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# Sentencing Discounts – Are they worth the effort?

By Justice Rod Howie of NSW Supreme Court

A paper presented at the Sentencing Conference 2008 of the National Judicial College of Australia and the Australian Nation University on 10 February 2008

## Introduction

- 1 The otherwise appropriate sentence to be imposed for a particular criminal act might be reduced for a number of reasons, many personal to the offender. Although such a reduction may be regarded as a discount of the sentence otherwise warranted by the objective circumstances of the offence, generally speaking and for the purpose of this paper, a sentencing discount refers to a specific reduction, usually quantifiable, relating to a discrete factor and which is applied after all other sentencing considerations have been taken into account.
  
- 2 Two sentencing discounts have generally been identified both relating to post-offence conduct on the part of the offender. They are, firstly, a reduction derived from a plea of guilty and, secondly, a reduction that recognises assistance given by the offender to the investigating or prosecuting authorities<sup>1</sup>. However, there have been occasions where sentencing judges at first instance have purported to apply other sentencing discounts. In *R v Z*<sup>2</sup> the judge applied a discount of 2 years imprisonment by reason of the offender's mental disability. In *Lewins v R*<sup>3</sup> the sentencing judge gave a specific, quantified discount by reason of the offender's disclosure of otherwise unknown offences to the police, often referred to in NSW as an "*Ellis* discount"<sup>4</sup>. In each case the Court of Criminal Appeal held that the judge erred in applying such a discount

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<sup>1</sup> These two matters were identified in the joint judgment in *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 at [24] as capable of being subject to "some specific numerical or proportional allowance".

<sup>2</sup> [2006] NSWCCA 342; 167 A Crim R 436.

<sup>3</sup> [2007] NSWCCA 189.

<sup>4</sup> See *R v Ellis* (1986) 6 NSWLR 603 and *Ryan v The Queen* (2001) 206 CLR 267 per McHugh J at 271ff.

notwithstanding that in each case the matter that was the subject of the discount was a relevant mitigating factor.

- 3 The problem of applying a discount to ultimately reduce the sentence that would otherwise have been appropriate is the risk of double counting. It is difficult to isolate a relevant sentencing factor as having only one effect upon the sentence or reflecting a specific aspect of the subjective factors of the offender. For example, a plea of guilty reflects a number of considerations: saving the public the time and expense of a trial, relieving victims from giving evidence in a stressful environment, and indicating that the offender accepts criminal responsibility for the conduct which is some evidence of remorse and hence suggests good prospects of rehabilitation. Similarly giving assistance to the authorities tends to suggest both remorse and a willingness on the part of the offender to redress the wrongful conduct involved in the commission of the offence or, where the assistance is unrelated to the offence committed, an indication of reform<sup>5</sup>. Of course both factors might reflect only self-interest on the part of the offender in seeking to reduce the sentences to be served. But the post-offending conduct of the offender is generally the best evidence of remorse, reform and the prospects of rehabilitation and, therefore, is generally mitigating regardless of any other consideration based upon a distinct public policy.
  
- 4 A consideration of the appropriateness of sentencing discounts leads to a consideration of the competing views about the proper manner of determining a sentence: the two-step or staged approach versus the instinctive synthesis approach. The difference in these approaches is best seen in the judgments of Kirby J (in support of the former approach) and McHugh J (in support of the latter approach) in *Markarian v The Queen*<sup>6</sup>. However the view expressed in the joint judgment in that decision supported the McHugh approach<sup>7</sup> but accepted that there may be

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<sup>5</sup> See *R v Gallagher* (1989) 23 NSWLR 220.

<sup>6</sup> Above at [39].

<sup>7</sup> Based upon the decision in *Wong v The Queen* [2001] HCA 64; 209 CLR 584.

occasions when “some indulgence in arithmetical process” might be appropriate in order to serve the interests of transparency in sentencing in an uncomplicated matter. One such occasion is where there has been a plea of guilty. However in *R v MAK and MSK*<sup>8</sup> it was held that the benefit of transparency should give way to the risk of double counting so far as a discount based upon remorse, either solely or in conjunction with a plea of guilty, was concerned.

### **Discount for plea of guilty**

- 5 In *R v Thomson and Houlton*<sup>9</sup> a five-judge bench of the NSW Court of Criminal Appeal considered the circumstances in which a discount should be applied following a plea of guilty. The Court established a guideline set out in paragraph [161] of the judgment of the Chief Justice. The Court determined that a discrete discount should be given to reflect the utilitarian value of the plea, that is its benefit to the system of justice generally by saving the time and expense of a trial. The discount was not based upon remorse and hence was unconnected with the strength of the prosecution case<sup>10</sup> or the relief of witnesses in not being required to give evidence. The discount was generally to be between 10 and 25 per cent: the amount of the discount determined according to the timing of the plea and the complexity of the prosecution case. However the Court stressed that the amount of the discount was a matter for the exercise of the discretion of the sentencer and that an offender had no right to any particular discount<sup>11</sup>. The guideline has continued to be applied notwithstanding later decisions of the High Court and applies whether or not the offender intends to facilitate the administration of justice<sup>12</sup>.
- 6 The guideline also applies to Commonwealth offences. However even here there is a complication. Even though the strength of the Crown case is not a consideration when applying the guideline to state offences

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<sup>8</sup> [2006] NSWCCA 381 at [45]

<sup>9</sup> [2000] NSWCCA 309; 49 NSWLR 383.

<sup>10</sup> See *R v Carter* [2001] NSWCCA 245 at [13]ff.

<sup>11</sup> *R v Scott* [2003] NSWCCA 286.

<sup>12</sup> See *R v Sharma* (2002) 54 NSWLR 300 at [52].

because the discount is based upon the utilitarian value of the plea<sup>13</sup>, the strength of the Crown case is relevant in Commonwealth offences because the discount is based upon a willingness to facilitate the course of justice<sup>14</sup>.

7 Since the statement of the guideline in relation to the discount for the plea of guilty there has been some fine-tuning of the position. The Chief Justice accepted in **Thomson and Houlton** that a discount for all aspects of the plea of guilty, including remorse and relief to witnesses, might be in the vicinity of 30 per cent<sup>15</sup>. However in **R v MAK and MSK**<sup>16</sup> it was held that the discount for the plea of guilty should not include any aspect of remorse nor should any specific discount be granted by reason of remorse alone. The view was expressed that, if the presence of remorse did not lead to a finding of good prospects of rehabilitation or the likelihood of reform or did not indicate the personal deterrence was not required, then it had no particular relevance and certainly did not justify a discrete discount of the sentence<sup>17</sup>. Before that decision combined discounts for both the utilitarian value of the plea and remorse could be as high as 40 per cent. The maximum discount applicable will therefore be 25 per cent unless the case is one of the earliest plea in a very complex and difficult case. In some cases the plea of guilty might result in a more lenient sentencing order rather than in a discount of the length of the sentence<sup>18</sup>.

8 There are cases that hold that remorse itself may give rise to a reduction in sentence. It is a particular matter mentioned as a mitigating factor in the NSW **Crimes (Sentencing Procedure) Act 1999**<sup>19</sup>. Very often the plea of guilty itself is seen as evidence of remorse. But remorse alone is not

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<sup>13</sup> See above at note 10.

<sup>14</sup> **Tyler v R** [2007] NSWCCA 247; **Danial v R** [2008] NSWCCA 15

<sup>15</sup> Op cit at [162].

<sup>16</sup> Op cit at [44].

<sup>17</sup> Ibid at [42].

<sup>18</sup> For example see **Walsh v R** [2006] NSWCCA 406 where a determinate sentence was given rather than a life sentence.

<sup>19</sup> See s 21A(3)(i). A recent amendment to the section limits the power of court to take into account remorse to a situation where the offender has provided evidence of accepting responsibility for his or her actions and has acknowledged any injury loss or damage as a result of his or her actions.

necessarily a mitigating factor. For example, a drug-addict or a mentally disturbed person may be contrite for a particular act of criminality yet lack the willpower or ability to address the problem causing the criminal conduct. In such a situation, if there is no finding of the likelihood of reform or rehabilitation, why should the sentence be reduced simply because the offender regrets the particular activity bringing him or her before the court? Rather, in such a case public protection would indicate that the sentence should be at a higher level in reflecting the objective gravity of the criminal conduct.

- 9 There is one limitation on the discount for the utilitarian value of the plea of guilty that has been identified: where the offence is of the utmost seriousness<sup>20</sup>. In other words the maximum penalty for an offence can be applicable notwithstanding that there has been a plea of guilty to an offence in the worst possible category.<sup>21</sup> This is because the discount is based upon a specific public policy that must in some cases give way to other policies such as the protection of the public, which is after all the whole purpose of sentencing. In some cases the competing public policies of encouraging pleas of guilty, on the one hand, and yet of protecting the public from an individual or a type of offender, on the other, requires that the protection of the public be paramount. The only cases where to my knowledge the discount has not been given are sentences for murder<sup>22</sup>, but then s 61 of the **Crimes (Sentencing Procedure) Act 1999** provides for mandatory life sentences for murder and some other offences in the worst cases.
- 10 An anomalous situation that has arisen since **Thomson and Houlton** is where there was in effect no utilitarian value in the plea of guilty because the Crown did not accept it. This has arisen principally in cases of murder where the Crown has refused to accept a plea of guilty to manslaughter and yet after trial the offender is convicted of that offence. Of course in

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<sup>20</sup> *Thomson and Houlton* op cit at [158]

<sup>21</sup> *R v Kalache* [2000] NSWCCA 2; (2000) 111 A Crim R 152 cf *R v El-Andouri* [2004] NSWCCA 178.

<sup>22</sup> See for example *R v Miles* [2002] NSWCCA 276; *Knight v R* [2006] NSWCCA 292; 164 A Crim R 126.

such a situation there was no utilitarian value in the plea of guilty but it was not the fault of the offender. The discount has been awarded in such a case depending upon when the plea was offered<sup>23</sup>. There has been some criticism of this situation<sup>24</sup> but it should be seen as exceptional and arising from the requirement of fairness to the offender otherwise the Crown could deprive the offender of the benefit simply by refusing the plea.

- 11 This scenario should be compared with a situation where, because of negotiations with the Crown or for some other reason, such as the lack of legal advice for the offender, the plea of guilty has been delayed. I have expressed the view that, if a plea of guilty does not come until late in the proceedings whatever be the reason, the offender cannot receive the full value of the utilitarian discount<sup>25</sup>. There is no right to a discount and it is a reward for saving the time and cost of preparation for a trial. If the plea of guilty is delayed so that the utilitarian value of the plea is less, it follows that the reward must be less. The Court cannot enter into an inquiry as to why a plea of guilty was not given earlier to ascertain whether there was any “fault” on the part of the offender for the delay. That issue is irrelevant: the plea either has utilitarian value to some degree or it does not. The fact that the offender cannot plead guilty because he or she is unfit to be tried does not permit a discount to be given when the court is imposing a limiting term<sup>26</sup>. The utilitarian value of the plea is unaffected by the existence or otherwise of remorse or other post-offending conduct<sup>27</sup>.
- 12 A question of continuing difficulty is the case where the plea of guilty comes late in the proceedings because of negotiations between the offender and the Crown. In such a case the offender receives the benefit of an offence of reduced seriousness as well as a discount for the plea.

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<sup>23</sup> *R v Oinonen* [1999] NSWCCA 310 and *R v Cardoso* [2003] NSWCCA 15; 137 A Crim R 535 but cf *R v Curry* [2002] NSWCCA 109.

<sup>24</sup> See *R v Hamouche* [2005] NSWCCA 398; 158 A Crim R 357 at [44] per Hulme J and *R v FD and JD* [2006] NSWCCA 31; 160 A Crim R 392 where it was held that a full discount was not justified in such a case.

<sup>25</sup> *R v Stambolis* [2006] NSWCCA 56; 160 A Crim R 510 at [11].

<sup>26</sup> *R v Mitchell* [1999] NSWCCA 120; 108 A Crim R 105.

<sup>27</sup> See for example *R v Perry* [2006] NSWCCA 351; 166 A Crim R 383 where the discount was halved due to matter stated by the offender to police when interviewed.

The amount of the discount is determined by whether it came “at the first reasonable opportunity”. This is to be answered in a realistic and commonsense way<sup>28</sup>. Unfortunately the resolution of this issue has often been made more difficult by inappropriate concessions by the prosecutor, usually as part of the plea bargain struck with the offender. There are a number of cases criticising such concessions by the Crown even though the court is entitled to reject them and should do so if they appear to lack substance<sup>29</sup>.

- 13 An example is *Ahmad v R*<sup>30</sup>. There the accused pleaded guilty to manslaughter on an indictment for murder some 18 months after committal. Yet the prosecutor conceded that the full discount should be given for the plea because the Crown had indicated until just before the sentencing proceedings that it would not accept a plea of guilty to manslaughter. The Crown’s submission was rightly rejected on the basis that it was open to the accused to indicate a preparedness to plead guilty to manslaughter notwithstanding that the plea would not be accepted by the Crown and had he done so it could in no way jeopardise him if the charge of murder proceeded to trial. The Court held that it would be a “rare case” in which a discount of 25 per cent would be appropriate in the circumstances of that case.
- 14 It has been held that, although the discount for the plea of guilty should not be reduced because it follows a plea negotiation, the fact that the plea is delayed is still a relevant consideration<sup>31</sup>.
- 15 One of the reasons for the *Thomson and Houlton* guideline was to encourage consistency in sentencing judges in giving discounts for a plea of guilty both as to the amount given and the basis for the discount. But it was only a guideline and did not bind the sentencing judge’s discretion. Although encouraging judges to announce the discount, it did not require

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<sup>28</sup> *Cameron v The Queen* (2002) 209 CLR 339

<sup>29</sup> For example see *R v McNaughton* [2006] NSWCCA 242; 163 A Crim R 381.

<sup>30</sup> [2006] NSWCCA 177.



them to do so. The result is that there are judges who refuse to nominate the amount of the discount notwithstanding that they have been encouraged to do so by subsequent decisions at least in the straightforward case<sup>32</sup>. Further, the sentence specified often does not apparently disclose that any discount, or the discount nominated, has been given because the actual sentences imposed do not appear to reflect such a mathematical approach<sup>33</sup>.

16 There has been in some cases a lack of precision stating the discount given or the reason for it. In one case the judge was criticised for a lack of precision in indicating a discount, which was said to be at the bottom of the range, of “something in the vicinity of 10-15 per cent”<sup>34</sup>. When the range of the discount is only between 10 and 25 per cent, there is a significant difference between a discount of 10 per cent and one of 15 per cent. If the judge does not know what discount is being given, there can be little confidence by either the offender or the appeal court in accepting that a discount has been given. In another case the judge referred to “the normal discount” without disclosing what it was.<sup>35</sup> A discount of 15 per cent given after an aborted trial in which the complainant had given evidence and had been cross-examined was criticised as overly generous<sup>36</sup>.

17 It has also been plain since *Thomson and Houlton* that different judges have very different views about what the extent of the discount for the utilitarian plea of guilty should be and the rationale for the discount<sup>37</sup>. This is perhaps as a result of a view by some that a discount of 25 per cent solely based upon the utilitarian value of a plea of guilty is overly generous. In any case the Court of Criminal Appeal has faced the situation of a discount of as low as 15 per cent being given for a plea of guilty at the Local Court notwithstanding the guideline judgment that would suggest

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<sup>31</sup> *R v Dib* [2003] NSWCCA 117.

<sup>32</sup> See for example *R v Shenton* [2003] NSWCCA 346, *R v Sutton* [2004] NSWCCA 225.

<sup>33</sup> See for example *R v Ghazi* [2006] NSWCCA 320.

<sup>34</sup> *R v Knight* [2007] NSWCCA 283.

<sup>35</sup> *R v Kilpatrick* [2005] NSWCCA 351; 156 A Crim R 478.

<sup>36</sup> *R v MAK*, above at [46].

<sup>37</sup> For example see the discussion particularly by Sully J in *R v Otto* [2005] NSWCCA 333.

that 25 per cent would be appropriate<sup>38</sup>. On the other hand some judges are giving discounts of 25 per cent for very late pleas often at the urging of the Crown. Yet the guideline is not binding and the offender has no right to a particular discount.

- 18 The problem is that although the amount of discount is a matter of discretion, the basis upon which the discretion is exercised is very limited: in the vast majority of cases it is merely the timing of the plea<sup>39</sup>. Whenever the judge departs from the guideline or does not state the value of the discount this is almost inevitably a ground of appeal and the Court of Criminal Appeal is faced with the difficult task of determining either what the discount might have been or the discretionary reasons that may have existed for departing from the guideline. In the absence of reasons, which is normally the case, the offender will find it difficult to understand why a discount in accordance with the guideline was not given in his or her particular case.
- 19 Other Australian jurisdictions have not generally followed the NSW approach by distinguishing one part of the effect of the plea of guilty and treating it as a separate matter of mitigation. In Western Australia the Court maintains an instinctive synthesis approach to sentencing so that “attempts to specify the extent of the discount for a plea of guilty should be addressed with care”<sup>40</sup>. But it is accepted that the court must take into account the plea even where there is an absence of remorse<sup>41</sup>. In a simple case it is not an error to state the discount given for the plea of guilty but nor is it an error not to specify the discount<sup>42</sup>. It has been held that the public interest would benefit from the judge identifying the amount of the discount and the reasons for it<sup>43</sup>. If a discount is given, that fact must be stated<sup>44</sup>. The discount for a fast-track plea of guilty will be between 20 and

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<sup>38</sup> *McKibben v R* [2007] NSWCCA 89.

<sup>39</sup> *R v Forbes* [2005] NSWCCA 377; 160 A Crim R 1 at [117].

<sup>40</sup> *Harding v Moreland* [2006] WASC 8; 159 A Crim R 370 at [23].

<sup>41</sup> *Stapelton v R* [2004] WASCA 130 at [34].

<sup>42</sup> *Chivers v Western Australia* [2005] WASCA 97 and see *WA Sentencing Act 1995* s 8(2).

<sup>43</sup> *Fullgrave v Western Australia* [2006] WASCA138 at [29].

<sup>44</sup> *WA Sentencing Act 1995* s 8(4).

35 per cent but the discount takes into account all aspects of the plea including remorse and an acceptance of responsibility<sup>45</sup>.

- 20 In Tasmania the principles were set out in *Pavlic v R*<sup>46</sup>. Green CJ at 16 stated:

“The appellant's remorse, the fact that he pleaded guilty and the fact that he volunteered information which would not otherwise have been known to the police were mitigating factors. However I do not accept the submissions made by counsel for the applicant that this Court should endorse a formalised approach whereby considerations of this kind should be reflected by applying a nominated percentage "discount" to the "head sentence". Considerations of this kind are no different in kind from and should be treated in the same way as all the other considerations which are relevant to the exercise of the sentencing discretion. It is not regarded as appropriate to reflect the other aggravating and mitigating circumstances relevant to sentence in a list of premiums or discounts each expressed as a percentage and I can see no reason why mitigating circumstances arising out of remorse, a plea of guilty or assistance given to the police should be treated differently.”

- 21 This has remained the approach and it was not an error for a judge merely to indicate that “some credit” was given for a plea of guilty<sup>47</sup>. However, where the plea of guilty is a cogent factor, there is no error in identifying it as a component in the sentencing synthesis and analysing its weight<sup>48</sup>.
- 22 In South Australia a five-judge bench considered the discount for the plea of guilty in *R v Place*<sup>49</sup>. The Court saw no difficulty in continuing the practice that had existed in that State by indicating a discount for the plea of guilty. However, the discount includes all aspects of the plea including remorse and contrition and active assistance to the police<sup>50</sup>. There is a statutory requirement that the court take into account the plea of guilty but

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<sup>45</sup> See generally *McDonald v White* [2007] WASC 138.

<sup>46</sup> (1995) 5 Tas R 186; 83 A Crim R 13

<sup>47</sup> *W v Tasmania* [2007] TASSC 24.

<sup>48</sup> *Dennison v Tasmania* [2005] TASSC 54; 15 Tas R 50.

<sup>49</sup> [2002] SASC 101; 81 SASR 395.

<sup>50</sup> *R v Simpson* [2004] SASC 307; 89 SASR 515

it does not indicate the manner in which it is to do so<sup>51</sup>. The Court held that the discount for the plea of guilty should be identified but it was not an error if it were not. The plea of guilty is only mitigatory if it results from genuine remorse or if it results from a willingness to co-operate with the administration of justice or some other public interest<sup>52</sup>.

23 In the Northern Territory the discount for the plea of guilty encompasses all aspects of the plea but no tariff has been determined<sup>53</sup>. Where there was a plea of guilty at the earliest opportunity accompanied by true remorse a discount of 15 per cent was inadequate<sup>54</sup>. A discount of 10 per cent was held to be appropriate for a late plea after the complainant gave evidence in chief<sup>55</sup>. The court is to have regard to an offer made to plead guilty including any terms attached to the offer<sup>56</sup>. An offer to plead guilty to manslaughter was given little weight where it was “self-interested manoeuvring”<sup>57</sup>.

24 In Queensland there is a statutory requirement that a plea of guilty be taken into account and if a sentence is not reduced the court must state its reasons<sup>58</sup>. There should be a reduction in the sentence even though there is no remorse<sup>59</sup>. It has been held that a court should indicate how it is reducing the sentence if it is doing so because of the plea<sup>60</sup>. A reduction may be achieved by making a recommendation for early parole<sup>61</sup>. An unaccepted offer to plead guilty is a relevant fact in determining sentence for that offence<sup>62</sup>.

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<sup>51</sup> SA *Criminal Law (Sentencing) Act 1988* s 10.

<sup>52</sup> *R v Davey* [2006] SASC 177; 95 SASR 63.

<sup>53</sup> *Kelly v R* (2000) 10 NTLR 39.

<sup>54</sup> *Wright v R* [2007] NTCCA 5; 19 NTLR 123.

<sup>55</sup> *Gilligan v R* [2007] NTCCA 8.

<sup>56</sup> *DF v R* [2006] NTCCA 13.

<sup>57</sup> *Spencer v R* [2005] NTCCA 3.

<sup>58</sup> *QLD Penalties and Sentences Act 1992* s 13

<sup>59</sup> *R v Bates* [2002] QCA 174.

<sup>60</sup> *Corrigan v R* [1994] 2 Qd R 415

<sup>61</sup> *R v Maxfield* [2000] QCA 320; [2002] 1 Qd R 316.

<sup>62</sup> *R v Marshall* [1994] QCA 161; [1995] 1 Qd R 673

- 25 The courts in Victoria take into account the plea of guilty in all its aspects including remorse but are reluctant to specify the discount<sup>63</sup>. Credit is given for the plea as part of the general synthesis of factors relevant to the sentence<sup>64</sup>. The plea of guilty is a mitigating factor even if it is a result of self-interest in receiving a lesser sentence, although the value would be limited<sup>65</sup>. A plea of guilty to murder will not necessarily avoid a life sentence<sup>66</sup>.
- 26 In the Australian Capital Territory the effect of the plea of guilty is set out in s 35 of the **Crimes (Sentencing) Act 2005** which requires the court to take into account various factors including whether the plea of guilty was related to negotiations between the offender and the prosecutor.
- 27 It seems that generally the discount for a plea of guilty in NSW is higher than that in other jurisdictions because the discount is related to the utilitarian value of the plea and for that alone can be as high as 25 per cent. The Chief Justice in **Thomson and Houlton** appreciated this fact. It is a discount that is routinely given for an early plea and is a reduction that is applied once other sentencing factors are taken into account, including remorse and the consequences of such a finding which itself is a facet of the plea of guilty. There has been some criticism of the approach of taking one aspect of the plea and elevating it to a discrete discount<sup>67</sup>.
- 28 It can hardly be said that the decision has added to transparency in sentencing in New South Wales when a judge is not required to nominate the discount and judges frequently do not do so. Nor does it seem to have much assisted consistency when the discount is discretionary despite the very limited factors upon which it is based and there are variations discernable in the discounts given even when the discounts are disclosed. There are cases where the sentence imposed appears to be inconsistent

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<sup>63</sup> *R v Low* [2002] VSCA 167, 135 A Crim R 79 at [30].

<sup>64</sup> *R v Rosenow* [2007] VSCA 265.

<sup>65</sup> *R v RND* [2002] VSCA 192.

<sup>66</sup> *R v Quarry* [2005] VSCA 65; 11 VR 337.

<sup>67</sup> *Wong v The Queen* [2001] HCA 64; 207 CLR 584 at [76].

with the stated discount notwithstanding that there will be a degree of rounding out of the numbers.

- 29 The decision in *Thomson and Houlton*, despite its aim at increased transparency and consistency in sentencing in relation to an important factor in sentencing, has in my opinion resulted in added complication to a sentencing regime that was, and has become, increasingly more complex with the addition of standard non-parole periods. Whether the decision has added to the rate of pleas of guilty or the earlier identification of pleas of guilty as compared with the approach in other jurisdictions is impossible to determine. There still appears to be a very significant number of pleas coming late in proceedings and usually after negotiations between the parties. In many, if not most, of those cases, discounts of about 25 per cent are still given.
- 30 Any one reading sentencing decisions in NSW or the Court of Criminal Appeal judgments upon the topic would immediately appreciate the difference between the approach in NSW and other jurisdictions to sentencing generally, at least some of which is due to the intervention of the Parliament in that State. The assessment of a sentence in NSW is almost as complicated as the determination of common law damages. It is a very fertile ground upon which to seek the intervention of the Court of Criminal Appeal.

#### **Assistance to the authorities**

- 31 It is recognised throughout Australian jurisdictions that assistance given by an offender to investigating or prosecuting agencies is mitigatory and is to be taken into account when determining the sentence to be imposed. In NSW and other jurisdictions there are provisions relating to assistance to authorities<sup>68</sup>. Assistance may be taken into account whether it relates to the particular offence for which the offender is to be sentenced or

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<sup>68</sup> NSW *Crimes (Sentencing Procedure) Act* s 23; Qld *Penalties and Sentencing Act 1992* s 13A; WA *Sentencing Act 1995* s 8(5); SA *Criminal Law (Sentencing) Act* s 10(1)(h); Vic *Sentencing Act 1991* s

otherwise. It is a matter of public policy that offenders should be encouraged to assist the police in relation to co-offenders or criminal activity generally<sup>69</sup>. This policy has been emphasised in drug importation offences<sup>70</sup>. There is also a need to compensate the informer from any harshness of the custodial regime arising from protection offered to the offender because of the assistance given<sup>71</sup>.

- 32 The assistance given can range from general intelligence information, participation in the investigatory process, such as the wearing of a listening device, or an undertaking to give evidence for the prosecution. Although there was initially a view that the effectiveness of the assistance was not a relevant factor, legislation in NSW requires the court to take this factor into account<sup>72</sup>. It has been held to be relevant in sentencing for Commonwealth offences<sup>73</sup>.
- 33 Assistance can also arise from the voluntary admission of unknown criminality committed by the offender, but in NSW this does not result in a particular discount and is often seen as part of the effect of the plea of guilty<sup>74</sup>. In South Australia it has been held that a discount of about a third would be appropriate where the offender would not have been prosecuted but for having voluntarily confessed the crime to police<sup>75</sup>.
- 34 In sentencing for Federal offenders, the court is required to indicate the amount of the discount given for future assistance<sup>76</sup>. Courts in NSW have been encouraged to do the same when sentencing for State offences<sup>77</sup>.

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5(2AB); ACT *Crimes (Sentencing) Act 2005* s 36; NT *Sentencing Act* s 5(2)(h); Cth *Crimes Act 1914* s 16A(2)(h).

<sup>69</sup> *R v Golding* (1980) 24 SASR 161; 3 A Crim R 26; *R v Heaney* [1992] VR 531; 61 A Crim R 241.

<sup>70</sup> *R v Perrier (No 1)* [1991] VR 697; 50 A Crim R 122.

<sup>71</sup> *R v Cartwright* (1989) 17 NSWLR 243 at 250.

<sup>72</sup> *Crimes (Sentencing Procedure) Act 1999* s 23(2)(b).

<sup>73</sup> *R v El Hani* [2004] NSWCCA 162 at [75].

<sup>74</sup> See *R v Lewins*, above and the discussion generally on the discount for the plea of guilty.

<sup>75</sup> *R v Simpson* [2004] SASC 307; 89 SASR 515.

<sup>76</sup> Cth *Crimes Act* s 21E.

<sup>77</sup> *SZ v R* [2007] NSWCCA 19; 168 A Crim R 249 at [51].

This is because the prosecutor can appeal to the Court of Criminal Appeal where the undertaking to give assistance has not been met<sup>78</sup>.

35 In NSW it has been considered that the discount for assistance would fall generally within the range of 20 to 50 per cent<sup>79</sup>. But that range was established before *Thomson and Houlton* determined that the discount for the utilitarian value of the plea might be as high as 25 per cent. Notwithstanding that the guideline judgment appreciated that it might not be appropriate to give separate discounts for the plea and assistance<sup>80</sup>, the practice quickly arose of giving two discounts, notwithstanding reservations expressed in the Court of Criminal Appeal<sup>81</sup>. Where two discounts were given, the question arose as how the discounts should be combined<sup>82</sup> and the Court of Criminal Appeal endorsed discounts as high as 60 per cent<sup>83</sup>. The situation reached the stage that a judge gave discounts totally over 80 per cent without a Crown appeal<sup>84</sup>. However, there were attempts to restrict the discount to a combined total of 50 per cent<sup>85</sup>.

36 To a significant degree, particularly in the District Court of NSW, the discount for assistance took on a life of its own with little apparent regard in many cases to the rationale for the discount or the statutory limitation that the discount not result in a sentence that was unreasonably disproportionate to the object seriousness of the offence<sup>86</sup>. To some degree this occurred because of joint submissions by the defence and Crown<sup>87</sup>. Some of the matters to be taken into account in determining the discount as set out in the particular section have never, to my knowledge,

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<sup>78</sup> See for example NSW *Criminal Appeal Act* s 5DA.

<sup>79</sup> See *R v Chu* (unreported NSWCCA, 16 October 1998).

<sup>80</sup> See *Thomson and Houlton* above at [160(ii)]

<sup>81</sup> See for example *R v M* [2005] NSWCCA 224

<sup>82</sup> See *R v NP* [2003] NSWCCA 195 and *R v Wacqa (No 2)* [2005] NSWCCA 33; 156 A Crim R 454

<sup>83</sup> *R v AMT* [2005] NSWCCA 151

<sup>84</sup> See *R v Lewins*, above, where the Court of Criminal Appeal felt obliged to reduce the sentence of a co-offender as a consequence.

<sup>85</sup> See for example *R v El Hani* above.

<sup>86</sup> *Crimes (Sentencing Procedure) Act* s 23(3).

<sup>87</sup> See *R v Chaaban* [2006] NSWCCA 107.



been acknowledged in sentencing remarks<sup>88</sup>. Other matters were often ignored, for example discounts in the range of 50 per cent were given even though the offender was not being held in protective custody or was not, by reason of having given assistance, experiencing harsher custodial conditions<sup>89</sup>. In *R v Sukkar*<sup>90</sup> it was held that a combined discount for assistance and plea should not normally exceed 40 per cent unless there was evidence that the offender would serve the sentence in harsher conditions. It is for the offender to indicate the actual nature of the conditions in which the sentence is to be served.

37 But there was a persisting argument that sometimes found favour that the discount for assistance was additional to that for the plea of guilty and in an appropriate case the discount could be as high as 75 per cent. This argument was ultimately rejected in *R v SZ*<sup>91</sup> where it was held that the discounts should be combined and should not normally exceed 50 per cent. It was stressed that there was a limit to the degree that a sentence could be reduced by discounts before it became inadequate either as a breach of s 23(3) of the *Crimes (Sentencing Procedure) Act 1999* or under the common law. When the discount for the guilty plea is as high as 25 per cent, there is correspondingly less scope to reduce the sentence for any other factor including assistance. With the concurrence of Simpson J, I wrote<sup>92</sup>:

There is in my opinion nothing unfair about this result nor is the public policy in encouraging assistance necessarily reduced. There is still on offer, even after an early plea, a discount of somewhere in the vicinity of 25 per cent, or more in an exceptional case. The simple fact is that it is more important to the administration of justice to encourage and reward early pleas of guilty. If the pursuit of that policy diminishes the ability to encourage and reward assistance, so be it. There is a greater public policy at stake and that is public confidence in the courts to impose sentences that are just and reasonable to all concerned.

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<sup>88</sup> For example the likelihood that the offender will commit further offences when released, or the effect of the offence on the victim.

<sup>89</sup> See *R v Mostyn* (2004) 145 A Crim R 304 cf s 23(2)(g).

<sup>90</sup> [2006] NSWCCA 92; 172 A Crim R 151

<sup>91</sup> [2007] NSWCCA 19; 168 A Crim R 249.

<sup>92</sup> *Ibid* at [10].

- 38 Of course there will be cases where, because of the particular circumstances of the assistance given and the offender's circumstances, the sentence might on its face appear to be inadequate, for example where the offender's life might be at risk in custody<sup>93</sup>.
- 39 In South Australia the relevance of assistance was recently considered in **Director of Public Prosecutions (Cth) v AB**<sup>94</sup>. It was emphasised that the nature of the assistance and the relevant factors can vary so that it would be wrong to be exhaustive about the matters that can be taken into account<sup>95</sup>. The view was expressed that it was preferable to give a combined discount for the plea and assistance because of the risk of double counting by combining the two discounts<sup>96</sup>. There it was held that a discount totalling 65 per cent was manifestly excessive and a 40 per cent discount was substituted notwithstanding threats made to the offender and his family.
- 40 In **R v Webber**<sup>97</sup> The Queensland Court of Appeal commented upon the difficulty of striking a balance between encouraging assistance to authorities and yet imposing a sentence that reflected the seriousness of the offence. Under the legislation of that State the court is required to indicate in closed court the sentence it would have given but for the future assistance offered and a failure to do so will vitiate the sentence.
- 41 In Victoria a discount of up to 50 per cent may be appropriate in cases such as drug matters where the assistance is of particular significance and comes at very great risk to the offender<sup>98</sup>. Otherwise there is a wide discretion in the discount to be given. The fact that the offender is in protective custody as a result of information is a matter to be taken into

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<sup>93</sup> See for example *York v The Queen* [2005] HCA 60; 225 CLR 466.

<sup>94</sup> [2006] SASC 84; 94 SASR 316

<sup>95</sup> Per Perry J at [31].

<sup>96</sup> Ibid at [66].

<sup>97</sup> [2000] QCA 316; 114 A Crim R 381.

<sup>98</sup> **R v KFC** [2006] VSCA 270; 167 A Crim R 475.

account<sup>99</sup>. An offender who has given assistance before the commission of the offence does not receive the discount although the fact that he or she is in protection because of that assistance is relevant<sup>100</sup>. As is the situation now in NSW, the offender is to lead evidence as to the hardship suffered<sup>101</sup>. Generally the court considers the effectiveness of the assistance as irrelevant<sup>102</sup>.

- 42 In Western Australia a discount for assistance of up to 50 per cent can be given<sup>103</sup>. Where the offender delayed in giving information and the police considered it to be of little value, the reduction of a sentence of 14 years by 2 years for the assistance, plea and other subjective matters was not inadequate<sup>104</sup>. The court will take into account conditions of imprisonment but the court should have information as to the nature of the conditions<sup>105</sup>.
- 43 In NSW after *Thomson and Houlton* discounts for assistance resulted in a large number of appeals and on one view gave rise to a further complication of the sentencing practice in that State by the consideration of the utilitarian value of the plea separately from the assistance otherwise provided by the offender. There was to a degree inconsistency in the approach adopted to the matter in the Court of Criminal Appeal, with some courts considering independent discounts and how they were to be combined and other courts advocating a single discount for both forms of assistance. The issue now seems to have been settled by the decision in **SZ**, but whether there will now follow a simpler and more consistent approach remains to be seen. **SZ** has been applied both at the sentencing level<sup>106</sup>, and by the Court of Criminal Appeal<sup>107</sup> to limit the discount given to the offender.

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<sup>99</sup> *R v Bangard* [2005] VSCA 313; 13 VR 146.

<sup>100</sup> *R v ZMN* [2002] VSCA 140; 4 VR 537.

<sup>101</sup> *R v Males* [2007] VSCA 302.

<sup>102</sup> *R v Su* [1997] 1 VR 1

<sup>103</sup> *Voong v R* [2000] WASC 220.

<sup>104</sup> *Duffy v R* (1996) 85 A Crim R 456.

<sup>105</sup> *De La Espriella-Valesco v R* [2006] WASC 31; 31 WAR 291 at [139] and [442].

<sup>106</sup> See for example *R v Burns* [2007] NSWSC 298.

<sup>107</sup> *T v R* [2007] NSWCCA 62; *HVN v R* [2007] NSWCCA 207

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## Criminal Law Review 2007

### CRIMINAL LAW REVIEW 2007

#### APPEAL

##### The proviso

1 Last year *Weiss v The Queen* [1] had led to a reconsideration of how the proviso should be applied where there had been an irregularity in the trial. In effect the decision required the Court to determine whether a miscarriage of justice had occurred by evaluating the evidence in the trial to determine whether on the evidence the Court was satisfied that the offence was proved beyond reasonable doubt. One question that was left open by that decision was the extent to which the Court should quash a conviction even if it were satisfied that the appellant's guilt had been proved.

2 Some members of the High Court considered the decision of *Weiss* in *Libke v The Queen* [2]. The case concerned the behaviour of a prosecutor when cross-examining the accused. All members of the Court were critical of the conduct but only Kirby and Callinan JJ would have allowed the appeal. In considering whether the proviso should be applied in a joint judgment their Honours stated:

[45] As it is put in *Stokes v The Queen*, an appellate court should only apply the proviso if the irregularity "could not reasonably be supposed to have influenced the result". If this cannot be ruled out, it may be impossible for a court to be satisfied that a substantial miscarriage of justice has not occurred. What occurred here could not justify the negative supposition required to deny the appellant a retrial. In our view this is so even if the irregularities were confined to the prosecutor's comments and did not extend, as we believe, to the questions that we have identified.

[46] Not only will there be cases in which it is proper to allow the appeal and order a new trial, even though the appellate court may be persuaded on the admissible evidence to the requisite degree of the appellant's guilt, but also, as much more often will be the case, even after a careful examination of the record for itself, it will simply be impossible for that court to assess the impact of the irregularities on the fairness of the trial. Ultimately, an appellate court may only apply the proviso if it is affirmatively satisfied that no substantial miscarriage of justice to the accused has occurred. A significant denial of procedural fairness will not, of course, be the only occasion for allowing an appeal. The reasoning of the Court in *Weiss* does not suggest otherwise.

[47] What occurred in the present case plainly involved an interference with the fairness of the trial, whether it should be characterized as procedurally or otherwise irregular. Because of the repetition of the conduct, and the trial judge's abstention from reproof and checking of it, it can only be described as significant. At one end of the scale, the relevant conduct can be seen to have posed a real risk of a wrongful conviction. At the other end, it is difficult to see how it could have done otherwise than to prejudice the jury against the appellant.

3 And later:

[50] We have undertaken for ourselves the exercise which *Weiss* reiterates should be undertaken. We have independently assessed the evidence, making due allowance for such natural limitations as apply to appellate processes. But in doing so, necessarily, we have had regard to the complexion that the evidence, counsel's addresses and the trial judge's summing up may well have assumed, by reason of the highly inappropriate

remarks of the prosecutor, and more, the trial judge's apparent silent approval of them.

[51] In undertaking this exercise, we are not attempting to predict what a jury may or may not do, but simply to make it clear that we are not convinced that a substantial miscarriage of justice has not occurred.

[52] *Weiss* is only part of the relevant law on the topic. What the law is presents a question for legal analysis of the relevant statute and of the several authorities which together bear upon it. *Weiss* was written against the background of, and should be read subject to, almost a century of elucidation of the language of the "proviso" in criminal appeal statutes. It certainly did not cast doubt on the existence of the forensic burden imposed on the prosecution to demonstrate innocuous harmless error once a mistake of law, or observance of the requirements of justice, or an irregularity has been proved to have occurred in a criminal trial. That is the position here. *Weiss* holds that in undertaking its assessment, the appellate court must keep in mind that the jury has returned a verdict of guilty. The relevance and force of that consideration are capable of immense variation according to the degree of irregularity in the conduct of the trial.

4 Hayne J, with whom Gleeson CJ and Heydon J, agreed stated:

[115] None of the appellant's grounds of appeal being made out, it is, of course, not necessary to go on to consider the application of the proviso. It is as well to emphasise, however, that the unanimous decision of this Court in *Weiss v The Queen* warned against attempting to describe the operation of the statutory language in other words, lest such expressions mask the nature of the appellate court's task in considering the application of the proviso. The Court expressly discountenanced any attempt to predict what a jury (whether the jury at trial, or some hypothetical future jury) would or might do. Rather, the Court said that "in applying the proviso, the task is to decide whether a 'substantial miscarriage of justice has actually occurred'". Unless, and until, a majority of this Court qualifies what is said in *Weiss*, the intermediate courts of Australia must continue to apply that decision.

5 So nothing has changed and we still await guidance as to when it might be that the proviso cannot be applied to an irregularity in the trial notwithstanding that the Court is of the view that the appellant was properly convicted on the evidence.

### Application of s 6(3)

6 A question arose as to the way the Court should approach s 6(3) of the ***Criminal Appeal Act*** after finding error in the exercise of the sentencing discretion. There was a suggestion that the decision in ***R v Johnson*** [3] meant that the words in the subsection permitting the Court to allow an appeal if it is of the opinion that some other sentence "is warranted in law and should have been passed" required the Court to consider whether the sentence passed was manifestly excessive before intervening. There has been some question also about the admissibility of evidence of post-sentence facts. This decision was the subject of some discussion at the conference in 2005.

7 In ***Douar v R*** [4] the various decision bearing on these issues were considered without ultimately determining the correctness of ***Johnson***. Thereafter the issue seemed to have gone into the "too-hard basket". However it was raised recently and the issue has been finally determined.

8 In ***Baxter v R*** [5] there was an error by the Judge in stating the maximum penalty for the offence with which he was concerned. The error was made twice during the sentencing remarks and once at a place where it might be considered to have been more than a simple slip. There was also evidence placed before the Court of material relevant to the applicant's psychiatric state, although it was clearly

not fresh and should have been available before the sentencing judge. The issue arose as to whether the Court should intervene and whether in determining that question it should consider the tendered evidence. The Crown argued relying upon **Johnson** that the sentence imposed was not manifestly excessive and the Court should not take into account the new evidence.

9 Kirby J found that there had been a material error in misstating the maximum penalty as that error in the circumstances of the case could have affected the sentence imposed and therefore **Douar** applied. His Honour concluded that the Court should re-sentence the appellant taking into account the new material. Spigelman CJ agreed with Kirby J but went on to point out that what Hunt AJ said in **Johnson** was not intended to bring about the effect for which it was being used by the Crown as authority and should not be taken as requiring the Court to determine whether the sentence is "outside the appropriate range" as a pre-condition to the formation of the opinion in s 6(3).

10 The Chief Justice stated:

17 The words "warranted in law" in s6(3) do not refer only to the situation in which a sentence actually passed was outside the permissible range. That would focus attention only on the time of the original sentence and the reasoning process of the sentencing judge. For the reasons I have identified above, the dual reference to the present tense reinforces the express reference to the "opinion" of the Court of Criminal Appeal to emphasise that it is the appellate court that is making a judgment as to whether or not the sentence actually passed was "warranted in law". The subsection is not directed to answering the question as to whether or not the particular sentence was warranted in law from the perspective of the original sentencing judge alone.

18 In these circumstances the phrase "warranted in law" should be understood as a reference to the entire body of legal rules that inform the exercise of a sentencing discretion, i.e. both statutory requirements and sentencing principles developed at common law.

19 The import of par [79] of Simpson was to ensure that submissions in the Court of Criminal Appeal did not proceed as if the identification of error created an entitlement on the part of an Applicant to a new sentence, for example, by merely adjusting the sentence actually passed by some allowance for the error identified. That would be to proceed on the assumption that the sentencing judge was presumptively correct, when the Court has determined that the exercise of the discretion had miscarried. Section 6(3) is directed to ensuring that the Court of Criminal Appeal does not proceed in that manner, but re-exercises the sentencing discretion taking into account all relevant statutory requirements and sentencing principles with a view to formulating the positive opinion for which the subsection provides.

11 Latham J agreed with both the Chief Justice and Kirby J but pointed out that it is only if the error may have affected the sentence imposed that it is necessary to determine whether some other sentence is warranted in law. Her Honour noted that even in the case of a misstatement of the maximum penalty it does not necessarily follow that the error may have affected the sentence imposed, for example because the error occurs in only one of a number of sentences, see **Tadrosse** [6].

### **Unreasonable verdict**

12 In **The Queen v Hillier** [7] the High Court considered a Crown appeal from a decision of a Court of Appeal setting aside a verdict and ordering an acquittal on a charge of murder. The case was a circumstantial one aimed at proving that H was the killer. The High Court held that the Court misdirected itself in considering the ground of appeal by not considering all of the evidence in the trial. The Crown relied upon opportunity for H to kill the deceased, motive to do so, damage to H's hand and DNA evidence.

13 In the joint judgment allowing the appeal, the evidence relied upon by the Crown at trial was considered in detail. The majority in the Court of Appeal after reviewing various aspects of the evidence had concluded:

.....that "[a]t face value" these considerations provided "strong grounds for an inference that someone else may have entered the house and been responsible for [the] death" of Ms Hardwick. The majority went on to say that "there may be explanations for these matters that are compatible with the Crown case" but said that "potentially exculpatory inferences cannot be ignored merely because there may be other possible explanations for the relevant facts".

It was held that this reasoning was erroneous [8]

14 It was stressed in the joint judgment that it is "*of critical importance to recognise, however, that in considering a circumstantial case, all of the circumstances established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence*"[9] and that:

"Often enough, in a circumstantial case, there will be evidence of matters which, looked at in isolation from other evidence, would yield an inference compatible with the innocence of the accused. But neither at trial, nor on appeal, is a circumstantial case to be considered piecemeal....." [10]

The failure of the majority in the Court of Appeal was to concentrate on evidence favouring the innocence of H without considering the evidence as a whole, including the fact that H gave evidence at the trial and what conclusion the jury would have made about his evidence.

15 The appeal was allowed and the matter referred back to the Court of Appeal to be reconsidered by a differently constituted court.

### **Dealing with all grounds of appeal**

16 In *The Queen v Cornwell* [11] the High Court had before it an appeal by the Crown against orders from the Court of Criminal Appeal granting the accused a new trial. In the course of considering the appeal the majority of the High Court had cause to consider again the requirement that an intermediate court deal with all grounds of appeal even though they may only result in a re-trial. The background is that there was a cross-appeal by the accused complaining that the Court of Criminal Appeal did not adequately address the ground that the verdict was unreasonable, ground 5. The majority in the High Court concluded that the reasons as stated were not sufficient for dismissing that ground of appeal and remitted the matter.

17 The majority held:

[105] Intermediate appellate courts in criminal appeals must deal with grounds of appeal which, if made out, could result in a verdict of acquittal notwithstanding that a ground justifying an order for a new trial has been made out. That principle does not apply here, for apart from ground 5, none of the grounds of appeal, if made out, were likely to result in a verdict of acquittal as distinct from an order for a new trial. This case presents a different and more difficult problem. Intermediate courts of appeal in this country are very busy, and it is understandable that they should not wish to deal with matters which it is not necessary for them to deal with. However, while no universal rule can be enunciated, intermediate courts of appeal should bear in mind the factors making it desirable for them to deal with all grounds of appeal, rather than to deal with what is seen as a decisive



ground in a way which apparently renders it unnecessary to deal with other grounds. That is because of the trouble caused if this Court, as here, disagrees with the intermediate court of appeal on one ground it did deal with fully, considers that its treatment of the other ground it dealt with was incomplete, and has returned the matter to the intermediate court for the four grounds not dealt with and the one ground not completely dealt with to be considered again. The trouble comes in the form of cost, delay and the need for reargument. This is particularly so in criminal appeals, where adding to delays can result in accused persons who are ultimately acquitted at a second trial having to remain imprisoned for longer than necessary, and longer than in justice they should be.

#### **Verdict of acquittal or retrial**

18 In *The Queen v Taufahema* [12] a majority of the High Court allowed an appeal by the Crown against a decision to direct a verdict of acquittal rather than order a retrial in a situation where the Crown could not indicate any error on the part of the Court of Criminal Appeal in the exercise of its discretion but wished to conduct a further trial on a basis other than that which it relied upon at trial or before the Court of Criminal Appeal. In the end the decision probably can be distinguished, if need be, on the basis of its unusual facts.

19 The Court of Criminal Appeal has power to order a retrial "if the court considers that a miscarriage of justice has occurred, and, that having regard to all the circumstances, such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order which the court is empowered to make": see s 8(1) of the *Criminal Appeal Act*. In relation to that section the majority said:

[49].....One of the key "circumstances" referred to in s 8(1), and one of the key factors in assessing whether a new trial is an adequate remedy, is "the public interest in the due prosecution and conviction of offenders"[28]. It is in "the interest of the public ... that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury."[29] This passage highlights two points about the present case.

[50] First, there is no doubt that Senior Constable McEnallay was murdered; almost all murders are very serious crimes, and murders of police officers while carrying out their duties are no exception to that generalisation.

[51] Secondly, whether or not one chooses to call the errors identified by the Court of Criminal Appeal "blunders", they were certainly "technical", and they were errors by the trial judge rather than by the prosecution. For it was the trial judge rather than the prosecution who bore primary responsibility for the circumstances which led the Court of Criminal Appeal to allow the appeal. Apart from the errors in summing up criticised by the Court of Criminal Appeal, it was by reason of the trial judge's influence, in a long debate with counsel for the prosecution after the evidence had closed but before final addresses, that the prosecution ended up not pressing its original case as opened to the jury, instead relying only on a case turning on a "foundational crime" of evading lawful apprehension which does not exist. The fact is that the trial which took place was a flawed one. The question is whether an order for a new trial is a more adequate remedy for the flaws in that trial than an order for an acquittal - that is, an order terminating the possibility of any investigation by a jury, in an unflawed fashion, of the accused's role in the circumstances leading to Senior Constable McEnallay's death. An order for acquittal conflicts with "the desirability, if possible, of having the guilt or innocence of the [accused] finally determined by a jury which, according to the constitutional arrangements applicable in [New South Wales], is the appropriate body to make such a decision.".....

20 The majority accepted that it was not appropriate to order a retrial where the evidence at the first trial was insufficient to support a conviction. The majority stated:

[52].....In *Gerakiteys v The Queen*, Gibbs CJ, when considering what was a sound exercise of the power of a court of criminal appeal to order a new trial, said:

"It would conflict with basic principle to order a new trial in a case in which the evidence at the original trial was insufficient to justify a conviction."

That proposition rests in part on the idea that if the evidence is unchanged at the second trial, accused persons should not be placed in jeopardy of conviction by a second jury where an appellate court has found that the evidence was insufficient at the first trial; and in part on the idea that a new trial should not be ordered merely to give the prosecution an opportunity of mending its hand and presenting new evidence at the second trial which it failed to present at the first.

However they were of the view that this proposition did not apply in the case before them.

21 There is a considerable discussion in the majority judgment of what is meant by the proposition that the Crown should not be permitted to make a new case on a retrial. They noted:

[60] The authorities on whether appellate courts should order a new trial or an acquittal offer very little explicit exposition of what is meant, conceptually, by a "new case which was not made at the first trial". However, the way the authorities have been decided tends to show that the "new case" test is not easy for accused persons to satisfy. It is proposed to examine four of those authorities.

Having reviewed authorities in the High Court on this issue, the majority concluded:

[67] These authorities suggest that the difference between the case relied on in a first trial and the case to be relied on in a second trial must be substantial if the difference is to stand as a bar to an order for a second trial.

22 The majority concluded that the intended case and that conducted at the first trial were not substantially different and so it was not unfair for the Crown to seek to remould its case based upon principally the same evidence led at the first trial.

23 In *R v Abbas* [13] the Court allowed an appeal against conviction on the basis that the verdict was unsupported on the evidence. The trial concerned the shooting of two persons and the issue was whether the appellant was one of the persons responsible. The Crown case was a circumstantial one. The judgment of the Chief Justice concludes with the following paragraphs:

99 This case comes down to one issue. Does the absence of a clear video record of blood or injury on the face of the Appellant raise a reasonable doubt about his guilt? In my mind it does raise a reasonable doubt.

100 The preponderance of the evidence is that there was a significant amount of blood on the face of the alleged perpetrator, both at the time of the fight with [the victim] and at the time of the shooting. In the absence of any expert evidence that the CCTV system may not pick up such detail, the complete absence of any visual manifestation of blood on the Appellant, or of any conduct consistent with such an injury, on the video footage, creates in my mind a reasonable doubt, notwithstanding the other evidence.

101 There is no reason to believe that this deficiency in the Crown case can be remedied without some modification of the Crown case at the trial or new evidence. Nevertheless, the strength of the balance of the case is such that, in my opinion, this Court should not direct a verdict of acquittal. Whether there should be a second trial should be left to the exercise of a prosecutorial discretion.

102 The orders I propose are:

1 Appeal allowed.

2 A new trial be conducted.

24 I understand that the Crown intends to proceed against the appellant again with further evidence as to the CCTV footage. The appellant has sought special leave in the High Court. It will be interesting to see how the Court applies the statement of the majority in **Taufahema** as to the proposition set out in para 14 above.

25 The High Court considered the issue of the consequence of an order for a retrial in **AJS v The Queen** [14]. That was a case where the Court of Appeal of Victoria had determined that there was insufficient evidence to support a conviction of incest. There had been an available alternative count of indecent assault. The Court quashed the conviction for incest but made an order for a new trial. The appellant argued that he was entitled to have the Court enter a verdict of acquittal on the incest count and a retrial on the alternative count.

26 The Court said this about the identification of orders sought by an appellant:

[3] Neither before nor after the Court of Appeal made its orders did the appellant make any submission to that Court about the form of the orders to be made if his appeal succeeded. The consequence is that the Court of Appeal has not expressly considered the issues that now arise. It is for the appellant to formulate the precise orders which are sought in an appeal. If that is done, any controversy about the form of the orders can be identified, and arguments advanced that will assist the Court to resolve that controversy. If, after publication of reasons and pronouncement of orders, some issue emerges about the form of those orders, application should be made, before the order is perfected, to relist the matter for further argument about the form that the orders should take. These steps not having been taken in this matter, this Court must deal with the matter without the benefit of the Court of Appeal's consideration of the issues that have been debated.

27 The High Court was of the view that an acquittal should have been entered once the Court of Appeal found that the charge of incest was unsustainable. The joint judgment of the Court stated:

[5] Directing the entry of judgment and verdict of acquittal would not engage principles of estoppel or preclusion that fall for consideration where there is a double prosecution of an accused, either in the one proceeding or in successive proceedings. A new trial of the appellant, limited to a charge of committing an indecent act, would not be a second or subsequent prosecution. It would be the continuation of so much of the original prosecution as remained alive after the Court of Appeal's determination of the appeal. In particular, the entry of judgment and verdict of acquittal on the count of incest would not found a plea of autrefois acquit in answer to the statutory alternative offence, any more than a jury's verdict of not guilty to the count of incest, at the first trial, would have precluded the jury from going on to consider that alternative offence.

28 Later the joint judgment considered further the consequence of the verdict of acquittal on the incest charge for a retrial on the charge of indecent assault. It held:

[19] No question of double jeopardy arises in the present matter. The proceedings commenced by the prosecution against the appellant were, as the Court of Appeal's orders recognised, only partly determined by that Court's disposition of the appeal. The second of the offences now under consideration (the offence of committing an indecent act) was a statutory alternative to the first. There has been and would be no double prosecution of the kind considered in Pearce. In Pearce, the prosecution sought and obtained convictions for two offences charged in the one indictment. Further, unlike Island Maritime, there would be no separate institution of a second prosecution. In this case the prosecution does not seek to institute new and different proceedings against the appellant after the final determination (against the prosecution) of earlier proceedings. The charge of incest preferred against the appellant has now been finally resolved in his favour. He is entitled to the entry of judgment and verdict of acquittal of that offence. But the other, lesser, statutory alternative offence of committing an indecent act put in issue by the presentment charging the appellant with incest has not been determined by the Court of Appeal and remains unresolved.

29 The Court also considered what might arise at the trial of the indecent assault if the complainant gave evidence of penetration consistent with an allegation of incest. The joint judgment stated:

[24] When an accused person has been acquitted of a charge by verdict of a jury, it will not be possible to know why the jury reached its verdict. In those circumstances, the reference to the person having the "full benefit" of an acquittal may reflect the opacity of that verdict. But it is important to recognise that the references made to the "full benefit" of an acquittal are no more than a particular restatement of a more fundamental principle. That principle is that the verdict, as recorded in the court's record, is not to be controverted. And where, as here, the reasons for quashing the conviction are known, the reasons for directing entry of judgment and verdict of acquittal are known. There would be a controverting of that record only if the jury were to be left in a position where in the course of considering whether the appellant had committed an indecent act they might consider whether there had been, or may have been, an act of digital penetration of the complainant. A concession by the prosecution that the evidence may not be understood by the jury as establishing that there had been that penetration, or in default of such a concession, a direction to that effect, would give the appellant the full benefit of the verdict to which he was and is now entitled in respect of the count of incest.

[25] While the exact content of directions to the jury must depend upon the way in which the real issues in the case emerge at trial, it is not immediately apparent why it would be necessary to explain to the jury the reason that the conclusion that there had been digital penetration is not open. If, as may be expected, the credit of the complainant is taxed with her earlier accounts of the events giving rise to the prosecution, that would be reason enough for the jury to be told that they must proceed on the footing that there was no digital penetration. Further explanation of why they must proceed on that basis would very probably not be necessary. In particular, to tell the jury of an earlier trial, conviction and successful appeal would, at first sight, appear to introduce unnecessary and distracting complexity to the trial of the offence of committing an indecent act.

#### **Evidence for the purpose of resentencing**

30 *R v Deng* [15] was a Crown appeal that was dismissed on discretionary grounds notwithstanding that the sentence was held to be manifestly inadequate. At the hearing of the appeal counsel for the

respondent attempted to tender material that could and should have been before the sentencing judge. Briefly it was the ERISP of the respondent that gave a different version of the events from those outlined in the agreed statement of facts. The evidence was rejected.

31 The judgment of James J contains a consideration of what evidence should be received by the Court for the purposes of resentencing after the finding of error. His Honour applied that part of the judgment in *R v Fordham* [16] dealing with the reception of fresh or new evidence on a sentence appeal. In effect he held that the Court will not normally receive evidence that could have, or should have, been placed before the sentencing judge even for the purposes of resentencing the appellant or respondent to a Crown appeal.

## **EVIDENCE**

### **A certificate of immunity**

32 In *Cornwell v The Queen*[17] the High Court considered the jurisdiction of a trial judge to grant a certificate under s 128 of the *Evidence Act* to an accused who objects to answering questions from his own counsel on matters giving rise to the possibility of prosecution for offences not before the trial court. In that case, the trial judge having admitted evidence of other criminal conduct as being relevant to proof of the charge of conspiracy to import drugs, the accused objected to answering questions about that activity on the basis that the answers would tend to incriminate him of offences other than that for which he was on trial.

33 A majority of the Court held that the trial judge was in error in granting the certificate on the basis that it related to evidence about which the accused could not object. The trial judge had held that the evidence of other offences was not evidence that the accused "did an act the doing of which was a fact in issue" or "had a state of mind the existence of which is a fact in issue" within the terms of s 128 (8) and, therefore, the section applied. The High Court held that this was too restrictive an approach to the section and resulted in too radical a departure from what had been the law prior to the section coming into operation.

34 In effect the decision means that, at least for the purposes of s 128(8), evidence that the accused did an act the doing of which is a fact in issue includes evidence tending to prove that the accused did an act the doing of which is a fact in issue. As the evidence of other offences was evidence that tended to prove that the accused was part of the conspiracy charged against him, he could not refuse to answer questions in respect of the evidence of the other offences notwithstanding that those answers might tend to incriminate him of the other offences.[18]

35 Further the Court held that, as the certificate ought not to have been given, it did not bind the second trial judge conducting a retrial of the accused after a hung jury at the first trial. But even had the certificate not been erroneously given, it could not avail the accused at a retrial, because they were not proceedings caught by s 128(7) that prohibits the evidence subject to a certificate being used in proceedings. In effect it was held that the second trial was the same proceeding as that in which the certificate was granted notwithstanding there was a different jury, different judge, different court and different parties were named in the indictment [19].

36 The majority of the High Court was of the view that the use of the evidence at the second trial was not unfair notwithstanding that the accused gave evidence at the first trial in the belief that the evidence could not be used against him at any subsequent proceeding. The second trial judge had refused to reject the evidence under s 137. The Court of Criminal Appeal held that this was an error but the majority of the High Court were of the view that the second trial judge was entitled to reach that decision and the second trial did not miscarry by the reception of the evidence of the accused from the first trial.

### **Uncharged acts in sexual assault matters**

37 The admissibility of evidence of uncharged acts in sexual assault cases was considered by some judges of the High Court in *Tully v The Queen* [20] even though it was held by a majority that the case was a suitable vehicle for reconsideration of the issue. This has been the subject of Special Bulletin No 18 issued by the Judicial Commission so it is unnecessary to refer to it in detail. However

Callinan J took the opportunity to again indicate his view consistent with what he said in **Gipp v The Queen**[21] that the evidence is not admissible simply to explain the nature of the relationship.

38 However the High Court has granted special leave to revisit the issue in **SB v The Queen**[22] an appeal from South Australia. Of course Callinan J will not be sitting on that Court, but there appears to be some support for his views from Heydon and Crennan JJ.

39 In **Rolfe v R**[23] it was held that letters written by the accused apparently admitting and expressing remorse for general sexual misconduct against the complainant were admissible on a trial for particular offences none of which were mentioned in the letters. The admissibility was not based upon relationship or as evidence of "guilty passion" but a general admission of the type of conduct which embraced the offences alleged even though it could not be used to prove any of the counts in the indictment [24].

## OFFENCES

### Child sexual assault offences

40 On 13 June 2003 s 77(2) of the **Crimes Act** was repealed and at the same time the offence of having intercourse with a child between the age of 14 and 16 were restructured. Section 77(2) had provided a defence to certain child sexual assault offences where the child was over the age of 14, consented to the intercourse and the accused believed that she was over the age of 16. In **CTM v R** [25] the question arose as to the consequences of the repeal of s 77(2). In particular the issue was whether the common law defence applied to the new offences created at the time of the repeal of that section. There had been conflicted decisions in the District Court on this question.

41 It was held that the common law defence did not arise. The case considers in depth the history of child sexual assault offences in New South Wales and determined whether from that history parliament could be taken to have intended by the repeal of s 77(2) to also displace the common law defence that would otherwise arise in respect of strict liability offences. The decision also contains dicta that the common law defence does not apply to any of the offences of child sexual assault in the **Crimes Act**. The consequence of the decision is that those offences are now to be considered as absolute liability offences so far as the age of the child is concerned, such that a mistaken belief that the child is over the age of 16, even if the belief is a reasonable one to hold, provides no defence. Clearly such a mistaken belief will be a highly relevant matter on sentence.

## PRACTICE AND PROCEDURE

42 In **Lodhi v R** [26] an indictment alleging certain terrorist offences under the **Criminal Code (CTH)** was quashed because the statement of each of the charges failed to allege all the ingredients of the offence. The Court considered s 11 of the **Criminal Procedure Act** (the CP Act) that in effect provides that it is sufficient description of an offence if the words of the provision creating the offence are used. However, it was held, in accordance with a number of authorities concerned with the section when it appeared as s 145A in the **Justices Act**, that more was required and that the statement of the offence had to include "the essential factual ingredients" of the offence. In that case the offences did not plead all the particulars of the "terrorist act" relied upon and therefore the charges in the indictment were bad. The Crown was required to replead the charges in the indictment and ultimately the accused was convicted.

43 The scope of the requirement to plead "essential factual ingredients" as distinct from the requirement merely to give particulars to an accused person has never been fully explored. But it has been considered that a defect by failing to give proper particulars in the statement of charge would not be cured by a provision such as s 16 of the CP Act that in effect provides that formal defects in a charge could be ignored. The position, however, has been recently considered in the Court of Appeal.

44 In **Knaggs v DPP** [27] the Court of Appeal considered the validity of a Court Attendance Notice (CAN) for an offence of assault occasioning actual bodily harm. On the form in the box for the details of the offence it stated:

“Crimes Act 1900, Section 59(1) – T2 Law Part Code 243  
 Assault occasioning actual bodily harm  
 Between 8:00 am and 5:30 pm on 24/03/2005 at Potts Point.  
 did assault Ann TEESE thereby occasioning actual bodily harm to her.”

45 The claimant was convicted in the Local Court and again on an appeal to the District Court. He sought prerogative-type relief against both the magistrate and the judge. It was argued that the CAN was defective in that it failed to comply with s 175(3)(b) of the CP Act in that it failed to “briefly state the particulars of the alleged offence” in accordance with that section. It was argued that, as there are many ways in which an offence of assault could be committed, the notice should have indicated how it was alleged that the claimant had assaulted the complainant and how she was injured. According to the claimant the notice should have said:

“The accused threw a television set at the face of the said Ann Teese in the accused’s office, which struck her on her raised arms, and he then seized her just below both elbows and pushed her against a wall of the office, causing bruising and contusions to her arms and head.”

The claimant contended that this defect was such that the CAN was a nullity and did not commence proceedings against him.

46 Section 175 of the CP Act provides:

175 Form of court attendance notice

(1) A court attendance notice must be in writing and be in the form prescribed by the rules.

(2) The rules may prescribe one or more forms of court attendance notice.

(3) A court attendance notice must do the following:

- (a) describe the offence,
- (b) briefly state the particulars of the alleged offence,
- (c) contain the name of the prosecutor,
- (d) require the accused person to appear before the court at a specified date, time and place, unless a warrant is issued for the arrest of the person or the person is refused bail,
- (e) state, unless a warrant is issued for the arrest of the person or the person is refused bail, that failure to appear may result in the arrest of the person or in the matter being dealt with in the absence of the person.

(4) The rules may prescribe additional matters to be included in court attendance notices.

(5) A court attendance notice may describe an offence, act or other thing in a way that is sufficient under this Act for the purposes of an indictment or an averment in an indictment.

47 Campbell JA gave the leading judgment of the Court and dismissed the application. It was assumed that the CAN was defective and his Honour considered what consequence flowed from that defect. It was considered that there were two routes to answer the question. The first was based upon construction of the CP Act. Campbell JA referred to **Project Blue Sky Inc & Others v Australian Broadcasting Authority** [28] a decision concerned with the consequences of failing to comply with a provision of a statute and **Berowra Holdings Pty Ltd v Gordon** [29]. His Honour then stated:

39 The requirement created by section 175(3)(b) is an imperfect obligation, in the sense that it does not make express provision for the consequences

of failure to comply with it. Nothing in the statute states that proceedings purportedly commenced without complying with section 175(3)(b) will be invalid or a nullity or in any other way of no effect. Thus, it is only if there is a necessary implication to that effect that such a consequence will arise.

40 In a situation like the present, where it is not alleged that the CAN fails to identify all the elements of an offence, I do not find in the statute any necessary implication that any failure of the CAN to “briefly state the particulars of the alleged offence” should result in either the CAN, or a conviction in proceedings begun by the CAN, being void.

48 Campbell JA then went on to consider the operation of ss 11 and 12 of the CP Act. Those sections are relevantly as follows:

11. The description of any offence in the words of an Act ... creating the offence, or in similar words, is sufficient in law.

12(1) For the purposes of this or any other Act, a summary offence, or an indictable offence that may be dealt with summarily, is taken to be sufficiently stated or described if it is stated or described by the use of a short expression that describes the offence in general terms.

(2) This section applies to a statement or description of an offence in any court attendance notice ...

(3) Nothing in this section affects any other method of stating or describing an offence.

(4) Nothing in this section affects any requirement made by or under this Act in relation to the form of a court attendance notice ...”

49 In relation to s 12 his Honour stated:

44 Each of section 12(1), (2) and (3) uses (through differing grammatical cognates) two different notions – that of stating the offence, and that of describing the offence. Those verbs are precisely the ones used in section 175(3)(a) and (b). As well, section 12(1) and section 175(3)(b) both contain the notion of brevity or shortness. In section 175(3)(b), “briefly” is an adverb that qualifies the requirement to “state the particulars of the alleged offence”. I recognise that section 12(1) is concerned with stating or describing the offence itself, while section 175(3)(b) creates an obligation to state “the particulars of” the offence. Even so, it seems to me that section 12(1) can cast light upon the degree of specificity with which an offence needs to be described and particularised in the CAN. That light is cast in an imprecise way, through creating an impression that the shade of meaning to be attributed to the general words of section 175(3)(a) and (b) is at the less elaborate rather than the more elaborate end of the spectrum of meanings that those general words can bear. The way one gains this sort of impression about shades of meaning falls well short of a rigorous logical process. However, alertness to nuances of meaning and shades of language is a legitimate part of the task of construing the statute as a whole, and having regard to the scope and object of the whole statute. It is one part, though in the present case is not a sufficient part, of deciding whether there is any necessary intendment in the Criminal Procedure Act that a CAN that does not comply with section 175(3)(b) is invalid.

50 His Honour considered s 16 of the CP Act that applies to a CAN as it does to an indictment. He stated:



[48].....The wording of section 16(2) is broad, and its reference to a defect in a CAN "in substance or in form" is capable of applying, as a matter of language, to a failure to state the particulars of the alleged offence. It may be that, in some circumstances, there are deficiencies in a CAN so gross that as a matter of construction section 16(2)(a) would be read as not applying to them: cf *The King v Hickman & Others*; ex parte *Fox & Clinton* (1945) 70 CLR 598. There is no need to decide whether that is so, as the argument we are asked to consider in this application is whether, when the CAN identified all the elements of the offence, any failure to comply with section 175(3)(b) has the effect that the proceedings purportedly commenced by the CAN that breaches that requirement are void.

49 The claimant argued that section 16(2) had no application in the present circumstances, because it applies only to "any indictment" (including in that expression the extended meaning of "any CAN") and, because section 175(3) sets out what a CAN "must" do, any CAN that fails to comply with section 175(3) was not the type of entity to which section 16(2) could apply. I do not accept the correctness of that process of reasoning. The exercise I am presently engaged in is one of deciding whether a failure to comply with one or other of the requirements of section 175(3) renders void the CAN and any resultant proceedings. The argument that the claimant advances already presumes the answer to that question by asserting that section 16(2) applies only to valid CANs, and hence not to a CAN that breaches any of the requirements of section 175(3). Rather, the task of construction that should be performed is one that involves construing the whole statute.

51 Having considered the various provision of the CP Act relevant to the task, Campbell JA came to the conclusion that it was not the intention of Parliament that a defect in the CAN in relation to the statement of particulars would result in the invalidity of the CAN to commence a prosecution.

52 His Honour next considered extrinsic aids to construction including the history of the section and what was said in the second reading speech when s 175 was amended. In effect it was stated that it was not intended that the section would alter the law that existed under the **Justices Act**. Campbell JA then considered the provisions of that Act including s 65, now s 16(2) of the CP Act, and s 145A, now s 12. His Honour considered the line of authority that was concerned with the provisions of particulars in an information including **John L Proprietary Ltd v The Attorney-General for the State of New South Wales** [30] and **Stanton v Abernathy** [31] and then stated:

83 It follows that, under the law that applied before the introduction of section 175 Criminal Procedure Act, a failure to supply particulars in an information did not invalidate any proceedings commenced by that information. As the apparent intention of the legislature in enacting section 175(3)(b) was not to alter the pre-existing state of affairs under the Justices Act concerning the contents of informations, this consideration of the pre-existing law leads to the same conclusion as I have arrived at from a construction of the relevant provisions of the Criminal Procedure Act considered in isolation.

53 There was no reference in the review of decisions dealing with the equivalent of s 145A and s 65, or their CP Act equivalents, to **Lodhi**.

54 The issue was more recently considered in **Rockdale Beef P/L v Industrial Relations Commission** [32]. The Court was comprised of the Chief Justice, the President and Basten JA. The case concerned charges under the **Occupational Health and Safety Act**. The judge at first instance in the Commission dismissed one of the charges and ruled that it would be an abuse of process to proceed with the other. The matter was referred to the Full Bench of the Commission and ultimately came before the Court of Appeal where declarations were sought, one being that one of the charges was defective in that it failed to plead an essential element of the offence.

55 The particular charge was laid under s 10 of the Act. The section provided:

“10(2) A person who has control of any plant ... used by people at work must ensure that the plant ... is safe and without risks to health when properly used.”

56 Section 10(3)(d) was also relevant and it provided:

10(3) The duties of a person under this section:

...

(d) apply only if the premises, plant or substances are controlled in the course of a trade, business or other undertaking (whether for profit or not) of the person.”

57 The charge was in the following terms:

[the claimant] failed to ensure that plant used by people at work over which it had control was safe and without risks to health when properly used contrary to s10(2) of the Occupational Health & Safety Act 2000.”

The alleged defect in the charge was the failure to state that the plant was being controlled “in the course of a trade, business or other undertaking”. It was argued that what was missing was an essential legal element of the offence.

58 The Chief Justice was of the view that the failure was to state a legal ingredient and not a factual one by construing s 10 because it was only if the plant was being controlled under s 10(3)(d) that an offence arose. He stated:

26 This is not a case in which the Second Opponent can rely on the traditional provision that charging an offence in the words of an act creating the offence is sufficient, now found in s11 of the Criminal Procedure Act 1986. The issue is what are the “words of [the] Act” which “create the offence”. In my opinion, those words include the relevant part of s10(3)(d).

27 Nor does s16 of the Criminal Procedure Act 1986 apply to save a charge that omits an essential legal element of an offence. (Ex parte Lovell; Re Buckley (1938) 3 SR(NSW) 153 at 173; Ex parte Burnett; Re Wicks [1968] 2 NSWLR 119 at 120; Taylor v Environment Protection Authority (2000) 50 NSWLR 48 at [26].)

28 In my opinion, the position is the same as that which this Court recently considered in *Lodhi v The Queen* (2006) 199 FLR 303; [2006] NSWCCA 121. That case involved alleged offences under each of ss101.4(1), 101.5(1) and 101.6(1) of the Commonwealth Criminal Code, being the Schedule to the Criminal Code Act 1995 (Cth). Each of those sections referred to a person committing a “terrorist act”. The term was defined in s100.1 of the Code. The Court of Criminal Appeal held that the failure to plead aspects of that definition was defective, on the basis that the matters constituted an essential element of the offence. (See *Lodhi* supra at [83]-[94].)

59 The Chief Justice was also of the view that the defect prevented the Commission from having jurisdiction to hear and determine the charge.

60 Justice Basten came to a different view. The President agreed with Basten JA.

61 After referring to the relevant provisions of the **Criminal Procedure Act** and decided cases on the

issue of whether the failure to state an ingredient of an offence was a defect curable under s 16, Basten JA stated:

122 At a time when the trial court lacked an express power to amend an information, there was an important distinction to be drawn between the provision of particulars (which could be ordered) and amendment of the information itself. That distinction is no longer of importance and s 16(2) should not be read down as if it were. Rather, the relevant principle is that there may be defects which are capable of remedy and defects which are not. The appropriate classification should be considered on a principled basis, and not by use of labels, seeking to distinguish between "essential legal elements" and "essential factual particulars". Cases where an objection in relation to the specification of an essential element of an offence has been upheld, in circumstances where a legislative regime exists, equivalent to that under the *Criminal Procedure Act*, were not identified in the course of the present proceedings. None of the cases discussed so far was such a case. However, an example, referred to by Sperling J in *Taylor*, was *Ex parte Thomas; Re Otzen* (1947) 47 SR(NSW) 261. That case involved an offence under the National Security Regulations, by supplying a declared service at a price exceeding the maximum permitted under the regulation. The Full Court held that the charge of supplying bottled beer together with corkage for an undivided remuneration (at a rate above the maximum rate) was not an offence under the regulation. Jordan CJ stated (p 263):

"It was sought to get over this by appeal to s 65 of the *Justices Act*, 1902, and a contention that there had been a mere variance. But it has been decided over and over again that a person cannot be convicted upon an information that does not charge an offence, and that s 65 does not meet such a case: *Ex parte Lovell* ... . The proper course, when this occurs is to amend the information so as to make it allege an offence known to the law and triable before the magistrate; and for the magistrate then to allow any adjournment reasonably necessary to give the defence an opportunity of meeting the charge."

To the same effect, Davidson J stated (p 265):

"The further contentions were submitted first, that there was merely a variance which was cured by reason of ss 65 and 115 of the *Justices Act*, ... .

As to the first of these points, however, the section relied upon does not warrant a conviction for an offence that does not exist and the magistrate stated the effect of his order in the precise terms of the information: *Ex parte Lovell* ... . If it had really been intended to rely upon proof of a sale, there should have been an amendment and then if desired by the defendant an adjournment to enable him to raise his defence completely to that charge."

Street J agreed with the Chief Justice.

123 These remarks are inconsistent with the proposition that a failure properly to plead the elements of an offence necessarily rendered the information invalid. Indeed, the power of "amendment" itself may be inconsistent with such a conclusion. Accordingly, so long as a defect can be remedied by amendment, the informations are not "void" in the sense that the "defects cannot be removed by amendment or otherwise put aside", adopting the terminology of Mahoney JA in *Boral Gas* at 518C-D [33], nor are the proceedings based on them a nullity.

62 In relation to the decision of the judge to dismiss the charge as defective Basten JA stated:

125 .....The error lay in the fact that the failure to plead that the conduct in question took place in circumstances where the relevant plant was controlled in “the course of a trade, business or other undertaking” was a failure to allege an essential legal element of the offence. Nevertheless, the complaint did not involve a fundamental issue, going to the fairness of the prosecution, and should better be described as a complaint “at the level of technical validity”, adopting the language of Gleeson CJ in Stanton [34]: see [118] above. Because the charge stated that the plant was “used by people at work” and asserted that the plant was in the control of the defendant, there is little substance in the complaint that it was not alleged to be controlled in the course of a trade, business or other undertaking. Further, the identification of the plant as a “drag chain conveyor” also gave rise to the inference that it was machinery of a kind used in the course of a trade, business or other undertaking.

63 After referring to the decision in *Knaggs* and the history of the relevant provisions examined by Campbell JA, Basten JA stated:

130 That history demonstrates that it has long been sufficient to describe the nature of an offence by use of the statutory language: see ss 145A of the former *Justices Act* 1902 (NSW) and *Ex parte Lovell; Re Buckley* (1938) 38 SR(NSW) 153 at 174 (Jordan CJ, Davidson and Halse Rogers JJ agreeing) and now s 11. However, it does not follow that all the words of the statute must be used, nor that, where the specific provision is adequately identified, all the legal elements must be expressly identified. For example, some may be necessarily implied from what is described, for the purposes of s 16(1)(b).

131 The fact that s 16(2) (and its predecessors) has been held not to apply in relation to necessary particulars, does not mean that it has no effect in relation to a statement as to the nature of the offence. In *Knaggs*, Campbell JA noted that the deficiencies in a court attendance notice could be “so gross that as a matter of construction s 16(2)(a) would be read as not applying to them”: at [48]. That may be conceded, in circumstances where doubt is left as to the precise offence which is sought to be charged; but that is not this case. Where an offence is identified, in terms which admit of no uncertainty or ambiguity, it would be to ignore the purpose and intended effect of s 16(2) to find that proceedings had not been validly commenced because a phrase had been omitted which described a particular element of the offence which was in substance an extended description of the circumstances in which the section operated, rather than an additional element. In other words, the allegation that a person had control of plant used by people at work, the plant being identified as a drag chain conveyor, is not advanced by saying that the plant was controlled in the course of a business. However, if that were a defect and a matter of substance, it nevertheless fell within the literal terms of s 16(2).

132 More broadly, whether a defect is of a kind that might not be covered by s 16(2)(a) must be judged by reference to the purpose of the statutory requirements not complied with and the likely effect of the non-compliance in relation to the purpose for which the notice is given. If the notice could be read as not clearly identifying the offence charged, or at least “the nature of” that offence, in some material respect, the defect might be outside the scope of the remedial provision. The effect of s 16(2) may be seen to weaken the mandatory statutory requirement with respect to notice, by removing a basis of invalidity. However, its operation will not depend on the good faith of the prosecutor, but on the effect of the notice. The test for validity will differ from that applied in relation to privative clauses: see *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 616; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [19]-[20] (Gleeson CJ) and [57]-[60] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). On the other hand, the construction to be given to s 16(2)

will involve reconciliation between its terms and those of a provision imposing a requirement with which there has been defective compliance: c.f. *Plaintiff S157* at [69] and [77].

133 Section 16(2) (and related provisions) do not reveal an intention to deprive a defendant of a fair trial. The possibility of a need for remedial amendment is recognised in ss 17 and 21. If irredeemable unfairness would result from a particular defect, that defect might well fall outside the terms of s 16(2). No such unfairness was demonstrated in relation to the charge under s 10(2).

64 The situation would appear to be that s 16(2) can apply to save a charge even if there was a failure to state all the essential legal ingredients of the offence provided that an amendment of the charge would not result in a new charge being alleged or where there is no uncertainty or ambiguity in the statement of the charge, or where certain ingredients can be inferred from what is stated in the charge. But there will be situations where the charge is so defective, for example where it is not obvious what offence is being alleged, where s 16(2) cannot be relied upon.

65 Of course it has been determined that the Court of Criminal Appeal is not bound to follow the Court of Appeal and has refused to do so [35].

### Jury empanelment

66 In *Petroulias v R* [36] a majority of the Court held that the inclusion of a person in the jury who was disqualified from being a juror tainted the whole jury with the effect that the jury had to be discharged not just the juror. As a result some question has arisen as to what action a trial judge should take to ensure that the jury panel does not contain any person who was disqualified before the jury is empanelled.

67 One suggestion, and as I understand it the course adopted with the new jury panel in the trial of Petroulias, is for the judge to go through with the panel the reasons for disqualification and ask the members of the panel whether any one falls within the categories. Annexed is a copy of a form used by the Sheriff to try to weed out disqualified persons. One of the problems may be that this information is provided at a time well before the empanelment takes place.

### Majority verdicts

68 In *RJS v R* [37] the Court was concerned with an appeal against conviction after a majority verdict was given. In effect after the trial judge was informed that the jury could not agree, he gave the **Black** direction but informed them that at 2.30pm, that is 8 hours after the jury retired, if they still could not reach a unanimous verdict, they could give a majority verdict. At 2.45pm the jury sent a note indicating that they had reached a majority verdict and that no further deliberation could affect that decision. The judge then had the jury brought into court and accepted the verdict.

69 The Crown conceded that there were two errors made by the judge. Firstly the judge did not determine what period of time was "reasonable having regard to the nature and complexity of the criminal proceedings". [38] The second was that the judge did not examine the foreperson of the jury on oath. [39] The Chief Justice stated:

[25] In the present case, the course of events should have been to give the **Black** direction and then, in the absence of the jury, to take submissions from counsel as to when, in the particular circumstances of this case, a reasonable time could be said to have expired. It is inappropriate to determine that there should be a general practice about whether the trial judge, having determined what was such a reasonable time, should upon the elapse of that time, intervene in the jury's deliberations. What should occur will vary from case to case.

[26] In many cases, the trial judge may well decide to await a further indication from the jury that it is unlikely that the jurors would reach a unanimous verdict. That is not to say that after the passage of a further lengthy period of time, a matter to be determined by the trial judge, some kind of inquiry to the jury would constitute legal error. This is a matter with respect to which the practice should develop in accordance with the experience of the implementation of the majority verdict system over time. It does not require any definitive guidance from this Court.

### **SUMMING UP**

#### **Longman warning**

70 The content of the Longman warning in any particular case has continued to be a fertile ground for appellants, and perhaps it will continue to do so because there is more room now for trial judges to depart from a fixed formula that seemed to be required by the decision in *R v BWT* [40] and I am not sure that the decision in that case would be the same had it been decided in the past year.

71 In *Wade v R* [41] Barr J summarised the then present state of the law [42] as follows:

[19] As Simpson J observed in *R v DRE* [2006] NSWCCA 280 at [47], the principle dealt with in *Longman v R* has, since that case, had a long and rather troubled history. As her Honour observed at [59] no definitive statement of the minimum requirements of a *Longman* direction have yet emerged.

[20] Some things may be said with confidence. First, the charge to the jury should take into account all the relevant circumstances of the case before the jury. One circumstance will be the length of time which elapsed between the events and the accused's appreciation of the accusation. In cases of gross delay, the charge will need to be strong. It is not irrelevant that the strong warnings called for in *Longman* and *Crompton* resulted from delays approaching and exceeding twenty years. See also *R v Sheehan* [2006] NSWCCA 233, another case in this Court calling for a strong direction, which was concerned with delays varying between seventeen and twenty-two years.

[21] On the other hand, the shorter the time between events and accusation, the less insistent must surely be the need for a strong warning. Spigelman CJ described *DRE*, a case involving a delay of up to three years for some counts but only a matter of months for others, as at best a borderline case for a *Longman* direction. However, I do not understand his Honour to have formed that conclusion from a reckoning of time alone — that a *Longman* direction was required was accepted by both sides in the appeal — and I would not wish to be understood as proposing such an approach.

[22] There may be other circumstances, too. There may be evidence going directly to the accused's ability to remember events and otherwise account for his movements and activities. Such circumstances must be borne in mind as well.

[23] Secondly, it may be said that no particular form of words is needed when directing the jury: *R v Kesisyan* [2003] NSWCCA 259.

[24] Thirdly, it is not necessary, in fact undesirable, to use the words "dangerous to convict" or "unsafe to convict" when giving a *Longman* warning. These expressions bear similar meanings: *Doggett v R* (2001) 208 CLR 343 per Glesson CJ at [10]; see also the judgment of Spigelman CJ in *R v Robinson* [2006] NSWCCA 192 and of Sully J in *R v BWT*.

[25] What is necessary is that the trial judge should add the weight of judicial opinion that the relevant disadvantages do exist and why they exist. The most recent consideration of what is necessary by way of warning is *KJR v R* [43].

72 Some reference should also be made to *Tully v The Queen* [44]. That was a case from Queensland and is somewhat complicated by a reference to what might be called a *Robinson* direction, derived from the decision of the High Court in *Robinson v The Queen* [45], concerned with the warning to be given in relation to the uncorroborated evidence of a child, and its relationship to the Longman warning. However the complaint was that the trial judge should have warned the jury that it would be dangerous to convict on the evidence of the complainant because of the forensic disadvantages to the accused by delay in complaint. No such direction was sought. The child was aged about 10 years and the delay before complaint was about 2 years.

73 One matter that was emphasised particularly by Crennan J with whom Heydon J agreed, was that a Longman warning was required where there was extensive delay because the jury might not appreciate that such a fact might forensically disadvantage an accused and in what manner [46]. Her Honour stated that the question was, "whether all of the circumstances gave rise to some forensic disadvantage to the appellant, palpable or obvious to a judge, which may not have been apparent to the jury, thus necessitating a warning so as to avoid a miscarriage of justice".

74 Her Honour stated:

[181] The critical issue in relation to the need for a warning in accordance with Longman is whether any delay in complaint (and/or prosecution), be it 20 years or 2 or 3 years, creates a forensic disadvantage to an accused in respect of adequately testing allegations or adequately marshalling a defence, compared with the position if the complaint were of "reasonable contemporaneity".

[182] The shorter the delay, the more difficult it is to assert that an accused has lost the ability to adequately test the evidence of the complainant or to adequately marshal his defence. In circumstances where the delay is short by comparison with the delay in Longman, and is explained by an accused's threats, some forensic disadvantage which is palpable and obvious to an experienced judge, but which a jury may fail to appreciate, needs to be identified because a judge must warn of the relevant danger<sup>192</sup> before explaining to the jury how the particular danger is to be avoided. Without that circumstance, a warning in accordance with Longman is not imperative because a trial judge is in no position to explain why it would be dangerous to convict on the complainant's uncorroborated evidence.

.....

[186] There was no forensic disadvantage to the appellant, arising out of the explained delay, which would have been palpable or obvious to the trial judge, but would not have been apparent to the jury. The concatenation of circumstances, being the age of the complainant at the time of the offences and at trial, the sexual nature of the offences, the explained delay between the offences and report, and trial, and inconsistencies in the complainant's evidence, could all be evaluated by the jury in the light of their own experiences. Therefore, it was not necessary for the trial judge to give a warning to avoid a miscarriage of justice.

75 One of the matters referred to by judges both in the majority and minority was the inappropriateness of considering that a warning as to the danger of convicting on the complainant's evidence arises only in a Longman situation, that is where there is extensive delay. The Court recognised that there might be other factors that justify a warning to avoid the perceptible risk of a miscarriage of justice notwithstanding that there was no extensive delay and no forensic disadvantage [47]. The real difference between the majority and the minority was whether a warning was required in the circumstances of that case notwithstanding that no warning was sought at the trial.

76 There have been amendments in relation to the directions to be given in sexual assault trials by the **Criminal Procedure Amendment (Sexual and Other Offences) Act 2006** which commenced 1 January 2007. Section 294 of the CP Act was amended to include a prohibition on a judge warning that delay in complaint is relevant to the complainant's credibility "unless there is sufficient evidence to justify such a warning". The section was also amended to restrict the use of a Longman warning to those cases where the delay in complaint is "significant" and the judge is satisfied that the accused "has suffered a significant forensic disadvantage caused by that delay". The provision states, "The mere passage of time is not in itself to be regarded as establishing a significant forensic disadvantage" [48]. The section also limits the giving of a warning to those cases where a party requests it. Section 294AA contains a prohibition on a judge warning a jury "of the danger of convicting on the uncorroborated evidence of any complainant". Relevant parts of the second reading speech relating to these amendments are set out in Special Bulletin 17 issued by the Judicial Commission. There is a discussion of the possible effect of these amendments in Volume 19 No 3 of the Judicial Officer's Bulletin.

## SENTENCING

### Standard non-parole period

77 Section 21A of the **Crimes (Sentencing Procedure) Act** seems no longer to be a major problem in sentencing appeals, although judges are still finding new ways to use the section erroneously [49]. The provisions in respect of the standard non-parole period are a source of error. In 2007 there have been so far 26 appeals concerned with the standard non-parole provisions of which error was found in 11 cases. Many of the problems are simply a failure of the sentencing judge to give satisfactory reasons for the conclusions or giving sufficient weight to the standard non-parole period. The Court has identified the difficulties in dealing with the standard non-parole provisions in respect of some particular offences. For example there is a standard non-parole period for an offence under s 112(2) aggravated break and enter and commit a serious offence of 5 years even though the maximum penalty is 20 years. There is also the difficulty that an offence under s 112(2) can involve serious offences ranging from larceny to sexual assault to armed robbery. The problem was considered in **Marshall v R** [50] and an example of the application of the standard non-parole period in such a case can be found in **R v Harris** [51] in which there are some interesting statistics revealed.

### Application of Henry guideline

78 Care should be taken when applying the Henry guideline not to fall into the trap of taking into account when assessing the plea of guilty the strength of the Crown case. It should be remembered that the Henry guideline was postulated before **Thomson and Houlton** was decided. One of the facts taken into account in **Henry** was:

7. Plea of guilty, the significance of which is limited by a strong Crown case.

79 But after **Thomson and Houlton** the strength of the Crown case is not relevant to an evaluation of the discount for the plea. Thus an application of **Henry** has to take that matter into account. The problem can be seen in **R v Witchard** [52] in the following passage (my underlining):

31 In my opinion the present offences were worse than those contemplated in Henry. The respondent committed the offences in company and used actual violence towards Mr McDonald and Mr Delaney. He had a criminal history for assault and was on conditional liberty at the time of the commission of the offence. He used a weapon, namely a bottle, with which he struck Mr Delaney over the head several times. Although the respondent pleaded guilty the Crown case was strong, the respondent having been arrested shortly after the incident, following the activation of the panic button at the railway station. To my mind an appropriate discount for the plea was 15 percent. The sentencing judge described the offences as spontaneous acts of hostility with the consequence that they were committed with a limited degree of planning as was contemplated in the



Henry guidelines.

80 It is also to be recalled that the Henry guideline itself takes into account a discount for the plea of about 10 per cent and there have been errors made by judges applying an additional discount for the plea after adopting the Henry guideline [53].

### Concurrent or cumulative sentences

81 A number of appeals, particularly Crown appeals, reveal a fairly wide misconception in the District Court as to when it is appropriate to order concurrent sentences. There seems still to exist a view that, if offences are part of the same criminal conduct, the sentences must of necessity be served concurrently. There have been repeated attempts to indicate that this is not so and that the issue is one governed largely by the principle of totality.

82 In *Cahyadi v R* [54] it was stated:

[27]... there is no general rule that determines whether sentences ought to be imposed concurrently or consecutively. The issue is determined by the application of the principle of totality of criminality: can the sentence for one offence comprehend and reflect the criminality for the other offence? If it can, the sentences ought to be concurrent otherwise there is a risk that the combined sentences will exceed that which is warranted to reflect the total criminality of the two offences. If not, the sentences should be at least partly cumulative otherwise there is a risk that the total sentence will fail to reflect the total criminality of the two offences. This is so regardless of whether the two offences represent two discrete acts of criminality or can be regarded as part of a single episode of criminality. Of course it is more likely that, where the offences are discrete and independent criminal acts, the sentence for one offence cannot comprehend the criminality of the other. Similarly, where they are part of a single episode of criminality with common factors, it is more likely that the sentence for one of the offences will reflect the criminality of both.

83 In *R v Harris* [55] this was stated in relation to discussion on the principle of totality:

45 Two points may be made. Firstly, the principle is expressed in terms of coming back from the result of a simple aggregation. Secondly, if each individual sentence is appropriate for the criminality of the offence to which it relates, prima facie additional criminality requires an increase in sentence. Obviously the totality principle imposes limits to that last proposition but those limits will rarely if ever go so far as to justify wholly concurrent sentences for all of a series of offences such as those here. Subject to those limits, in general, sentences significantly cumulative should be imposed for separate serious offences of which those here are all examples.

In that case it was held that the simple fact that three offences of break enter and steal were committed as part of one spree did not itself justify concurrent sentences.

### Taking Commonwealth matters into account

84 A practice appears to have established, where Commonwealth matters are taken into account under s 16BA of the *Crimes Act (Cth)*, of the relevant form referring to all the offences before the court and asking the judge to take into account the matters on the form when sentencing for all offences. This is actually in accordance with the terms of s 16BA. However in *Assafiri v R* [56] it was pointed out that the practice could lead to double counting of the matters being taken into account particularly where the sentences for the offences are made cumulative. The Crown accepted at the hearing that the practice should cease.

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## END NOTES

1. (2005) 224 CLR 300
2. [2007] HCA 30
3. [2005] NSWCCA 186
4. (2005) 159 A Crim R 154
5. [2007] NSWCCA 237
6. (2005) 65 NSWLR 740
7. [2007] HCA 13
8. Ibid at [44]-[45]
9. Ibid at [46]
10. Ibid at [48]
11. [2007] HCA 12
12. [2007] HCA 11; (2007) 234 ALR 1
13. [2006] NSWCCA 331
14. [2007] HCA 27
15. [2007] NSWCCA 216
16. (1997) 98A Crim R 359
17. [2007] HCA 12
18. Ibid at [84]
19. Ibid at [88]
20. [2006] HCA 56; (2006) 81 ALJR 391
21. (1998) 194 CLR 106
22. [2007] HCATrans 253
23. [2007] NSWCCA 155
24. Ibid at [67]
25. [2007] NSWCCA 131
26. [2006] NSWCCA 121
27. [2007] NSWCA 83
28. (1998) 194 CLR 355
29. [2006] HCA 32; (2006) 228 ALR 387
30. (1987) 163 CLR 508
31. (1990) 19 NSWLR 656
32. [2007] NSWCA 128.
33. Boral Gas (NSW) Pty Ltd v Magill (1993) 32 NSWLR 501
34. Stanton v Abernathy (1990) 19 NSWLR 656
35. R v Masters (1992) 26 NSWLR 450
36. [2007] NSWCCA 134
37. [2007] NSWCCA 241
38. See Jury Act s 55F(2)(a)
39. See ibid s 55F(2)(b)
40. (2002) 54 NSWLR 241.
41. [2006] NSWCCA 295.
42. As at September 2006
43. [2007] NSWCCA 165.
44. [2006] HCA 56; (2006) 81 ALJR 391
45. (1999) 197 CLR 162
46. Per Crennan J at [178]
47. See Kirby J at [60]ff, Hayne J at [89]ff, Callinan J at [131].
48. Section 294(5).
49. See Smith v R [2007] NSWCCA 138, where a judge took into account when sentencing for an offence under s 25A that it was aggravated by there being a series of criminal acts.
50. [2007] NSWCCA 24
51. [2007] NSWCCA 130
52. [2007] NSWCCA 167
53. For example R v Wilson-Winship [2007] NSWCCA 163
54. [2007] NSWCCA 1 (2007) 168 A Crim R 41
55. [2007] NSWCCA 130
56. [2007] NSWCCA 159

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## Review of the Criminal Law 2007

### Review of the Criminal Law 2007 by Justice Howie

#### Sentencing

##### Suspended sentences

1 There has been some consideration of suspended sentences by both the legislature and the courts. The **Crimes and Courts Legislation Amendment Act 2006** made amendments to the provisions relating to suspended sentences principally to overcome decisions of the Court of Criminal Appeal that had restricted the power of a court when dealing with the breach of a suspended sentence. A court is no longer required to fix the non-parole period when the sentence to be suspended is imposed [1]. Rather the court when revoking the order suspending the sentence fixes the non-parole period [2]. Further there is now an appeal to the District Court from an order revoking a good behaviour bond [3].

2 In **DPP v Cooke**[4] the principles to be applied when determining whether to revoke a good behaviour bond given under s 12 were considered. That was a case where the offender had committed a further offence while subject to a suspended sentence. The judge determined that the sentence for the further offence should be a further suspended sentence and as a result took no action on the breach of the bond. There was both a Crown appeal and an application for prerogative – type relief. The Court held the judge acted erroneously in the manner in which he exercised the jurisdiction under s 98(3). That section requires a court to revoke a bond given under s 12 unless the breach was trivial or there were good reasons to excuse the breach. The Court considered the decision of Hidden J in **DPP v Burrows**[5].

3 The following principles can be distilled from the decision:

- (i) as a general rule a breach of the bond should result in the offender serving the sentence that was suspended;
- (ii) the focus should be on the conduct breaching the bond in determining whether the breach was trivial or could be excused;
- (iii) the issue is not whether there are good reasons for not breaching the bond;
- (iv) there may be good reasons found in extenuating circumstances surrounding the breach;
- (v) the subjective circumstances of the offender are generally irrelevant as to whether the bond should be breached;
- (vi) the need for rehabilitation by supervision or otherwise is not a good reason to excuse the breach;
- (vii) it would be a rare case where the court would take into account, if at all, the impact of the breach upon the offender;
- (viii) the penalty to be imposed for the further offence is irrelevant to whether the bond should be revoked;
- (viii) the issue whether to breach the bond should be determined before the sentence is imposed for the further offence.

4 In the course of my judgment, with which the other members of the Court agreed, I stated:

23 .....There is nothing more likely to bring suspended sentences into disrepute than the failure of courts to act where there has been a clear breach of the conditions of the bond by which the offender avoided being sent to prison. Notwithstanding what has been stated about the reality of the punishment involved in a suspended sentence, if offenders do not treat the obligations imposed upon them by the bond seriously and if courts are not rigorous in revoking the bond upon breach in the usual case, both offenders and the public in general will treat them as being nothing more than a legal fiction designed to allow an offender to escape the punishment that he or she rightly deserved.

24 As King CJ pointed out, it should not be forgotten that before suspending a sentence the court must have reached the view that nothing but a sentence of imprisonment was appropriate to punish the offender for that crime: see *R v Zamagias* [2002] NSWCCA 17. The suspended sentence is not an alternative to a bond and should not be treated as such. The suspension of the sentence of imprisonment was an act of mercy designed to assist the offender's rehabilitation or for some other purpose to benefit the offender on the understanding that, if the offender did not fulfil the conditions of the bond, the sentence would be imposed. Therefore, generally speaking, there can be no unfairness in requiring the offender to serve the sentence when the obligations under the bond have been breached.

5 This decision dealt only with the principles to be considered where there has been a breach of a bond in connection with a suspended sentence. They arise mainly because of the policy and philosophy behind suspended sentences and the words of the section dealing with a breach of a s 12 bond. In respect of the breach of other bonds the principles set out in *R v Morris*[6] apply. There it was held:

In many, and probably in the majority of, cases where leniency is extended to an offender by the courts availing themselves of those options, there is a significant contribution to the rehabilitation of the offender and no recurrence of criminal activity, at least during the period when the offender's conduct is by reason of the court's order kept under review. There is therefore a considerable community interest in maintaining the integrity of those sentencing options.

However (if leniency extended in such fashion is abused, there is a very real risk that the whole regimen of non-custodial sentencing options will be discredited both in the eyes of those members of the community who might otherwise have continued to support them and in the eyes of magistrates and judges; and there is a substantial risk that courts, of their own motion but also reflecting in a general way community opinion, may become increasingly reluctant to extend to offenders those lesser sentencing options which the legislature has provided. It is therefore extremely important that breaches of non-custodial sentencing orders be brought promptly to the notice of the sentencing court and there be dealt with swiftly and, generally speaking, in a manner which will demonstrate how seriously such breaches are regarded and must be regarded in the community interest.) Of course, there may be circumstances where the breach of recognizance is merely technical or may be seen as trivial or may readily be excused in the light of particular circumstances affecting the offender at the time of the breach. Absent such considerations, the consequence of a breach of a recognizance ought usually be the imposition of a sentence which, while not exceeding the appropriate range for the offence in question, is determined with a real awareness of the fact that it comes to be imposed following such a breach. It may not, of course, exceed that sentence which is appropriate to the objective circumstances; but it should usually reflect the fact that by his rejection of the trust placed in him by the previous sentencing court, the offender will have shown a lack of remorse and cast doubt upon his prospects of rehabilitation.

Two things need to be borne in mind by any court which is called upon to sentence an offender in circumstances where that offender is called before the court by reason of such a breach. The first and fundamental is that that offender comes to be punished not for the breach but, following the breach, for his other original offence in respect of which the recognizance was imposed. Secondly, in assessing the appropriate punishment for that original offence, the court must not ignore whatever penalty, whether by way of imprisonment or otherwise, may have been imposed by it or by some other court in respect of the conduct constituting the breach. The principle of totality clearly applies to the sentences to be imposed in respect of the breach and thereafter in respect of the original offence.

### Discounts

6 In *R v MAK and MAK* [7] it was held that there should be no separate and quantified discount given for remorse either over and above, or in combination with, the discount for the plea of guilty. Although there was a suggestion in the guideline judgment in *Thomson and Houlton* [8] that a single discount could be given for plea, contrition, and witness vulnerability, it was held to be no longer appropriate to do so since the introduction of s 21A of the *Crimes (Sentencing Procedure) Act* [9]. Remorse is a factor relevant to a number of mitigating considerations such as likelihood of further offending and prospects of rehabilitation and, therefore, to take it into account in those matters as well as making it the subject of a separate quantified discount was to double count the factor.

7 Discounts for assistance has been a matter of some controversy in that there can be identified different approaches to applying the discount in the Court of Criminal Appeal reflective of different approaches being taken at first instance. The current situation is that generally there should not be a separate discount for assistance where there is a discount being given for a plea of guilty. The matter was comprehensively considered in *SZ v R* [10] Buddin J stated:

52 I acknowledge, as did Latham J in *Sukkar* (supra), that there will be cases in which a combined or composite discount of more than 50% is called for. There may well be a case in which the assistance proffered is of a quite extraordinary kind. Alternatively there may be a case in which the offender is entitled to an additional discount, in accordance with the principles enunciated in *R v Ellis* (1986) 6 NSWLR 603, on account of having disclosed information which was otherwise unknown to the authorities. Indeed, composite discounts in excess of 50% have been allowed on several occasions when this Court has proceeded to re-sentence following a successful appeal by an offender. See, for example, *R v NP* (supra); *R v OPA* [2004] NSWCCA 464 and *R v AMT* [2005] NSWCCA 151.

53 However, in light of the authorities to which I have referred and particularly given the statutory mandate contained in s 23(3) of the Act, it is my opinion that a combined discount exceeding 50% should be reserved for an exceptional case. Counsel for the applicant went so far as to suggest that a combined discount of 75%, comprising a discount of 25% for the plea of guilty to which would be added a further 50% for assistance to authorities, may be available in an appropriate case. In view of the matters to which I have referred, I regard such a submission as being simply untenable. Apart from any other consideration, the aggregation of discrete discounts is at odds with the observations of Gleeson CJ in *Gallagher* (supra) which are recited in the extract from *El Hani* (supra) which appears at par 31 of this judgment. See also *R v NP* (supra) at pars 30 and 47.

8 In the same case I pointed out that once a discount of 25 per cent for a plea of guilty was thought appropriate, the opportunity to discount a sentence for assistance was accordingly reduced. If a discount for assistance was given in addition to the discount for a plea at a rate of say 50 per cent, that might have been appropriate before *Thomson and Houlton*, the result must be a sentence that was manifestly inadequate and in breach of s 23(3) of the *Crimes (Sentencing Procedure) Act*.

9 The result, therefore, is that a combined discount of more than 50 per cent for plea and assistance will be exceptional. Where the offender will not be serving the sentence in harsher conditions, then the discount will be generally no more than 40 per cent *R v Sukkar* [2006] NSWCCA 92 at [5]. The Court will generally assume that the offender is not going to serve the sentence in harsher conditions and it is for the offender to show the contrary.

10 In *Lewins v R* [2007] NSWCCA 189 the Court was highly critical of a judge who gave a separate and quantified discount for assistance based upon voluntary disclosure of offences. In that case the judge gave a discount for a plea of 25 per cent, then a discount for assistance of 50 per cent and then what was called an Ellis discount of 50 per cent. The result was that the notional starting sentence was discounted by about 82 per cent. Then special circumstances were found and the non-parole period reduced to 50 per cent of the head sentence. The resulting sentence was described as "an affront to the community and tends to bring the criminal justice system into disrespect".

### Concurrent or cumulative sentences

11 There are a number of cases in the Court of Criminal Appeal where it has been held that there was an error in the fact that the sentencing judge has made sentences for separate offences concurrent. There are few cases where the error is in cumulating sentences. Making sentences concurrent where there is no good reason to do so often results in the overall sentence being inadequate. In *Nguyen v R* [2007] NSWCCA 14 reference was made to the apparent insufficient understanding of the principle of totality as it is reflected in the structuring of sentences.

12 It is important to bear in mind that the question of the structure of sentences will be determined generally by the application of the principle of totality. In *R v MMK* [2006] NSWCCA 272, 164 A Crim R 481 the Court stated:

13 In some cases the fact that a sentence for a particular offence is to be served completely concurrently with another sentence for a different offence will result in a sentence that is erroneously inadequate because it does not reflect the totality of the criminality for which the offender was to be punished for the two acts of offending: see for example *R v Brown* [1999] NSWCCA 323. This may be so even if the two offences arise from the same precise criminal act, such as the dangerous driving of a motor vehicle on the one occasion: *R v Janceski (No 2)* [2005] NSWCCA 288. The same principle has been applied to sexual assault offences arising from a single incident of sexual assault: *R v Gorman* (2002) 137 A Crim R 326. Although, it has been held that a determination of the extent, if any, that a sentence is to be served cumulatively with another sentence is an exercise of discretion on which minds might differ, *R v Hammoud* (2000) 118 A Crim R 66, that discretion is generally circumscribed by a proper application of the principle of totality.

13 In many cases the problem is caused by the sentencer giving too much weight to the fact that the offences were part of the same course of criminal conduct. In *Cahyadi v R* [2007] NSWCCA 1 this was said about the issue:

27 ..... there is no general rule that determines whether sentences ought to be imposed concurrently or consecutively. The issue is determined by the application of the principle of totality of criminality: can the sentence for one offence comprehend and reflect the criminality for the other offence? If it can, the sentences ought to be concurrent otherwise there is a risk that the combined sentences will exceed that which is warranted to reflect the total criminality of the two offences. If not, the sentences should be at least partly cumulative otherwise there is a risk that the total sentence will fail to reflect the total criminality of the two offences. This is so regardless of whether the two offences represent two discrete acts of criminality or can be regarded as part of a single episode of criminality. Of course it is more likely that, where the offences are discrete and independent criminal acts, the sentence for one offence cannot

comprehend the criminality of the other. Similarly, where they are part of a single episode of criminality with common factors, it is more likely that the sentence for one of the offences will reflect the criminality of both.

14 The latest consideration of the issue was in **R v Harris** [2007] NSWCCA 130. That was a Crown appeal against sentences imposed upon the offender for two aggravated break and enter offences committed on the same day and in the same street. One of the errors found in the sentencing was that the judge imposed concurrent sentences on the two offences. It was held:

38 Offences of the nature of those committed by the Respondent each involve their own loss or damage, in part in the sense of physical damage and goods taken and in part in the unease, disquiet, and feeling of violation such offences engender. With rare exceptions, each involves a different victim or group of victims and a separate exercise of an offender's will. Even an offender who decides to spend his day breaking and entering makes separate decisions as he goes along a street, considering which houses are occupied, which may be entered undetected and which are likely to [be] most productive of gain. Similarly in the case of car stealing or use. Although the offences may all share the same motivation, such as an offender's need for money or goods with which to indulge a drug addiction, each involves its own separate criminality. Putting aside cases where there is a significant difference in the nature of the offences, an offender's criminality is greater by reason of committing three offences rather than one or two.

.....

42 Nor is it an adequate reason for complete concurrency that a group of offences such as breaking, entering and stealing may be of the same type or committed as part of one criminal spree. As the Court has sought to point out, implementation of a decision to commit another offence will generally involve more loss and damage, and more victims. When it does, there is also a greater entitlement of the community to retribution.

43 Of course at times there will be good reason for complete concurrency. One is where some offences are little more than incidents of, or incidental to, others. Thus had the possession of the jemmy been charged rather than placed on a Form 1, and there been no other evidence as to its use beyond what I have stated, it would not have been inappropriate to make that sentence wholly concurrent with the sentence for the offence in which it was used. Were an offender charged with break, enter and steal also charged with having custody of the same goods, it would be a rare case where anything other than concurrent sentences for those offences would be appropriate.

### Later criminality

15 In **R v MAK and MSK**[17] the Court considered the relevance of prior convictions for offences that occurred after the offence for which sentence was being passed. In that case the offender had previously been sentenced after trial for offences of sexual assault occurring later than the offence for which he was being sentenced. The Judge stated that he was taking into account that the offender had no prior convictions at the time of the offence. It was held that this was an error as there was no relevance in the fact that the accused had no prior convictions in light of the fact that he had committed other offences of a similar nature a short time later. Those prior convictions deprived the offender of the leniency that otherwise might have been shown to him by reason of the fact that he had no prior record. The later offending showed that the conduct for which he was being sentenced was not an aberration but was the start of a course of conduct that resulted in the later offending.

16 The Court also stated:

61 We appreciate that less regard might be paid to later offending because

at the time of the offence for which sentence is to be passed the offender has not been subject to the "formal condemnation of the law" or been given "the warning as to the future which the conviction experience implies"; see *McInerney* [18] at 113 applied in *R v Bui* (2002) 137 A Crim R 220 at [27]. But in the circumstances of this case and given the seriousness of the conduct for which he was before Hidden J we do not think that the fact that MAK had not been convicted of sexual assault offences when he committed the offences against TW or TA was a basis for treating as a mitigating factor the absence of any criminal record.

### **Domestic violence offences**

17 In *R v Hamid* [19] the Court of Criminal Appeal considered the relevant principles in sentencing for offences of domestic violence. After reviewing a number of decisions both in this and other States and the relevance of Pt 15A of the *Crimes Act*, Johnson J stated:

86 In sentencing a domestic violence offender, and in particular a repeat domestic violence offender, specific and general deterrence are important factors, together with the requirement of powerful denunciation by the community of such conduct and the need for protection of the community. Recognition of the harm done to the victim and the community as a result of crimes of domestic violence is important. These principles flow from statements of this Court and are fortified by the enactment of Division 1A of Part 15A of the Crimes Act 1900 including the statutory objects recited in s.562AC.

.....

88 This is not to say that promotion of rehabilitation of the offender is not an important factor. It remains necessary to provide individualised justice in the circumstances of the particular sentencing decision. Nevertheless, the factors to which reference has been made above assume particular significance in the case of a domestic violence offender who has committed a series of offences over an extended period of time against different victims.

### **Application of totality to fines**

18 The High Court judgment of *Pearce*[20] has been taken as laying down a principle in relation to sentencing for multiple offences whereby the court is first to fix the appropriate sentence for each offence and then, having regard to totality, determine how to structure the sentences. The consideration of this approach in relation to fines was considered in *EPA v Barnes*[21]. There the offender was sentenced in the Land and Environment Court for two offences arising from two occasions when he dumped waste on a deserted property. In respect of the first count he was fined \$4,000 and on the second \$500. The prosecutor appealed.

19 It was held that there was no error in the approach taken by the judge who properly applied the principle of totality. It was stated:

49 ..... the totality principle clearly had application. Her Honour was sentencing for two offences. It was not simply a matter of fixing a fine for each offence. Her Honour was obliged to review the aggregate and consider whether it was just and appropriate, as a reflection of the criminality overall. That may require some moderation of the sentences imposed in respect of each offence.



50 ..... Where there are multiple offences, each punishable by a custodial sentence, the totality principle may find expression through the complete or partial accumulation of sentences, or through making all or some of the sentences concurrent (cf *Pearce v The Queen* (1998) 194 CLR 610, per McHugh, Hayne and Callinan JJ at 624 (para 45)). However, there is obviously no room for partial accumulation or concurrence in the case of fines. If the sentencing Judge believed that the totality principle required an adjustment to the fines which may otherwise be appropriate, the amount of each fine had to be altered, applying the sentencing principles suggested in *Johnson v The Queen* (2004) 205 ALR 346.

### **Cannabis offences**

In *R v Nguyen and Cannistra*[22] the Court of Criminal Appeal stressed the seriousness of offences involving cannabis. McClellan CJ at CL said:

54 Although in former years some people accepted marijuana as a "recreational drug" and believed that it did not have the addictive qualities and potential to damage the health of users which can occur with "hard drugs", this assumption has more recently been called into serious question. It is now recognised that marijuana can have very serious consequences for users with destructive potential for the lives of young persons. The legislature has recognised this damaging potential by providing a maximum penalty of twenty years for the present offence. When an enterprise thirty times larger than the minimum number of plants which constitutes the offence is identified the principals must anticipate that, unless there are significant mitigating factors, the maximum penalty will be imposed.

### **Parity**

20 A question was raised about resolving the issue of parity between a juvenile and an adult. The general rule is that where the co-offenders are dealt with in two different jurisdictions the issue of parity does not arise. Parity requires like sentences when everything else is alike. Being sentenced in different jurisdictions means that all things are not equal obviously because there are different sentencing options available, different principles apply and there are different policy considerations between the sentencing of an adult and that of a juvenile. But the issue of parity is a discretionary consideration in determining the appropriate sentence and a general rule will not always apply.

21 Clearly one of the important considerations will be the age difference between the juvenile and the adult. If it is significant and if the adult is taking advantage of the child, then no allowance will be made when sentencing the adult. It might even be an aggravating factor that the adult is committing an offence by using a child. On the other hand, if the age gap is not significant and there is no real way to distinguish the two in the criminality involved, then some mitigation might be made of the sentence of the adult.

22 This occurred in *R v Govinden*[23]. There the age gap was about a year and the co-offenders had been at school together. Further the criminality of the child was greater than the adult as he was the instigator of the offence. The more serious offender received a non-custodial sentence in the Children's Court and the question was whether the adult should have received a sentence of full time custody. The Court took into account the issue of parity in the particular circumstances of that matter. A different approach was taken in *R v Ho* [24] where it was considered that the sentence given to the juvenile was manifestly inadequate.

23 The most that can be said is that the sentence imposed upon the juvenile is not irrelevant [25] but its effect upon the sentencing of the adult will vary depending upon the particular facts and circumstances.

24 In *Tatana v R*[26] it was held that generally disparity does not arise from different findings on special circumstances between co-offenders [27]. However, it was held that parity might require a finding of special circumstances to be made in the case of a co-offender in order to avoid an

apparently unjust and unjustified result. In that case the less serious offender was to serve longer in gaol because of a failure to find special circumstances in his case. It was stated:

33 It seems to me that a permissible means of avoiding this unacceptable situation would have been for Acting Judge Boulton, when confronted with that result, to have considered whether the need to preserve a proper parity with the co-offenders itself gave rise to special circumstances justifying a reduction in the non-parole period. Although matters giving rise to special circumstances for the purposes of s 44 of the Crimes (Sentencing Procedure) Act 1999 will be, generally speaking, subjective considerations personal to the particular offender, they are not limited to such factors. As has already been noted, special circumstances may be found when sentences are being made cumulative in order to retain an appropriate ratio between the overall term and the overall non-parole period. In my opinion, the need in a particular case to preserve proper parity between co-offenders may itself amount to special circumstances enabling a principled avoidance of a situation of manifest unfairness arising from a too literal application of conventional sentencing principles and the requirements of s 44. Such a use of the concept of special circumstances will need, always, to be justified by the special requirements in a particular sentencing context.

34 This is not to suggest that disparity will generally arise simply because the application of s 44 to particular offenders has resulted in different sentences between co-offenders: Do is against that proposition. But this is an exceptional case where the subjective factors favourable to the co-offenders were insufficient to justify the fact that the applicant would spend longer in custody even though he was being sentenced for significantly less criminality. In the end it is a matter of degree and balance. The applicant clearly has a justifiable sense of grievance with the outcome of the two different sentencing proceedings. In order to avoid that outcome Acting Judge Boulton ought to have found that parity with the co-offenders amounted to special circumstances justifying a reduction in the otherwise appropriate non-parole period. However, proper sentencing principles and the findings made by Acting Judge Boulton limit the extent to which the non-parole period can be reduced to address parity.

#### **Sentencing for multiple offences**

25 In *R v JRD*[28] the judge had sentenced the offender for a number of offences. He did so by considering each offence separately and determining the appropriate sentence. As a consequence he imposed three sentences but suspended each. There was a Crown appeal. The Court held the discretion miscarried by this approach. It was held:

27 In my opinion this was an erroneous way of carrying out the task of sentencing the respondent. I do not believe that, in a case where the one offender is being sentenced for a number of offences, it can ever be appropriate to determine the sentence for each offence as if it were the only matter before the court. True it is that the court must decide the appropriate sentence for each offence independently and that the sentence for one offence cannot be increased simply because there happens to be other offences committed by the offender for which he or she is to be sentenced. But it does not follow that it is irrelevant to the determination of the sentence for one offence that the offender is before the court for sentence on other offences.

.....

29 But it is obviously relevant that the offender is before the court for sentence for more than one offence when the penalty for any individual offence is being determined. Clearly it may be a fact or circumstances relevant to the commission of a particular offence that, at or about the time

when that offence was committed, the offender committed other offences. It would be relevant, for example, to a finding whether the particular offence was an isolated "fall from grace" or whether it was merely an instance of a course of criminal conduct in which the offender was involved at the relevant time.

.....

33 So when a court is sentencing for multiple offences and before it imposes the sentence for any one offence, it will have considered the outcome for all offences. It will have done so for at least two reasons: firstly, in order to ensure that the court imposes sentences that fall within statutory limitations, that are consistent with sentencing principles and that do not conflict with one another. Secondly it will ensure that the overall sentence imposed reflects the overall criminality of the offences before the court.

### **Offences**

#### **Child sexual offences**

26 In **CTM v R** [29] the Court had to consider the effect of the repeal of s 77(3) of the **Crimes Act**. That section provided a defence to certain child sexual assault offences where the complainant was consenting, was over the age of 14 and the accused believed that she was over the age of 16 years. The question was whether the repeal of that section meant that the offences to which it applied were thereafter absolute liability offences or whether the common law defence applied.

27 The Court held that, after the repeal, child sexual assault offences were offences of absolute liability so far as the accused's belief in the age of the child was concerned. The decision was based largely on a consideration of the history of sexual assault offences in this State and anomalies that would follow if the common law defence arose for some offences and not others. Although the decision was actually concerned with one offence, an offence created at the time of the repeal of the defence provisions, it is clear that by analogous reasoning it applies to all child sexual assault offences.

### **Practice and procedure**

#### **Nature of appeal from Local Court**

28 In **Charara v R** [30] the Court of Criminal Appeal considered the nature of an appeal from the Local Court to the District Court. It had generally been considered, at least by District Court judges, that an appeal against conviction was in the nature of a complete rehearing of the charge only restricted to the evidence before the magistrate. It was only with leave that the appellant could supplement the evidence in the Local Court. It was also accepted, even by eminent authors of a certain service, that the magistrate's reasons were not part of the transcript upon which the District Court appeal was determined. However, the Court, having considered the amendments brought about by the **Justices Legislation Amendment (Appeals) Act** 1998, determined that the appeal to the District Court was a rehearing in the sense that Court of Appeal determines matters by rehearing.

29 The significance of this is that there is an additional burden on magistrates to give reasons for decisions to convict a defendant and in particular to make credit findings and the reason for those findings very clear. Those findings will generally bind the District Court judge where the witness has not been called in the District Court. The District Court judge does not simply determine whether the magistrate erred but has to rehear the matter by forming his or her own view on the evidence taking into account the magistrate's reasons where appropriate: see **Wood v DPP** [31].

### **Authority of prosecutor**

30 In **Sasterawan v Morris** [32] a question arose as to the authority of an officer of the Ministry of Transport to issue a court attendance notice (CAN) for three offences against s 178BB of the **Crimes Act**. The defendant was a taxi driver accused of altering cab charge dockets. He was convicted in the Local Court and appealed to the District Court. A case was stated to the Court of Criminal Appeal as to the validity of the CAN.

31 It was held that the CAN was valid. Basten JA stated:

17 The provisions relied on were ss 14, 172, 173 and 174 of the Criminal Procedure Act 1986 (NSW). It is convenient to commence with s 172, which provides that proceedings for an offence are to be commenced "by the issue and filing of a court attendance notice in accordance with this Division": s 172(1). The following two sections then provided, as in force in March 2004:

**"173 Commencement of proceedings by police officer or public officer**

If a police officer or public officer is authorised to commence proceedings for an offence against a person, the officer may commence the proceedings by issuing a court attendance notice and filing the notice in accordance with this Division.

**174 Commencement of private prosecutions**

(1) If a person other than a police officer or public officer is authorised to commence proceedings for an offence against a person, the person may commence the proceedings by issuing a court attendance notice, signed by a registrar, and filing the notice in accordance with this Division."

18 The intention of ss 173 and 174 was to require that a notice, issued otherwise than by a police officer or public officer with authority to do so, must be issued by the registrar. The registrar must be satisfied that the notice discloses grounds for the proceedings, that it is in the appropriate form and that no ground for refusal, identified in the rules, is applicable: s 174(2).

19 The provisions set out above are found in Chapter 4, Part 2, Division 1 of the Criminal Procedure Act. The other relevant provision, s 14, is found in Chapter 2, Part 1 and provides:

**"14 Common informer**

A prosecution or proceeding in respect of any offence under an Act may be instituted by any person unless the right to institute the prosecution or proceeding is expressly conferred by that Act on a specified person or class of persons."

20 The case for the prosecutor was quite simple: she asserted that her authority to commence proceedings was derived from s 14, she being a person and a prosecution under s 178BB of the Crimes Act 1900 (NSW) not being the subject of any restriction requiring it to be instituted by any particular person or class of persons. Further, she, being a public officer, was entitled to commence proceedings by issuing the court attendance notice in her own name, pursuant to s 173.

32 As to the argument that the officer did not have authority to commence the prosecution, Basten JA held:

22 ..... Section 14 is unambiguous and clear in the breadth of its operation. There is no basis for reading it down to exclude from the concept of "person" those persons who may happen to be police officers or public officers. Similarly, the purpose of ss 173 and 174 is also clear. Those provisions say nothing about the source of authority to institute proceedings: each commences with the conditional, 'if ... is authorised to commence proceedings'. The purpose is to place a control on persons other than police and public officers, no doubt to ensure that members of the public are not vexed by private prosecutions which have no proper basis in law, being a control placed in the hands of a registrar. Each of ss 14, 173 and 174 is qualified to reflect the fact that some statutory offences, including some which arise under the *Crimes Act*, are subject to

restrictions on authority to prosecute for their contravention: see, eg, *Crimes Act*, s.338 (perjury).

23 There is no qualification in relation to persons who may prosecute for breaches of s 178BB of the *Crimes Act*. Accordingly, any person may commence proceedings for such an offence, pursuant to s 14 of the *Criminal Procedure Act*. If the person who in fact commences proceedings is a public officer, as the prosecutor in the present case was, the procedure for issuing a court attendance notice, pursuant to s 173 of the *Criminal Procedure Act*, is available.

33 The Court noted that the wording in s 14 had been changed after the commencement of the prosecution by the addition of the words “under section 14 of this Act or under any other law” after the word “authorised” in s 173. It was left open whether s 16 of the ***Criminal Procedure Act*** would have cured the defect even had the officer not been authorised.

#### Statement of charge

34 There has been a somewhat vexing question of the extent to which a charge is required to contain particulars of the offence alleged. The matter was recently considered in ***R v Lodhi***[33]. There an indictment alleging terrorist offences under the ***Criminal Code (Cth)*** was held to be defective in that the charges failed to state particulars relating to the “terrorist act” alleged and that were essential factual ingredients of the charge. This was notwithstanding s 11 of the ***Criminal Procedure Act*** that in effect provides that it is sufficient if a charge is described in the words of the provisions creating the charge and s 16 which provides that certain defects will not render a charge bad.

35 In ***Knaggs v DPP***[34] the Court of Appeal considered the validity of a CAN for an offence of assault occasioning actual bodily harm. On the form in the box for the details of the offence it stated:

“Crimes Act 1900, Section 59(1) – T2 Law Part Code 243  
Assault occasioning actual bodily harm  
Between 8:00 am and 5:30 pm on 24/03/2005 at Potts Point.  
did assault Ann TEESE thereby occasioning actual bodily harm to her.”

36 The claimant was convicted in the Local Court and again on an appeal to the District Court. He sought prerogative type relief against both the magistrate and the judge. It was argued that the CAN was defective in that it failed to comply with s 175(3)(b) of the ***Criminal Procedure Act*** in that it failed to “briefly state the particulars of the alleged offence” in accordance with that section. It was argued that, as there are many ways in which the offence could be committed, the notice should have indicated how it was alleged the claimant had assaulted the complainant and how she was injured. According to the claimant the notice should have said:

“The accused threw a television set at the face of the said Ann Teese in the accused’s office, which struck her on her raised arms, and he then seized her just below both elbows and pushed her against a wall of the office, causing bruising and contusions to her arms and head.”

37 Campbell JA stated:

39 The requirement created by section 175(3)(b) is an imperfect obligation, in the sense that it does not make express provision for the consequences of failure to comply with it. Nothing in the statute states that proceedings purportedly commenced without complying with section 175(3)(b) will be invalid or a nullity or in any other way of no effect. Thus, it is only if there is a necessary implication to that effect that such a consequence will arise.

40 In a situation like the present, where it is not alleged that the CAN fails to identify all the elements of an offence, I do not find in the statute any

necessary implication that any failure of the CAN to “briefly state the particulars of the alleged offence” should result in either the CAN, or a conviction in proceedings begun by the CAN, being void.

38 In relation to s 12 of the **Criminal Procedure Act**, a section that allows for short form of charges, his Honour stated:

44 Each of section 12(1), (2) and (3) uses (through differing grammatical cognates) two different notions – that of stating the offence, and that of describing the offence. Those verbs are precisely the ones used in section 175(3)(a) and (b). As well, section 12(1) and section 175(3)(b) both contain the notion of brevity or shortness. In section 175(3)(b), “briefly” is an adverb that qualifies the requirement to “state the particulars of the alleged offence”. I recognise that section 12(1) is concerned with stating or describing the offence itself, while section 175(3)(b) creates an obligation to state “the particulars of” the offence. Even so, it seems to me that section 12(1) can cast light upon the degree of specificity with which an offence needs to be described and particularised in the CAN. That light is cast in an imprecise way, through creating an impression that the shade of meaning to be attributed to the general words of section 175(3)(a) and (b) is at the less elaborate rather than the more elaborate end of the spectrum of meanings that those general words can bear. The way one gains this sort of impression about shades of meaning falls well short of a rigorous logical process. However, alertness to nuances of meaning and shades of language is a legitimate part of the task of construing the statute as a whole, and having regard to the scope and object of the whole statute. It is one part, though in the present case is not a sufficient part, of deciding whether there is any necessary intendment in the Criminal Procedure Act that a CAN that does not comply with section 175(3)(b) is invalid.

39 Campbell JA considered the line of authority that was concerned with the provisions of particulars in an information including **John L Proprietary Ltd v The Attorney-General for the State of New South Wales**[35] and **Stanton v Abernathy** [36] and then stated:

83 It follows that, under the law that applied before the introduction of section 175 Criminal Procedure Act, a failure to supply particulars in an information did not invalidate any proceedings commenced by that information. As the apparent intention of the legislature in enacting section 175(3)(b) was not to alter the pre-existing state of affairs under the Justices Act concerning the contents of informations, this consideration of the pre-existing law leads to the same conclusion as I have arrived at from a construction of the relevant provisions of the Criminal Procedure Act considered in isolation.

40 The issue was more recently considered in **Rockdale Beef P/L v Industrial Relations Commission** [37]. The case concerned charges under the **Occupational Health and Safety Act**. The judge dismissed one of the charges and ruled that it would be an abuse of process to proceed with the other. Ultimately the matter came before the Court of Appeal where declarations were sought, one being that one of the charges was defective in that it failed to plead an essential element of the offence. After referring to the relevant provisions of the **Criminal Procedure Act** and decided cases on the issue of whether the failure to state an ingredient of an offence was a defect curable under s 16, Basten JA, with whom Mason P agreed, stated:

122 At a time when the trial court lacked an express power to amend an information, there was an important distinction to be drawn between the provision of particulars (which could be ordered) and amendment of the information itself. That distinction is no longer of importance and s 16(2) should not be read down as if it were. Rather, the relevant principle is that there may be defects which are capable of remedy and defects which are

not. The appropriate classification should be considered on a principled basis, and not by use of labels, seeking to distinguish between “essential legal elements” and “essential factual particulars”. Cases where an objection in relation to the specification of an essential element of an offence has been upheld, in circumstances where a legislative regime exists, equivalent to that under the *Criminal Procedure Act*, were not identified in the course of the present proceedings. None of the cases discussed so far was such a case. However, an example, referred to by Sperling J in *Taylor*, was *Ex parte Thomas; Re Otzen* (1947) 47 SR(NSW) 261. That case involved an offence under the National Security Regulations, by supplying a declared service at a price exceeding the maximum permitted under the regulation. The Full Court held that the charge of supplying bottled beer together with corkage for an undivided remuneration (at a rate above the maximum rate) was not an offence under the regulation. Jordan CJ stated (p 263):

“It was sought to get over this by appeal to s 65 of the *Justices Act*, 1902, and a contention that there had been a mere variance. But it has been decided over and over again that a person cannot be convicted upon an information that does not charge an offence, and that s 65 does not meet such a case: *Ex parte Lovell* ... . The proper course, when this occurs is to amend the information so as to make it allege an offence known to the law and triable before the magistrate; and for the magistrate then to allow any adjournment reasonably necessary to give the defence an opportunity of meeting the charge.”

To the same effect, Davidson J stated (p 265):

“The further contentions were submitted first, that there was merely a variance which was cured by reason of ss 65 and 115 of the *Justices Act*; ... .

As to the first of these points, however, the section relied upon does not warrant a conviction for an offence that does not exist and the magistrate stated the effect of his order in the precise terms of the information: *Ex parte Lovell* ... . If it had really been intended to rely upon proof of a sale, there should have been an amendment and then if desired by the defendant an adjournment to enable him to raise his defence completely to that charge.”

Street J agreed with the Chief Justice.

123 These remarks are inconsistent with the proposition that a failure properly to plead the elements of an offence necessarily rendered the information invalid. Indeed, the power of “amendment” itself may be inconsistent with such a conclusion. Accordingly, so long as a defect can be remedied by amendment, the informations are not “void” in the sense that the “defects cannot be removed by amendment or otherwise put aside”, adopting the terminology of Mahoney JA in *Boral Gas* at 518C-D, nor are the proceedings based on them a nullity.

41 After referring to the decision in *Knaggs* Basten JA stated:

130 That history demonstrates that it has long been sufficient to describe the nature of an offence by use of the statutory language: see ss 145A of the former *Justices Act* 1902 (NSW) and *Ex parte Lovell; Re Buckley* (1938) 38 SR(NSW) 153 at 174 (Jordan CJ, Davidson and Halse Rogers JJ agreeing) and now s 11. However, it does not follow that all the words of the statute must be used, nor that, where the specific provision is adequately identified, all the legal elements must be expressly identified. For example, some may be necessarily implied from what is described, for the purposes of s 16(1)(b).

131 The fact that s 16(2) (and its predecessors) has been held not to apply in relation to necessary particulars, does not mean that it has no effect in relation to a statement as to the nature of the offence. In *Knaggs*, Campbell JA noted that the deficiencies in a court attendance notice could be "so gross that as a matter of construction s 16(2)(a) would be read as not applying to them": at [48]. That may be conceded, in circumstances where doubt is left as to the precise offence which is sought to be charged; but that is not this case. Where an offence is identified, in terms which admit of no uncertainty or ambiguity, it would be to ignore the purpose and intended effect of s 16(2) to find that proceedings had not been validly commenced because a phrase had been omitted which described a particular element of the offence which was in substance an extended description of the circumstances in which the section operated, rather than an additional element. In other words, the allegation that a person had control of plant used by people at work, the plant being identified as a drag chain conveyor, is not advanced by saying that the plant was controlled in the course of a business. However, if that were a defect and a matter of substance, it nevertheless fell within the literal terms of s 16(2).

132 More broadly, whether a defect is of a kind that might not be covered by s 16(2)(a) must be judged by reference to the purpose of the statutory requirements not complied with and the likely effect of the non-compliance in relation to the purpose for which the notice is given. If the notice could be read as not clearly identifying the offence charged, or at least "the nature of" that offence, in some material respect, the defect might be outside the scope of the remedial provision. The effect of s 16(2) may be seen to weaken the mandatory statutory requirement with respect to notice, by removing a basis of invalidity. However, its operation will not depend on the good faith of the prosecutor, but on the effect of the notice. The test for validity will differ from that applied in relation to privative clauses: see *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 616; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at [19]-[20] (Gleeson CJ) and [57]-[60] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). On the other hand, the construction to be given to s 16(2) will involve reconciliation between its terms and those of a provision imposing a requirement with which there has been defective compliance: c.f. *Plaintiff S157* at [69] and [77].

42 It should be noted that the Chief Justice was in the minority on this point and followed *Lohdi*. His Honour was of the view that the missing words amounted to a failure to plead an essential legal ingredient and was not saved by either s 11 or s 16(2) of the Act. He was of the opinion that the Industrial Court had no jurisdiction to hear the charge.

43 The situation would appear to be that s 16(2) can apply to save a charge even if there was a failure to state all the essential legal ingredients of the offence provided that an amendment of the charge would not result in a new charge being alleged or where there is no uncertainty or ambiguity or where certain ingredients can be inferred from what is stated in the charge. But there will be situations where the charge is so defective, for example where it is not obvious what offence is being alleged, where s 16(2) cannot be relied upon.

\*\*\*\*\*

#### END NOTES

1. Crimes (Sentencing Procedure) Act s 12(3) which states Part 4 of the Act does not apply.
2. *Ibid* s 99(1)(c)(ii)
3. *Ibid* s 99(5)
4. [2007] NSWCA 2
5. [2004] NSWSC 433.
6. (NSWCCA unreported, 14 July 1995)
7. [2006] NSWCCA 381; 167 A Crim R 159.
8. (2000) 49 NSWLR 383.



9. [2006] NSWCCA 381 at [41], 167 A Crim R 159.
10. [2007] NSWCCA 19
11. R v Sukkar [2006] NSWCCA 92 at [5].
12. [2007] NSWCCA 189
13. [2007] NSWCCA 14
14. [2006] NSWCCA 272, 164 A Crim R 481
15. [2007] NSWCCA 1
16. [2007] NSWCCA 130
17. [2006] NSWCCA 381; 167 A Crim R 159
18. (1986) 42 SASR 111
19. [2006] NSWCCA 302, 164 A Crim R 179
20. (1998) 194 CLR 610
21. [2006] NSWCCA 246
22. [2006] NSWCCA 389
23. [1999] NSWCCA 118
24. (NSWCCA, unreported, 28 February 1997)
25. R v Colgan [1999] NSWCCA 292 at [15].
26. [2006] NSWCCA 398
27. See R v Do [2005] NSWCCA 209
28. [2007] NSWCCA 55
29. [2007] NSWCCA 131
30. [2006] NSWCCA 244, 164 A Crim R 39
31. [2006] NSWCA 240.
32. [2007] NSWCCA 185
33. [2006] NSWCCA 121, 199 FLR 303
34. [2007] NSWCA 83
35. (1987) 163 CLR 508
36. (1990) 19 NSWLR 656
37. [2007] NSWCA 128.

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## Swearing in Ceremony of The Honourable Roderick Neil Howie QC

**THE SUPREME COURT  
OF NEW SOUTH WALES  
BANCO COURT**

**SPIGELMAN CJ  
AND THE JUDGES OF  
THE SUPREME COURT**

**Wednesday 11 October 2000**

### **SWEARING IN CEREMONY OF THE HONOURABLE RODERICK NEIL HOWIE QC AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES**

1 HOWIE J: Chief Justice, I have the honour to announce I have been appointed a Judge of this Court. I present to you my Commission.

2 SPIGELMAN CJ: Thank you, Justice Howie. Please be seated whilst the Commission is read. Principal Registrar, would you please read the Commission.

(Commission read).

3 Justice Howie, I ask you to rise and take the oaths of office; first the oath of allegiance and then the judicial oath.

(Oaths of Office taken).

4 Principal Registrar, I hand to you the oaths to be placed amongst the Court's archives. Sheriff, I hand to you the Bible so you may have the customary inscription placed in it in order that it may then be presented to Justice Howie as a memento of this occasion.

5 Justice Howie, on behalf of the Judges of the Court and on my behalf I wish you a very warm welcome to this Court. I look forward to many years of service with you. We will hear presently of your many years of service to the people in this State, particularly in the area of criminal law. I look forward to many years of contribution in that and other fields, particularly in the Court of Criminal Appeal.

6 THE HONOURABLE R J DEBUS MP ATTORNEY GENERAL OF NEW SOUTH WALES: Your Honour, as Attorney General and on behalf of the Bar and legal profession it is with great pleasure that I am able to congratulate you this morning on your elevation to the Supreme Court Bench.

7 Your Honour was born in Sydney and educated at Mortlake Public School and Homebush Boys' High School (as I was myself a few years earlier).

8 After leaving Homebush Boys' High, your Honour proceeded to Sydney University, graduating in Bachelor of Laws and Bachelor of Arts. At the age of twenty four your Honour worked as an articulated clerk and in 1974 you were admitted to practise as a solicitor. Your master solicitor was the well-known Bruce Holcombe, a partner in the firm of Hickson, Lakeman and Holcombe. (He had been my master solicitor a few years before.)

9 Throughout your time in that firm your Honour practised substantially in the areas of conveyancing and probate, a far cry from the criminal law with which you are today so closely identified.

10 In 1976 you took up a vacancy as a criminal law solicitor in the Public Solicitor's Office and remained in that office until 1980. In that time you acted as a duty solicitor in Courts of Petty Sessions and instructed Counsel in the District Court and the Court of Criminal Appeal.

11 During this period your Honour also returned to University and completed a masters degree in criminology.

12 In June 1980 you were admitted to the Bar and appointed as a Public Defender. You served in this pivotal role in the administration of criminal justice in New South Wales between 1980 and 1984. During this period you represented accused persons in District Court trials, the Common Law Division of the Supreme Court and in appeals to the Court of Criminal Appeal and the High Court.

13 Between 1984 and 1987 you were the Director of the Criminal Law Review Division of the Attorney General's Department and your particular responsibilities during that period included formulation of the Drug Misuse and Trafficking Act, the Director of Public Prosecutions Act, the Criminal Procedure Act as well as major reforms to the Justices Act and the Crimes Act.

14 In November 1986 you were appointed Queen's Counsel and between July 1987 and May 1993 you were the Deputy Director of Public Prosecutions.

15 May 1993 and May 1996 you worked as the Crown Advocate where you were greatly valued for your depth of knowledge of criminal law and procedure.

16 During your career at the Bar you appeared in many notable cases either for the defence or the Crown. These include Veen No. 2, McKinney, Maxwell and Taikato.

17 Your Honour has also been attracted to legal writing. Your Honour's work with Peter Johnson in authoring Butterworth's Criminal Practice and Procedure in New South Wales saw that service outstrip any potential rival for accuracy and comprehensiveness. Your Honour was also the major contributor to the section of Halsbury's Laws of Australia on Sentencing and Criminal Procedure.

18 Music has also played a practical as well as aesthetic role in your Honour's life. It proved to be a useful fall-back source of income when you needed to finance your way through University. At that time I am informed you played a double bass in a dance band. Your Honour is also an accomplished pianist, fully entitled to put the letters AMSA after your name. At an early stage of your career you also played the cello with a considerable degree of accomplishment.

19 Another particularly interesting phase of your Honour's life, again reflecting your deep interest in music, revolved around a quite different instrument, the bag pipes. This was I suppose a predictable reflection of your Scottish background and you played that instrument in the Sydney University Regiment Pipe Band, although I am bound to say this is an area in which your Honour's earlier career had absolutely no resemblance to my own.

20 Your Honour has a distinguished academic record. You hold Bachelor degrees in Arts and Law from the University of Sydney, together with a Master of Laws with First Class Honours. In proceeding to the last degree you received the J H McClemens Prize for criminology and the Law Graduates Association Prize Medal, this being awarded to the most outstanding graduate in the Masters of Laws degree.

21 Legal administration in this State owes your Honour an enormous debt. Your extensive knowledge of criminal law and procedure has assisted countless Public Defenders and Crown Prosecutors. You have played a major role in the formulation and development of law reform proposals in the Criminal Law Review Division of the Attorney General's Department as Crown Advocate, as a member of the Justices Act Review Steering Committee and as Chairperson of the Model Criminal Code Officers' Committee. Your skill in drafting instant and plausible responses to extract Attorneys General, Directors of Public Prosecutions and others from sticky situations is

legendary. All these skills combine to make you an outstanding advocate.

22 Your Honour was, in recognition of the skills I have referred to, appointed as a Judge of the District Court of New South Wales on 15 May 1996, where your Honour has presided with both distinction and compassion.

23 Your Honour was also appointed as an Acting Judge of the Supreme Court of New South Wales between September and December 1997.

24 You bring to the Supreme Court Bench deep experience in the law, especially in the criminal law and administrative law. You also possess the personal qualities and ability desired of a Supreme Court Judge and I have every confidence that in that role your Honour will continue to preside with the integrity, fairness and independence you have so ably demonstrated in the District Court. I welcome your experience and expertise which I believe will enrich the Supreme Court Bench to the advantage of all those who appear before you.

25 Once again I congratulate you on your well-deserved appointment and wish you every success on the Supreme Court Bench.

26 MR J F S NORTH, PRESIDENT, LAW SOCIETY OF NEW SOUTH WALES: May it please the Court. Your Honour, on behalf of the Law Society of New South Wales it gives me great pleasure to congratulate you upon your appointment as a Judge of the Supreme Court of New South Wales.

27 Your Honour, in viewing your career to date it is evident that you have succeeded as a lawyer and Judge in both serving the community and further advancing the practise of law. As our Attorney has so ably pointed out this morning, you have enjoyed a remarkable breadth of experience during your career, not only as an academic but also as an articled clerk, a solicitor in private practice, a solicitor with the Public Solicitor's Office, a Public Defender, a barrister rising to the rank of QC, Director of the Criminal Law Division of the Attorney General's Department, Deputy Director of Public Prosecutions, appearing in all Courts up to the High Court.

28 As a Crown Advocate, Deputy Solicitor General, Acting Director of Public Prosecutions and latterly as a Judge of the District Court, and even as an Acting Judge of this Court it is easy to see why you have been appointed to this Court. It might be true to say that you have all bases covered.

29 My inquiries reveal a paucity of appeals from your Honour's decisions during the time you have been a Judge in the District Court and this is a positive indication as to the calibre of your Honour's decisions. As, no doubt, the Chief Justice has informed your Honour, there is much to be done in the Supreme Court. However between murder trials, complex drug matters and appeal matters, we trust you will find time to enjoy your favourite past time of scuba diving. I hear you particularly enjoy exploring old wrecks and that you have dived in many of the world's exotic dive locations. Although your wife tolerates this idiosyncrasy with great good humour, she positively supports your other passions - an interest in Middle Eastern archaeology and antique furniture. These pursuits have taken you both to many exciting places and countries and provided the foil necessary for an extremely busy and varied professional life.

30 Your Honour, on behalf of the Law Society of New South Wales, I congratulate you upon your appointment as a Judge of this Court. The Society wishes you every measure of success in your future work. May it please the Court.

31 HOWIE J: Thank you Mr Attorney and Mr North for your kind words to welcome me to this Bench and your generous statements in support of my appointment.

32 I believe that I would not be alone in judicial ranks in confessing that one of the most difficult and nerve-racking aspects of taking on judicial office is the necessity to make a speech at one's swearing

in. To parody Lady Brachnell, to have to do so once in one's life maybe regarded as a misfortune, but to be required to do so twice seems to look like carelessness.

33 I went to my swearing in at the District Court with very much the same mixed feelings of anxiety and excitement in which I find myself today. Fortunately, my concerns and apprehension about becoming a Judge of that Bench proved to be completely unwarranted. I relished my term as a District Court Judge and I have considerable regrets about leaving that Bench. In fact it proved to be the happiest and most rewarding period of my professional life.

34 Many of my misgivings about taking judicial appointment were dispelled on the day of my swearing in. I think one of the strengths of the District Court is the strong collegiate spirit and sense of camaraderie which exists between its Judges. I was from the outset warmly embraced as a valued member of the Court. I was overwhelmed with expressions of support and encouragement and genuine offers of assistance.

35 Since that day there have been innumerable occasions when I have sought advice from one or more of my fellow Judges. Very often it has been at lunch time at either one of the two common rooms. I cannot pretend that there has always been unanimity in the views expressed and I confess that there have been times, especially in the Downing Centre, when it has resulted in very lively debates indeed, some of which might not have assisted the task of the digestive juices.

36 But always those whom I asked were unstinting in their time and efforts to assist and they were able to draw on a profound knowledge of the law and often very many years of practical experience. I am honoured to have a number of my erstwhile brothers and sisters present today and I take the opportunity to acknowledge the debt that I owe and the high esteem in which I hold them.

37 There was also a lively social side to the membership of that Bench which I greatly enjoyed and which I believe contributed considerably to the sense of fellowship which I felt. The simple fact is I took considerable pleasure from the company of many of the Judges of the Court. I now count a large number of them as amongst my close personal friends and in that sense my life has been enriched by my period of membership of the District Court.

38 I enjoyed the challenge and stimulation that the variety and scope of the Court's jurisdiction offered. Even my occasional forays into the civil jurisdiction which I think initially alarmed Judge Garling, proved to be rewarding for me and perhaps even one or two plaintiffs along the way. I must, however, acknowledge my indebtedness to those members of the profession who showed such patience and, at times, persistence in endeavouring to aid me in my early days on the Bench and especially when hearing matters in areas of the law which were completely unfamiliar to me.

39 No doubt there will be occasions while on this Bench when I will find myself again in need of the same nurturing and guidance from those who have a specialist knowledge in some particular area of the law. If I receive the same assistance that I routinely received in the civil jurisdiction of the District Court, both I and this Court will be well served.

40 There are a large number of barristers and solicitors who have appeared in matters before me in the District Court but who, for one reason or another, do not routinely practise in the Supreme Court. I am aware there are a number of them present today, particularly from the public arm of the profession, both prosecution and defence. I thank them for the professional and competent manner in which they performed their functions before me.

41 My short period as a Judge so far has brought home to me the importance of the relationship between the legal profession and the Bench. I learned very quickly how much easier it is to administer justice and how much better that justice is likely to be if the Court is assisted by experienced and well-prepared legal practitioners on both sides of the Bar table. I was fortunate to have found myself in that position wherever in the State I was sitting.

42 The circuit work of the District Court was perhaps the most enjoyable aspect of my last four years. My wife and I will have fond memories of visiting towns and cities in this State which we had not found the time or perhaps inclination to visit before I was appointed. I was aware of some grumbling around the corridors of the John Maddison Tower that when I was doing circuit work I was frequently out of my depth and having difficulties keeping my head above water. But the fact that I often sat in

locations where I could indulge in my passion for scuba diving was purely coincidental. I think on my appointment to this Court there has been an audible sigh of relief that criminal sittings on the Eastern seaboard might now be freely available to other Judges.

43 Of course, those country sittings gave me the opportunity to become acquainted with many persons with whom I would never have come into contact but for being a District Court Judge. These people include members of the local legal profession, both private solicitors and those employed by the office of the DPP, court staff and sheriff's officers. At this time I wish to acknowledge the warmth with which my wife, my Associate and I were welcomed in each of those Courts and the assistance which I in particular received both on and off the Bench from the people I met in those places. Unfortunately, this Court does not generally sit in many of those locations and I sincerely regret I will not be able to renew both the professional and personal contact with many of those persons.

44 Of course, I come to this Bench with some foretaste of what lies ahead. I enjoyed the short period I spent as an acting Justice in 1996. I was fortunate enough to experience a range of work carried out by a Judge of the Common Law Division. I had the opportunity to sit on the Court of Criminal Appeal, preside over murder trials and spend one week as duty judge, which gave me the experience of being required to come into chambers one wet Sunday evening to determine an urgent but hopeless application for an injunction.

45 One aspect of criminal trial work I have yet to experience in this jurisdiction is taking a jury verdict. Quite extraordinarily, each of the four trials over which I presided as an acting Justice failed to reach the stage where the evidence was considered by the jury. In one case I was forced to discharge three separate juries, one after the other for quite different reasons. Hopefully the hex has been lifted from me over the intervening years and I can bring the trial which I am about to commence this afternoon to finality, whatever might be the result.

46 As was the situation with the District Court, I have fortunately come to this Bench being well acquainted with many members of this Court, some of whom were once colleagues of mine in one or other of the positions I have held in my career at the Bar. I look forward to the opportunity that will now present itself to renew those acquaintances and friendships and forge new relationships which, as I was already indicated, has been one of the most rewarding aspects of my period as a Judge so far.

47 I expect this appointment will bring with it new demands and challenges which I have not experienced before. I confess to not a little anxiety in that regard. However, I am fortified by the fact that I will be assisted and supported in meeting these tasks by my Associate, Patricia Hew, who was with me in the District Court and who has been prepared to accompany me to this Court. We have now worked together throughout the different offices I have held for the past twelve years and I would be lost without her. But I appreciate that she makes the change with her own regrets and at the risk of breaking ties and friendships which she forged amongst the Associates and staff of the District Court.

48 My parents, members of my immediate family and some of my closest friends both within and outside the legal profession are present today to mark this occasion. I acknowledge the important part these people individually and collectively have played throughout my private and professional life. I thank them for the warm enthusiasm with which they treated the news of this appointment and their attendance here today.

49 It has also been gratifying to receive so many letters, e-mails and phone calls from many Judges of the courts of this State and members of every aspect of the legal profession welcoming my appointment and offering words of encouragement and support. I thank all of them for taking the time and making the effort to convey their good wishes to me.

50 When I was sworn in as a District Court Judge I paid tribute to the person who had been prepared to bear the brunt of the difficulties and crises which so frequently appeared to me to arise during my career at the Bar. That person is, of course, my wife Kay. Thankfully, the road we have travelled together over the last four years has been a straight and smooth one. I think that it may well have been the first time that she was actually happy that she had married a lawyer. However, once more I wish to publicly acknowledge that her love, patience and support have enabled me to reach what I accept is the pinnacle of my legal career.

51 Finally, I thank you all for being present and helping to mark this occasion as a very special one.

