LOCAL COURT
of
NEW SOUTH WALES
2017
ANNUAL CONFERENCE

Criminal Law Update

The Honourable Justice R A Hulme

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CONTENTS

SCOPE OF PAPER

The purpose of this paper is to provide brief notes concerning the range of issues that have been considered in appellate criminal decisions in the past 12 months.

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.

Assistance in the compilation of this paper provided by Mr Ryan Schmidt BCCJ LLB (Hons) and Ms Christina White BA (Hons) LLB (Hons) is gratefully acknowledged.

BAIL

Bail decisions of the Supreme Court rarely of any precedential value

The respondent in ***Director of Public Prosecutions (NSW) v Zaiter*** **[2016] NSWCCA 247** was charged with serious drug supply and proceeds of crime offences. He was granted bail by the Supreme Court and the Crown filed a detention application shortly thereafter. R A Hulme J granted the application and bail was refused. His Honour paused to make the following observations concerning the commonplace reliance of parties on previous bail decisions. Judgments of single judges of the Supreme Court presiding in the Bails List do not often lay down anything of precedential value for bail authorities. Bail decisions involve a discretionary evaluative judgment on factors about which reasonable minds may differ and each judgment is very specifically directed to the facts and circumstances of the case at hand. Judgments published on the Caselaw website are no more authoritative than others that are not.

Show cause (s 16A of the Bail Act*) principles*

The applicant in ***Moukhallaletti v Director of Public Prosecutions*** **(NSW) [2016] NSWCCA 314** was charged with fabricating false evidence and dealing with the proceeds of crime whilst on bail for offences relating to interfering with the administration of justice. Her release application was refused and the NSWCCA considered her further application. Button J found that the applicant failed to show cause why her detention was not justified, pursuant to s 16A of the *Bail Act 2013* (NSW), and refused bail. His Honour set out six principles applying to the show cause requirement:

1) The question is separate from the question of whether there would be unacceptable risks of certain things occurring if the applicant were granted bail (*Director of Public Prosecutions (NSW) v Tikomaimaleya* [2015] NSWCA 83 at [25]).

2) Unlike factors relevant to the assessment of unacceptable risks, Parliament has not enumerated the facts that may show cause.

3) There will often be a substantial overlap between the factors going to the show cause requirement and determination of unacceptable risks (*Tikomaimaleya* at [24]).

4) Cause may be shown by a single powerful factor, or a powerful combination of factors (*R v S* [2016] NSWCCA 189 at [63]).

5) One should refrain from placing a gloss on the words of the *Bail Act* (*Director of Public Prosecutions (NSW) v Mawad* [2015] NSWCCA 227 at [42]). It is not incumbent upon an applicant to show special or exceptional circumstances in order to show cause (cf s 22 of the *Bail Act*).

6) There is little or no precedential value in decisions of a single judge of the Supreme Court finding that an applicant has shown cause or not, unless they contain a discussion of legal principles (Director of Public Prosecutions (NSW) v Zaiter [2016] NSWCCA 247 at [30]-[33]). Such judgments about the interplay of a multitude of factors, not determinations of legal questions.

DEFENCES

"Defence" of lawful correction - defendant bears the onus of proof on the balance of probabilities

The respondent in ***Director of Public Prosecutions v FD*** **[2017] NSWSC 679** was charged with assault occasioning actual bodily harm against his son. The respondent did not deny striking his son on the legs and abdomen with a belt, but claimed he was lawfully reprimanding his son. He raised the statutory defence of lawful correction: s 61AA of the *Crimes Act 1900.* The magistrate dismissed proceedings on the basis that she was "not satisfied beyond reasonable doubt that lawful chastisement and correction was not intended by the defendant". The DPP appealed to the Supreme Court, contending that the magistrate failed to apply the correct onus of proof on the question of whether the s 61AA defence had been established. Lonergan J held that the magistrate did err. Rather than determining whether the defendant had established the statutory defence on the balance of probabilities, the magistrate found that the prosecution had not shown it was not lawful correction beyond reasonable doubt. The proceedings were remitted to the Local Court to be redetermined.

The following two-step process should have been adopted. First, a finding should have been made as to whether there was an assault occasioning actual bodily harm: s 59 *Crimes* Act, which must be found beyond reasonable doubt: s 141(1) *Evidence Act 1995.* Then second, turning to the defendant's case, the standard of proof required is on the balance of probabilities: s 141(2) *Evidence Act*. Her Honour noted that there has been debate as to whether s 61AA is sufficiently clear regarding the allocation of the onus of proof. Whilst in the past the common law position may have suggested that the burden of proof was placed on the prosecution to rebut the defence, that was prior to the enactment of s 61AA. The appeal was allowed

EVIDENCE

Prior sexual experience (etc) - exceptions to prohibition of evidence in s 293 of the Criminal Procedure Act 1986

The appellant in ***GP v R*** **[2016] NSWCCA 150** was convicted by a jury of two counts of sexual intercourse with a child under the age of 10 contrary to s 66A of the *Crimes Act 1900* for offending committed against his niece when she was aged 3 or 4. At the beginning of the trial the appellant sought to cross-examine the 12-year-old complainant about the content of her original complaint – which included information regarding sexual activity involving her cousin – and to suggest that it was her cousin and not the appellant who had assaulted her. The trial judge refused that application on the basis that the cross-examination about the complainant's prior sexual experience was precluded by s 293 of the *Criminal Procedure Act 1986* and no relevant exception applied. The appellant's conviction appeal included a ground challenging that ruling. He advocated for a "broad" construction of the exceptions in s 293(4), submitting that evidence of "fear" and "anxiety" displayed by the complainant when she disclosed the offences years after they occurred were each an "injury" which was "attributable to the sexual intercourse alleged to have been had by the accused person" within the meaning of s 293(4)(c).

Payne JA (McCallum and Wilson JJ agreeing, the latter with additional remarks) dismissed the ground and the appeal. Section 293 clearly strikes a balance between competing interests; as a matter of statutory construction it would be erroneous to attempt to discern a single purpose of the provision or to promote the interest reflected in the exceptions over the interest reflected in the general prohibition. Furthermore, fear and anxiety, without more, do not fall within the description of an "injury". Section 293(4)(c) does not apply to the fleeting display of distress demonstrated by the complainant when recounting the facts of the assault to family members. Whilst Payne JA was prepared to accept that a recognised psychological condition may be an "injury" for the purposes of s 293(4)(c), it was unnecessary to finally decide that question in the present case.

Prior sexual experience (etc) – exceptions to prohibition of evidence in s 293 of the Criminal Procedure Act 1986 – disclosure in Crown case that complainant a prostitute – cross-examination on allegedly false prior accusations of sexual assault disallowed

The applicant in ***Allan v R*** **[2017] NSWCCA 6** was convicted of sexual intercourse without consent, an attempt at same, and arming himself with a knife intending to commit assault. The complainant was a prostitute who had agreed to engage in limited sexual acts, but the applicant was said to have continued with other acts against her will. At trial, the applicant sought to rely on s 293(6) of the *Criminal Procedure Act 1986* for permission to cross-examine the complainant on previous false allegations she was said to have made of sexual assault. It was asserted that the Crown's disclosure that the complainant was a prostitute triggered the operation of subs (6).

In the applicant's conviction appeal, one ground of appeal was that the jury was unable to make a realistic or informed assessment of the complainant's credibility because the trial judge did not permit cross examination on prior false allegations. The CCA rejected this ground and dismissed the appeal. Whilst Harrison J did find that the material related to

previous complaints was capable of substantially affecting the complainant's credibility, and thus the applicant was likely to be unfairly prejudiced without cross-examination on the subject, his Honour held that the precondition in s 293(6)(b) was not met. The unfair prejudice must arise from the inability to cross-examine "in relation to the disclosure or implication". The only relevant disclosure in the Crown case was that the complainant was a prostitute. The evidence sought to be raised in cross-examination was not about the complainant's work, but rather a tendency to make false allegations. The making of false complaints of sexual assault does not arise in relation to the disclosure that the complainant was a prostitute or even by implication from it. Indeed, as the trial judge found, they were "far removed". The appeal was dismissed.

Hearsay – maker unavailable (s 65 Evidence Act) – erroneous *to take a compendious approach in assessing whether representations are made in circumstances enlivening exceptions to the hearsay rule*

The appellant in ***Sio v The Queen*** **[2016] HCA 32** was convicted of armed robbery with wounding. He appealed against his conviction to the NSW CCA on the basis that the trial judge erred in concluding that the conditions for the admissibility of a representation under s 65(2)(d) of the *Evidence Act 1995* were satisfied in respect of a representation by a witness, Mr Filihia, to the effect that the appellant gave him the knife with which he stabbed the victim. That evidence entered the trial through the tender of Mr Filihia's police interviews and statements following his refusal to give evidence on a *voir dire* and at the trial. Objection was taken to the tender but the judge concluded that the representations were made in circumstances that made it likely they were reliable and therefore admissible under s 65(2)(d). The CCA dismissed that appeal and the appellant appealed to the High Court. French CJ, Bell, Gageler, Keane and Gordon JJ granted special leave and allowed the appeal, quashed the conviction and ordered a new trial.

The application of s 65(2) proceeds upon the assumption that a party is seeking to prove a particular fact relevant to an issue in the case. It then requires the identification of the particular representation to be adduced in evidence as proof of that fact. The circumstances in which that representation was made may then be considered in order to determine whether the conditions of admissibility are met. This process must be observed in relation to each relevant fact sought to be proved by tendering evidence under s 65. In the present case neither the trial judge nor the CCA considered any particular representation upon which the Crown sought to rely in this way. The application of the provision was approached on a compendious basis whereby an overall impression was formed of the general reliability of the statements made by Mr Filihia, and then all of his statements were held to be admissible against the appellant. That approach does not conform to the requirements of the *Evidence Act 1995* nor the authorities referred to by the CCA.

Compellability of spouses and others – s 18 of the Evidence Act – *spouse's evidence not inadmissible due to an asserted failure to comply with s 18*

The appellant in ***Mulvihill v R*** **[2016] NSWCCA 259** was convicted of murder. At the trial his estranged wife gave evidence for the prosecution. At trial there was no reference made to

s 18 of the *Evidence Act 1995* (NSW). Ms Mulvihill never objected to giving evidence. On appeal, it was contended that her evidence was inadmissible because the procedure in s 18 was not followed. It was submitted for the appellant that, despite Ms Mulvihill's apparent willingness to assist the Crown, s 18(4) required the trial judge to satisfy herself that Ms Mulvihill was aware of her right to object to giving evidence. It was asserted that the trial judge did not do so as there was nothing to that effect in the transcript. The Court (Ward JA, Beech-Jones and Fagan JJ) refused leave to raise this ground. It cannot be inferred from the fact that the trial judge did not expressly refer to s 18(4) that her Honour was not so satisfied. The Court said it was doubtful whether the failure of a trial judge to form the opinion in s 18(4) renders evidence inadmissible. The Court differentiated the present case from *Demirok v The Queen* (1977) 137 CLR 20; HCA 21, which involved a spouse reticent to give evidence and s 400(2) of the *Crimes Act 1958* (Vic). It could not be said that Ms Mulvihill's evidence would not have been adduced if s 18 was complied with. There was no basis to conclude either that she would have objected once informed of her right to do so, or that the process in s 18(6) would have led to her being excused. Leave to raise this ground was refused.

Identification – voice – ad hoc expert – admissible under s 79 of the Evidence Act *where police officer repeatedly listened to recordings*

The applicant in ***Nguyen v R*** **[2017] NSWCCA 4** was convicted of supplying methylamphetamine. The Crown relied on a number of intercepted phone calls involving a female voice which the Crown claimed was the applicant's. At trial, a police officer who had listened to the recorded conversations and the applicant's record of interview gave evidence that it was indeed the applicant's voice. He had spent a significant amount of time listening to the recordings; including two weeks replaying certain calls and five days reviewing the calls alongside transcripts to ensure accuracy for Court. He gave evidence on common voice characteristics (a loud female voice, speaking English with a Vietnamese accent but sometimes lapsing into Vietnamese, and a distinct high-rising inflection) and use of common references like "down west".

The applicant appealed against her convictions with one ground being that the police officer's evidence was inadmissible. It was submitted that s 79 of the *Evidence Act 1995* was not engaged because the officer was in no better position than the jury to compare the voices in the intercept material with the applicant's police interview. Basten JA, R A Hulme and Schmidt JJ all held it was relevant and admissible. R A Hulme J (Schmidt J agreeing) held that it was admissible under s 79. Whilst jurors could have made their own assessment of two of the three bases for the identification (common voice characteristics and common references), the officer also relied on the overall sound of the voice and the amount of time the officer had invested in listening to the two sources would have been impractical for the jury to replicate. Therefore the evidence was relevant and admissible.

Identification in court – an unusual case in which there was no error

A witness was asked how he could identify the accused and replied, "I know he is one of the boys of the next door family. I can recognise him. I am positive it is that man there".

On appeal it was contended that the jury should have been discharged because of the in court identification of the appellant: **Fadel v R [2017] NSWCCA 134**.

Simpson JA rejected the argument. She referred to the general recognition in the common law of dangers in relation to identification evidence, and of in-court identification in particular: for example, *Alexander v The* Queen (1981) 145 CLR 395; *Festa v The* Queen (2001) 208 CLR 593. But in this case, before the evidence in question was given, the witness had already said that the man (the appellant) who he later saw being arrested had carried out certain acts of violence in the course of a neighbourhood melee and he knew he was one of "the boys of the family living in number 94". This was not a case in which the identification was made by a witness previously unacquainted or unfamiliar with the person identified. It was given by a person who had frequented the premises next door to those of the appellant, who knew and recognised, although not by name, the appellant and members of his family, and who had witnessed at close range the events in question and their immediate aftermath, including the appellant's arrest. If it was in-court identification, it was of an unusual and special kind that was not subject to all of the same weaknesses often associated with such evidence.

Coincidence evidence – s 98 Evidence Act – *dissimilarities only detract from probative value if they undercut the improbability of the two events being a coincidence*

The applicant in ***Selby v R*** **[2017] NSWCCA 40** was convicted by a jury of demanding money with menaces. This arose from the first of two events, where the same victim was threatened in the same location by a man with a gun who demanded money. The applicant pleaded guilty to one count of intimidation in relation to the second event. The trial judge ruled that evidence of the second event was admissible as coincidence evidence. The applicant appealed against his conviction. Unusually, the admissibility of the coincidence evidence was not challenged. Rather, the applicant submitted that the trial judge erred in directing the jury that they could use coincidence evidence reasoning when it was not open on the evidence for s 98 of the *Evidence Act* to be engaged. This was based upon dissimilarities of the two events (eg. the assailant having a goatee in one, but clean shaven in the other).

The Court (Leeming JA, Schmidt and Wilson JJ) held that it was open to the trial judge to find that coincidence reasoning was open to the jury. The applicant's submission that the similarities were outweighed by dissimilarities was rejected. Not all dissimilarities have a bearing on the process of inferential reasoning permitted by s 98. The question is whether the dissimilarities are relevant, i.e. whether they detract from the strength of the inferential mode of reasoning permitted for coincidence evidence: *El-Haddad v The Queen* (2015) 88 NSWLR 93; NSWCCA 10 at [74]-[75]. See also *Page v The Queen* [2015] VSCA 357 at [59]. If certain similarities raise the improbability of coincidence, thus giving the evidence its probative value, the existence of dissimilarities will not necessarily alter that position. Unlike some differences (eg the perpetrator being an amputee/able-bodied) the dissimilarities identified regarding the assailant's voice and the hand in which he held the gun did not undercut the improbability that the same victim was targeted in such similar circumstances by different people.

Admissions – discretion to exclude – s 90 Evidence Act – *whilst some covertly recorded conversations between complainant and accused may need to be excluded due to unfairness, such a circumstance alone is unlikely to give rise to unfairness for the purposes of s 90*

The respondent in ***R v DRF*** **[2015] NSWCCA 181** (a judgment which only became publicly available in 2017) was charged with several sexual offences committed against his step-son, relating to sexual abuse over three years (1979-1982) when the complainant was 9-12 years old. In 2011 the complainant reported the abuse to police. The respondent declined to be interviewed by police. Pursuant to a warrant issued under the *Surveillance Devices Act 2007*, the police fitted the complainant with listening devices and took him to the respondent's home. In a recorded conversation that ensued between the complainant and the respondent, the respondent made statements said to amount to admissions. The trial judge excluded that evidence and the Crown appealed pursuant to s 5F(3A) of the *Criminal Appeal Act 1912*. Simpson JA allowed the appeal, finding that the decision to exclude the evidence had to be set aside because the trial judge's interpretation of the *Surveillance Devices Act* was erroneous.

The Court also considered whether the evidence should be excluded under s 90 of the *Evidence Act 1995.* Simpson JA held that the evidence was admissible; the circumstances in which the evidence was obtained did not render it unfair for the Crown to use the evidence at the respondent's trial. Her Honour held that police arranging for a complainant to secretly record a conversation with an alleged offender does not alone cause unfairness, even if the offender has refused to be interviewed by police: *Em v The Queen* [2007] HCA 46; 232 CLR 67. Her Honour found that calling evidence such as this (i.e. obtained lawfully and on the express authorisation of a judge fully informed of the relevant facts) as "unfair" would subvert the "statutory scheme involving judicially sanctioned covert surveillance as an aid to the detection of crime" adopted by the legislature and endorsed by the High Court in *Em.* She clarified that she was not suggesting that evidence obtained in these circumstances could never be excluded under s 90.

Leeming JA preferred not to decide the question of whether these tactics amounted to unfairness. First he said this was not an ideal test case because the Crown conceded the complainant was an "agent of the state". Next, he observed that there is always an element of deception because the complainant knows about the recording but the accused does not. He raised several scenarios where it would be unfair to admit evidence obtained by a complainant recording a conversation with the perpetrator (eg. when the conversation took place at a time when the accused was vulnerable or when the complainant used words that had a special meaning or were deliberately ambiguous).

Good character rebuttal – s 110 Evidence Act – *excluded tendency evidence may still be used*

The appellant in **Clegg v R [2017] NSWCCA 125** was charged with sexual offences against 4 boarders at the school where he was a teacher. The judge allowed a joint trial on the basis of admissible tendency evidence in relation to 3 of the complainants but excluded the 4th on a s 101 *Evidence Act* basis (probative value did not substantially outweigh prejudicial effect). Mr Clegg then sought an advance ruling on evidence the judge would allow if he

raised character. The judge said she would allow the Crown to call evidence from the 4th complainant in rebuttal. In the end, Mr Clegg did not raise his character but argued on an appeal against his convictions that the judge's ruling was wrong because she had already held that the 4th complainant's evidence was inadmissible as tendency evidence.

Payne JA rejected the argument. Section 110(2) and (3) provide, inter alia, that the tendency rule does not apply to evidence rebutting a claim of good character. Further, if s 101 applied the evidence would have been admissible under s 101(3) as it would contradict evidence led by Mr Clegg that raised his good character via tendency reasoning (the character evidence was to the effect that the appellant did not have a tendency to act inappropriately towards young boys in his care). But generally, evidence excluded as tendency evidence is capable of being adduced to rebut evidence of good character, unless a relevant rule of exclusion or a discretion under the *Evidence Act* applies. It is not the case that once evidence is excluded as tendency evidence, that evidence is necessarily inadmissible to rebut evidence of good character.

Tendency evidence – s 97 Evidence Act – *no need for similar features to the act in issue for there to be "significant probative value"*

The appellant in ***Hughes v The Queen*** **[2017] HCA 20** was charged with 11 counts of sexual offences against young girls. There were five complainants aged between 6 and 15 at the time of the offending. The acts giving rise to the charges varied, as did the circumstances in which they were committed. At trial, the Crown sought to adduce the evidence of each complainant and six other witnesses (three from the appellant's workplace and three who had been at the appellant's home as young girls; all described sexual touching or indecent exposure) as tendency evidence in the trial of each count. The identified tendencies were (i) having a sexual interest in female children under 16, and (ii) using his social and familial relationships to obtain access to underage girls so he could engage in sexual activities with them. The tendency notice particularised conduct occurring within the vicinity of another adult. The trial judge allowed the tendency evidence in part (the evidence of the workplace witnesses only admissible in relation to one count which also occurred at the appellant's workplace). The jury convicted on 10 counts. On appeal to the CCA the appellant contended that the breadth of the asserted tendency deprived the tendency evidence of significant probative value, relying on the statement in *Velkoski v The Queen* [2014] VSCA 121; 45 VR 680 at 682 [3] that tendency evidence must possess "sufficient common or similar features with the conduct in the charge in issue so as to demonstrate a pattern that cogently increases the likelihood of the occurrence of that conduct". The CCA declined to follow *Velkoski* and dismissed the appeal.

The appellant appealed to the High Court. The crux of the two grounds of appeal was one issue: is tendency evidence required to display features of similarity with the facts in issue before it can be said to have "significant probative value"? A majority of the High Court (Kiefel CJ, Bell, Keane and Edelman JJ) held that there is no such requirement.

One ground asserted error in the CCA's refusal to follow the approach in *Velkoski* to the assessment of significant probative value. The majority rejected this ground, holding that *Velkoski* evinces an unduly restrictive approach to the admission of tendency evidence. The Victorian Court of Appeal's decision, couched in common law language, is inconsistent

with Part 3.6 of the *Evidence Act.* Section 97(1) does not condition the admissibility of tendency evidence on the court's assessment of operative features of similarity with the conduct in issue. An "underlying unity" or "pattern of conduct" need not be established before tendency evidence can be said to have significant probative value. The majority noted that tendency evidence does not have to make the establishment of the relevant fact more likely by itself; that effect can be assessed together with other evidence. The assessment of whether evidence has significant probative value involves two interrelated but separate matters: (i) the extent to which the evidence supports the tendency, and (ii) the extent to which the tendency makes more likely the facts making up the charged offence.

The other ground of appeal asserted error in the conclusion that the tendency evidence possessed "significant probative value". The appellant's submissions focussed on dissimilarity in the facts and circumstances of each event relied upon, noting particularly age of the child, location, and type of sexual conduct. The majority held that such a view ignored the tendency which the evidence was adduced to prove. In this case, the evidence as a whole was capable of proving that the appellant was a person with a tendency to engage in sexually predatory conduct with underage girls as and when an opportunity presented itself in order to obtain fleeting gratification, notwithstanding a high risk of detection. Whilst significant probative value is often established by a "modus operandi" or a "pattern of behaviour", it can be otherwise demonstrated. The separate acts in this case had in common a high degree of opportunism and a level of disinhibited regard of the risk of discovery; the alleged interactions courted a substantial risk of discovery by friends, family members, workmates, or casual passers-by. The significant probative value of the tendency evidence is not diminished by the fact that the acts were opportunistic (and for precisely that reason could not be said to be a pattern of behaviour) or the fact that the appellant expressed his interest in underage girls in different ways. On the second question for assessing probative value, whether the established tendency makes the elements of the offence charged more likely, the majority observed that whilst a tendency expressed at a high level of generality might mean that all the tendency evidence supports that tendency, it will also mean that the tendency cannot establish anything more than relevance. The majority held that the CCA did not err and the appeal was dismissed.

MENTAL HEALTH

Section 33(1)(b) of the Mental Health (Forensic Provisions) Act 1990 – *making an order does not extinguish the Local Court's jurisdiction with respect to pending charges*

In ***Director of Public Prosecutions (NSW) v Sheen and The Local Court of NSW*** **[2017] NSWSC 591**, Mr Sheen was charged with intimidation and two offences of damaging property. He was arrested and taken before a magistrate, who made an order under s 33(1)(b) of the *Mental Health (Forensic Provisions) Act 1990* (the Act) that Mr Sheen be taken to hospital by police for assessment. He was found to be a mentally ill person and detained for 8 days, after which he was released into police custody. When he re-appeared in the Local Court, the magistrate held that because a s 33 order had been made and Mr Sheen had been assessed as being mentally ill, the court had no further jurisdiction in relation to the charges. The DPP sought review of the magistrate's decision, requiring the Supreme Court to consider the proper construction of s 33(1)(b). Bellew J found that

the magistrate was in error. There is nothing in s 33 limiting or extinguishing the Local Court's powers when an order under that section is made. His Honour noted several aspects of the section which indicated to the contrary, including first, that s 33(1) confers the power to make an order "without derogating from any other [power to] order the Magistrate may make in relation to the defendant […]": *State of NSW v Roberson (by his tutor Roberson)* [2016] NSWCA 151 at [29]. Second, sections 33(1)(b) and 33(2) both expressly contemplate someone being brought back before a magistrate after the making of a s 33(1)(b) order. Third, when charges are regarded as dismissed is dealt with in s 33(2) and nowhere else. His Honour found that the magistrate's conclusion was at odds with the plain meaning of s 33(1)(b) and would have consequences which could not have been intended by Parliament. Bellew J concluded that the Local Court retained jurisdiction to deal with the charges against Mr Sheen, a conclusion his Honour noted was consistent with Fagan J's decision in *Director of Public Prosecutions v Wallman* [2017] NSWSC 40 at [39]-[41] with respect of a s 33(1)(a) order. The proceedings against Mr Sheen were remitted to the magistrate for determination

Section 32(3)(b) of the Mental Health (Forensic Provisions) Act 1990 – *order must name a particular place at which, or a particular person upon whom, the defendant is required to attend*

Mr Saunders, the first defendant in ***Director of Public Prosecutions (NSW) v Saunders* [2017] NSWSC 760**, was charged with assault after he spat in the face of a three month old child. When the matter came before the Local Court, a magistrate dismissed the charge and made an order under s 32(3)(b) of the *Mental Health (Forensic Provisions) Act 1990* with conditions requiring Mr Saunders to attend "a psychiatrist" but did not name any specific person or place. The DPP appealed to the Supreme Court and contended that the magistrate erred in the formulation of the conditions. R A Hulme J allowed the appeal and held that s 32(3)(b) does require a magistrate to nominate a particular person upon whom, or a particular place at which, the defendant is to attend for assessment of the defendant's mental condition and/or treatment. His Honour found that the contrary interpretation contended for by the defendant would not promote the underlying purpose or object of Part 3 of the *Mental Health (Forensic Provisions) Act*, which is primarily concerned with diversion of certain persons from the criminal justice system. Where discharge is conditional, as under s 32(3)(b), there are enforcement provisions which would be rendered ineffectual if there was no particular person or place named. The matter was remitted to the Local Court to be dealt with according to law.

OFFENCES

Extended joint criminal enterprise doctrine as enunciated in McAuliffe v The Queen remains the common law of Australia

The three appellants in ***Miller v The Queen* [2016] HCA 30** were convicted of murder on the basis of either joint criminal enterprise or extended joint criminal enterprise. They were parties to an assault with a fourth man who fatally stabbed the victim. The appellants unsuccessfully appealed their convictions to the Court of Criminal Appeal of South Australia. They then sought special leave to appeal to the High Court alleging that their

trial miscarried as a result of liability for murder being left to the jury on the basis of extended joint criminal enterprise. They invited the Court to abandon or confine the doctrine of extended joint criminal enterprise enunciated in *McAuliffe v The Queen* (1995) 183 CLR 108. The appellants relied on the contemporaneous decision of the Supreme Court of the UK and the Privy Council in *R v Jogee; Ruddock v The Queen* [2016] 2 WLR 681 where it was held that the common law took a "wrong turn" and there is no place for extended joint criminal enterprise liability in the law.

The Court (French CJ, Kiefel, Bell, Nettle and Gordon JJ; Keane J agreeing with additional remarks; Gageler J contra) rejected the ground of appeal and held that *McAuliffe v The Queen* remains a correct statement of the common law of Australia. Nonetheless, special leave was granted and the appeal was allowed on another ground; the matter was remitted to the Court of Criminal Appeal. The majority considered the history of the law of extended joint criminal enterprise at length before concluding that, in light of that history, it was not appropriate for the Court to abandon the doctrine and require, in the case of joint criminal enterprise liability, proof of intention in line with *R v Jogee*. The majority also held it was not appropriate to depart from *McAuliffe v The Queen* by substituting a requirement of foresight of the probability of the commission of the incidental offence.

Fraud - there is no deception if a bank allows a person to overdraw their account; the offence of dishonestly obtaining a financial advantage by deception is not made out

The appellant in ***Moore v R*** **[2016] NSWCCA 260** was found guilty of dishonestly obtaining a financial advantage by deception, contrary to s 192E(1)(b) of the *Crimes Act 1900* (NSW). The appellant had opened and account (ironically called a "Complete Freedom" account) with St George Bank. He made numerous withdrawals and debits such that by the time the account was closed there was a negative balance exceeding $2.1 million. The appellant's case, at trial and on appeal, was that he was authorised, albeit by an oversight, to act on the account as he did. The appellant made no false representations to the bank inducing the bank to continue to lend him money. The Crown relied on an expanded statutory definition of deception. Under s 192B(1)(b) of the *Crimes Act,* "deception" includes "conduct by a person that causes a computer, a machine or any electronic device to make a response that the person is not authorised to cause it to make". The Crown submitted that s 192B(1)(b) involved no element of deception; it stood alone and amounted to a deemed deception.

Leeming JA found that the appeal could be resolved by assuming, but not deciding, that no element of deception need be involved. To resolve the appeal the Court asked whether the appellant was "authorised" to make the withdrawals and debits, which turned on the terms and conditions of the relevant account. Those terms and conditions expressly permitted the bank to allow withdrawals in excess of the available balance and set out obligations regarding fees, interest and repayment. Leeming JA thus found the ongoing withdrawals and debits to be the requests for further loans and the bank acceding to those requests. The Court concluded that the transactions were authorised and allowed the appeal.

Drug manufacture - extracting cocaine from paper falls within the definition of "manufacture" in the Drug Misuse and Trafficking Act 1985 *(NSW)*

In ***R v Bucic*** **[2016] NSWCCA 297** the respondent allegedly took steps to separate cocaine from A4 sheets of paper which were impregnated with the drug. Cocaine hydrochloride (the common form of cocaine) is soluble in water or alcohol, and according to expert evidence at trial it goes in and out of paper in exactly the same form. The respondent was charged with knowingly taking part in the manufacture of cocaine, contrary to s 24(1) of the *Drug Misuse and Trafficking Act 1985* (the DMTA). At trial, defence counsel relied on *Beqiri v R* (2013) 37 VR 219; VSCA 39 which found that extracting cocaine from towels through evaporation was not "manufacture" in s 305.1 of the *Criminal Code 1995* (Cth). The primary judge noted that it dealt with different legislation but had "remarkably similar" facts, and found the decision "highly persuasive". The trial judge directed the jury to return a verdict of not guilty on the basis that separating cocaine from paper is not "manufacture". Her Honour referred to the ordinary English meaning of "manufacture" as making something different. Her Honour did not refer to the definition of "manufacture" in s 3 of the DMTA*,* which includes "the process of extracting or refining the prohibited drug".

The CCA allowed the Crown appeal and ordered a new trial. Campbell J held that separating cocaine from paper it is contained in is a process of extraction for the purpose of the DMTA*.* The ordinary English meaning of "manufacture" is not definitive. Campbell J noted High Court authority to the effect that it would be impermissible (and circular) to construe the words of a definition by reference to the term defined. Further, the use of "includes" in the definition indicates a more expansive definition than would otherwise be included in the notion of manufacture. Campbell J found that *Beqiri* has no application to the interpretation of the DMTA; the definitions of manufacture in the Commonwealth Code and the DMTA are different.

Intimidation with intent to cause fear of physical harm under s 13 of the Crimes (Domestic and Personal Violence) Act 2007 *is an offence of specific intent*

The applicant in ***McIlwraith v R*** **[2017] NSWCCA 13** was intoxicated at the time of the offending, which required the trial judge to determine whether the offence of intimidation under s 13 of the *Crimes (Domestic and Personal Violence) Act 2007* was an offence of specific intent. The trial judge held it was not, but found in the alternative that even if intoxication was taken into account the applicant still formed the requisite intent. On appeal, Basten JA held that it is an offence of specific intent. His Honour discussed the relationship between s 13(1) (which, if read in isolation, would clearly constitute an offence of specific intent) and s 13(3) (which uses language associated with reckless indifferences). His Honour concluded that the language of subs (3) is closely analogous to the particular state of mind necessary for specific intent. Whilst it is not a form of intention per se, it is a state of mind with a specific or particular focus, and thus distinguishable from general intent. Given the trial judge's alternative finding of fact, the appeal was dismissed.

Consorting - for the purposes of s 93X of the Crimes Act 1900 *"consorts" means intentionally seeking something in the nature of companionship; it does not include a casual conversation on the street*

The plaintiff in ***Forster v Director of Public Prosecutions*** **[2017] NSWSC 458** was convicted in the Local Court of habitual consorting contrary to s 93X of the *Crimes Act 1900.* He appealed against his conviction, contending that the magistrate construed the term "consorts" in s 93X too broadly. McCallum J allowed the appeal. From *Tajjour v New South Wales* (2014) 254 CLR 508; HCA 35 it is clear that a casual conversation on the street with an acquaintance cannot itself amount to consorting. *Tajjour* supports the proposition that the essence of consorting is the intentional seeking of something in the nature of companionship, not mere conversation. Such a view is also supported by the fact that the maximum penalty for the offence is 3 years. Her Honour found that the magistrate erroneously construed the section. Whilst the magistrate's language appeared to follow *Tajjour*, his consideration of the facts indicated an extremely narrow view as to what constitutes a casual encounter. The decision reflects a view that whilst a casual encounter not involving conversation (eg. a smile/nod) is not consorting, by embarking on a conversation of any kind the person evinces an unequivocal "intentional seeking out" of the kind of companionship proscribed in the section.

Next, McCallum J addressed the requirement that the consorting be habitual. The section plainly requires magistrates to separately consider whether individual acts of consorting amount to habitual consorting. Her Honour held that the bare proof of a number of conversations meeting the minimum requirements in s 93X(2) does not necessarily establish the offence in s 93X; the Court must make an evaluative judgment about the conduct. In the present case, the number of encounters relied upon by the prosecution scarcely established a habit. The first three encounters occurred within 24 hours and the fourth was almost a month later. The conviction was quashed.

The infliction of HIV amounts to "grievous bodily harm"

The appellant in ***Aubrey v R*** **[2017] HCA 18** knew he was HIV positive and had unprotected sexual intercourse with the complainant, who was then infected with HIV. The appellant was charged with two offences, the alternative count was maliciously inflicting grievous bodily harm contrary to s 35(1)(b) of the *Crimes Act 1900* (as the provision then was). One issue on appeal was whether having sexual intercourse with another person and thereby causing the other person to contract a grievous bodily disease was capable of amounting to the infliction of grievous bodily harm within the meaning of s 35(1)(b).

The majority (Kiefel CJ, Keane, Nettle and Edelman JJ) held that the question should be answered in the affirmative. *R v Clarence* (1888) 22 QBD 23 held that inflicting grievous bodily harm required proof of the direct causing of injury and the uncertain and delayed effect of infection from sexual intercourse was insufficient. *Clarence* has long been regarded as doubtful. The majority listed several reasons why *Clarence* should not be followed, including the fact it was based on a rudimentary understanding of infectious diseases; as well as the contemporaneous presumption of a married woman's consent to intercourse with her husband, and some judge's failure to distinguish between consent to

intercourse and consent to infection. The majority of the High Court saw no sufficient reason to disagree with later authority contrary to *Clarence*.

The appellant contended that the NSW Parliament should be taken to have intended for s 35 to operate in accordance with *Clarence* by virtue of the fact that s 36 (a separate provision on causing grievous bodily disease) was added separately, rather than amending s 35. This submission was rejected. Section 36 was enacted because *Clarence* was seen to have caused some doubt as to whether contracting a disease constituted bodily harm. This doubt does not suggest Parliament intended that s 35 be restricted in the way suggested by *Clarence*. The majority found that the principle of construing statute in favour of the subject in the face of doubt was a rule of last resort. The language of s 35 has a level of generality that attracts the operation of the "always speaking" approach, so it therefore includes the reckless infliction of a sexual disease: *R v Dica* [2004] EWCA Crim 1103; QB 1257.

Joint criminal enterprise liability - presence at the offence is not the only way to establish participation

The applicant in ***Dickson v R*** **[2017] NSWCCA 78** was convicted of five offences relating to break and enters. The Crown case was that there was a joint criminal enterprise to enter homes and steal property in order to sell it and divide the proceeds. No witnesses observed the applicant or his three co-offenders break and enter the houses or steal any property. The Crown case largely rested on intercepted phone calls between the co-offenders (which were said to evidence the formation and participation in the criminal agreement) and mobile phone tower data indicating that the applicant travelled to the suburb where the burglaries happened on the night they occurred. The applicant appealed his conviction, contending that the verdict was unreasonable or could not be supported having regard to the evidence because it was not proved that he was present when the offences were committed. Bathurst CJ reviewed the principles on joint criminal enterprise, which emphasise that a person is only liable if they participated in the commission of the offence. Presence at the actual commission of the crime is sufficient but not necessary. A party to an agreement to commit a crime can still be liable if they participated in the furtherance of the enterprise in some other way. The Chief Justice gave the examples of someone who agrees to murder a victim and supplies the poison to the other party but is not present when the poison is administered; or someone who creates a fraudulent instrument in an agreement to defraud a victim but is not there when the instrument is used. The verdict was open to the jury and the appeal was dismissed.

Reckless infliction of grievous bodily harm – s 35 of the Crimes Act 1900 *–foresight of possibility (not probability) of harm*

The appellant in ***Aubrey v R*** **[2017] HCA 18** knew he was HIV positive and had unprotected sexual intercourse with the complainant, who was then infected with HIV. The alternative count the appellant was charged with was maliciously inflicting grievous bodily harm contrary to s 35(1)(b) of the *Crimes Act 1900*. The second issue raised on appeal was whether recklessness requires foresight of the possibility or probability of grievous bodily harm. Kiefel CJ, Keane, Nettle and Edelman JJ held that in order to establish that an

accused acted recklessly within the meaning of s 5 of the *Crimes Act*, and thus maliciously within the meaning of that section and s 35, it is sufficient for the Crown to establish that the accused foresaw the possibility (not probability) that the act of sexual intercourse with the other person would result in the other person contracting the grievous bodily disease. Whilst the requirements in other states might vary according to the terms of their legislation, for ss 18 and 35 of the *Crimes Act* the reasoning in *R v Coleman* (1990) 19 NSWLR 467 was correct; the fact that recklessness for common law murder requires that the accused foresaw the probability (not possibility) of death or grievous bodily harm does not mean the same standard applies to s 35. The reason for requiring foresight of probability in the case of common law murder was the near moral equivalence of intention to kill or cause grievous bodily harm and the foresight of the probability of death: *R v Crabbe* (1985) 156 CLR 464 at 469. The same does not necessarily, if at all, apply to statutory offences other than murder.

The role of reasonableness in risk-taking was also discussed. The appellant pointed to recent English decisions which had held that recklessly causing grievous bodily harm required not only proof that the accused foresaw the possibility of harm and still proceeded, but also that it was unreasonable for the accused to take that risk in proceeding. The plurality rejected the appellant's submission that these decisions represented an advance in the law that the High Court should follow by replacing the requirement of foresight of possibility with probability. Reasonableness of an act and the degree of foresight of harm are logically connected. If the act in question lacks any social utility then a jury might more readily consider that foresight of mere possibility is enough to amount to recklessness. If, on the other hand, the act in question has a degree of social utility (such as driving a car, or playing a contact sport) then the jury might properly consider that foresight of something more than possibility is required. It was said that juries are ordinarily, as a matter of common sense and experience (and therefore without specific directions) able to take into account the social utility of an act in determining recklessness. There is no reason to replace the requirement of foresight of possibility with a test of probability.

PRACTICE AND PROCEDURE

Doli incapax *presumption - to rebut, the Crown must adduce evidence separate from the circumstances of the offence to prove that the child knew the conduct to be morally wrong.*

The appellant in ***RP v The Queen*** **[2016] HCA 53** was aged between 11½ and 12 years old at the time of the offending. He was convicted of sexual intercourse with a child under 10 (x2) and aggravated indecent assault (x1). The Crown adduced no evidence apart from the circumstances of the offences. The trial judge held that the presumption of *doli incapax* had been rebutted by the circumstances in which one of the offences was committed. The CCA upheld the convictions of sexual intercourse without consent, but quashed the conviction of aggravated indecent assault. The High Court allowed the appeal and quashed the remaining two convictions. The plurality (Kiefel, Bell, Keane and Gordon JJ), Gageler J agreeing, held that the CCA erred by finding the presumption of *doli incapax* had been rebutted.

The plurality held that the presumption of *doli incapax* cannot be rebutted merely by an inference from the doing of the act(s) which constitute the offence, no matter how obviously wrong the act(s) may be. Evidence is required from which an inference can be drawn that the child's development is such that they knew it was morally wrong. The plurality directed attention to the child's education and the environment in which the child has been raised. A child's awareness that their conduct is merely naughty or mischievous is insufficient; there must be proof that the child knew the conduct was "seriously wrong" or "gravely wrong". What constitutes sufficient evidence to rebut the presumption will vary depending on the nature of the allegation and the child. A child will more readily understand the seriousness of an act if it relates to values they have had direct personal experience with. Answers given in a police interview may establish the requisite knowledge in some cases but in others, evidence of the child's progress at school and home life will be required. The plurality criticised suggestions that the strength of evidence required depends on the child's age on the basis that they imply children mature at a uniform rate. Rebuttal of the presumption must focus on the intellectual and moral development of a particular child. On what can be inferred from child sexual behaviour, the plurality said children who engage in sexual play may try to keep it secret because they know it is naughty, and it cannot necessarily be inferred they know it to be morally wrong. In the present case, the appellant's conduct went well beyond normal childish sexual experimentation, but that does not mean he knew it was morally wrong.

Good behaviour bonds – Local Court power to deal with breach of bond imposed on appeal in the District Court

The offender in **Director of Public Prosecutions (NSW) v Jones, Dillon Michael [2017] NSWCCA 164** was sentenced to imprisonment in the Local Court. He appealed to the District Court where good behaviour bonds were imposed in lieu. The judge made a direction that any breach of the bonds be reported to him for further action. The offender committed further offences and when they were dealt with the magistrate also purported to re-sentence in respect of the breach of the District Court bonds. The offender again appealed, this time against the aggregate sentence imposed in the Local Court which included the offences the subject of the breached bonds. The District Court judge before whom the appeal came (not the same as the first judge) expressed concern about the failure to adhere to the direction of the other judge and about the power of the Local Court to call-up the offender and re-sentence. This resulted in a stated case coming to the Court of Criminal Appeal.

In relation to the first judge's direction, Basten JA held that it was not a condition of the bond; it was legally ineffective; it was unclear to whom it was directed; it was not based upon any statutory power vested in the judge; and it could not diminish the statutory authority of any other court or judicial officer to deal with a breach of the bond.

Basten JA also closely analysed the provisions of ss 95, 97-99 of the *Crimes (Sentencing Procedure) Act* 1999 and concluded that the Local Court had jurisdiction (as did the District Court) to deal with the breach.

His Honour also noted (at [18]) a practical matter favour a conclusion that the Local Court had power to deal with the breach: "Where the offender is before the Local Court for

further offences which constitute breaches of a bond imposed for earlier offences, it would be unfortunate if the one court could not deal with both the breach of the bond and the further offences. For that purpose, it should not matter whether the bond was imposed by the District Court or a Local Court."

His Honour also referred to *Yates v Commissioner of Corrective Services of NSW* [2014] NSWSC 653 which held that the Local Court had (sole) jurisdiction in respect of breach of a bond imposed in that Court but purportedly "confirmed" upon dismissal of an appeal to the Local Court.

SENTENCING – GENERAL ISSUES

Pre-sentence custody - permissible to backdate sentence so that non-parole period is substantially concurrent with service of balance of parole where parole was revoked only because of the new offences

The respondent in ***R v Hollaway*** **[2016] NSWCCA 166** was sentenced to 1 year 9 months with a non-parole period of 1 year for an offence of attempting to intentionally choke contrary to s 37(1) of the *Crimes Act 1900*. The Crown appealed against that sentence (other concurrent sentences were imposed but were not subject to appeal) *inter alia* on the ground that the judge erred in backdating the sentence so that only one month of the respondent's custody was solely referable to the non-parole period for the choking offence. The asserted error arose in circumstances where the respondent committed the offence approximately one week after being released on parole in relation to a prior offence. As a result of the index offending, she was required to serve the approximate 1 year 8 month balance of parole. This presented the sentencing judge with the question of whether, and if so by how much, to backdate the respondent's sentence.

R A Hulme J rejected the ground and dismissed the Crown appeal. The question facing the judge was governed by s 47 of the *Crimes (Sentencing Procedure) Act 1999*, which permitted the judge in this case to commence the sentence on the day of imposition or on some prior date on or after the respondent's arrest and refusal of bail. The judge was required to take into account the time which the respondent had been in custody in relation to the offence but beyond that, the decision was discretionary. It is clear that the sentencing judge carefully considered the issue. The result was that the respondent would serve approximately 9 months solely referable to the parole period of the previous sentence, 11 months referable to both matters and a further 1 month solely referable to the choking offence. That was a sound discretionary choice. It is also relevant that parole was revoked only because of the respondent's commission of the index offences; if not for the new offences, it may have been the case that even if parole had been revoked for some other reason, the respondent may have been given a further chance at parole.

Rehabilitation and the application of the principle of totality to cross-border offending

The applicant in ***WC v R*** **[2016] NSWCCA 173** served a term of imprisonment in Queensland for the sexual abuse of his daughter. At the expiration of that sentence, he was extradited to NSW and pleaded guilty to a range of further sexual offences committed

against the same daughter. He was sentenced to an aggregate term of 19 years imprisonment with a non-parole period of 13 years. His appeal against sentence included a ground that the judge erred by assigning no weight to rehabilitative programs undertaken in Queensland. Campbell J allowed the appeal and resentenced the applicant to 17 years with a non-parole period of 11 years 9 months. The sentencing judge correctly recognised that the application of the principle of totality to cross-border offending where an offender has first been imprisoned interstate entitled the Court to have regard "to the extent to which the offender has rehabilitated himself in consequence of the period of imprisonment served interstate". That is in accordance with *R v Todd* [1982] NSWLR 517 and *Mill v The Queen* (1988) 166 CLR 59.

The error in the judge's approach was the distinction he drew between rehabilitation with respect to the Queensland offending on the one hand and that in relation to the NSW offending on the other. As an object of sentencing generally, rehabilitation is directed principally to the *offender* rather than the *offence*. In this case, it was obvious that the applicant's rehabilitation was not complete nor had he progressed to a state of genuine remorse. While this limits the weight that can be given to his progress toward, and prospects of, rehabilitation, it does not nullify the consideration. It is clear that the sentencing judge gave no weight whatsoever to the progress the applicant had made.

The words "in company" have the same meaning as a statutory aggravating factor as at common law and where that fact is an element of an aggravated offence

The applicant in ***White v R*** **[2016] NSWCCA 190** appealed against a sentence imposed upon him for an offence of robbery whilst armed with an offensive weapon, with a similar offence taken into account on a Form 1. The sentence was one of 6 years 6 months with a non-parole period of 4 years. In both offences, the applicant and Ms Clauscen were together when he pointed to a shop, Ms Clauscen then walked away and the applicant entered that shop and robbed it whilst armed. The sentencing judge treated the offences as having been committed in company as an aggravating factor under s 21A(2)(e) of the *Crimes (Sentencing Procedure) Act 1999*. The applicant appealed against that finding.

Simpson JA (Bathurst CJ agreeing with additional remarks; Basten JA finding error but determining that it was immaterial and insufficient to uphold the ground) upheld the ground and allowed the appeal. While not determinative of the appeal, Simpson JA considered whether the words "in company" in s 21A(2)(e) have the same meaning as at common law and where that fact is an element of an aggravated offence. Her Honour answered that question in the affirmative. In each case, the words are used to aggravate the gravity of an offence and must be proved beyond reasonable doubt. The decisions concerning the construction to be placed on the element of an offence being committed in company are, therefore, relevant to the construction to be given to s 21A(2)(e). They are not an exhaustive statement and each case will depend upon its own facts. It is appropriate, however, to consider whether the presence of the other person is such as to have a potential effect on the victim (by way of intimidation or otherwise) or the offender (by offering support or encouragement) and whether the evidence establishes that the other person is present sharing a common purpose with the offender. In the present case, none of those considerations could be established by the agreed facts or the evidence.

Pre-sentence custody - failure to take delay into account when backdating sentence where the offender is serving a balance of parole

In June 2013 the applicant in ***White v R*** **[2016] NSWCCA 190** committed two offences of robbery whilst armed with an offensive weapon while he was on parole for offences committed in 2008. As a result of the 2013 offences, his parole for the 2008 offences was revoked. There was considerable delay between his apprehension in June 2013 and his ultimate sentencing in April 2015. At least from September 2014, and possibly earlier, the delay was not attributable to the applicant. The sentencing judge backdated the commencement date to 19 December 2014. The applicant appealed against that exercise of discretion on the ground that the judge failed to take into account the delay in the proceedings in her Honour's application of totality.

Simpson JA (Bathurst CJ agreeing with additional remarks; Basten JA dissenting) upheld the ground and allowed the appeal. Relevant to the appeal was s 47 of the *Crimes (Sentencing Procedure) Act 1999*. By s 47(2)(b), a court is permitted to post-date the commencement of a sentence, but only if the sentence is to be served consecutively or partly consecutively with another sentence of imprisonment. By sub-ss (4) and (5), a sentence may not be post-dated to a date later than the earliest date on which the offender will become entitled or eligible to release on parole having regard to any other sentence of imprisonment being served. At all material times, notwithstanding the revocation of parole, the applicant was *eligible* to be released on parole in relation to the 2008 offences. The delay in sentencing thereby extended the period of accumulation available to the sentencing judge and in that way the applicant was plainly disadvantaged by it. It would have been appropriate for the sentencing judge notionally to determine at what point the applicant could reasonably have expected to have been sentenced (having regard to the date of his plea) and to have directed that the sentence commence no later than that date.

Retribution relevant to sentence despite not appearing in the legislative purposes of sentencing

The applicant in ***Abdulrahman v R*** **[2016] NSWCCA 192** appealed against a sentence imposed upon him for an offence of aggravated break, enter and steal contrary to s 112(2) of the *Crimes Act 1900*. Included in the appeal was a ground alleging that the sentencing judge erred by treating retribution as an important factor when it is not part of the purposes of sentencing prescribed in s 3A of the *Crimes (Sentencing Procedure) Act 1999*. Price J rejected this ground and dismissed the appeal. Retribution has long been held to be an important aspect of sentencing. It was identified as such in *Veen (No 2)* (1988) 164 CLR 465 and the High Court in *Muldrock v R* (2011) 244 CLR 120 stated that it continued to be so irrespective of the enactment of s 3A.

No error in refusal to allow leniency for delay caused by the offender absconding

The applicant in ***Walker v R*** **[2016] NSWCCA 213** pleaded guilty in 2004 to an offence of maliciously inflicting grievous bodily harm contrary to s 35(b) of the *Crimes Act 1900*. He failed to appear for sentence and a bench warrant was issued. He was arrested by chance

over 11 years later in Victoria in 2015. He maintained his guilty plea and was sentenced in 2016 to 2 years with a non-parole period of 1 year. His sentence appeal included a ground that the judge erred by finding that it would not be appropriate to make any finding of leniency because of the delay in sentencing. Gleeson JA dismissed the appeal and held that the sentencing judge properly distinguished between cases where delay occurs because of circumstances outside of the offender's control, and those where it is the offender's actions that cause the delay. To allow leniency on account of delay alone with respect to the latter could hardly be said to further the public interest. Consistent with authority, her Honour took into account the evidence of the applicant's rehabilitation up to the date sentence was imposed.

Uncharged sexual conduct erroneously used to elevate the objective seriousness of index offences

The applicant in ***AK v R*** **[2016] NSWCCA 238** pleaded guilty to sexual offences committed between 2010 and 2011 against two girls aged 10 to 11 years old. One of the complainants was the daughter of the applicant's partner. A statement in the agreed facts indicated there had been inappropriate sexual touching of her since 2009 when she was aged 8. The applicant's appeal against sentence included a ground that the judge erred in the manner in which he took into account that uncharged conduct. Johnson J, after expressing reservations as to the correctness of the law, observed that the principles to be applied when imposing a sentence in respect of representative counts are those from *R v JCW* (2000) 112 A Crim R 466: (a) that the overall history of the conduct from which the representative charges have been selected may be looked at for the purpose of understanding the relationship between the parties; (b) to exclude any suggestion that the offences charged were of an isolated nature; and (c) as bearing upon the degree of any leniency the court might be considering in regard to sentencing.

In light of those principles, it was open to the sentencing judge in this case to have regard to the applicant's uncharged sexual conduct on sentence. It was not erroneous to describe the conduct concerning the relevant complainant as part of a "course of conduct" in the circumstances of this case – however, such a description may not be apt in a particular case if, for example, the uncharged conduct is said to constitute a small number of incidents. The error in the judge's approach was to elevate the objective seriousness of the offences by way of aggravation as a result of that finding. Despite the error, no lesser sentence was warranted in law.

Offences falling within the "worst category"

In ***The Queen v Kilic*** **[2016] HCA 48** the Victorian Court of Appeal ("VSCA") held the sentence imposed upon the respondent for an offence of intentionally causing serious injury was manifestly excessive. In its decision, the VSCA described the offence as being within "the worst category" of the offence. The High Court noted that, properly described, such an offence is an instance of the offence which is so grave that it warrants the imposition of the maximum prescribed penalty for that offence, taking into account both the nature of the crime and the circumstances of the criminal. An offence may fall within this category notwithstanding that it is possible to imagine an even worse instance of the

offence. The High Court warned that it is potentially confusing and likely to lead to error to describe an offence which does not warrant the maximum prescribed penalty as being "within the worst category"; it is a practice which should be avoided. Further, the common practice of describing an offence as "not within the worst category" may be misleading to laypersons. Instead, sentencing judges should state in full whether the offence is or is not so grave as to warrant the maximum prescribed penalty.

The discretion to reduce the utilitarian discount for a guilty plea under s 22(1A) of the Crimes (Sentencing Procedure) Act 1999 *is wide, but should not be applied inconsistently*

The applicant in ***Silvestri v R*** **[2016] NSWCCA 245** pleaded guilty to three charges of dangerous driving occasioning grievous bodily harm. Each charge related to one victim; two men and a pregnant woman who lost her baby as a result. For each of the two counts relating to the male passengers, the applicant was given a 25% discount for his guilty pleas. On the count relating to the female passenger however, the sentencing judge (who was also the sentencing judge in *Lehn v R* [2016] NSWCCA 255) only allowed a 20% discount on the basis that any greater discount would not reflect the object gravity of the offence. The applicant appealed on the ground that the trial judge erred in allowing a discount of only 20% for the utilitarian benefit of the guilty plea to that last charge.

Hidden AJ observed that the discretion to reduce a sentence for the utilitarian value of a guilty plea remains a wide one. However, his Honour held that there was incongruity in reducing the sentence for two counts by 25% but the other by 20%. Given the severity of the sentence for the last count (5 years, 3 non-parole), it was said to be hard to see how a 25% discount would have produced a sentence less than was required to mark the gravity of the offence. Hidden AJ held that if this was the only ground in the application the Court would not intervene because the difference is only a matter of a few months. However, his Honour found that there was merit in the ground on accumulation, so the combination of errors rendered the sentencing process erroneous. The appeal was allowed and the applicant was re-sentenced.

Justification for making a finding of special circumstances

The respondent in ***R v Lulham*** **[2016] NSWCCA 287** was given a sentence of 2 years imprisonment with a non-parole period of 1 month and 13 days for wounding with intent to cause grievous bodily harm. The Crown appealed, contending that the sentence was manifestly inadequate, in part asserting that the sentencing judge gave undue weight to the respondent's subjective circumstances, which in turn directed attention to the finding of special circumstances. The CCA constituted a bench of five judges (convened to consider whether the offence committed in the victim's home is an aggravating factor if the offender was not an intruder; see *Jonson v R* [2016] NSWCCA 286). On this issue, Bellew J held that there was no evidence before the sentencing judge to support a finding of special circumstances (ultimately finding manifest inadequacy, but using the residual discretion to dismiss the appeal). There was a divergence of opinions as to what a sentencing judge must be satisfied of before finding special circumstances.

Bellew J made one statement which provoked discord: "before a finding of special circumstances can be made, it is necessary for a sentencing judge to be satisfied that there exist significant positive signs which show that if the offender is allowed a longer period on parole, rehabilitation is likely to be successful as opposed to a mere possibility". The Chief Justice held that, in dealing with rehabilitation, "a judge would be entitled to find special circumstances if there is evidence before him or her that demonstrates that the offender has prospects of rehabilitation and that these prospects would be assisted if a longer parole period was allowed." Beazley P stated that, whilst Bellew J's statement is supported by authority, the "seemingly unqualified nature of his Honour's observation would not be appropriate in every case." Her Honour stated that one situation where the statement may be inappropriate is in the case of a long prison sentence, where the prospects of rehabilitation may be difficult to assess or even be non-existent. The Court may nevertheless be satisfied that a finding of special circumstances is appropriate to assist or promote an offender's rehabilitation: *R v Simpson* (2001) 53 NSWLR 704; [2001] NSWCCA 534 at [58]; *Dashti* at [81]-[91]. Hall and N Adams JJ also expressed their disagreement with the statement and agreement with the position of Bathurst CJ (and others, in the case of N Adams J).

The offender does not need to be unlawfully present in the home in order for it to be an aggravating factor in s 21A(2)(eb) of the Crimes (Sentencing Procedure) Act 1999

The applicant in ***Jonson v R*** **[2016] NSWCCA 286** was the victim's partner and their relationship involved domestic violence. The applicant physically and sexually assaulted the victim in the home where they lived together. The applicant was convicted of recklessly inflicting grievous bodily harm and sexual intercourse without consent. The sentencing judge took into account as an aggravating factor for all the offences the fact that they were committed in the home of the victim or any other person under s 21A(2)(eb) of the *Crimes (Sentencing Procedure) Act 1999.* The applicant appealed and one issue was whether the sentencing judge erred in determining that the offences were aggravated under s 21A(2)(eb). The applicant relied on a series of cases to support the claim that it was a rule of law or sentencing principle that it was not an aggravating factor for an offence when the offender was lawfully present, relying on *R v Comert* [2004] NSWCCA 125 and a series of cases said to consistently apply that principle.

A five-judge bench of the CCA dismissed the appeal and held that the offender does not need to be an intruder in the home for s 21A(2)(eb) to apply. First, the Court construed the text of the section. Bathurst CJ observed that there is no explicit pre-condition in the section that the offender be an intruder for the section to operate. Further, the section is not limited to the victim's home, but extends to the home of any person, which literally construed includes the offender. The Chief Justice held that the legislature did not appear to intend the section to only apply where the offender was an intruder. His Honour found this construction to be consistent with the purpose of the section, that a home should be safe and secure. It is also consistent with the purpose of "preserv[ing] the notion of sanctity of the home, whereby individuals are entitled to feel safe from harm of any kind" in the Second Reading Speech.

Secondly, the Court considered the interaction of s 21A(2)(eb) with s 21A(4), which provides that the Court should not have regard to an aggravating/mitigating factor if it

would be contrary to any Act or rule of law. Bathurst CJ held that s 21A(4) does not limit the operation of s 21A(2)(eb) just because sentencing principles up to the present time have only recognised the aggravating factor where the offender is an intruder. Inconsistency with sentencing principles must be shown for s 21A(4) to have an effect. There is no relevant rule of law limiting the content of s 21A(2)(eb) in the way contended for by the applicant. The decisions which said *Comert* stood for the contrary proposition were plainly wrong.

When an offence is committed in custody the sentence must be accumulated on the existing sentence to reflect separate criminality

The respondent in ***R v Jeremiah*** **[2016] NSWCCA 241** was being held on remand for several charges at Parklea Correctional Centre, during which time he assaulted a fellow inmate causing actual bodily harm. For that assault he was sentenced to imprisonment for 1½ years with a non-parole period of 1 year 1 month, concurrent with the sentences for the original charges. The Crown appealed against inadequacy of the sentence. The CCA (Meagher JA, Davies and Fagan JJ) allowed the appeal, finding that the sentence appealed against was manifestly inadequate by reason of its concurrence with the pre-existing term of imprisonment. The Court found totality error. The mere fact that the later assault occurred inside prison, after 11 months of remand, whereas the earlier offences were outside prison before his arrest, was sufficient to support a conclusion that the assault in custody involved entirely separate and unrelated criminality. The Court held that full concurrence would undermine public confidence in the administration of criminal justice.

In the present case, the sentence must affect sufficient general deterrence to demonstrate that violence and disorder between prisoners in custody will not be tolerated by the courts: *R v Fyffe* [2002] NSWSC 751 at [33]. The Court held that the sentence should have been fully accumulated on the non-parole period for the original offences. It was observed that full accumulation was consistent with the legislative policy underlying s 56(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) which provides that, if a "convicted inmate" commits an offence against the person while in custody, that sentence is to be consecutive upon the pre-existing term, unless otherwise ordered.

Delay before sentencing – when it may have limited weight

The applicant in ***Hudson v R*** **[2016] NSWCCA 278** committed the relevant offences in 2008 and was not sentenced until 2016. Whilst the applicant made admissions to the offences in documents filed in court in 2009, charges were not laid until 2014. The Crown gave no explanation for the almost five year delay after the admissions were made, other than that the applicant moved interstate in 2009. The applicant appealed against her sentence. One ground of appeal was that the sentencing judge erred in concluding that the delay was not significant. The applicant contended that delay should have been taken into account as a significant mitigating factor.

The appeal was dismissed. Hoeben CJ at CL found it to be clear from the sentencing judge's remarks that delay was taken into account as a mitigating factor. The sentencing judge considered the two important aspects of delay; the opportunity to pursue

rehabilitation and anxiety created by the prospect of future punishment. Therefore, the applicant's complaint must be that the sentencing judge only took it into account "to some limited extent". A sentencing judge has a wide discretion as to the weight to give to the issue of delay: *Luong v R* [2014] NSWCCA 129. Hoeben CJ at CL found it was clear why the sentencing judge only took delay into account to a limited extent; there was no evidence at all that applicant was in fact anxious about the prospect of future punishment. The sentencing judge was thus entitled to limit the extent to which he took that aspect of delay into account.

Vulnerability of an Aboriginal victim of domestic violence

The applicant in ***Drew v R*** **[2016] NSWCCA 310** pleaded guilty to wounding with intent to cause grievous bodily harm. The victim was his partner, and there was an Apprehended Domestic Violence Order in place for her protection at the time of the offence. The sentencing judge found the victim's vulnerability to be an aggravating factor: s 21A(2)(l) *Crimes (Sentencing Procedure) Act 1999*. Her Honour found that the victim was less likely to seek help or complain, and stated "[t]here is a well-known culture of silence and ostracism of those who do complain in relation to acts of violence within the Aboriginal community". The applicant's first ground of appeal against sentence was that the sentencing judge erred in finding that the victim was vulnerable.

Fagan J (Gleeson JA agreeing and N Adams J reaching the same conclusion) held that the sentencing judge did not have evidence upon which to make findings that there is a culture of silence about domestic violence within the Aboriginal community; that victims who do complain are ostracised, or; that such a culture of silence was applicable to the relevant community. Irrespective of whether these propositions are valid, they were not open to the sentencing judge without evidence. It was therefore not open to her Honour to conclude that those cultural phenomena made the victim "less likely" to seek help or complain to the authorities. Whilst the sentencing judge erred, there was other evidence upon which to find vulnerability. Fagan J found that the inescapable conclusion from the victim's emotional and intimate attachment to the applicant was one of individualised vulnerability. There was evidence of the victim returning to their home after numerous threats and recanting previous complaints. She was therefore less likely than other potential victims of his violence to try to avoid him or put herself out of harm's way. Therefore, despite the sentencing judge's error on this issue, the sentence was not excessive. The appeal was dismissed.

Hardship to third parties (family and dependents) - conflicting case law in respect to Commonwealth offences –evidence required that the offender's imprisonment would significantly and deleteriously affect those persons' lives.

The respondent in ***Director of Public Prosecutions (Cth) v Pratten (No 2)*** **[2017] NSWCCA 42** was convicted of seven counts of obtaining a financial advantage by deception contrary to s 134.2(1) of the *Criminal Code Act 1995* (Cth). The Crown appealed against sentence, contending that the sentencing judge erred in finding that hardship caused to the respondent's daughters warranted mitigation of sentence. The sentencing judge had taken

into account the effect on the daughters, mentioning their ill health. The appeal was allowed.

Basten JA found that the sentencing judge erred in relying on hardship to the offender's daughters in circumstances where the evidence did not establish that imprisonment of the offender would significantly and deleteriously affect their lives. His Honour discussed the tension between s 16A(2)(p), which requires the Court to take into account "the probable effect that any sentence or order under consideration would have on any of the person's family or dependents", and the general law principle that hardship to a family member can only be relied on to reduce the sentence in "exceptional" circumstances. It was thought that s 16A(2)(p) was intended to reflect the general law principle: *R v Togias* [2001] NSWCCA 522; 127 A Crim R 23. However, there have been expressions of disquiet that such an approach requires a reading down of the Commonwealth statute in a manner which finds no basis in statutory language: *R v Zerafa* [2013] NSWCCA 222 per Beech-Jones J, who was of the view that *Togias* was wrongly decided. Ultimately it was not necessary for the CCA to decide whether Beech-Jones J's view in *Zerafa* should be followed. The respondent on appeal conceded that exceptional circumstances were required and had not been established. However, Campbell and N Adams JJ both observed there was force in Beech-Jones J's position in *Zerafa*.

A subsidiary issue was whether the trial judge was entitled to take the effect on the offender's family into account in setting "an unusually short non-parole period", as the respondent contended. Basten JA rejected this submission, holding that the fixing of a non-parole period is as much part of a sentence as the nomination of a full term. Whilst there are State cases supporting the argument, there is no federal equivalent to s 44 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). The Crown appeal was allowed.

More on hardship to third parties in sentencing for Commonwealth offences

The applicant in ***Kaveh v R*** **[2017] NSWCCA 52** was sentenced for importing a marketable quantity of opium contrary to s 307.2(1) of the *Criminal Code Act 1995* (Cth). A ground of appeal was that the sentencing judge erred by failing to give any weight to the issue of probable hardship experienced by the applicant's family. Both Basten JA and Latham J (Campbell J agreeing with both) found that the ground was unsupportable as a matter of fact. The sentencing judge expressly found imprisonment would have an adverse effect on the applicant's family but that hardship should not result in any substantial reduction of the sentence. There was no error found in this approach. Whilst it was not contended that the sentencing judge misunderstood the correct sentencing principles, Basten JA observed that the ground raised the same issue addressed in *Director of Public Prosecutions (Cth) v Pratten (No 2)* [2017] NSWCCA 42. His Honour confirmed that there is still a live issue whether the standard of "exceptional" applies to third party hardship for s 16A of the *Crimes Act 1914* (Cth). He noted the division of opinion between the majority in *Elshani v R* [2015] NSWCCA 254 and Beech-Jones J's dissent in that case (repeating his view in *R v Zerafa* [2013] NSWCCA 222; 235 A Crim R 265) which found support from the CCA in obiter in *Pratten*. Leave to appeal with respect to this ground was refused.

Gambling addiction, generally, is not a mitigating factor

The applicant in ***Johnston v R*** **[2017] NSWCCA 53** was sentenced for one count of obtaining a financial advantage by deception contrary to s 192E(1)(b) of the *Crimes Act 1900.* The applicant had a gambling problem and all the money gained was lost through gambling. The sentencing judge said that there were differences between a gambling addiction and a drug addiction; gambling does not physically alter the mind or body, so a gambler knows what they are doing. On appeal against sentence, the applicant asserted errors in the sentencing judge's approach to his gambling addiction. Dismissing the appeal, Bathurst CJ found no error in the sentencing judge's observations; he was not postulating a hierarchy of addiction. He was simply stating that unlike some cases of drug addiction, the applicant could still exercise judgment and the crime was a willed act. The Chief Justice reviewed the principles on what relevance a gambling addiction has to sentencing. The fact that an offence was committed to feed a gambling addiction is generally not a mitigating factor. Whilst such an addiction may explain the crime and provide a motive, it will be rare for it to sustain an appreciable reduction in the sentence. This is particularly so where the offending involved planning or took place over a long period of time.

Discount for assistance to authorities should not be given when the assistance was given many years earlier for unrelated offences

The respondent in ***R v XX*** **[2017] NSWCCA 90** was sentenced for three offences relating to sexual abuse of his daughter. The offending occurred in 2013-14, when the daughter was four years old. The respondent received a discount of 15% for the assistance he gave to police and prosecuting authorities in 2006-7 in relation to a charge of conspiracy to murder. This was entirely unrelated to the child sexual abuse he was sentenced for. At the time he received $17,000 for his assistance. The Crown appealed, contending that the sentencing judge erred by allowing this discount. Beech-Jones J rejected the Crown's first submission that the discount was not open as a matter of law because the respondent did not fit into any category of witness established by the case law. The Crown's effort to ascertain the scope and limits of s 23 of the *Crimes (Sentencing Procedure) Act 1999* from case law was misconceived. On his Honour's construction, the respondent's assistance was capable of falling within s 23(1).

However, in the exercise of the discretion to reduce the sentence, Beech-Jones J accepted the Crown's alternative submission that the discount was not open to the sentencing judge in the circumstances. A proper exercise of the discretion under s 23(1), with regard to the factors in s 23(2), could only have led to a refusal to impose a lesser sentence. Beech-Jones J found that the sentencing judge acted on a wrong principle and the exercise of power under s 23(1) was unreasonable. The offence the subject of assistance was unrelated to the subject offence in any sense and there was no temporal association. The sentencing judge acted on wrong principle by assuming that once assistance fell within s 23(1) a discount is available.

His Honour also observed that the sentencing judge's determination was unreasonable when regard is had to the purpose of s 23(1). That purpose, being the public interest in encouraging offenders to supply information to the authorities which will assist them to bring other offenders to justice and to provide evidence, is not advanced when the

assistance was provided well prior to the commission of the subject offences. The sentencing judge failed to consider whether the unrelated nature of the offending the subject of the assistance affected the assessment of whether a lesser penalty should be imposed (s 23(2)(i)). The failure to give this factor great importance led to an unreasonable determination. The Crown appeal was allowed.

Objective seriousness assessment - criminal history irrelevant

The applicant in ***Kelly v R*** **[2017] NSWCCA 82** was sentenced for a number of robbery related offences. When assessing the objective seriousness of the offences, the sentencing judge listed a number of relevant factors, which included the applicant's criminal history. The applicant appealed against sentence. Price J held that the sentencing judge did err by taking into account the applicant's prior criminal history when assessing the objective seriousness of the offence. It is well established that a person's prior criminal record has no part to play in determining the objective gravity of an offence. It was a reserved judgment. The applicant's criminal antecedents were grouped with factors that were relevant to objective seriousness, mentioned between factors that are quintessentially part of an assessment of objective gravity. Despite error being established, the appeal was dismissed.

Objective seriousness assessment - whilst imprecise, a finding of a "serious offence of its type" can be sufficient

The applicant in ***Sharma v R*** **[2017] NSWCCA 85** was sentenced for several sexual offences, including sexual intercourse without consent contrary to s 61I *Crimes Act 1900*. A ground of appeal was that the sentencing judge failed to make a proper assessment of the objective seriousness of the s 61I offences. Her Honour had assessed the objective seriousness of those offences as "serious offences of their type". She reached this finding after mentioning a range of considerations (eg. the complainant saying "no", physical resistance, and the applicant's deliberate and to a limited extent predatory behaviour).

R A Hulme J rejected this ground of appeal, holding that there is no requirement for a sentencing judge to rank the objective seriousness of the offences on a scale. Sentencing judges are required to assess objective seriousness, and identify fully the facts, matters and circumstances which bear upon the judgment, both of which her Honour did. His Honour observed that the sentencing judge's assessment can be criticised for being vague or imprecise, but it was not erroneous. He noted that greater precision may be desirable, citing authority approving of sentencing judges assessing the gravity of offending according to a scale of seriousness. The sentencing judge did however err by mentioning the fact the offending occurred whilst the applicant was on conditional liberty in her assessment of objective seriousness. On that ground the appeal was allowed.

Objective seriousness assessment – a finding of "at a high range for the offence charged" can be interpreted to mean above mid-range but short of worst case category

The applicant in ***Mills v R*** **[2017] NSWCCA 87** was sentenced for one count of persistent sexual abuse of a child, contrary to s 66EA(1) of the *Crimes Act 1900*. The victim was his

daughter and the abuse included intercourse culminating in ejaculation. The charge was based on particularised offences of aggravated sexual assault (s 61J) which were representative of ongoing conduct over a period of three years. On appeal, the applicant contended that the sentencing judge erred in assessing objective seriousness as "at a high range for the offence charged". R A Hulme J observed the difficulty in understanding what sentencing judges mean when they use the terms such as "high range" and "mid-range", or above or below those ranges. His Honour interpreted the sentencing judge's finding as meaning that it was above mid-range but short of worst case category.

With regard to the circumstances of the case, he found this finding was open to the sentencing judge. His Honour stated that the absence of factors which, if present, would aggravate the offence, does not make the offence less serious. Attention was also paid to the seriousness of the "sexual offences" which can give rise to a s 66EA charge. It was submitted that s 66EA covered offences more serious than s 61J, such as offences with maximum penalties of 25 years' and life imprisonment (compared to 20 years for s 61J) but R A Hulme J noted that most of the offences listed have maximum penalties less than s 61J. This ground of appeal was rejected. The applicant was successful in establishing the sentence was manifestly excessive, and the appeal was allowed on that basis.

Objective seriousness assessment – an offence is not less serious because it is not more serious

In ***R v CTG*** **[2017] NSWCCA 163** it was again affirmed that an offence should not be regarded as being less objectively serious because there is an absence of features that would, if present, have rendered it more serious. In this case the Court rejected an argument that offences of having sexual intercourse with a 3 year old child were not less serious because there was no bodily harm and no force or coercion. Hoeben CJ at CL cited *Bravo v R* [2015] NSWCCA 302, in which *Saddler v R* [2009] NSWCCA 83; 194 A Crim R 452 was cited, and *Mills v R* [2017] NSWCCA 87.

Procedural fairness – no warning that an aggravating factor would be taken into account

The applicant in ***Aloniu v R*** **[2017] NSWCCA 74** was sentenced for three counts of aggravated sexual assault. The victim was his niece by marriage, who was 15 at the time and staying at the applicant's home. On appeal, the applicant contended that he was denied procedural fairness prior to the sentencing judge finding that the offences were aggravated by the fact that the applicant knew the victim was under 16 years old. The applicant had denied knowing the victim was under 16. The only aggravating factor on the indictment was that the victim was under the applicant's authority. Walton J (with whom Hoeben CJ at CL agreed, Price J dissenting on this ground) accepted this ground of appeal. His Honour found that the sentencing just had treated knowledge that the complainant was underage as an aggravating factor. The Crown had not submitted that such a finding be made at the sentence hearing and the sentencing judge did not raise the issue. The applicant was entitled to be given an opportunity to be heard on the issue before the sentencing judge took it into account as an aggravating factor: *R v Tadrosse* (2005) 65 NSWLR 740; NSWCCA 145. The failure to give the applicant that opportunity was a denial of procedural fairness. The appeal was allowed.

"Vulnerable person" for the purposes of the aggravating factor in s 21A(2)(l) of the Crimes (Sentencing Procedure) Act 1999 – security guard at licensed premises

The applicant in ***Longworth v R*** **[2017] NSWCCA 119** was sentenced for recklessly causing grievous bodily harm. The victim of the offence was working as a security guard at the time. After the victim denied the applicant entry to a bar on the basis that he was too intoxicated, the applicant "launched a heavy blow to [the victim's] head" which caused him to fall and suffer a serious brain injury. The sentencing judge found that because the victim was engaged in work as a security guard at the time of the attack, he was a vulnerable victim for the purposes of s 21A(2)(l) of the *Crimes (Sentencing Procedure) Act 1999*. On appeal, the applicant contended that the sentencing judge erred by finding this aggravating factor was made out. Macfarlan JA held that there was no such error. Security guards for licenced premises are "vulnerable" in the relevant sense. The examples given in subsection (2)(l) are not exhaustive; they are occupations where the worker is often isolated from other people and sometimes in possession of significant amounts of money. The victim's work as a security guard is also one where the worker is isolated from others who may be able to come to their assistance. Additionally, security guards for licenced venues are often liable to encounter, and have to control the conduct of, individuals who are intoxicated and/or disorderly. This is important given security guards' duties to prevent the admission of such persons and eject them from the venue. His Honour also noted that security guards assist in the licensees' performance of their duties under the *Liquor Act 2007*, and added that it was irrelevant that many security guards are physically strong or perhaps trained in self-defence. The appeal was dismissed.

Sentencing statistics must be used appropriately and practitioners should read "Explaining the Statistics" on the Judicial Commission's website

The applicant in ***Why v R*** **[2017] NSWCCA 101** received an aggregate sentence for two counts of supplying a prohibited drug, taking into account a further offence on Form 1. The applicant sought to appeal his sentence on the basis it was manifestly excessive. The appeal raised the issue of the proper use of sentencing statistics. One of the applicant's arguments relied upon a comparison between his aggregate sentence and the head sentence imposed on other offenders for the same offence (supply prohibited drug) where the offender had also pleaded guilty. Walton J criticised the invitation to compare an aggregate sentence and sentences for individual offences. The CCA has held on numerous occasions that statistics offer no guidance about the propriety of an aggregate sentence. His Honour noted that [in the past] the Judicial Commission only records the sentence imposed for one offence (the principle offence) in a multi-offence sentencing exercise and no statistics are maintained of the overall or aggregate sentence imposed in such cases: *Tweedie v R* [2015] NSWCCA 71 at [47].

In additional remarks, R A Hulme J said that sentencing statistics can be a very valuable tool if used appropriately and properly understood. If sentencing statistics are to be relied upon, counsel must ensure they understand the limits of their utility. His Honour implored practitioners to read the document called "Explaining the Statistics" on the Judicial Commission's website before relying upon sentencing statistics. He also discussed recent enhancements to statistics provided by the Judicial Commission, which include statistics

for “Aggregate/Effective” terms of sentence and non-parole periods, and the provision of further information about individual cases which make up the database.

*Assistance to authorities – “*Ellis *discount” – requirements of s 23 of the* Crimes (Sentencing Procedure) Act 1999 must be applied

The respondent in ***R v AA*** **[2017] NSWCCA 84** pleaded guilty to sexual assault offences committed against his two nieces. The respondent first denied the allegations, but within a few days made full admissions. The sentencing judge said that the respondent would receive an unspecified “further *Ellis* type discount”, referring to an additional measure of leniency afforded in circumstances where the offender voluntarily discloses guilt which would otherwise unlikely have been discovered and established: *R v Ellis* (1986) 6 NSWLR 603 at 604. The Crown appealed against the sentences imposed. One ground of appeal was that the sentencing judge erred in applying an *Ellis* discount.

Beech-Jones J upheld this ground. The sentencing judge allowed a discount for the respondent’s assistance to authorities but failed to address the factors in s 23(2) of the *Crimes (Sentencing Procedure) Act 1999*, which are mandatory considerations in deciding whether to impose a lesser penalty. Beech-Jones J found that, contrary to the respondent’s submissions, the sentencing judge had indeed given an *Ellis* style further discount, and not just considered his assistance as a demonstration of remorse. His Honour reviewed the authorities which hold that the disclosure of otherwise unknown guilt is subject to the stricture of s 23(3): *CMB v Attorney General for the State of NSW* [2015] HCA 9; 256 CLR 346 at [72]. If sentencing judges are considering imposing a lesser sentence due to a voluntary disclosure of unknown offending, the factors in s 23(2) must be considered in determining whether the discount should be given: *Williamson v R* [2015] NSWCCA 250 at [68]. They also must ensure that the penalty imposed is not disproportionate: s 23(3). Whilst error was made out, the sentences imposed were not manifestly inadequate and the appeal was dismissed.

SENTENCING - SPECIFIC OFFENCES

Drug trafficking to a substantial degree - common factors like a need for substantial supervision and recidivism do not give rise to “exceptional circumstances” justifying an ICO

The respondent in ***R v Ejefekaire*** **[2016] NSWCCA 308** pleaded guilty to an offence of ongoing supply of methylamphetamine. He was sentenced to a term of imprisonment of one year and ten months to be served by way of an Intensive Correction Order (ICO): s 7(2) of the *Crimes (Sentencing Procedure) Act 1999.* The Crown appealed, contending that the sentencing judge erred in finding exceptional circumstances. The CCA allowed the appeal, holding that exceptional circumstances justifying the imposition of an ICO had not been demonstrated.

It is well established that an offender involved in supply of prohibited drugs “to a substantial degree” (it was unchallenged that the respondent was) must receive a full-time custodial sentence unless there are “exceptional circumstances”. A guilty plea, remorse and rehabilitation are not matters constituting an exception unless together they render

the case "one of real difference from the general run of cases": *Smaragdis v R* [2010] NSWCCA 276 at [31]. Whilst a sentence other than full-time custody is possible for drug trafficking offences (as per *EF v R* [2015] NSWCCA 36) the sentencing judge erred in making a finding of exceptional circumstances in this case. There was nothing exceptional in the respondent's subjective case; a need for "substantial supervision" applies to many offenders; recidivism was not outside the common range, and nothing in the circumstances of the offending was exceptional.

Break, enter and steal - R v Ponfield – *care is needed in considering a prior record for similar offences in assessing objective seriousness*

The applicant in ***Dickinson v R*** **[2016] NSWCCA 301** pleaded guilty to five counts of break, enter and steal. He had a prior record for similar offences. Indeed, at the time of the relevant offending he was on parole for such an offence. The sentencing judge referred to *R v Ponfield* (1999) 48 NSWLR 327; NSWCCA 435 (a guideline judgment for sentencing s 112(1) *Crimes Act 1900* offences) and cited particular factors which were said in the judgment to increase the seriousness of the offence, including that an offender had a prior record for similar offences. The sentencing judge then found that the offences were objectively very serious.

On appeal, the applicant submitted that the sentencing judge erred in considering the fact that the applicant's prior record in his assessment of objective gravity. Hidden AJ rejected this ground of appeal (which was otherwise allowed), holding that the sentencing judge dealt with objective gravity as an issue separate from consideration of the applicant's history. The appeal nonetheless highlighted that *Ponfield* should be approached with care. The guideline judgment has been rendered of limited utility by the enactment of s 21A of the *Crimes (Sentencing Procedure) Act 1999*, which lists (more comprehensively) aggravating and mitigating factors: *Mapp v R* (2010) 206 A Crim R 497; NSWCCA 269 at [10]. Crucially, on the issue of an offender's prior record, *Ponfield* was decided before *R v McNaughton* (2006) 66 NSWLR 566; NSWCCA 242, which held at [24] that objective circumstances of an offence "do not encompass prior convictions".

Drug supply to an undercover operative – culpability not reduced when offender ready and willing to supply

The applicant in ***Cam Huynh Giang v R*** **[2017] NSWCCA 25** was sentenced for two drug supply offences. Undercover operatives had been involved, requesting supply of methylamphetamine and meeting with the applicant on several occasions over a five-month period. He supplied the operatives with five ounces of methylamphetamine and then one kilogram of the same drug. On appeal against sentence, it was contended that the sentencing judge failed to consider the role of police provocateurs in aggravating the seriousness of the offending and the applicant's overall criminality.

Latham J rejected this submission. As the applicant acknowledged, the question is whether there is a real possibility that he would not have committed the offences but for the undercover operatives' involvement. It was clear from the agreed facts that the applicant was ready and willing to supply high-grade methylamphetamine to any prospective

purchaser. For example, he had a practice of supplying samples so the purchaser knew they were buying a high quality product, he referred to having a usual supplier, and he contacted the operatives on his own volition. Contrary to the applicant's suggestion, any fair reading of the facts indicated that once the undercover operatives were referred to the applicant, they merely presented him with the opportunity to supply methylamphetamine and tested his capacity to supply commercial quantities. Thus, the fact that undercover operatives were involved could not be said to be a mitigating factor.