni principle.....	35
Not an aggravating feature in itself that offence was committed in premises offender entitled to be present in.....	36
Seriousness or aggravation: a distinction without difference .....	37
The relevance of entrenched disadvantage.....	37
Hardship to third parties when sentencing for Commonwealth offences .....	38
Form 1 offences not relevant to accumulation .....	38
General deterrence for vigilante offences.....	39
Principles of totality in sentencing an offender already serving another sentence .....	39

Suspended sentences do not reflect general deterrence.....	39
Threatening harm not always less serious than causing harm.....	40
Historical offences and whether to take into account the former availability of remissions.....	40
The relevance of a victim’s benevolent view towards offender.....	40
Discount for assistance incorrectly applied to single sentence.....	41
SENTENCING - MULDRICK ISSUES.....	41
Muldrick v The Queen – are matters personal to an offender relevant to the objective seriousness?.....	41
Reference to the mid-range of objective seriousness does not establish “Muldrick” error.....	42
Standard non-parole period and maximum penalty both relevant even where significant disparity is prescribed.....	42
Finding that standard non-parole period “highly relevant” not erroneous in light of judgment as a whole.....	43
Muldrick does not prohibit consideration of objective criminality of offence.....	43
SENTENCING - SPECIFIC OFFENCES.....	43
Dangerous driving causing death/gbh – aggravating factor of the number of persons put at risk.....	43
Setting condign sentences for tax fraud offences.....	44
Sexual assault – relevance of prior relationship.....	44
Home invasions by current or estranged partners.....	44
Firearms offences not a category of offence for which prior good character is of less weight.....	45
Sentencing for firearms crimes where multiple offences arise from possession of single firearm.....	45
Proper approach to sentencing for historical child sex offences.....	45
The relevance of quantity in sentencing for drug supply.....	46
Drugs manufactured to satisfy own addiction.....	46
SUMMING UP.....	46
Unhelpful “gloss” in directions to jury.....	46
Specificity in directions on conduct that is said to illustrate admission of guilt.....	47
Failure to give R v Mitchell direction in a trial for child sex offences.....	47
When directions on “proper medical purpose” required in sexual assault trial.....	48
Adverse Browne v Dunn direction to be given with caution.....	48
The giving of a Liberato direction where relevant evidence is led to defend provocation case.....	48
The two elements of an attempt.....	49
When manslaughter in the alternative should not be left to the jury.....	49

## SCOPE OF PAPER

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

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

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

## APPEALS

### *One indictment, one jury, one appeal*

Mr Morgan had successfully appealed a conviction for two counts of robbery. Those counts had been accompanied by two counts of dealing with proceeds of crime, which Mr Morgan's counsel had declined to appeal. Before a retrial could commence, the DPP directed that there be no further proceedings for the robbery offences. Mr Morgan sought then to appeal his conviction for dealing with proceeds of crime (or for the Court to excuse his "abandonment" of the appeal in relation to those charges). In ***Morgan v R (No 2)* [2013] NSWCCA 80**, Beazley P confirmed the rule that one jury must proceed on one indictment and, consequently, that only one appeal may be had against a conviction against multiple offences on a single indictment. To conclude otherwise would offend the principle of finality. On the side issue of abandonment, her Honour held that it was not possible to abandon an appeal against some, but not all, convictions on a single indictment.

### *Whether a conviction appeal may be heard on behalf of a deceased offender*

Frederick McDermott was convicted of murder in 1947 and sentenced to death, later commuted to life imprisonment. A subsequent Royal Commission found that the jury in his trial might have been misled by incorrect evidence, and Mr McDermott was released in 1952. He died in 1977. The remains of the victim were not discovered until 2004. Neither the location of the body nor the injuries sustained were at all consistent with the case Mr McDermott was convicted upon. The Attorney General referred the case to the Court of Criminal Appeal for a review of conviction under s 77 of the *Crimes (Appeal and Review) Act 2001*.

In ***A reference by the Attorney General for the State of New South Wales under s 77(1)(b) of the Crimes (Appeal and Review) Act 2001 re the conviction of Frederick Lincoln McDermott* [2013] NSWCCA 102** the Court determined, as a threshold matter, that it was irrelevant to the exercise of the power under s 77 that the offender was deceased. In making that finding, Bathurst CJ held, "The fact that a wrongly convicted person has died

does not mean an injustice has not occurred". The conviction was overturned and a verdict of acquittal entered.

*Events subsequent to sentence increasing the significance of mitigating facts*

Mr Cassar was sentenced in 2011 for offences relating to the manufacture of a very large quantity of MDA and being in possession of proceeds of crime. He provided assistance to authorities and received a modest discount of 10%. In 2012, he was sentenced for offences relating to false passports, an endeavour from which he had derived the proceeds of crime subject to the 2011 offences. For the 2012 sentence, Mr Cassar's assistance was found to be high enough to result in a combined discount with his guilty plea of 50%. He appealed his sentence on the basis that the more extensive evidence of his assistance before the second judge entitled him to a greater discount for the 2011 offences: **Cassar v R [2013] NSWCCA 147**.

Button J acknowledged, at [50], the "long-standing exemption to the general rule that events subsequent to the imposition of sentence that could have led to a shorter sentence if fully appreciated at the time of sentence are a matter for the Executive, and not this Court." That exception may apply, for instance, where an offender's medical condition degenerates after sentence. An earlier decision of the Court, *JM v R* [2008] NSWCCA 254, indicated support for the argument of Mr Cassar. But Button J characterised the relevant remarks in that case as *dicta*, and dismissed the appeal. He held at [51]:

I consider that that exception should be circumscribed and not extended beyond its current parameters. If matters known to sentencing judges that subsequently develop in favour of a shorter sentence could found successful appeals to this Court in the ordinary course, this Court would be swamped with such appeals. It is useful to consider two hypothetical examples.

*Misconduct of counsel sufficient to cause a miscarriage of justice*

**Matthews v R [2013] NSWCCA 187** concerned, relevantly, an appeal against conviction on the basis that defence counsel had been so negligent as to engender a miscarriage of justice. The ground of appeal was not upheld, the Court holding that the complaints were without substance. In so doing, the Court, at [63], noted the important features in an inquiry on appeal into asserted misconduct of counsel below:

1. Counsel for the accused is vested with responsibility for and control over the conduct of the case.
2. Unfairness is not established by a rational choice by counsel at trial leading to an adverse outcome for an accused.
3. The inquiry is objective search for a reasonable explanation for the impugned action.
4. But despite the above, evidence relevant to the subjective position of counsel, such as the accused's instructions, may in exceptional circumstances be relevant.

*The principle of finality as a bar to out-of-time Muldrock appeals*

**Montero v R [2013] NSWCCA 214** was a sentencing appeal asserting *Muldrock* error that was brought out of time. Counsel had conceded that if the grounds of appeal did not succeed, the application for an extension of time should be refused. On that basis, having

rejected the grounds of appeal, R A Hulme J refused an extension. Leeming JA made an additional comment on this point, at [2]:

There is a further reason for refusing the application for an extension of time. It is well established that a change in the law, even a change whose effect is that a conviction would be quashed on appeal, is not of itself sufficient to warrant the granting of an extension of time in which to appeal. This is an aspect of the principle of finality.

Leeming JA went on, at [3]-[8], to provide the relevant authorities, with emphasis on *R v Unger* [1977] 2 NSWLR 990. R A Hulme J expressed no view, the question being dealt with by the concession and having had no submissions on the point. Button J simply agreed with R A Hulme J.

*Whether the facts found by a trial court support the legal description given to them by the trial court is a question of law*

A man was convicted in the Local Court of two offences of assault occasioning actual bodily harm. Prior to sentence he admitted to a Corrective Services Officer that he had been involved in the assault but that he acted in self-defence, which contradicted his case at trial that he was not involved. The Crown was granted leave to educe this as fresh evidence on appeal to the District Court but the applicant asked the judge to state a case to the Court of Criminal Appeal pursuant to s 5B of the *Criminal Appeal Act 1912* (NSW). Blanch CJDC refused to state the case on the basis that the submissions did not raise any questions of law. In ***Landsman v Director of Public Prosecutions* [2013] NSWCCA 369**, Macfarlan JA found that, while the original, written submission put by the applicant did not raise a question of law, a subsequent formulation made during the District Court hearing did. The first submission was whether the trial judge erred in concluding that it was in the interests of justice to allow the prosecution to lead the evidence. The later formulation was whether the uncontested facts before the judge were capable of supporting the judge's view that it was in the interests of justice that leave be given. This is supported by the plurality in *Vetter v Lake Macquarie City Council* [2001] HCA 12; 202 CLR 439 at [24]: "whether the facts found by the trial court can support the legal description given to them by the trial court is a question of law".

*Principles applicable to extension of time to appeal*

In ***Abdul v R* [2013] NSWCCA 247**, the Court (Hoeben CJ at CL, Johnson and Bellew JJ) considered the principles to be applied in considering whether to grant an extension of time for an appeal based on a change of law. It was the first case brought by the Legal Aid team responsible for identifying apparent *Muldrock* error in cases previously refused assistance on the basis of low prospects of success.

The Crown opposed the granting of an extension of time. It relied primarily on the statements of principle of Campbell JA (Latham and Price JJ agreeing) in *Etchell v R* [2010] NSWCCA 262; 205 A Crim R 138 at [18]-[25]. Campbell JA held, at [24], that, "something beyond the presence of factors that would be sufficient to result in a sentence being varied" is required, and that it is proper to assess the appeal in a summary fashion. The Court also gave consideration to a series of "change of law" decisions in the United Kingdom regarding extensions of time, such as *Jawad v The Queen* [2013] EWCA Crim 644. In that case, the Court (Lord Justice Hughes, Mr Justice Foskett and Judge Radford) held, at

[29] that an extension would only be granted, “if substantial injustice would otherwise be done to the defendant”.

In *Abdul*, the Court adopted, at [52]-[53] an amalgamation of Campbell JA’s conclusion in *Etchell* with the UK approach. The “something beyond the presence of factors that would be sufficient to result in a sentence being varied” required in Campbell JA’s test is the occurrence of a substantial injustice if an extension of time is refused. In undertaking that test, it is proper to assess the proposed grounds of appeal in a summary fashion.

The Court ultimately concluded that notwithstanding the conceded error, no lesser sentence was warranted in law (s 6(3) *Criminal Appeal Act 1912*). No substantial injustice could occur if an extension was refused, and it accordingly was.

In *Alpha v R* [2013] NSWCCA 292, Leeming JA and Bellew J agreed that the approach described in *Abdul* was to be applied in *all* criminal appeals where an extension of time was required. *Alpha* was also notable for Leeming JA’s useful encapsulation of the relevant principles at [1]-[2]. R S Hulme AJ agreed with the orders proposed but was (mildly) critical of the degree to which the merits of the case had been examined in the principal judgment; more in keeping with an appeal than an application for an extension of time.

*Refusal to listen to summing up where transcript is uncontested*

A man was convicted of two sexual offences committed against his stepdaughter. In *Versi v R* [2013] NSWCCA 206, Basten JA (Latham J agreeing, Adams J differing on this point but agreeing with the result) held that it was not appropriate for the Court to listen to the summing up of the trial judge, either in whole or part, in order to assess whether the trial judge’s directions with respect to coincidence and tendency evidence were confusing and misleading. The transcript was corrected by the solicitors for the applicant and was provided to the Court without objection from the respondent. Nor was it contended that any words noted as untranscribable were of critical importance. Furthermore, there is no way for an appellate court to be sure that the sound recording conveys an accurate impression of what the jury heard. In addition, there is a question as to the extent an appeal court should seek to place itself in the shoes of the jury, as well as time and resource considerations. Adams J agreed to listen to the portions of the summing up concerning coincidence and tendency evidence, accepting that there were some obscurities and misspeaking but not such as to lead to a risk that the jury would have been confused or misled.

*Finality principle does not preclude an application under s 78 Crimes (Appeal and Review) Act 2001*

Mr Sinkovich’s application for an inquiry into his sentence pursuant to s 78 of the *Crimes (Appeal and Review) Act 2001* (NSW) was rejected by Latham J in *Application by Frank Sinkovich pursuant to s 78 Crimes (Appeal and Review) Act 2001* [2013] NSWSC 1342. His application was made out of time, on the basis of *Muldrock* error made by both the sentencing judge and, on appeal, the Court of Criminal Appeal. He then invoked the supervisory jurisdiction of the Court pursuant to s 69 of the *Supreme Court Act 1970* (NSW). In the alternative, he sought declaratory relief under s 75 of the *Supreme Court Act*.

In **Sinkovich v Attorney General of New South Wales [2013] NSWCA 383** Basten JA found that Latham J had made an error of law in rejecting the application. As a result, he granted a declaration that the *Muldrock* error made by the sentencing judge and the Court of Criminal Appeal may form the basis of a doubt or question as to the mitigating circumstances in the case (s 79(2) *Crimes (Appeal and Review) Act 2001* (NSW)). This provision acts as a 'gateway' to the direction of an inquiry (s 79(1)(a)) or a referral of the case to the Court of Criminal Appeal (s 79(1)(b)). While "appeals are, on one view, an affront to the principle of finality, rights of appeal are not narrowly confined. Nor is the supervisory power confined within strict limits: rather the contrary". Sections 78-79 are "inherently an exception to the principle of finality" [at 46].

*Sufficiency of reasons by appellate court in unreasonable verdict appeal*

BCM was charged, in Queensland, with three counts of indecent treatment of a child under 12. He was convicted of two of those counts, with the jury being unable to reach a verdict on the third. He appealed his conviction to the Court of Appeal of the Supreme Court of Queensland, arguing, inter alia, that the verdict was unsafe and unreasonable (referring to *SKA v The Queen* [2011] HCA 13; (2011) 243 CLR 400). The QCA succinctly dismissed the appeal in *R v BCM* [2012] QCA 333. The conclusion in relation to the unreasonable point was stated by Chief Justice de Jersey at [24]:

Having reviewed the evidence as required, I am satisfied these convictions are not unsafe. This is a case where the jury, alive to the competing considerations, were entitled, reasonably, to accept the evidence for the prosecution and convict.

The High Court (Hayne, Crennan, Kiefel, Bell and Keane JJ) held in ***BCM v The Queen* [2013] HCA 48** (at [31]) that the obligation to provide sufficient reasons in such a case "was not discharged by observing that the jury was entitled to accept [the complainant's] evidence and act upon it". However, rather than remitting the matter, the Court then examined criticisms of the evidence that were advanced in support of the unreasonable verdict ground and held that "none of the criticisms of [the complainant's] evidence discloses inconsistencies of a kind that lead, on a review of the whole of the evidence, to a conclusion that it was not open to the jury to convict".

*Post-conviction admissions may influence issue of retrial or acquittal*

Mr P was convicted of multiple sex offences against his stepdaughter. Prior to sentence he admitted to having sexual relations with his step-daughter, which was inconsistent with his case at trial. In ***TDP v R; R v TDP* [2013] NSWCCA 303**, the Crown submitted that, in the event that the applicant succeeded in any of his grounds of appeal, the post-conviction admission was relevant to the application of the proviso under s 6(1) *Criminal Appeal Act 1912* (NSW) or in determining whether to order a new trial under s 8 rather than directing an acquittal. Hoeben CJ at CL expressed doubt as to whether the admission would have affected the application of the proviso; section 6(1) directs attention to the evidence that was before the jury at trial. However, his Honour concluded (at [128]) that it may have been significant if there was an issue as to whether the appropriate order was of acquittal or retrial. This is because of the tension between the public interest in the due prosecution and conviction of offenders, and the undesirability of allowing the prosecution to present a new case with fresh evidence at a retrial (referring to dicta of Johnson J in *Raumakita v R* [2011] NSWCCA 126 at [58]-[60]; 210 A Crim R 326).

## EVIDENCE

### *Contemporaneous statements and the presumption of continuance*

**R v Salami [2013] NSWCCA 96** concerned the admissibility of a phone call made by an accused moments before an alleged offence. Mr Salami was charged with entering a dwelling with intent to commit a serious indictable offence in circumstances of aggravation (amongst other charges). The Crown alleged he entered the victim's home with a knife with the purpose of intimidating her into relinquishing an apprehended violence order. At trial, a translated transcript of a menacing telephone call by Mr Salami to the victim shortly before he entered the home was excluded by the trial judge pursuant to s 137 *Evidence Act*. His Honour had concluded that the phone call, made outside the home, was incapable of proving the conduct of Mr Salami inside the home. On the appeal, R S Hulme AJ held this finding was in error. By reference to the presumption of continuance, the occurrence of an event is inherently capable of being proved by circumstances occurring contemporaneous with it or shortly before. His Honour also observed that the relevant question, in this case, was the intention manifested by Mr Salami *before* he entered the premises.

### *Prohibition on cross-examination on credit where based on evidence with little probative value*

Mr Montgomery was convicted of conspiring to import a commercial quantity of cocaine. At trial, one of his alibi witnesses, a Mr Potter, had been subject to cross-examination as to credit by the Crown Prosecutor. That cross-examination had included reference to Mr Potter's past criminal convictions, including a rape charge that he was acquitted of on appeal. The Crown Prosecutor had not been aware of the acquittal before he commenced his cross-examination. The remaining offences had occurred, regardless, in the area of 50 years ago. Notice was not given to the defence of the cross-examination, nor was permission sought from the trial judge. Mr Montgomery appealed his conviction and argued, among other things, that the conduct of the prosecutor was unfair.

On the appeal, Simpson J (McClellan CJ at CL agreeing) held that the prosecutor should have sought a ruling under s 103(1) *Evidence Act* from the trial judge, or given defence notice of his intention to cross-examine on past convictions: **Montgomery v R [2013] NSWCCA 73**. Her Honour called the conduct, at [6], "a serious departure from proper standards of conduct required of a Crown Prosecutor". This was especially so because, having regard to the age of the convictions and the mistake as to the rape acquittal, permission to cross-examine would not have been forthcoming. Simpson J (McClellan CJ at CL) concluded, however, that there was no miscarriage of justice. Fullerton J was of the view that there was a miscarriage but favoured application of the proviso.

### *Probative value of evidence in relation to s 137*

The respondent in **R v XY [2013] NSWCCA 121** was charged with a number of child sex offences allegedly committed against the complainant when she was 8 years old. The Crown sought to tender two recorded telephone conversations between the respondent

and the complainant, in which, it alleged, the respondent had made admissions. Defence objected to the tender of the conversations on a number of grounds, including under s 137 *Evidence Act*. The recording allowed an inference that the respondent was not sure whom he was talking to, and that he was referring to sexual activity with a high school student. The asserted prejudice was that the jury would engage in tendency reasoning if aware of this last-mentioned confession. The trial judge excluded evidence of the conversations on the basis that its probative value was outweighed by the danger of unfair prejudice. The Crown appealed that ruling pursuant to s 5F(3A) of the *Criminal Appeal Act 1912*.

The grounds relied upon by the Crown raised a question of whether the trial judge had been mistaken, in excluding the conversations under s 137, in evaluating the *weight* of the evidence, not just its objective probative value. That is, he found that the probative value of the admissions was reduced by the circumstances in which they were made. The Court of Criminal Appeal convened a full bench, because the appeal required a consideration of whether the Court should be bound by *R v Shamouil* [2006] NSWCCA 112; 66 NSWLR 228, which had since been held to be wrongly decided in Victoria in *Dupas v The Queen* [2012] VSCA 328. The controversy was that *Shamouil* was argued to stand for the proposition that a trial judge should not take into account the weight a jury might give to evidence when considering whether to exclude it under s 137, while *Dupas* suggested a trial judge should make that assessment. Their Honours each delivered separate judgments.

Basten JA and Simpson J held that the correct approach in NSW was that identified in *Shamouil*. Basten JA summarised the principles, at [66], in the following way:

- (1) in determining inadmissibility under s 137, the judge should assess the evidence proffered by the prosecution on the basis of its capacity to advance the prosecution case;
- (2) it follows from (1) that the judge should deal with the evidence on the basis of any inference or direct support for a fact in issue which would be available to a reasonable jury considering the proffered evidence, without speculating as to whether the jury would in fact accept the evidence and give it particular weight;
- (3) it also follows from (1) that **the judge should not make his or her own findings as to whether or not to accept the inference or give the evidence particular weight.** (Emphasis added)

Hoeben CJ at CL agreed with the conclusion of Basten JA and Simpson J regarding the authority of *Shamouil*, and expressed specific approval of Basten JA's extraction of principles reproduced above.

But Hoeben CJ at CL was not in complete agreement with the judgments of Basten JA and Simpson J. Against their conclusions on the actual decision to reject the evidence, he instead agreed with Blanch and Price JJ that the probative value of the evidence was outweighed by the danger of unfair prejudice. In explaining his disagreement, he held, at [88]-[89] that the *fact* of competing available inferences may be taken into account, as distinct from deciding which of those inferences might be preferred. This view appears to have been taken by Blanch J, at [207], who held that competing inferences objectively affected the capacity of the evidence to prove a fact in issue. Price J did not endorse any particular view, and simply decided that the evidence was inherently weak.

(Note: Basten JA decided, at [40] that in the face of the controversy between *Shamouil* and *Dupas*, the Court should “determine for itself the correct approach to the statutory

provision, giving proper consideration to the reasoning and conclusions of earlier authorities, both in this Court and in the Victorian Court of Appeal”, rather than a technical approach requiring a conclusion that the court in *Dupas* was wrong in holding *Shamouil* wrong. Simpson J expressly agreed with that conclusion (at [159]) and Hoeben CJ at CL’s agreement that *Shamouil* applied (at [86]-[87]) appears to support that conclusion. This decision may have an effect on resolving disagreements between Australian intermediate courts of appeal, at least in NSW.)

#### *Relevance of risk of contamination to tendency evidence*

In ***BJS v R* [2013] NSWCCA 123**, the charges against the accused in respect of different complainants proceeded as a joint trial, and the Crown relied upon certain similarities in the evidence of the complainants as tendency evidence. There was some evidence that the complainants had seen publicity regarding the criminal charges, and that two (who were sisters) had had some discussion of their allegations. On his appeal, BJS argued that the risk of contamination between the accounts of the complainants meant that the Crown should not have been able to rely on tendency reasoning. Hoeben CJ at CL rejected this argument. The chance of contamination was established only to a speculative concern, not a “real risk”. The submission that this meant the evidence should have been excluded was to assert that the trial judge should go considerably beyond the tendency evidence balancing exercise in ss 97 and 101 *Evidence Act* and so usurp the function of the jury.

#### *Whether cross examination of accused as to veracity of witness accounts permissible*

BJS was a former Catholic priest charged with numerous counts of indecent assault against various complainants. He gave evidence at his trial. As part of his cross-examination by the Crown, he was asked whether a number of witnesses were wrong in having given evidence that he stayed in the home of one of the victims on three occasions. After he was convicted, BJS appealed, one of the grounds being that the jury should have been discharged after this exchange: ***BJS v R* [2013] NSWCCA 123**. He relied upon the principle in *Palmer v R* [2009] HCA 2; 193 CLR 1 that asking an accused if a complainant had a motive to lie invites the jury to accept that complainant’s evidence unless positively disproved.

Hoeben CJ at CL dismissed the ground of appeal. The accused was asked if the witnesses were wrong, not *why* their evidence was wrong. While in cross-examination the word “mistaken” was used once, it was clear in the context that it was used to mean “wrong”. Hoeben CJ at CL also observed that counsel for BJS had dealt with the concern by successfully seeking a specific direction on the subject of motive to lie.

#### *Using DNA evidence where analysis reveals relatively common profile*

MK was charged with the kidnapping and aggravated indecent assault of a 6-year-old girl. DNA swabs taken from the victim’s underpants yielded two male profiles. MK could not be excluded as the contributor of one of the two profiles, but neither could anyone from his paternal line. The profile was also unable to exclude an estimated 1 in 630 unrelated males in the general population (or 1 in 512 in the defence expert’s calculation). The trial judge held that the probative value of the DNA evidence was so weak as to “verging on

unreliable and meaningless". He excluded the evidence pursuant to ss 135 and 137 *Evidence Act*. In ***R v MK [2012] NSWCCA 110***, the Court held he was wrong to do so. The DNA ratio evidence formed part of the matrix of facts from which the jury might draw an adverse conclusion against MK. In this case, other possibly identifying facts included the sighting of MK's car in the neighbourhood, and unusual cheek piercings noticed by the victim's playmate. The DNA evidence was "conceptually no different" (at [46]) to these identifying characteristics.

*Expert evidence on shared anatomical features between persons*

***Honeysett v R [2013] NSWCCA 135*** concerned the evidence of Professor Henneberg, the slightly controversial anatomical expert previously the subject of extensive argument in *Morgan v R [2011] NSWCCA 257*. The finding in the latter case, in summary, was that Professor Henneberg's evidence that two photographs showed persons bearing a "high degree of anatomical similarity" was not an expert opinion, rather one that could be made by the jury for themselves, and lent an undesirable "white coat effect" to what was a lay observation. In *Honeysett*, Professor Henneberg gave evidence that a man depicted robbing a hotel on CCTV and a man photographed at a police station shared particular anatomical features. It was the Crown case that the images depicted the same person: Mr Honeysett. Mr Honeysett was convicted and appealed, arguing that the decision in *Morgan* required the ground relating to Professor Henneberg's evidence to be upheld.

Macfarlan JA disagreed with the appellant. Unlike in *Morgan*, Professor Henneberg did not state in this case that the two persons displayed a "high degree of anatomical similarity". In this case, Professor Henneberg did not give evidence of any conclusions to be drawn from his observations of identified common characteristics. And his evidence in this case, as to the characterisation of the shape of the head and face of a person wearing a balaclava, was clearly based on the evidence before him and his own specialised knowledge.

(The appellant had disavowed any reliance upon lack of relevance or the discretionary considerations in ss 135 and 137, making two rulings in *Morgan*, that the jury could make these observations for themselves and the undesirability of the "white coat effect", moot in this case.)

*Evidence of sexual interest in child sex offence cases requires tendency directions*

The appellant in ***Colquhoun v R (No 1) [2013] NSWCCA 190*** had been convicted of three offences of indecent assault on an eleven-year-old boy. He had befriended the child and the two, with the knowledge of the child's mother, spent time together doing various recreational activities. The appellant gave the mother two CDs of photographs and film of their activities, some of which featured the child. Those pictures and footage were admitted as evidence in the appellant's trial. The Crown suggested to the jury that one part of the footage focused "momentarily on the crotch area" and that "one might wonder whether they are the sorts of photographs that would appear in a family album". One ground of appeal was that the CDs were only relevant as tendency evidence of sexual interest and s 97 of the *Evidence Act* should have been applied. The Crown contended on the appeal, somewhat contrary to the inferences drawn out at trial, that the pictures and

footage did not suggest any such thing and were admissible as “context” evidence to support the victim’s evidence of various recreational activities.

Macfarlan JA remarked that many of the photographs were admissible as context evidence. But others, particularly those showing the victim partially dressed, were capable of carrying the implication that the appellant’s interest in the victim was sexual. The Crown Prosecutor had drawn out those implications at trial. Evidence of an accused’s sexual interest in a child is tendency evidence subject to ss 97 and 101, and was wrongly admitted in the appellant’s trial.

#### *Admissibility of prior inconsistent statement as evidence in its own right*

Ms Scott lived with her de facto partner, Mr Col. She suffered serious burns one evening as a result of an incident involving ignited methylated spirits. She gave a statement to police in which she said that Mr Col had deliberately doused her in the spirit and set it alight. Mr Col was charged with causing grievous bodily harm with intent. He maintained that he had found Ms Scott in bed, saw a smouldering fire, and had accidentally splashed her with spirits, thinking it was water.

Before trial, Ms Scott told police she had no recollection of the events and, that fact notwithstanding, asserted that the version recorded in the statement was “not the truth”. The prosecutor cross-examined Ms Scott as an unfavourable witness and, over objection, tendered her statement in evidence. Mr Col was found guilty and, on appeal, argued, *inter alia*, that the trial judge made an error of law in admitting the statement: **Col v R [2013] NSWCCA 302**. Latham J dismissed the appeal. The contents of the statement were admissible pursuant to ss 103 (cross-examination as to credibility) and 106 (prior inconsistent evidence) of the *Evidence Act 1995* and there was no miscarriage arising from the tender.

## **DEFENCES**

#### *Excessive-self defence raised in charge for contract killing*

**Ryan v R; Coulter v R [2013] NSWCCA 175** concerned a contract killing organised by Ms Ryan (of her husband) to which her mother, Ms Coulter, contributed funds. There was evidence that Ms Ryan told Ms Coulter that her husband had threatened to kill her, and that Ms Coulter believed her. The ground of appeal in respect of Ms Coulter’s conviction was that the trial judge had erred in failing to leave excessive self-defence (s 421 *Crimes Act*) to the jury. That section applies if, first, the application of the Division is raised, and second, if:

- (a) the person uses force that involves the infliction of death, and
- (b) the conduct is not a reasonable response in the circumstances as he or she perceives them, but the person believes the conduct is necessary:
- (c) to defend himself or herself or another person, or

(d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.

If the conditions are satisfied, the section operates to reduce an offence of murder to manslaughter. Simpson J determined by reference to s 419 (onus of proof on prosecution) that the final requirement is that the prosecution is unable to prove that the person did not subjectively hold the relevant belief (at [29]). But as defence counsel did not raise excessive self-defence, it would have to arise on the evidence. As Ms Coulter gave no evidence of possessing the belief referred to in s 421(1)(c) (and there was insufficient other evidence on the point), excessive self-defence simply did not arise on the evidence, and the Crown did not have to prove lack of belief.

As a side note, Simpson J reluctantly accepted that excessive self-defence was available to persons who did not commit the lethal acts themselves, at [42]:

The notion that a court might be called upon to direct a jury that a contract killing, if motivated by a (subjective) belief in its necessity for defensive purposes, ought to result in a conviction for manslaughter rather than murder is both repugnant and abhorrent. Yet the language of s 421 appears to comprehend just that - provided that its benefit can fall upon a person other than the person who uses actual force. Subject to that question, if Coulter had given evidence that she held the requisite belief, or if there had been evidence in the Crown case that she held that belief, Latham J would have been obliged to leave the question to the jury.

The question was not, of course, decided finally.

## **LEGISLATION**

### *Road Transport Act 2013 No 18*

The *Road Transport Act 2013* was proclaimed to commence on 1 July 2013. In the words of the 2nd reading speech, this Act,

amalgamates into one Act the *Road Transport (Driver Licensing) Act 1998*, the *Road Transport (Vehicle Registration) Act 1997* and the *Road Transport (Safety and Traffic Management) Act 1999*, and the compliance and enforcement provisions of the *Road Transport (General) Act 2005* applicable to road transport legislation generally.

The introduction of the Act comes with the usual difficulties inherent in a consolidation.

### *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013 No 78*

The *Crimes (Sentencing Procedure) Act 1999* (NSW) was amended in order to clarify the role of standard non-parole periods in sentencing following the High Court decision in *Muldrock v R* [2011] HCA 39; (2011) 244 CLR 120. Section 54A(2) now provides that the standard non-parole period represents the non-parole period for an offence that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness. A recast s 54B provides, amongst other things, that a court must make a record of its reasons for setting a non-parole period that is longer or shorter than the standard non-parole period and must identify each factor that it took into account. This does not include that the court should identify the extent to which

the seriousness of the offence differs from that of an offence to which the standard non-parole period is referable.

The *Act* received assent and commenced on 29 October 2013.

*Firearms and Criminal Groups Legislation Amendment Act 2013 No 74*

Section 74A was added to the *Firearms Act 1966* (NSW) to empower police officers without warrant to enter and search premises occupied by persons who are subject to a firearms prohibition order for the purposes of determining whether the person is complying with the order. In addition, those persons are prohibited from acquiring or possessing firearm parts or ammunition (ss 74(1)-(3)), from residing at premises where there are firearms (s 74(6)) and from attending certain other places such as gun shops and shooting ranges (s 74(8)). Existing offences relating to sale and purchase of firearms and related items apply instead to supply and acquisition of those things. "Supply" is defined in s 4 of the *Act* in very broad terms. A new s 50B was inserted to create an offence of giving possession of firearms or firearm parts to unauthorised persons.

The *Restricted Premises Act 1943* (NSW) was amended and a new s 8(2A) was inserted to provide that after the owner of a premises has been served with a "reputed criminal declaration" notice, the owner is guilty of an offence if a reputed criminal attends the premises or takes part in the control or management of the premises. A definition of "reputed criminal" was inserted in s 2 and includes anyone convicted of an indictable offence; a person engaged in an organised criminal activity within the meaning of s 46AA *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW); or is a controlled member of a declared organisation under the *Crimes (Criminal Organisations Control) Act 2012* (NSW).

The *Act* received assent on 23 October 2013 and commenced on 1 November 2013.

*Law Enforcement (Powers and Responsibilities) Amendment (Arrest without Warrant) Act 2013 No 98*

The *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) was amended to extend police powers of arrest without warrant. Section 99 was recast and the list of reasons for which a police officer may make an arrest without warrant if the officer suspects on reasonable grounds that the person is committing or has committed an offence were extended. They include: to stop a person fleeing (s 99(1)(b)(ii)); to enable enquiries to be made to establish a person's identity (s 99(1)(b)(iii)); and to protect to the safety and welfare of any person, including the person arrested (s 99(1)(b)(viii)). Section 105(3) was inserted to provide that a police officer may discontinue an arrest despite any obligation to take the arrested person before an authorised officer to be dealt with according to law.

The *Act* received assent on 27 November 2013 and commenced on 16 December 2013.

*Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014 No 2*

The Act inserted a new offence of “assault causing death” into the *Crimes Act 1900* (s 25A) and mandates a minimum sentence of 8 years non-parole where the offender is intoxicated (s 25B(1)). Section 25A(6)(b) establishes that a person is “conclusively presumed” to be intoxicated by alcohol if analysis shows an alcohol concentration of 0.15 or more. The *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) was also amended to provide for new police powers to test, by breath, blood and urine, for the presence of alcohol or drugs (ss 138F-138G). It is an offence punishable by 2 years imprisonment to refuse to provide a blood or urine sample (s 138H).

The Act inserted a new provision into the *Crimes (Sentencing Procedure) Act 1999* which establishes that self-induced intoxication is not to be taken into account as a mitigating factor (s 21A(5AA)). It is more than arguable that this adds nothing to existing law.

Anabolic steroids, and other substances, have been added to Schedule 1 to the *Drug Misuse and Trafficking Act 1985*.

Most of the Act received assent and commenced on 31 January 2014.

*Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2013 No 110*

The Act abolished the DNA Review Panel and implemented savings and transitional arrangements. It provides for the removal of the existing time limit for retention of exhibits and for applications to be made to the Commissioner of Police to request the DNA testing of retained swabs and samples. If police do not comply with such a request an application for an order may be made to the Supreme Court. The function of the DNA Review Panel of referring appropriate matters to the Court of Criminal Appeal is to cease, it being recognised that there is already facility for such referral by way of application under Part 7 of the *Crimes (Appeal and Review) Act 2001* (NSW).

The Act received assent on 3 December 2013 and commenced on 23 February 2014.

*Bail Act 2013 No 26*

The long-awaited *Bail Act 2013* was passed and received assent on 27 May 2013. It follows a comprehensive report by the Law Reform Commission, which was tabled in 2012. The legislation enacts many of the Commission’s recommendations, with some significant differences. The primary difference is a move towards a general “risk-management” approach, reflected in the terms of the Act. Section 20 is in the following terms:

A bail authority may refuse bail for an offence only if the bail authority is satisfied that there is an unacceptable risk that cannot be sufficiently mitigated by the imposition of bail conditions.

An “unacceptable risk” is an unacceptable risk that the accused will fail to appear at any proceedings for the offence; commit a serious offence; endanger the safety of victims, individuals or the community; or interfere with witnesses or evidence. Presumptions against bail for particular offences are not provided for.

In his second reading speech, the Attorney General indicated that the Act would not commence until approximately May 2014. The Attorney General stated:

The Government is aware that its new bail model is a paradigm shift. Therefore, the period between passage of the legislation and its commencement will be used to mount an education and training campaign for police, legal practitioners and courts regarding the new legislation. Further, changes will be made to the courts' JusticeLink system, the New South Wales Police information technology systems and bail forms to ensure a smooth transition to the new regime. Supporting regulations for the new legislation will also be drafted in anticipation of its commencement.

## MENTAL HEALTH

*Reasons for dismissal under s 32 Mental Health (Forensic Provisions) Act 1990*

***Director of Public Prosecutions v Lopez-Aguilar [2013] NSWSC 1019*** was an appeal by the Director against a decision by a magistrate to dismiss charges against an accused in accordance with the discretion offered by s 32 of the *Mental Health (Forensic Provisions) Act 1990*. Ms Lopez-Aguilar committed a series of very serious traffic offences. She drove at 120km/h in a 60km/hr zone, and failed to pull over when signalled by police. There was evidence before the Local Court that she suffered from a Major Depressive Disorder. She sought dismissal of the charge under s 32.

The Director argued, inter alia, that the magistrate had failed to make a finding of whether “it would be more appropriate to deal with the defendant” under s 32 and failed to have regard to the seriousness of the offences. Harrison J agreed. He referred to the comments of Button J in *DPP v Soliman [2013] NSWSC 346* at [61] that only terse reasons are required, but found that in this matter no reasons were discernable. The magistrate was required to have regard to the charges, the surrounding circumstances, the mental illness and the public interest. Harrison J also commented that the connection between the mental illness, the subject offence and Ms Lopez-Aguilar’s multiple criminal antecedents required consideration.

*Power of Mental Health Review Tribunal to make directions contrary to conditions of release imposed by judge on a person found not guilty by reason of mental illness*

In 2010, a young man, “X”, attempted to hold-up a convenience store with a pair of scissors. He was charged with attempted armed robbery, but found not guilty by reason of mental illness in accordance with s 38 of the *Mental Health (Forensic Provisions) Act 1990*. After the special verdict was entered in 2011, the judge made orders, pursuant to s 39, that X be subject to supervised treatment for two years and then unconditionally released. X did not respond particularly well to treatment, and in 2013 the Mental Health Review Tribunal made directions that he reside in Macquarie Hospital beyond the two-year limit specified in the orders made in 2011. X challenged the validity of those conditions, and the Attorney General applied to the Supreme Court for declaratory relief.

***Attorney General of New South Wales v X [2013] NSWSC 1392*** was heard by Johnson J. Section 39(1) is in the following terms:

If, on the trial of a person charged with an offence, the jury returns a special verdict that the accused person is not guilty by reason of mental illness, the Court may order that the person be detained in such place and in such manner as the Court thinks fit until released by due process of law or may make such other order (including an order releasing the person from custody, either unconditionally or subject to conditions) as the Court considers appropriate.

Johnson J doubted that these provisions empowered a judge to make any order with respect to time. But the Attorney General did not argue that point, and he expressed no concluded view. Regardless, proper construction of the statutory scheme made clear that a court was not able under s 39 to fix a legally binding period upon the Tribunal in the exercise of its functions under the Act. Johnson J granted declaratory relief in respect of the conditions imposed by the Tribunal.

## OFFENCES

*Is spitting on a bench “damaging property”?*

Mr Hammond was arrested and taken to the local police station. While in the dock, he expectorated upon the stainless steel bench he was sitting on. He was charged with an offence under s 195(1)(a) *Crimes Act 1900*, of maliciously damaging the property of another. He was convicted and his appeal to the District Court was dismissed, but Lerve DCJ referred a question of a law to the Court of Criminal Appeal for determination in ***Hammond v R [2013] NSWCCA 93***.

Slattery J held that, in this case, Mr Hammond could not have committed the offence charged because the element that “a person damages” requires proof of either physical harm or functional interference. The only evidence that any cost could or would be incurred was a hearsay assertion from a police officer that a professional cleaner would have to be engaged. Slattery J was obviously not convinced that this was so (at [74]): “these findings are quite consistent with an employee at the police station merely wiping a damp cloth over the seat to clear it of spittle/mucus in the course of otherwise required routine cleaning”.

*Intent to cause harm and “reckless wounding”*

***Chen v R [2013] NSWCCA 116*** concerned a finding that the appellant, who had been convicted of reckless wounding contrary to s 35(3) *Crimes Act*, had *intended* to cause some injury. The appeal was conducted on the basis that the finding was inconsistent with the meaning of “recklessness” as defined in *Blackwell v R [2011] NSWCCA 93*; (2011) 81 NSWLR 119. The appeal was dismissed by Button J (Hoeben JA agreeing, Campbell J finding it unnecessary to decide). *Blackwell* was concerned with the offence of recklessly causing grievous bodily harm. It decided that, to commit that offence, an offender must have foreseen the possibility of the infliction of *grievous* bodily harm, not merely *actual* bodily harm; it had no application to the mental elements of reckless wounding.

*One “demand” may satisfy multiple offences of demand money with menaces*

Mr Delaney visited the owner of a new tattoo parlour at Raymond Terrace with persons identified as members of the Rebels Motorcycle Club. He said, "Do you know who we are?"

... We can close you down and blow your shop up. You can pay \$200 a week. If you don't, we'll run you out of town". Money was not collected at that time, but was collected the following day and on another occasion. Mr Delaney was present on the first occasion money was collected, but did not make a demand accompanied by a menace, and was not present at all on the second occasion. He was convicted of three offences of demanding with intent to steal contrary to s 99 *Crimes Act*.

Mr Delaney appealed his conviction, arguing that the verdict could not be supported: ***Delaney v R* [2013] NSWCCA 150**. In particular, he argued that once the first demand had been made, the first offence was complete, and further demands were required in relation to the two other convictions. Hoeben CJ at CL rejected the second part of that proposition. A specific threat does not have to be articulated if it is clear that the threat exists. Hoeben CJ at CL specifically refuted (at [28]) the suggestion that a continuing threat is somehow terminated by the completion of a particular offence related to it.

*Dangerous navigation occasioning death: what does "navigate" mean?*

***Small v R* [2013] NSWCCA 165** concerned a collision between a workboat and a much larger fishing trawler in Sydney Harbour in the early hours of the morning. Six passengers on the workboat were killed. Mr Small had taken the helm before the accident at the invitation of the skipper, Mr Reynolds. Mr Small was not an experienced boat operator and was intoxicated. He was charged and convicted of six counts of dangerous navigation occasioning death in contravention of s 52B *Crimes Act*. He appealed, arguing that mere physical control of the helm did not constitute "navigation" and that Mr Reynolds, as skipper, was the one navigating the work boat. Emmett JA held that the term extended to persons directing, steering, or helming vessels, and other more nautical aspects of the term, such as captaincy or a person who plots a route, depending on the circumstances. He was guided in his determination of the breadth of the term by its ordinary English meaning, and the clear intention of Parliament to re-enact the provisions of s 52A (motor vehicles) in s 52B (vessels). The appeal was dismissed.

*What is "waste" for the offence of unlawful transport of waste*

Shannongrove Pty Ltd collected organic sludge from a domestic waste treatment facility at Eastern Creek. The sludge was transported to a dairy farm at Bringelly where it was used to fertilise pastures. But the farm was not licensed to receive "waste" under the *Protection of the Environment Operations Act 1997*. As a result, Shannongrove was charged and convicted with transporting waste to a place that could not lawfully be used as a waste facility, contrary to s 143(1) of that Act. Shannongrove appealed its conviction pursuant to ss 5AB and 5AA of the *Criminal Appeal Act*, arguing that the definition of "waste" did not encompass the sludge subject of the offences: ***Shannongrove Pty Ltd v Environment Protection Authority* [2013] NSWCCA 179**.

On the appeal, Basten ACJ acknowledged that depending on perspective, the sludge could be either waste or useful fertiliser. But "waste" was defined in s 143(4) as "any unwanted or surplus substance", and it was provided that the fact that it could be reused or reprocessed was not relevant to its definition. The appellant's argument that the waste was not "unwanted" while being transported because it was being transported at the request of a person, the farmer, who "wanted" it was rejected. The consequence of that

argument was that no transportation of waste to a willing recipient could be properly regarded as an offence, it being always “wanted” by that person. The appeal was dismissed.

*Knowledge of destination as element of offence of aggravated people smuggling*

**Taru Ali v R [2013] NSWCCA 211** concerned an Indonesian national who was steering a vessel when it was intercepted by the Royal Australian Navy off Ashmore Reef. Fifty-two illegal immigrants were aboard. He was charged and convicted for an offence of aggravated people smuggling contrary to s 233C of the *Migration Act 1958* (Cth). His case at trial had been that he thought the passengers were going on a holiday to Bali, and that after it became clear that the boat was not going to Bali, he had no idea of the destination. He said he had not heard of Australia or Ashmore Reef. In addressing the mental element of the offence, the trial judge directed the jury that “the accused meant to do what he did if he knew that by steering the boat and taking the group to the place that he did he was helping to take the group to Australia”. Mr Taru Ali appealed his conviction, arguing that the trial judge should have also directed the jury that the Crown had to prove he knew Ashmore Reef was part of Australia. On appeal, reliance for this proposition was placed upon decisions such as *Alomalu v R* [2012] NSWCCA 255 **and** *Sunanda v R; Jaru v R* [2012] NSWCCA 187.

R A Hulme J undertook an analysis of the evidence in the trial. Some passengers gave evidence that Mr Taru Ali indicated that their destination was Ashmore Reef; that they were entering Australian waters; and that the “Australian Navy will come and collect you guys” and that “when the Australian Navy [come] they will put us in jail and you guys will be free”. *Alomalu* and *Sunanda* were cases where the evidence was only capable of establishing that the accused knew the immediate destination of the passengers. This was not so with respect to Mr Taru Ali. As he knew the ultimate destination of the passengers was Australia, and that bringing them to Ashmore Reef facilitated their arrival at their ultimate destination, it was not necessary to prove any intent with respect to whether he knew Ashmore Reef was part of Australia. R A Hulme J held that there had been no misdirection.

*Part 9.1 of the Criminal Code Act 1995 (Cth) does not cover the field in regards to supply*

This appeal in **Buckman v R [2013] NSWCCA 258** was heard simultaneously with **Ratcliff v R [2013] NSWCCA 259**, which raised identical issues. The appellant contended that the provision under which he was charged, s 25 of the *Drug Misuse and Trafficking Act 1985* (NSW), is inconsistent with Pt 9.1 of the *Criminal Code Act 1995* (Cth). Thus it was argued that the NSW provision infringes s 109 of the *Australian Constitution*. The appellant relied on the High Court decision of *Dickson v The Queen* [2010] HCA 30; (2010) 241 CLR 491, submitting that, just as there, the two Acts in issue are directed at controlling the same activities, drug possession and supply (at [36]). Since the *Drug Act* renders unlawful many acts not covered by the *Criminal Code*, it was argued that it acts to alter, impair or detract from the operation of the *Criminal Code*.

Bathurst CJ dismissed the appeal. He noted (at [78]) that s 300.4 of the *Criminal Code* “explicitly seeks to preserve concurrent operation even when the same act or omission is an offence under the *Criminal Code* and a State law and the penalty and fault element in

the State law is different". This indicates that the Commonwealth did not intend to cover the field. All that the *Drug Act* does is treat possession with an intention to supply gratuitously to a third person as a more serious offence. Section 300.4 does not operate to eliminate direct inconsistency but allows for federal law to be read and construed as not disclosing a subject matter or purpose with which it deals exhaustively and exclusively (citing *Momcilovic v The Queen* [2011] HCA 34; (2011) 245 CLR 1 at [272]).

*Section 25(2) of the Drug Misuse and Trafficking Act can operate concurrently with s 233B of the Customs Act*

The appellant in ***Gedeon v R* [2013] NSWCCA 257** was charged with two counts of supplying cocaine in contravention of s 25(2) of the *Drug Misuse and Trafficking Act 1985* (NSW). On appeal he claimed that this section is directly inconsistent with s 233B of the *Customs Act 1901* (Cth), thereby violating s 109 of the *Australian Constitution*, which invalidates State legislation insofar as it is inconsistent with Commonwealth legislation. The appellant argued that both Acts criminalise possession of narcotics. The inconsistency arises since the *Drug Act* does not provide for the defence of reasonable excuse, whereas the *Customs Act* does, the State act thereby denying a right or privilege conferred by a Commonwealth law.

Bathurst CJ dismissed the appeal. The test is whether the State Act alters, impairs or detracts from the operation of the federal Act: *State of Victoria v The Commonwealth (The Kakariki)* (1937) 58 CLR 618 at 630 (Dixon J). Section 233B of the *Customs Act* relates to imported goods. To establish an offence under that section the prosecution must prove beyond reasonable doubt that the accused knew that he or she possessed the goods: *He Kaw Teh v The Queen* (1984) 157 CLR 523 at 545, 584, 589 and 603. The *Drug Act* deals with the supply of drugs. The necessary element is intention to supply. Once possession for supply is established it is hard to see how a defence of reasonable excuse for possession could be made out. In addition, the reasonable excuse defence is co-extensive with defences at common law, the only difference being that under the *Customs Act* the onus is clearly on the defendant.

*Mens rea for reckless wounding in company by joint criminal enterprise*

The appellant in ***Prince v R* [2013] NSWCCA 274** was found guilty by a jury of offences of affray and wounding with intent to cause grievous bodily harm. The primary charge was brought under s 33(1)(a) *Crimes Act 1900*, and a statutory alternative was provided under s 35(3). Both charges were put on alternative bases, direct liability and joint criminal enterprise. It was conceded that the trial judge erred in his directions for the s 35(3) offence when put on the joint criminal enterprise basis. The jury was directed that the person inflicting the wound must have been reckless, and also that the appellant intended that the person would inflict the wound recklessly. Instead, what the Crown had to prove was that the wound was inflicted recklessly by one of the appellant's co-offenders; that the appellant had agreed to attack the victim; that he was acting in company with his co-offenders who he knew were armed; that he realised the victim might be harmed; and that he continued to act in furtherance of the enterprise. However, the trial judge directed the jury to consider the statutory alternative only in the event that the jury acquitted the appellant of the primary offence, which they did not. Furthermore, the misdirection

favoured the appellant by overstating the mens rea requirement, and so no miscarriage of justice could have flowed.

There was no reference in the judgment (presumably because neither counsel raised it) to *Blackwell v R* [2011] NSWCCA 93 where an error in directing as to the elements of an alternative offence resulted in a successful appeal, notwithstanding the appellant was found guilty of the primary offence.

*Where multiple traffic offences charged, withdrawal of one does not void licence suspension*

Upon being charged with refusing to undergo a breath test, failing to undergo a breath analysis and driving whilst under the influence of alcohol, Mr Firth was issued with a notice of suspension of authority to drive in NSW. The suspension came into effect immediately. The charge of failing to undergo a breath analysis was later withdrawn but before that occurred, Mr Firth was charged with driving whilst suspended to which he pleaded guilty. He sought judicial review of the suspension on the basis that the suspension had been void ab initio upon the withdrawal of the charge. Leeming JA in ***Firth v Direction of Public Prosecutions* [2013] NSWCA 403** held that it was the charge of refusing to undergo a breath test that gave rise to the suspension and the suspension remained valid as long as the charge remained on foot. A pre-condition to the issuing of a suspension notice under s 205 of the *Road Transport (General) Act 2005* is that the person has been charged with an offence listed in s 205(1)(a) or (b), which Mr Firth had. (NB: the relevant provisions have since been transferred to *Road Transport Act 2013*).

*Consent to surgery in a medical assault case*

Former doctor Reeves was convicted of malicious infliction of grievous bodily harm with intent. He was sentenced on the basis that he did not have the complainant's consent to surgically remove her entire genitalia. The issue on appeal to the Court of Criminal Appeal was whether the trial judge provided erroneous directions to the jury on the issue of consent. The High Court found in ***Reeves v R* [2013] HCA 57** that the Court of Criminal Appeal formulated the correct test. The CCA was correct to find that the trial judge was wrong to direct that the practitioner had to explain the "possible major consequences of the operation" together with "options" and "alternative treatments" in order for there to be "informed consent". All that is needed in order to negate the offence of battery is consent to the nature of the procedure, in broad terms. (This is not necessarily enough to protect against liability in negligence, however). The appellant argued that Bathurst CJ formulated a more demanding test, by requiring consent to the "nature and extent of the procedure". The High Court ruled that this was irrelevant since neither formulation could be said to have been agreed to on the facts.

## **PRACTICE AND PROCEDURE**

*Whether availability of Crime Commission transcripts results in fundamental defect in trial for related offences*

In a trial of two individuals for tax offences, the Commonwealth Director of Public Prosecutions (“CDPP”) was provided with transcripts of evidence both accused had given in a private hearing of the Australian Crime Commission. After argument, the trial judge found that the transcripts should not have been disseminated: in contravention of s 25A(9) *Australian Crime Commission Act 2002* (Cth), the material had the potential to prejudice a fair trial. He granted a permanent stay of the proceedings and the Crown appealed. In ***R v Seller; R v McCarthy* [2013] NSWCCA 42**, Bathurst CJ held that the trial judge was right to decide that the transcripts should not have been disseminated, but that the bare risk of a resulting defect in the trial process did not entitle the accused to a stay. It must have been shown that a defect had in fact arisen. In this case, the CDPP case officer had not read the transcripts or known of their contents, and nor had CDPP counsel at trial. The stay was quashed.

*Unlawful disclosure of evidence given before NSW Crime Commission before trial for related offences*

The appellants in ***Lee v R; Lee v R* [2013] NSWCCA 68** were convicted of a number of drug and weapons offences. The offences related to their involvement in a syndicate that imported pseudoephedrine from Korea in the guise of washing machine powder. Before they were charged, the applicants (and another person who would become a Crown witness) had given evidence in Crime Commission proceedings relating to the syndicate. The Commissioner had provided transcripts of that evidence to the Crown. It was conceded by the Crown, on the appeal, that the dissemination of the transcripts was unlawful. But Basten JA did not find that possession of the material caused a miscarriage of justice. The salient reasons were as follows:

1. If the prosecution possesses inadmissible material potentially relevant to the defence of the accused the trial is not by default unfair;
2. there was no objective unfairness in the conduct of the trial resulting from the dissemination of the transcripts; and
3. no objection was taken at trial, despite the appellant being aware of all the material in the prosecution brief.

*Duplicity*

***Chapman v R* [2013] NSWCCA 91** concerned a single charge that disclosed two separate offences. The kitchen pantry of Mr Chapman’s house was found to contain 224 tablets of methylamphetamine. Five further tablets were found in his car, of a total weight less than that needed for deemed supply. He was charged with a drug supply offence. Mr Chapman moved for the charge to be quashed on the grounds of duplicity. His motion was refused, and he appealed to the Court of Criminal Appeal under s 5F of the *Criminal Appeal Act 1912*.

Adamson J agreed that the indictment revealed duplicity. Mr Chapman could be convicted of the offence if the jury were satisfied that he was in possession of the deemed supply quantity in the pantry; or if he was in possession of the five tablets in the utility for the purpose of supply; or both. It would not be possible to ascertain definitively on what facts the jury reached their verdicts, or whether they were unanimously convinced of one

ground. (On the appeal, the Crown indicated that it would not rely on the five tablets being for supply, rendering the point moot.)

*Application for judge-alone trial on basis of “revolting” facts*

Mr Stanley was accused of intentionally or recklessly inflicting actual bodily harm with intent to have sexual intercourse. It appeared from the facts, which were not contested, that he had violently assaulted a nurse at a hospital and, while naked, jabbed his erect penis in her face. He was affected by drugs and alcohol at the time, and the sole issue was intent. Mr Stanley’s counsel made an application for a judge alone trial on the basis that the nature of the evidence was likely to engender prejudice in the jury. The trial judge granted the application, which was appealed by the Crown.

In ***R v Stanley [2013] NSWCCA 124***, Barr AJ quashed the order of the trial judge. While it was true that the evidence was of a kind that could make a jury experience disgust, the same was true of evidence in many criminal trials in NSW. Jurors are warned in advance about such evidence and have an opportunity to recuse themselves, and in any event are directed to not allow emotion to interfere with their reasoning. His Honour rejected two alternate grounds of which argued the expert evidence was complex and that the trial did not call for the application of community standards as incorrect characterisations of the issues in the trial.

*Whether ex officio indictment filed after Local Court refuses leave to proceed on indictment is an abuse of process*

Mr Iqbal was charged with recklessly causing grievous bodily harm. The police prosecutor did not elect to have the matter heard on indictment, and his trial was to proceed in the Local Court. Before the hearing date, the DPP took over the matter and applied for leave, under s 263(2) *Criminal Procedure Act*, to make a late election to have the matter proceed by way of indictment. The Court refused leave, but the DPP, evidently determined, filed an *ex officio* indictment in the District Court. Mr Iqbal sought a stay of the District Court proceedings. He contended that the circumvention of the Local Court determination by the DPP was an abuse of process because of the adverse impact it had upon public confidence in the proper administration of justice. The stay was refused, and Mr Iqbal appealed.

In ***Iqbal v R [2012] NSWCCA 72***, McClellan CJ at CL confirmed the refusal to grant a stay. First, his Honour held that the DPP had the necessary power. The applicant disavowed any argument that the legislative scheme excluded the filing of an *ex officio* indictment where s 263 leave was refused. His Honour drew a comparison between Mr Iqbal’s circumstances and the situation where a magistrate declines to commit an accused person, both being decisions of the Local Court preventing a matter going to indictment. Since filing of an *ex officio* indictment is permissible in the latter case, there was no technical reason why it was not in relation to Mr Iqbal. Second, it was not an abuse of process. The applicant did not argue that unfair prejudice was occasioned by the *ex officio* indictment. In response to the allegation that public confidence would be impaired, McClellan CJ at CL merely observed, at [24]:

My present understanding of the facts to be alleged against the applicant are such that public confidence in the criminal justice system may be adversely impacted if the matter is not prosecuted on indictment.

*Failure to answer outstanding question from jury before delivery of verdict*

Mr Alameddine was on trial for two counts of aggravated armed robbery arising from a security van heist. The jury experienced difficulty in reaching a verdict. A note was sent to the judge expressing this, and the trial judge delivered encouragements generally along the lines suggested in *Black v The Queen* (1993) 179 CLR 44. Soon another note was received from the jury, this one asking what use could be made of a specific piece of DNA evidence. The note read:

How much weight can be given in reference to joint criminal enterprise in regard to using the DNA evidence from the interior door handle of the car to implicate the accused for robbery?

The trial judge and counsel agreed that the note required clarification. This was sought from the jury, but was not immediately forthcoming. One hour later, the jury sent another note stating that it had “finished deliberating”, by which it meant that it was unable to reach a verdict. The jury was informed of its ability to deliver a majority verdict, and soon found Mr Alameddine guilty of both counts. Mr Alameddine appealed.

On the appeal (*Alameddine v R* [2012] NSWCCA 63), Grove AJ held that it was an error to accept a verdict from the jury while a question remained unanswered. He held, at [44]-[45]:

Where a question manifests confusion, it is important that this be removed and the jury be directed along the correct path. Even if, absent direction, a jury has resolved an issue to their own satisfaction, it has been held erroneous to omit so to do: *R v Salama* [1999] NSWCCA 105.

It is perhaps understandable how the obtaining of the requested redraft of the question was overlooked, given the focus of the series of communications from the jury concerning its inability to agree but the omission amounted to error. Even where the directions in the initial charge are adequate, it has been held that they no longer remain so in the light of the existence of an unanswered question: *R v Hickey* (2002) 137 A Crim R 62.

*Appearance of pregnant prosecution witness by AVL not “unfair” to accused*

*JD v R* [2013] NSWCCA 198 concerned a stay application on account of the pregnancy of the complainant. JD was charged with child sex offences. The complainant was, by the time of the trial, an adult. She was pregnant, residing in another state, and had been advised by a doctor not to fly. An application that she give evidence by video link was foreshadowed. JD sought a stay, arguing that the jury might react with a “heightened level of sympathy” to strenuous cross-examination of the witness, and that this would cause prejudice to the appellant because a reasonably informed member of the public might perceive unfairness. The trial judge refused the stay, and JD appealed to the CCA.

The Court refused leave to appeal. The first point was that the touchstone for apprehended bias (“fair minded lay observer”) is not the relevant test for refusing an application under s 7(2)(c) *Evidence (Audio and Audio Visual Links) Act 1998*, which is simply that the Court is satisfied that “the direction would be unfair”. The second was that

arrangements could very easily be made for the complainant to give evidence in such a way that her pregnancy was not visible to the court in NSW. Appropriate arrangements could also be made for the officers of the court from which she was giving evidence to have any documents that might be required for cross-examination.

(The Court remarked that the AVL arrangements could be such that the jury would never know that the witness was pregnant. So the case is not authority for the proposition that *physical* attendance of a heavily pregnant witness is not an arguable ground for a stay.)

#### *Inadequately particularised charges of aggravated sexual assault*

Mr Tonari was convicted of offences of sexual intercourse without consent in circumstances of aggravation (s 61J *Crimes Act*). The aggravating feature cited in the indictment was the threatened infliction of actual bodily harm to the victim. The indictment was defective in that it did not disclose that the prescribed aggravating feature required the threats to be conveyed “by means of an offensive weapon or instrument”. The defect was not noticed at trial. Mr Tonari appealed his conviction before he was sentenced for the subject offences: ***Tonari v R* [2013] NSWCCA 232**. He relied, inter alia, on two grounds: that the indictment disclosed no offence known to law and the trial was a nullity; and that the defect led the trial judge to misdirect the jury.

Johnson J rejected the first ground. The indictment disclosed “an imperfect formulation of a known offence” (at [95]). It was a case of incorrect particularisation. But a real consequence was the jury was given incomplete directions of law on the circumstance of aggravation relied upon. There was some very slight evidence of an implement having been used, but the jury was not directed to make a finding on that issue because of the way the indictment was framed. The appropriate course was for the court to substitute verdicts for the non-aggravated form of the offence (s 61I) by means of s7(2) *Criminal Appeal Act 1912*.

#### *Legislative change did not affect conviction*

The appeal against conviction in ***MJ v R* [2013] NSWCCA 250** arose because three counts of aggravated indecent assault brought against the appellant used the language of s 61E(1A) of the *Crimes Act 1900* (NSW). This provision was repealed on 17 March 1991 and replaced with ss 61L and 61M. The evidence was incapable of establishing whether the offence was committed before or after this date. The appellant accepted that the counts could be established under the new s 61M. However, he claimed that the counts failed to allege an offence known to the law (because neither provision covered the entire period referred to in the count) or alternatively were bad for duplicity (because two different offences were alleged). Macfarlan JA dismissed the appeal. He accepted the Crown’s submission that the conduct charged in the counts was unlawful at all times in the period referred to “and the fact that the source of the unlawfulness changed did not invalidate the appellant’s convictions” (at [29]). It was also recognised, as in *R v MAJW* [2007] NSWCCA 145; 171 A Crim R 407, that if the factual matters alleged would constitute offences under more than one legislative provision, the offender should be sentenced on the basis of the lower maximum penalty. Furthermore, there was no unfairness to the appellant arising out of the fact that the statutory provision which rendered the appellant’s conduct unlawful was not identified; the essential factual ingredients of the charges were clear in the indictment.

*District Court has no power to order costs on the setting aside a subpoena*

While the applicant was an accused in criminal proceedings for sexual assault offences pending in the District Court, his solicitors issued a subpoena calling for various documents to be produced by the complainant. The trial judge set aside the subpoena at the request of the complainant's solicitors, and also ordered the applicant to pay costs. The ordering of costs was found by R A Hulme J in ***Stanizzo v Complainant* [2013] NSWCCA 295** to be beyond the power of the District Court. There is no express conferral of power to do so, and nor does the District Court possess inherent jurisdiction in this respect. The question was whether there was an implied power, "by a strict test of necessity" (at [12]). R A Hulme J referred to *R v Mosley* (1992) 28 NSWLR 735 in which it was confirmed that there is neither express nor implied power for a District Court to order costs in its criminal jurisdiction. Reference was also made to *DPP v Deeks* (1994) 34 NSWLR 523 where Kirby P observed (at 534) that the power to award costs in criminal proceedings must be "very clearly conferred". These two authorities take precedence over *Darcy v Pre-Term Foundation Clinic* [1983] 2 NSWLR 497 upon which the respondent had relied.

*Undesirable for prosecutor to frame address as questions to be answered by defence*

The appellant in ***Lane v R* [2013] NSWCCA 317** appealed, inter alia, against certain aspects of the Crown Prosecutor's closing address in her trial for murder. The objectionable portion involved the Crown posing a series of questions to the jury, and asking that they be borne in mind during the defence address. The appellant argued that this had the effect of reversing the onus of proof, and that as a result the trial had been unfair.

The Court (Bathurst CJ, Simpson and Adamson JJ), referring to *Wood v R* [2012] NSWCCA 21, agreed that asking questions with a view to inviting the jury to consider if satisfactory questions were provided was highly undesirable. But a miscarriage of justice did not automatically flow. In this case, the issues raised as "questions" were factually relevant to the Crown onus of excluding a defence case. Had the questions been framed as issues, they would have been unobjectionable. (And no objection was taken at trial.) The Court felt bound to accept that the jury applied the directions of the trial judge assiduously.

## **SENTENCING – GENERAL ISSUES**

*Correct calculation of discount for assistance to authorities*

LB was involved in the large-scale manufacture of methamphetamine and ecstasy in Western Sydney. He was arrested and charged with two serious drug manufacture offences, to which he pleaded guilty. He provided the Crown with significant information in relation to the criminal enterprise that he was involved in. At his sentencing, Garling DCJ allowed LB a discount of 25% for his plea of guilty, and 25% for his assistance to the authorities. But his Honour applied a combined discount of only 30% to the final sentence, giving no particular reasons for doing so. LB appealed on the basis he had not been afforded a sufficient discount for assistance.

In **LB v R [2013] NSWCCA 70**, Button J rejected the suggestion that there had been mathematical miscalculation. Rather, he found that DCJ Garling had attempted to balance the competing imperatives of s 23(4) *Crimes (Sentencing Procedure) Act 1999*, which requires particularisation of the discount, with s 23(3), which requires that the total penalty not be unreasonably disproportionate to the offence. The approach taken led to error. If LB withdrew his assistance in the future, it would not be possible to calculate the relevant discount for the purpose of a Crown appeal under s 5DA *Criminal Appeal Act 1912*. The correct approach was to formulate the discounts; explicitly reduce them, if necessary, by reference to s 24(3); and then apply them to the undiscounted sentence.

*Illicit drug dependence and moral culpability*

**Nair v R [2013] NSWCCA 79** involved a sentence appeal by Dr Nair, a neurosurgeon who was convicted of manslaughter for failing to intervene in the fatal cocaine overdose of an escort he had hired. One ground of appeal was that the sentencing judge had not reduced Dr Nair's moral culpability to take into account his "intense craving to use the drug in sexual situations". Blanch J rejected any suggestion that drug addiction, without underlying or supervening mental illness, is a reason to reduce moral culpability. His Honour referred in particular to the free (initial) choice to experiment with illicit drugs known generally to have addictive qualities.

*Self-induced intoxication and violent offences*

**ZZ v R [2013] NSWCCA 83** concerned, amongst other things, the relevance of self-induced intoxication as a mitigating factor on sentence for violent offences. The appellant had, while severely affected by alcohol and cocaine, committed a violent sexual assault on his girlfriend. It was submitted for the appellant that his was the unusual case where intoxication mitigated the offences because it led to violence being committed out of character. Johnson J held that it was not a mitigating factor of any account. The appellant's conduct was committed over a sustained period in the face of a clear lack of consent; and he did not demonstrate himself to be a person of prior good character, being a considerable recidivist in terms of fraud offences.

(It did not appear to be argued that the appellant was not an inexperienced user of alcohol and cocaine, but that seems apparent from the facts and would serve, by reference to authorities such as *Hasan v R [2010] VSCA 352*; 31 VR 28, to further diminish the relevance of his intoxication.)

*More onerous imprisonment as consequence of assisting authorities*

**C v R [2013] NSWCCA 81** concerned the extent to which a sentencing judge should take into account the onerous prison conditions that invariably come with an offender providing a high degree of assistance to authorities. The appellant was engaged by a Mexican cartel to come to Sydney to receive and distribute an enormous shipment of cocaine. The shipment was detected and the appellant was arrested. He plead guilty and provided considerable assistance in relation to the criminal enterprise he was involved in. On sentence, he was allowed a combined discount of 35 per cent. The sentence judge noted he would be kept in the Special Purpose Centre at Long Bay, but said that she had

received no evidence to establish that conditions there would be more onerous than in the general population.

In the Court of Criminal Appeal, Hoeben JA found that the sentencing judge had been in error to not make at least some allowance for the fact that the appellant was to be detained in the Special Purpose Centre. He found, at [41], that

an offender in the position of the applicant during a sentence hearing, if he or she wishes to gain some benefit in the sentencing process because of the conditions under which the sentence is likely to be served, should adduce evidence as to those conditions. If the Crown disputes that evidence, it can call its own evidence, otherwise the evidence of the offender should be given appropriate weight.

But notwithstanding the lack of evidence, an appropriate discount in this case was 45 per cent.

*Hardship to third parties not to be considered unless “exceptional circumstances” present*

Mr MacLeod received a suspended sentence in the District Court. The sentencing judge found that the “offender in my judgment deserves to go to gaol and I have no reservations about that” but decided that an order under s 12 of the *Crimes (Sentencing Procedure) Act* was appropriate because of the impact his incarceration would have on his family and employees. In ***R v MacLeod* [2013] NSWCCA 108**, Simpson J held that in the absence of exceptional subjective circumstances, hardship to third parties was not a relevant factor in sentencing. Indeed, hardship to third parties is one of the expected outcomes of the majority of sentences of imprisonment. Because there were no exceptional circumstances in Mr MacLeod’s case, the suspended sentence converted to one to be served by way of full-time imprisonment.

*Erroneous assessment of objective gravity by reference to Local Court’s jurisdictional limit*

In ***Roads and Maritime Services v L & M Scott Haulage Pty Ltd* [2013] NSWCCA 107**, the respondent, a haulage company, had been fined \$35,750 in the Local Court for an offence against s 56 of the *Road Transport (General) Act 2005* relating to the overloading of heavy vehicles. The relevant maximum penalty was \$203,500. However, the Local Court could not impose a fine greater than \$55,000. The Local Court sentence was reduced to \$5000 on appeal to the District Court, where Toner DCJ held that the penalty imposed in the Local Court was grossly disproportionate to the offence, having regard to the lower jurisdictional limit. On a referred question of law, the Court of Criminal Appeal held that this was an incorrect approach. Latham J, by reference to the recent case of *Zreika v R* [2012] NSWCCA 44, confirmed that objective gravity is to be assessed by reference to the maximum penalty, not the jurisdictional limit.

(Latham J also held that the matters to be considered in s 60(2) are not aggravating factors and there is no need for evidence of the relevant consequences to be adduced.)

*Failing to warn that uncontested evidence will not be accepted amounts to procedural unfairness*

The appellant in ***Cherdchoochatri v R* [2013] NSWCCA 118** was being sentenced for importing a marketable quantity of heroin. He gave evidence, which was not challenged by the Crown, that he had been subject to duress in respect of the offending. That evidence was the subject of a submission on the appellant's behalf, and neither the Crown nor the sentencing judge made any comment on the use that was made of it. But on sentence, the judge rejected the argument that the appellant was motivated by duress. In the Court of Criminal Appeal, Emmett JA and Simpson J (with whom Latham J agreed) held that to give no warning that the submission might be rejected amounted to a denial of procedural fairness. In terms of the practical aspects of this, Simpson J pointed out at [58] that:

It may even have been possible to call additional evidence in support, for example, from the applicant's wife, or from Mr Howard. In this respect it is pertinent to note (although it is often overlooked) that the *Evidence Act 1995* applies in sentencing proceedings only if a direction is given to that effect. There is a degree of flexibility in sentencing proceedings in the manner in which evidence may be given.

*No tinkering with sentences imposed in the District Court*

Mr Tabuan was sentenced for his part in the supply of a prohibited drug. He was present, for the purposes of security, at a sale of 460g of methylamphetamine. The jury verdict of acquittal of commercial supply could only be reconciled with a finding that Mr Tabuan did not know the quantity of drug involved. In his remarks on sentence, the judge found that Mr Tabuan would have known that the quantity of drugs involved was large, "in the order of 150 grams or thereabouts", or his presence would not have been required. Mr Tabuan appealed, and in ***Tabuan v R* [2013] NSWCCA 143**, Harrison J found that there had been an insufficient factual basis for such a finding. But his Honour also found that no lesser penalty was warranted. His Honour also remarked, at [28]:

As an additional matter I consider that it is important to recognise that the judges in the District Court are faced on a daily basis with an almost unending onslaught of serious and complex sentencing exercises. The fact that an error or errors may be identified upon quiet reflection by others in circumstances that are unconstrained by the pressures under which the judges are required to operate is neither surprising nor derogatory. There is no doubt that the process must be undertaken according to the detailed and difficult sentencing principles that guide all sentencing judges. *But where, as in this case, the sentencing judge passes a sentence that in all of the circumstances of the case is a proper sentence howsoever it is viewed, it is not appropriate to make minor adjustments to the result in order only to give some practical recognition of or endorsement to the identified error if it is not otherwise warranted.* (Emphasis supplied)

*Form 1 offences and the primary sentence*

Mr Abbas was sentenced for two offences of knowingly taking part in the supply of a commercial quantity of a prohibited drug. The sentencing judge was asked to take into account four offences on a Form 1. The judge stated that, in some cases, taking additional matters into account would increase the weight given to personal deterrence and retribution, and so have the consequential effect of increasing the penalty for the primary offence. Mr Abbas appealed his sentence and contended that this approach was erroneous.

On the appeal (**Abbas, Bodiotis, Taleb and Amoun v R [2013] NSWCCA 115**) Bathurst CJ (Garling and Campbell JJ agreeing, Basten JA and Hoeben CJ at CL also rejecting the ground) held that the approach was correct. While it was not open to the sentencing judge to punish the offender for the criminality reflected by the Form 1 offences, it was open to find personal deterrence and retribution be given additional weight in respect of the primary offence.

*“One punch” assaults and drunken violence*

**Pattalis v R [2013] NSWCCA 171** was an appeal against a sentence imposed for an offence of assault occasioning actual bodily harm. Mr Pattalis had exited a Sydney nightclub at 3:25am, drunk, and struck another patron in the face for no apparent reason (nor one he could later recall). He pleaded guilty to the charge, and was sentenced to two years imprisonment with a non-parole period of one year. He appealed on the sole ground of manifest excess. In refusing leave to appeal, Hoeben CJ at CL remarked, at [23]:

it is now notorious (as his Honour recognised) that a single punch can not only cause catastrophic injuries but also death. For offences of this kind, the community has the rightful expectation that judicial officers will impose meaningful penalties.

*Reflecting Form 1 offences in aggregate sentencing*

**R v Grover [2013] NSWCCA 149** concerned a Crown appeal against an aggregate sentence. The respondent had pleaded guilty to a number of offences and received an aggregate sentence of imprisonment. Sequences one, two and three were aggravated break enter and steals. But the sentencing judge specified the same individual sentence for each count, regardless of the fact that *nineteen* Form 1 offences were attached to the first sequence. On the appeal, the Crown argued that the failure to show the impact of the Form 1 offences was indicative of error. Hoeben CJ at CL agreed. The point of taking into account Form 1 offences is to increase the penalty that would otherwise be appropriate for the particular offence through the consideration of personal deterrence and the community’s expectation of condign retribution.

*Parity does not assist the Crown*

Mr Delaney was convicted of a number of offences of menace with intent to steal and deal with proceeds. The Crown took the view that he had received a lighter sentence than he should have, and appealed. One of the grounds argued on the appeal, **R v Delaney [2013] NSWCCA 150**, was parity: the Crown pointed to more a severe sentence imposed on a co-offender. Hoeben CJ at CL rejected the argument, making very clear at [69] that “the parity principle is one of amelioration designed to benefit offenders”, not the Crown.

*Failure to observe that offence could have been dealt with in the Local Court*

The appellant in **Hendra v R [2013] NSWCCA 151** was convicted of an offence of common assault, as an alternative to a more serious charge of assault occasioning actual bodily harm. He appealed his sentence, arguing, inter alia, that the trial judge had entered error by failing to observe, in his remarks on sentence, that the assault could have been dealt with summarily. The trial judge had not been asked to do so by counsel. McCallum J, observing *Zreika v R [2012] NSWCCA 44* at [111]-[112], remarked that the failure to raise the matter was indicative of it not being realistically available. Once it had been concluded

that the offence was in the worst category (a finding that was open) and that the sentence would be higher than that which the Local Court could impose, the significance of the lower jurisdictional limit fell away.

*Meaning of offence being committed in the “presence” of a child*

Mr McLaughlin pleaded guilty to and was convicted of three domestic violence related offences. All were committed in the home he shared with his partner and her young son. The agreed facts mentioned that the last offence occurred in the child’s bedroom while he was asleep. The sentencing judge acknowledged that there was no evidence that the child had seen the offending conduct. But she remarked that the presence of the child was a “potentially aggravating circumstance”, applying s 21A(2)(ea) of the *Crimes (Sentencing Procedure) Act*. Mr McLaughlin appealed, arguing that the sentencing judge erred in taking into account as an aggravating factor the “generalised presence” of the child.

On the appeal, **McLaughlin v R [2013] NSWCCA 152**, Button J agreed that the circumstance should not have been taken into account as an aggravating feature. There was no direct evidence that the child was present at the first two offences. The sentencing judge could have made a finding that the child must have realised what was occurring during the third offence, but she did not do so. In those circumstances, her Honour’s view did not accord with the strict approach to s 21A(2)(ea) put down by *Gore v R; Hunter v R [2012] NSWCCA 330; (2012) 208 A Crim R 353 at [103]-[104]*. The Crown must prove the specific feature of aggravation beyond reasonable doubt. (The appeal was dismissed as no lesser sentence was warranted.)

*The maximum penalty for a statutory offence serves only as a reference point for the equivalent common law crime*

**Blackstock v R [2013] NSWCCA 172** concerned a plea of guilty to the common law offence of misconduct in a public office. Mr Blackstock had, between 2003 and 2007, improperly used his position at Rail Corp to surreptitiously create a company to take up a maintenance contract. Part 4A of the *Crimes Act* creates a number of statutory offences proscribing similar conduct to the common law offence. Those offences have prescribed maximum penalties, while the sanction for the common law offence is, of course, at large. Mr Blackstock argued that his sentence of six years was equivalent to a finding of the worst degree of criminality in respect of the statutory offence, and that it was thus manifestly excessive. Campbell J rejected his argument. His Honour held that the statutory analogue provided a reference, but no more than that, and that there was no limit to the term of imprisonment that could be imposed on a person convicted of a common law misdemeanour.

*Aggregate sentences: whether fixed terms indicate head sentence or non-parole period*

The appellant in **Tuvunivono v R [2013] NSWCCA 176** had received an aggregate sentence in respect of ten offences of armed robbery or attempted armed robbery. The total sentence was 12 years with a minimum custodial component of 8 years. One sentence reflected a number of Form 1 offences, but for the other nine offences the sentencing judge delivered similar fixed terms of four to five years in accordance with the guideline judgment of *R v Henry [1999] NSWCCA 111; (1999) 46 NSWLR 346*. On appeal, it was

argued that the fixed terms were, effectively, non-parole periods, not head sentences, and that as a result the sentences were manifestly excessive (purportedly reflecting notional head sentences higher than the guideline). The argument was rejected by Price J (Campbell J agreeing). The sentencing judge's reliance upon *R v Henry* showed that he intended to set fixed terms as "head sentences" that reflected the guideline.

*Following the rule in Pearce*

Mr Finnigan unscrupulously promoted a Ponzi scheme. He was charged and pleaded guilty to nine offences relating to eight victims and a sum of almost two million dollars. He received a total sentence of ten years, with a non-parole period of six years. He appealed his sentence, arguing, inter alia, that the sentencing judge failed to fix proportionate sentences for each individual offence by approaching the sentencing task: ***Finnigan v R [2013] NSWCCA 177***. The relevant remarks of the sentencing judge included:

For the other sentences in the main they will be three years and seven months or thereabouts. For Counts 7, 8 and 9 they will be a straight four years. As will be seen that is done to ensure that in an overall sense a greater sentence is not imposed than it should be imposed.

Campbell J agreed that the decision below displayed error. By fixing an appropriate total term and then (seemingly) arbitrarily setting individual sentences to correspond with that, the sentencing judge failed to follow the mandatory sequence required by *Pearce v The Queen* (1998) 194 CLR 610 at 624[24]. The sentencing judge must fix an appropriate sentence for each offence and then go on to consider the other questions, including totality.

*Victim impact statement expressing harm far in excess of what might be expected from offence*

The appellant in ***RP v R [2013] NSWCCA 192*** pleaded guilty to an offence of indecent assault upon a female under the age of 16 (proscribed by s 76 *Crimes Act*, now repealed) committed between 1978 and 1980. The conduct involved two occasions of rubbing cream into the face and upper chest of an 11-year-old girl (the second occasion appearing as a Form 1). The sentencing judge found that the seriousness of the offence was "near the bottom" of the range, but imposed a fairly stiff fixed-term of one year, including a utilitarian discount. He had considerable regard to a victim impact statement that spoke of profound and devastating lifelong suffering by the victim. It included statements to the effect that, "her thoughts were consumed with the horror of the abuse, she was not able to function as a parent or a person". The appellant complained, on appeal, that the judge was in error in giving weight to its contents in light of it expressing a level of harm incommensurate with the scale of the offending.

The appeal was upheld. Price J found that the sentencing judge was obliged, in the context of the charged offences, to approach the victim impact statement with caution. The harm asserted to be suffered by the victim was not supported by other evidence. It did not accord with what would generally be expected from the circumstances of the offence. The appellant was re-sentenced to two months imprisonment.

### *Principles applicable to suspended sentences*

**R v Egan [2013] NSWCCA 196** is another reminder of the importance of assiduously following the proper steps when considering whether to impose a suspended sentence. The three primary things to be determined, elucidated in the judgment of R A Hulme J at [79], are:

1. Whether no other penalty than imprisonment is appropriate.
2. If so, what the length of the term of imprisonment should be.
3. Whether the sentence *can* and *should* be suspended.

Mr Egan pleaded guilty to a number of serious offences. In written submissions on sentence, his counsel conceded that a full-time custodial sentence should be imposed. While hearing submissions, various things fell from the bench that indicated the sentencing judge was giving serious consideration to imposing some kind of alternative to custody. At the conclusion of his remarks on sentence, he imposed sentences that gave the appearance of being calculated to give effect to that intention. It was evident that he had missed the second step in the principles above: he had not determined the length of the sentences of imprisonment before he decided to suspend them. As a result, the sentencing exercise miscarried and resulted in a manifestly inadequate sentence. R A Hulme J expressed his regret for:

the unfortunate consequences that flow from a judge being unduly merciful in imposing a sentence that is substantially less than that which the law demands and that the judge's duty requires be imposed.

### *Offending the De Simoni principle*

Mr Nguyen was conducting a minor criminal enterprise from the garage of his unit complex. Two masked men attempted, unsuccessfully, to rob him. Mr Nguyen was able to scare them off unarmed, but later obtained a pistol to prevent further robberies. Two weeks later, eight police officers executed a search of Mr Nguyen's unit and garage. When they entered the basement, Mr Nguyen confronted them. A brief exchange of fire ensued, in the course of which Mr Nguyen shot Constable Crews in the arm, and another police officer, in returning fire moments later, accidentally shot Const. Crews dead. Mr Nguyen claimed that he had mistaken the police officers for disguised robbers. He pled guilty to manslaughter on the basis of excessive self-defence (and also pleaded to wounding with intent). The Crown accepted his plea.

The sentencing judge expanding on the consequences of the plea:

The plea of guilty to manslaughter also entails the Crown accepting the reasonable possibility that the offender genuinely believed that it was necessary to shoot at the person who proved to be Constable Crews in order to defend himself (based as it was on his mistaken belief that the officer was someone who was intent on robbing him and someone who might have posed a serious risk to his safety). It also entails acceptance by the offender that a reasonable person in his position would not have considered that it was necessary to shoot that person in defence of himself or his property.

Her Honour made a finding that the offence was not in the worst category of manslaughter, reasoning by comparison to a hypothetical scenario where the offender

knew the victim was a police officer. The Crown appealed the sentence, arguing, inter alia, that if Mr Nguyen had *known* that Constable Crews was a police officer, he would have been guilty of murder: ***R v Nguyen [2013] NSWCCA 195***.

The Court of Criminal Appeal agreed. The sentencing judge had erred by having regard to the absence of a factor that, if present, would have rendered Mr Nguyen criminally liable to the more serious offence of murder (see *The Queen v De Simoni* (1981) 147 CLR 383 at 389). As a result, the sentencing discretion miscarried by taking into account an extraneous consideration.

*Not an aggravating feature in itself that offence was committed in premises offender entitled to be present in*

The facts in ***Melbom v R [2013] NSWCCA 210*** involved an offender stabbing one of his housemates and threatening another. The sentencing judge referred to as an aggravating feature that the offence "was committed in the home of the offender". Section 21A(2)(eb) of the *Crimes (Sentencing Procedure) Act 1999* provides that it is an aggravating feature if, "the offence was committed in the home of the victim or any other person". It has been held to not apply where offences are committed in a home where the offender has a lawful right to reside, in accordance with pre- s 21A common law. Mr Melbom appealed his sentence, arguing, inter alia, that this interpretation had been transgressed.

On appeal, R A Hulme J found that the sentencing judge was not in error because she relied on other circumstances (domestic violence and the special vulnerability of housemates) in making her findings in relation to the offence occurring in the home. But he was, in passing, sceptical of the current state of the law on the scope of s 21A(2)(eb). Simpson J took the point further, and remarked (Price J agreeing with her additional comments) at [1]-[2]:

I have read in draft the judgment of R A Hulme J. I agree with his Honour's analysis and the orders he proposes. In relation to Ground 1, I note that the Crown initially sought to challenge the correctness of previous decisions of this Court that hold that the aggravating feature specified in s 21A(2)(eb) of the *Crimes (Sentencing Procedure) Act 1999* (that the offence was committed in the home of the victim or any other person) does not extend to offences committed in the home of the victim if the offender lives in the same home. The Crown expressly abandoned that challenge. Why that course was taken is not apparent.

I understand R A Hulme J to have expressed some reservations about the principle stated. I share those reservations. It is, perhaps, time for re-examination by this Court of those previous decisions.

A similar conclusion was reached in ***Montero v R [2013] NSWCCA 214***, handed down days after *Melbom*. *Montero* involved a sexual assault in premises the offender was entitled to be in after a New Year's Party. Mr Montero climbed into a bed occupied by a guest after he had a fight with his girlfriend, and, in the morning, raped her. The sentencing judge referred to s 21A(2)(eb) as an aggravating factor. Mr Montero appealed, arguing that this finding was erroneous. Judgment on the appeal was again given by R A Hulme J, who found the ground was not made out. It was clear that the sentencing judge was occupied with the entitlement of the young victim to safety and security while a guest at a friend's home. (In the event that it was an erroneous finding, R A Hulme J found it was not material.)

*Seriousness or aggravation: a distinction without difference*

The appellant in ***Richardson v R* [2013] NSWCCA 218** killed his partner and dismembered her body with a power saw. The cadaver was placed in garbage bags and buried in the bush. The appellant was tried and convicted of murder. At the sentence hearing, his counsel conceded that his treatment of the body could be taken into account “in assessing the seriousness of the offence” (by reference to cases such as *Knight v R* [2006] NSWCCA 292; (2006) 164 A Crim R 126). The sentencing judge made findings of fact that the dismemberment was not done only to facilitate disposal of the body, but also to remove evidence of injuries and express the appellant’s anger and hatred of the victim. He considered that the sentence should be increased on account of this feature. On appeal, the appellant sought to make a distinction between his concession that the dismemberment went to the seriousness of the offence and the finding that it was a matter of aggravation. Hoeben CJ at CL remarked that this was a distinction without difference, and that it was not open for the appellant to resile from the concession below. The relevant findings of fact were open and uncontradicted.

*The relevance of entrenched disadvantage*

***Bugmy v The Queen* [2013] HCA 37** was an appeal against a decision of the Court of Criminal Appeal affirming a sentence below. The offender had assaulted a corrective services officer, blinding him in one eye. He came from a profoundly disadvantaged background in a variety of respects. The Court of Criminal Appeal found that the importance of these features must diminish over time where a person goes on to accumulate a significant criminal record. The High Court remitted the appeal on a technical matter, but also gave its considered view on this point. It held, at [43]-[44] below:

...The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.

Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision. However, this is not to suggest, as the appellant's submissions were apt to do, that an offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment. Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult. An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.

The reasoning was based on the principle outlined by Brennan J in *Neal v The Queen* [1982] HCA 55; (1982) 149 CLR 305 at 326, reflected in particular in NSW in *Fernando* (1992) 76 A Crim R 58 at 63.

The appellant in ***Munda v Western Australia* [2013] HCA 38** argued a similar point, that “systemic deprivation and disadvantage, including an environment in which the abuse of alcohol is endemic in indigenous communities” should have been taken into account. The

appellant had killed his spouse in an intoxicated assault. The High Court reached a similar conclusion as it had in *Bugmy*, but also mounted a strong argument in support of features of the criminal law that look beyond the offender, including the “obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence” (at [54]).

#### *Hardship to third parties when sentencing for Commonwealth offences*

**R v Zerafa [2013] NSWCCA 222** concerned an offender who was convicted of a number of tax offences. The proceedings had been attended by significant delay. Section 16A(2)(p) of the *Crimes Act 1914* (Cth) requires a sentencing court to have regard to “the probable effect that any sentence or order under consideration would have on any of the person's family or dependants”. Despite the obvious and uncontested hardships on Mr Zerafa's young family, the sentencing judge felt constrained by authority not to take this into account because it was not “exceptional”. In response to a Crown appeal against leniency, Mr Zerafa raised a contention that the cases relied upon, primarily *R v Togias* [2001] NSWCCA 522 and *R v Hinton* [2002] NSWCCA 405; 143 A Crim R 286, were wrongly decided. Hoeben CJ at CL (Latham J agreeing, Beech-Jones J dissenting on this point) ruled that whatever the argument against the present interpretation of the legislation, the remarks of Spigelman CJ in *Togias* at [17] held true, “If there is to be any change in this position...only the High Court can effect it”.

#### *Form 1 offences not relevant to accumulation*

Mr Sparos was sentenced for import and supply offences relating to a large quantity of cocaine. The sentencing judge was asked to take into account a Form 1 offence relating to Mr Sparos' dealings with the profits of his criminal enterprise. In his remarks, the sentencing judge said “the Form 1 matter requires an increase in the sentence for the principle offence *and* militates against complete concurrence for that offence with that to be imposed for the Commonwealth matter” (emphasis supplied). Mr Sparos appealed his sentence, arguing that the sentencing judge was not entitled to, in effect, take into account a Form 1 offence twice: **Sparos v R [2013] NSWCCA 223**.

Johnson J (Beazley P agreeing, Beech-Jones J in disagreement on this point) considered whether such an approach was contrary to the principles laid down in *Abbas, Bodiotis, Taleb and Amoun v R* [2013] NSWCCA 115. In *Abbas*, Bathurst CJ held that s 33 *Crimes (Sentencing Procedure) Act 1999* was framed so as to allow a sentencing judge to take Form 1 offending into account when “dealing with the primary offence” ([22]-[23]). Applying this, Johnson J held that having determined the appropriate sentence for the primary offence, it was not open to the judge in sentencing Mr Sparos to take the Form 1 offence into account for the subsequent consideration of the extent to which sentences should be accumulated. Authorities emphasising the role of totality in the sentencing process must be read as being applicable only to offending the subject of a criminal conviction.

### *General deterrence for vigilante offences*

Four offenders assaulted, drugged and robbed Michael Venn at his home. The attack was carried out because the group believed Mr Venn, who was 42, was maintaining a sexual relationship with one of their number who was then aged 16: a fact they viewed as abhorrent and illegal. The group was arrested and charged shortly after the crime.

**Bonnet v R [2013] NSWCCA 234** concerned an appeal brought by one of the group, Ms Bonnet, against her sentence for an offence of robbery with deprivation of liberty. She argued, inter alia, that the sentencing judge had erred by not giving ameliorating weight to her motivation for committing the offence. Ms Bonnet relied on the case of *R v Swan* [2006] NSWCCA 47, which concerned an assault by an intellectually disabled victim of a sexual offence against his attacker.

Adamson J dismissed the appeal. Unlike *R v Swan*, the offender in this case was not affected by any mental disorder or delusion. Vigilante offences are to be discouraged by general deterrence, and even more so where, as in this case, the perceived crime may be unsavoury to the attackers, but is no crime in law at all.

### *Principles of totality in sentencing an offender already serving another sentence*

**R v DKL [2013] NSWCCA 233** was a Crown appeal against sentences for offences of sexual intercourse with a child under 10 and using a weapon to intimidate. The sentence imposed for those offences amounted to, in total, a five-year non-parole period and an eight-year head sentence. The Crown did not cavil with that aspect. But the offender was already serving a substantial sentence of imprisonment for other sexual offences committed against a different complainant. The sentencing judge accumulated the new sentences on the existing sentences to such an extent that the effective additional non-parole period was reduced from five years to two years and three months. Adamson J, on the appeal, found that the degree of accumulation rendered the sentences so inadequate that it must have involved error. The new offences were different in time, character and victim to the other offences. The structural approach meant the new sentences did not sufficiently reflect the offender's criminality.

(The Court exercised its residual discretion to dismiss the Crown appeal because of the deterioration of the offender's health in custody.)

### *Suspended sentences do not reflect general deterrence*

Mr Donald was sentenced for one offence of dishonestly using his position as an employee of a corporation with the intention of gaining an advantage. The offence covered a considerable number of activities and an illicit advantage of more than \$1,700,000. Mr Donald was sentenced to two and a half years imprisonment, but released on a good behaviour bond. The Crown appealed the adequacy of the sentence, arguing that it failed to reflect the gravity of the crime: **R v Donald [2013] NSWCCA 238**.

Latham J, allowing the appeal, referred to the inherent leniency of a suspended sentence as an effective general deterrent to white-collar professionals. She remarked, at [86], that "the real bite of general deterrence takes hold only when a custodial sentence is

imposed". A sentence of two years from judgment on the appeal was imposed, with only the last year to be served by way of bond.

*Threatening harm not always less serious than causing harm*

In **Linney v R [2013] NSWCCA 251** the applicant had pleaded guilty to threatening to cause injury to a judicial officer on account of something lawfully done contrary to s 326(1) of the *Crimes Act 1900* (NSW). There was an issue about the sentencing judge having assessed the seriousness of the offence by referring solely to threatening behaviour without acknowledging that an offence will be more serious if it involves the actual doing or causing of injury or detriment, all of which is contemplated by the offence-making provision. R A Hulme J held that the sentencing judge did not err in his assessment of the seriousness of the offence. The sentencing judge did not merely compare various sorts of behaviour encompassed by the section, in which case the applicant's argument would have had force, but referred to a wide range of *threatening* behaviour. It was open to him to conclude that the offence fell above the mid-range, given that the threats encompassed the worst types of threatening behaviour (i.e. to kill the judge).

*Historical offences and whether to take into account the former availability of remissions*

In **Versi v R [2013] NSWCCA 206**, the applicant had been found guilty of offences committed in 1985-1986 and a question arose whether there was a need to replicate sentencing practices that would have prevailed at that time, that is, prior to the "truth-in-sentencing" reforms. Basten JA (Latham J agreeing, Adams J contra) held that, since the offender would not have been sentenced until after the commencement of the *Sentencing Act 1989* (NSW), there was no need to take account of principles that may have operated prior to this. Accordingly, the Court should have regard to statutory guidelines, the range of conduct covered by the offence in each count and other sentencing principles that were applicable at the time.

*The relevance of a victim's benevolent view towards offender*

**Efthimiadias v R [2013] NSWCCA 276** illustrates a victim's potential influence on sentencing that was firmly rejected. In this case, the offender had attempted to solicit (from an undercover officer) the murder of his young partner. After the offender's arrest and imprisonment, the victim expressed a desire to at least maintain contact with him. This was said, on the sentence appeal, to be a relevant mitigatory circumstance. Johnson J strongly disagreed. He stated, at [67]:

The attitude of a victim cannot be allowed to interfere with a proper exercise of sentencing discretion. A serious crime such as this is a wrong committed against the community at large and the community itself is entitled to retribution. Matters of general public importance are at the heart of the policies and principles that direct the proper assessment of punishment, the purpose of which is to protect the public, not to mollify the victim: *R v Palu* [2002] NSWCCA 381; 134 A Crim R 174 at 183-184 [37]; *R v Burton* [2008] NSWCCA 128 at [102]ff. To adopt the words used in another solicit to murder case (*R v Qutami* [2001] NSWCCA 353; 127 A Crim R 369 at 374 [37]-[38]), the fact that the victim adopted a generous attitude to the Applicant was not something on which the Applicant can trade.

### *Discount for assistance incorrectly applied to single sentence*

In **CM v R [2013] NSWCCA 341**, the applicant was allowed a discount on sentencing as a result of providing assistance to authorities. His appeal centred on the fact that the sentencing judge only applied the discount to one of five sentences. R A Hulme J held that, since the assistance did not relate to any of the offences for which the appellant was charged, there was no reason not to apply the discount to each of the sentences. Further, such discounts should not be eroded by a process of accumulation of sentences.

## **SENTENCING - MULDRACK ISSUES**

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

The Court of Criminal Appeal has grappled with this issue since the High Court delivered its judgment in *Muldrock v The Queen* [2011] HCA 39; (2011) 244 CLR 120; see, for example, *Yang v R* [2012] NSWCCA 49, *MDZ v R* [2011] NSWCCA 243 and *Ayshow v R* [2011] NSWCCA 240. In *Williams v R* [2012] NSWCCA 172, Price J held, at [42]:

The objective seriousness of an offence is to be determined wholly by reference to the "*nature of the offending*". I do not think that the nature of the offending is to be confined to the ingredients of the crime, but may be taken to mean the fundamental qualities of the offence. In my view, where provocation is established such that it is a mitigating factor under s 21A(3)(c) *Crimes (Sentencing Procedure) Act*, it is a fundamental quality of the offending which may reduce its objective seriousness. It seems to me, that in those circumstances, there cannot be a realistic assessment of the objective seriousness of the offence unless the provocation is taken into account. The absence of provocation is not a factor of aggravation and does not increase the objective seriousness of the offence.

In **McLaren v R [2012] NSWCCA 284** there a ground of appeal that "[t]he Sentencing Judge erroneously attributed weight to the appellant's apparent state of mind when making findings as to the objective seriousness of the offence." McCallum J found that the sentencing judge had indeed articulated his reasons for sentence in accordance with *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168. But her Honour went on to say, at [28]-[29]:

...there is no sense in attempting to place the offence at hand (with all its features, including matters personal to the offender where relevant to an assessment of the nature of the offending) at a point along a purely hypothetical range which, of its nature, is ignorant of those matters.

The decision in *Muldrock* does not, however, derogate from the requirement on a sentencing judge to form an assessment as to the moral culpability of the offending in question, which remains an important task in the sentencing process. That this assessment is also sometimes referred to as the "objective seriousness" of the offence perhaps contributes to the misconception. I do not understand the High Court to have suggested in *Muldrock* that a sentencing judge cannot have regard to an offender's mental state when undertaking that task (as an aspect of his or her instinctive synthesis of all of the factors relevant to sentencing).

A differently composed bench in **Subramaniam v R [2013] NSWCCA 159** approached the question afresh; that is, without reference to *McLaren*. Latham J (Simpson J agreeing, Emmett JA providing a separate judgment) held at [57] that "attributes personal to the

applicant (in particular her mental state at the time of offending) more appropriately belong to an assessment of moral culpability” as distinguished from the objective features of the offending.

Question: If *Muldrock* affirms *Markarian* in requiring all facts, matters and circumstances to be considered in the assessment of sentence, what is the a point of distinguishing between “objective seriousness of the offence” and “moral culpability” by assigning consideration of the offender’s mental state to the latter and not the former?

*Reference to the mid-range of objective seriousness does not establish “Muldrock” error*

Mr Kerrtai was sentenced for an offence of having sexual intercourse with a child under 10. He appealed his sentence, arguing that the sentencing judge had fallen into *Muldrock* error in expressing a finding that the objective seriousness of the offence was “slightly below mid-range”: ***Kerrtai v R* [2013] NSWCCA 252**. Mr Kerrtai submitted that the degree of specificity in that finding was contrary to an instinctive synthesis approach. Hoeben CJ at CL disagreed. It is no error to express a finding of objective seriousness on a scale. And the judge did not engage in a two-step process. He had identified all factors relevant to sentence, evaluated their significance, and determined the appropriate sentence according. The application for an extension of time in which to appeal was refused.

*Standard non-parole period and maximum penalty both relevant even where significant disparity is prescribed*

The appellant in ***Duncombe v R* [2013] NSWCCA 271** was sentenced, pre-*Muldrock*, to an offence of inflicting grievous bodily harm. That offence carries a non-parole period of seven years, and a significantly higher maximum penalty of 25 years. The appellant argued that the sentencing judge had applied a two-stage process, and had also assigned determinative significance to the standard non-parole period.

In his remarks, the sentencing judge said:

Taking all of these matters into consideration I would fix the objective criminality of this offence as being slightly below the mid range for offences of this nature. The prisoner's counsel Mr Priestley submitted that as against the standard non-parole period of seven years such an analysis as that which I have disclosed might be quantified at six years. I agree that represents a fair appraisal of the culpability of this offender. I stress however that this is to be viewed not simply against the standard non-parole period but against the overall maximum penalty of twenty five years. I have not been distracted from consideration of that penalty by over concentration on the standard non-parole period.

Johnson J agreed that the remarks revealed a two-stage approach. But he did not see that the sentencing judge assigned determinative significance to the standard non-parole period. Rather, the remarks showed appropriate regard to the statutory guideposts of both the standard non-parole period and the maximum penalty. His Honour remarked, at [53], that both standards are relevant even where there is such a significant gap in their prescribed lengths.

*Finding that standard non-parole period “highly relevant” not erroneous in light of judgment as a whole*

**Black v R [2013] NSWCCA 265** concerned a finding by a sentencing judge that, for offences in the mid-range with no guilty pleas, the prescribed standard non-parole periods were “highly relevant”. The offender argued that this demonstrated *Muldrock* error. Bellew J held that this ground did not succeed in the light of the judgment as a whole. The sentencing judge only made that remark after considering objective seriousness and the subjective case. It was also not possible to conclude that anything expressed as “relevant”, to whatever degree, could be equated with a finding of determinative significance. The application for an extension of time in which to appeal was refused.

*Muldrock does not prohibit consideration of objective criminality of offence*

Mr Ramea appealed a sentence out of time which he claimed had been calculated on a two-stage basis contrary to *Muldrock* and *Markarian*. He claimed that the sentencing judge had given determinative weight to the standard non-parole period, in particular by referring to *R v Knight; R v Biuvanua* [2007] NSWCCA 283. In **Ramea v R [2013] NSWCCA 310** Latham J held (at [17]) that there is “nothing inherently objectionable, even post *Muldrock*, in the statement that there must be an appropriate relationship between the standard non-parole period and the objective criminality of the offence. In my view, that is saying no more than that the standard non-parole period operates as a benchmark.” The appellant’s claim that the sentencing judge had offended the approved approach to sentencing set out in *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 was also rejected. *Markarian* was not a standard non-parole period case, and indeed the plurality recognised that careful attention ought be paid to legislative yardsticks. Instead, the prohibited approach involves “determining a sentence referable to an offence, and then engaging in ‘arithmetical deduction’ from that sentence for mitigating and/or subjective factors” (Latham J at [21]).

## SENTENCING - SPECIFIC OFFENCES

*Dangerous driving causing death/gbh – aggravating factor of the number of persons put at risk*

While driving in Boat Harbour Park, south of Sydney, Mr Stanyard miscalculated his speed and launched his vehicle off the crest of a sand dune. The vehicle pitched forward and rolled on impact with the descending slope. Mr Stanyard’s two passengers were seriously injured. He was convicted of two counts of driving in a manner dangerous to the public occasioning grievous bodily harm, contrary to s 52A(3) of the *Crimes Act 1900*. At sentence, Berman DCJ found (as was conceded by the defence) that the number of people put at risk, being the two passengers, was an aggravating feature of the offence. Mr Stanyard appealed Berman DCJ’s severity findings.

On the appeal (**Stanyard v R [2013] NSWCCA 134**), Fullerton J held that Berman DCJ had been in error in finding (and counsel had been in error in conceding) that having two passengers was an aggravating feature in the circumstances. Her Honour held, at 32:

In promulgating the guideline judgment in *Juriscic*, where the nature and extent of the injuries inflicted has been recognised as a discrete aggravating factor and where, as here, the suffering of grievous bodily harm is an element of the offence of dangerous driving, I am satisfied that the number of persons who may have been exposed to risk by the offender's dangerous driving must refer to people other than those identified as victims in the particulars of charge. Were it otherwise there is a danger of double counting and a corresponding risk that the sentence imposed will be excessive.

The judgment does not refer to *R v Berg* [2004] NSWCCA 300 in which Howie J (at [26]) regarded risk to a single passenger/victim as a matter of aggravation. Nor does it refer to *SBF v R* [2009] NSWCCA 231; 198 A Crim R 219 in which Johnson J (at [78]) adopted a similar approach. Pertinently, Johnson J said:

“the fact that each of them was killed or seriously injured does not render it impermissible for the sentencing Judge to have regard to the number of people put at risk by the course of driving, as an aggravating factor”.

#### *Setting condign sentences for tax fraud offences*

***R v Hawkins* [2013] NSWCCA 208** was a Crown appeal against a sentence imposed on a tax fraud, Mr Hawkins. The offending conduct occurred over a number of years and deprived the Commonwealth of something in the area of \$600,000 in tax revenue. Mr Hawkins received a total head sentence of 3 years 4 months including a non-parole period of 1 year 8 months. RS Hulme AJ agreed, in strong terms, that the sentences were inadequate. He referred to the decision in *Hili v The Queen; Jones v The Queen* [2010] HCA 45; (2010) 242 CLR 520 and its summation of the many features that make revenue fraud serious, such as the cost to the community and difficulty of detection. But RS Hulme AJ went on to say, at [30] that even without the guidance of *Hili v The Queen; Jones v The Queen*, the sentences were “utterly disproportionate to a fraud yielding a benefit of over \$600,000”. Mr Hawkins was resentenced to a total head sentence of 6 years, with a non-parole period of 3 years 6 months.

#### *Sexual assault – relevance of prior relationship*

***R v Cortese* [2013] NSWCCA 148** concerned an application by a sentencing judge of the decision in *NM v R* [2012] NSWCCA 215. Mr Cortese committed two serious sexual assaults on his girlfriend, in circumstances where she was trying to end the relationship; her lack of consent was made abundantly clear; and she was forcibly detained overnight. The judge, imposing a suspended sentence and a s 9 bond, considered *NM v R* and concluded that the “prior sexual relationship [between the respondent and the victim] is an important mitigating factor”. The Crown initiated an appeal. Beech-Jones J, imposing full-time imprisonment, held that the finding in *NM v R* was predicated on the particular circumstances of that case, and that the existence of a prior sexual relationship would usually only be relevant where it suggested some prevarication or initial consent.

#### *Home invasions by current or estranged partners*

Mr Eckermann pleaded guilty to a charge of aggravated breaking and entering and assault. The offence was committed against his ex-partner in the early hours of the morning. It was violent and terrifying. The sentencing judge found that “this would have been less frightening than a home invasion by some stranger where the occupants, including Ms

Haines, would have no idea initially why the stranger was there or what he or she was about.” Mr Eckermann received a suspended sentence. The Crown appealed, arguing, inter alia, that this finding was erroneous: **R v Eckermann [2013] NSWCCA 188**. It submitted that the comments were not reconcilable with the vulnerability of women to violent attack by current or estranged partners. Price J agreed. An offence does not become less serious because of a prior relationship, and the finding made by the trial judge was not open in the face of the terrifying circumstances of the home invasion.

*Firearms offences not a category of offence for which prior good character is of less weight*

Mr Athos plead guilty firearms offences relating to a cache of guns, gun parts and ammunition he was transporting for his associates. It was his first criminal offence. The sentencing judge remarked that because the possession of illegal firearms by a person of prior good character was less likely to come to the attention of police, he would give the mitigating feature of good character less weight than he would otherwise. Mr Athos appealed his sentence: **Athos v R [2013] NSWCCA 205**. On the appeal, Price J held that firearms offences were not regarded as within the category of offences where less weight is afforded to prior good character (e.g. white-collar crime, child sex offences, drug couriership). It was erroneous, in the absence of evidence about how such crimes are typically committed, to extend the same reasoning as applies to drug couriers to firearms offences of this kind. His Honour also found that the facts of the individual case did not support a finding that the “good character” of the offender facilitated the crime. It would have been permissible to find that good character was not, in general, a factor of great weight, but it was an error to base that finding in the category of offence.

*Sentencing for firearms crimes where multiple offences arise from possession of single firearm*

**Bejanov v R [2013] NSWCCA 207** concerned a Mr Bejanov, who was sentenced for a number of firearms offences. Two offences related to a .22 calibre rifle with a box magazine and telescopic sight that was found at his house. The first offence arose from that weapon being unregistered and prohibited (s 36 *Firearms Act 1996*); the second from it being unauthorised and prohibited (s 7 *Firearms Act 1996*). On the sentence appeal, Button J held that the sentencing judge had erred in not affording a substantial degree of concurrency.

*Proper approach to sentencing for historical child sex offences*

**MPB v R [2013] NSWCCA 213** was an appeal in respect of sentences imposed for a number of child sex offences committed by the appellant in the 1970s and late 1990s. Garling J (Basten JA agreeing with additional reasons, R A Hulme J agreeing) discussed the approach to be taken when sentencing for historical child sexual offences. He noted the difficulties in objectively ascertaining historical sentencing patterns, and the caution with which statistical tables should be approached. This is a pronounced difficulty when sentencing for child sex offences that historically encompassed a wider range of criminal conduct than their present analogues. Garling J warned that judicial recollection, which cannot be tested, should be applied with even greater care. His Honour stated, at [87], that the most reliable benchmarks were the maximum penalty and range of proscribed conduct:

The guide which is entirely objective and is easily ascertainable, and therefore which is likely to be of most use to a sentencing court, when attempting to impose sentences which accord with an earlier practice or pattern, is the maximum penalty fixed by the law for the offence charged, together with the range of criminality encompassed by the offence charged. By having regard to these features, a sentencing judge will be able to readily assess where the particular offence charged falls along the spectrum of conduct encapsulated in the offence, and accordingly how the particular offence ought be viewed against the maximum penalty fixed by the legislation.

### *The relevance of quantity in sentencing for drug supply*

The appellant in **Pham v R [2013] NSWCCA 217** was convicted of supply offences relating to 30 kilograms of cocaine. In finding that the offence fell in the middle of the range of objective seriousness, the sentencing judge remarked that “no other finding is really open given the amount involved was thirty times the large commercial quantity for the offence”. The appellant argued that this reasoning gave erroneous weight to the quantity.

McCallum J agreed that quantity was not the primary determinant of seriousness. Her Honour pointed to the ruling of the High Court in *Wong v R* [2001] HCA 64; (2001) CLR 584, and in particular to the observation of Gleeson CJ at [31] that, in certain cases, an offender’s own state of mind about the amount of drug is far more important than the bare fact of quantity. The appellant’s role was that of a middleman and he did not expect to benefit directly from the proceeds of sale of the drug. He did not appear to have an awareness of the exact amount he would be entrusted with. But the amount was not irrelevant. And the sentencing judge took into account the appellant’s apparent contemplation, as disclosed by the evidence, that whatever amount he would be receiving would not be insubstantial. Read in context, the sentencing remarks revealed no error.

### *Drugs manufactured to satisfy own addiction*

Mr Dang was addicted to methamphetamine. He manufactured a quantity for his own use, and for his partner and friends. He was charged and sentenced for two offences of drug manufacture (and other offences). In **Dang v R [2013] NSWCCA 246**, he appealed his sentence, arguing under the umbrella of manifest excess that the sentencing judge had insufficient regard to the motive for the manufacture offences. Basten JA (Adams J agreeing, Latham J disagreeing) agreed. First, the manufacture of drugs for personal satisfaction is a less serious offence than the same manufacture conducted for profit (at [27]). And second, the circumstance of addiction is relevant to moral culpability (at [30]). Mr Deng was accordingly resentenced.

## **SUMMING UP**

### *Unhelpful “gloss” in directions to jury*

**Abbosh v R; Bene v R [2011] NSWCCA 265** is another case where the Court of Criminal Appeal delivered an admonition in response to the use of poorly considered expressions in directions. The impugned directions related, in a trial for violent offences, to good character and self-defence. On the former, the trial judge had correctly outlined the use the jury could make of evidence of good character, but finished his direction with “an unhelpful anecdotal gloss” by referring to the notorious fall from grace of Allan Bond.

Then, in relation to self-defence, the judge elaborated at the end of his standard directions:

It does not arise unless there is a reasonable possibility of it happening in the way that the said it happened. And a reasonable possibility means a reasonable possibility, not a far flung chance, or perhaps it could have happened somehow or another.

This was submitted, on appeal, to be a misdirection on the necessary standard of proof. In the Court of Criminal Appeal, Johnson J held that the comments at the end of the standard directions were regrettable because they had the potential to distract the jury, but was not convinced that they did in this case. (The appeal was dismissed on the proviso.)

*Specificity in directions on conduct that is said to illustrate admission of guilt*

Mr Christian was charged with seven child sex offences allegedly committed against a complainant at various times when the complainant was between the ages of five and thirteen. The Crown sought to use a recorded conversation between the victim and Mr Christian where the latter had failed to unequivocally deny certain allegations as evidence of incriminating conduct. Mr Christian was convicted, and appealed on the ground, amongst others, that the trial judge had provided inadequate directions on the use the jury could make of the telephone call: **Christian v R [2012] NSWCCA 34**. McClellan CJ at CL held that the trial judge should have given more specific directions. In particular, he pointed out the ambiguity of the conversation in the context of the historical spread of the offences and the fact that Mr Christian and the complainant had had consensual adult sexual relations. The trial judge was required to direct the jury to consider particular parts of the conversation, in the context of the whole, in relation to specific charges on the indictment and to remind the jury of the available alternative explanations. The jury ought also have been warned against engaging in tendency reasoning when the evidence was not led for that purpose.

*Failure to give R v Mitchell direction in a trial for child sex offences*

The appellant in **RSS v R [2013] NSWCCA 94** argued that his trial for child sexual assault offences had miscarried because the trial judge had failed to give a direction in accordance with *R v Mitchell* (NSW Court of Criminal Appeal, 5 April 1995, unreported) and *R v Mayberry* [2000] NSWCCA 531. That is, the trial judge had failed to warn the jury in explicit terms against using the evidence of one complainant as proof of the guilt of the appellant of offences against another child.

Hall J rejected the appellant's argument. An *R v Mitchell* direction is necessary where the jury might assume, due to the way the evidence is led or the summing up is framed, that the evidence of one complainant was admissible towards the issue of the accused's guilt generally. But in the appellant's case, there was no such suggestion in either addresses or summing up. The summing up was carefully delivered and emphasised the caution to be exercised and the necessary standard of guilt in relation to each case. The issue of "cross-admissibility" was not raised at trial, and no *R v Mitchell* direction was sought. There was no error by the trial judge, in those circumstances, in failing to give a direction along those lines.

*When directions on “proper medical purpose” required in sexual assault trial*

**Zhu v R [2013] NSWCCA 163** was an appeal involving a contention that a trial judge should have directed the jury that sexual intercourse is not established where penetration is carried out for proper medical purposes. Mr Zhu was a practitioner of traditional Chinese medicine, and the complainant was a patient who presented with a skin rash on her arms and lips. During the course of the examination, Mr Zhu inserted his finger into his patient’s vagina twice. Hoeben CJ at CL and Fullerton and McCallum JJ agreed in separate judgments that the question of “proper medical purpose” did not arise on the evidence and no direction was required. Hoeben CJ at CL observed at [79] and [84], that though the fact that the issue was disclaimed at trial was not determinative, the appellant’s case at trial was that the act in question had not occurred. No evidence at all was adduced at trial to the effect that the conduct was part of the practice of traditional Chinese medicine. Or, as McCallum J put it at [103], “the notion of there being a proper medical purpose for inserting a finger in SB’s vagina when she presented for treatment of skin irritation around the eye and mouth...is frankly ridiculous.”

*Adverse Browne v Dunn direction to be given with caution*

Mr Giourtalis was charged with fifty-seven tax offences. He gave evidence in his trial. Parts of his version of events, as it came out in cross-examination, had not been put to witnesses that preceded him. The trial judge gave a direction to the effect that the jury could assume that Mr Giourtalis had not told his representation of these matters, and that they could consider that a relevant factor in assessing his credibility. Mr Giourtalis appealed, arguing, inter alia, that the direction should not have been given and the witnesses should have been recalled: **Giourtalis v R [2013] NSWCCA 216**. Bathurst CJ agreed that the direction was incorrect. True it was that *Browne v Dunn* applies in criminal trials. But it should be applied with circumspection. It was not correct to invite the inference in the context of this trial. There were many reasons why Mr Giourtalis might not have informed counsel of discrete matters, not least the sheer volume of charges in which he had to give instructions on. However, the appeal was dismissed on the proviso.

Note: Counsel at trial agreed to the judge giving a *Browne v Dunn* direction in general, and did not object to the form it ultimately took. While the obvious issue was miscarriage of justice, and the dismissal of the appeal on the proviso showed consideration of that question, r 4 of the *Criminal Appeal Rules* seems to have been overlooked.

*The giving of a Liberato direction where relevant evidence is led to defend provocation case*

The appellant in **Iskander v R [2013] NSWCCA 256** was charged with murder. He pleaded guilty to manslaughter, raising provocation. The Crown did not accept his plea. He was convicted of murder after a trial. On appeal he argued that the trial judge should have given a direction based on *Liberato v The Queen* (1985) 159 CLR 507. The conventional form of that direction reminds the jury that evidence given for the defence may cast sufficient doubt on the Crown case even if not positively accepted in its own right. In this case, the appellant argued that the direction should have been given in relation to evidence led for the defence about what the deceased said that sought to resist the Crown’s attempt to negative provocation.

Macfarlan JA considered the appellant's argument that the jury might have been led to erroneously believe that if they rejected the defence evidence in this regard provocation failed, rather than having to consider whether the Crown had in fact negated it. His Honour noted that the trial judge had told the jury that the defence evidence need only be "possibly true". And the only evidence of provocation was from this defence evidence. So if the jury considered that the evidence was not "possibly true", the defence of provocation was bound to fail. A *Liberato* direction was not called for in the circumstances.

#### *The two elements of an attempt*

Mr Inegbedion and an associate attempted to intercept a parcel of heroin being delivered to a residential address. Unbeknown to them, the courier was an undercover officer of the Australia Federal Police. Mr Inegbedion was arrested and charged with an offence of attempting to possess a marketable quantity of heroin. He was convicted at trial. On his appeal, ***Inegbedion v R* [2013] NSWCCA 291**, he argued that the directions on attempt were erroneous.

Rothman J restated the two elements of an attempt: there must be an intention to commit the crime alleged; and the accused must have performed some act towards the commission of the offence that was more than merely preparatory and could not be regarded as being for any other purpose than the commission of the crime. In Mr Inegbedion's trial, the judge on no occasion expressly referred to these separate elements in adequate terms, instead using "intention" and "conduct". However, the trial judge directed the jury that intention was to be inferred from "conduct that was more than preparatory towards the commission of the offence". That is, while the directions were incorrect, they were favourable to the offender in restricting what could be considered in establishing intention. No miscarriage of justice was occasioned.

#### *When manslaughter in the alternative should not be left to the jury*

The notorious facts in ***Lane v R* [2013] NSWCCA 317** involved the disappearance of a newborn child while in the custody of her mother, Ms Lane. No body was ever found. After a substantial police investigation, Ms Lane was charged with, and ultimately convicted of, murder. On the conviction appeal, it was argued, despite the lack of any suggestion to the effect at trial, that the judge had been in error in not leaving a manslaughter verdict open to the jury.

The Court (Bathurst CJ, Simpson and Adamson JJ) considered that the success of this ground hinged on whether there was sufficient evidence to support a verdict of manslaughter on either of the two bases put forward on appeal: by unlawful and dangerous act, or by criminal negligence. In relation to the first, the Court observed that since no body was found, there was no evidence of a cause of death. The jury could not perform a reasonable person test in relation to a purely hypothesised unlawful or dangerous act. A similar defect affected the proposed criminal negligence basis. Without an identified breach of duty, to leave the verdict open would invite the jury to engage in pure speculation. Manslaughter may only be left to the jury where it rests (on whatever basis) on an evidentiary foundation.