

Supreme Court of New South Wales Annual Conference

Criminal Law Update

The Honourable Justice R A Hulme

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

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

APPEALS

Crown appeal can create disparity

R v Green and Quinn [2010] NSWCCA 313 involved a bench of five considering a Crown appeal against sentences that were imposed upon the two respondents in the District Court. The sentence imposed upon a co-offender, Taylor, was not the subject of a Crown appeal. It became apparent that should the Crown appeal succeed, the respondents would argue disparity between sentences imposed on them when compared with the sentences imposed upon Taylor. In those circumstances, it was submitted that the appeal should be dismissed.

The appeal was allowed and the respondents re-sentenced. In the principal judgment of RS Hulme J (with whom McClellan CJ at CL generally agreed in a separate judgment; Latham J agreeing with both), it was held that the fact that allowing a Crown appeal would create disparity with a sentence imposed on a co-offender is not a bar to the appeal being allowed. RS Hulme J examined earlier decisions of the Court of Criminal Appeal in which Crown appeals were ultimately dismissed because of the disparity they would create if successful, but noted that the Court was not bound by its earlier decisions (*Jimmy v R* [2010] NSWCCA 60 at [126]). Reference should be made to the conclusions that were expressed (at [131] – [133]) after an analysis of sentencing principles and practical considerations. (On 24 June 2011 the High Court of Australia allowed an appeal and restored the sentences originally imposed. Reasons are to be given at a later date)

Extension of time to appeal

In **McCall v R [2010] NSWCCA 174**, the appellant was convicted and sentenced in late 2007. An application for extension of time to appeal against both conviction and sentence was filed on 23 December 2009. McClellan CJ at CL refused to extend the time to appeal against conviction but granted it in respect of sentence (because of the length of the 29 years 4 months sentence). The application in respect of conviction was refused on the basis of a finding that there was no satisfactory explanation for the delay and a lack of merit in the ground of appeal. Reference was made to *R v Lawrence* (1980) 1 NSWLR 122 in which the Court said (at 148, per Nagle CJ at CL and Yeldham J) “where any considerable delay has occurred, *exceptional circumstances* will be required before the appeal is permitted to proceed” (emphasis added).

In the subsequent decision of **Arja v R [2010] NSWCCA 190**, Basten JA referred (at [5]) to the reference to “exceptional circumstances” as undesirable as it suggested the imposition of a fetter on the exercise of discretion which is not to be found in the statutory scheme.

Constitutional validity of s 68A Crimes (Appeal and Review) Act 2001

Director of Public Prosecutions (DPP) (Cth) v De La Rosa [2010] NSWCCA 194 concerned a Crown appeal in respect of a Commonwealth drug importation offence. An issue arose as to whether s 16A of the *Crimes Act* 1914 (Cth) and s 68A of the *Crimes (Appeal and Review) Act 2001* (NSW) were inconsistent for the purposes of s 109 of the Constitution. That is, as s 68A removes any consideration of “double jeopardy” in relation to a Crown appeal against sentence (including consideration of distress and anxiety to which all respondents to a Crown appeal are presumed to be subject: *R v JW* [2010] NSWCCA 49), the question was whether it was contrary to s 16A(2)(m) which requires the sentencing court to have regard to the “mental condition” of the offender. It was held that there was no such inconsistency because s 68A is not to be construed as operating of its own force to sentencing for Commonwealth offences. McClellan CJ at CL (with Simpson J and Barr AJ agreeing) held (at [174] – [178]) that aside from s 68A, the “mental condition” of an offender must still be considered when re-sentencing as part of a Crown Appeal.

Court undertaking its own research

De La Rosa is also notable for an issue concerning the Court carrying out its own research. The Court requested assistance from the parties in identifying cases in which sentences had been imposed for similar offences throughout Australia. In response, the parties referred the Court to a relatively small number of such cases. McClellan CJ at CL conducted his own research and located another 78 decisions. Further submissions were invited from the parties. Different views were expressed in the judgment regarding the appropriateness of the course taken.

Allsop P (at [71]) said that neither party put any submission against the Court undertaking research and so there was no need to definitively deal with the issue. It would appear, however, that he was not necessarily convinced that such a course was appropriate in the context of a Crown appeal. Basten JA (at [73] and [129]) was of the view that the course taken was inappropriate and demonstrated a departure from established practice in relation to the proper role of an intermediate criminal appeal court. The Court should not have required the parties to have undertaken further research and should not have

engaged in further research itself. If the prosecutor's case was inadequate, the appeal should have been dismissed on that basis. However, Simpson J expressed the view (at [283] – [290]) that on occasion it is both appropriate and desirable that the court undertake its own research, especially in circumstances where the Court does not receive adequate assistance.

Conviction appeal from a judge alone trial where it is contended that the verdict is unreasonable or cannot be supported

In **Arun v R [2010] NSWCCA 214**, consideration was given to the principles to be applied in an appeal against conviction where it is contended that a verdict of guilty is unreasonable or cannot be supported, having regard to the evidence. Hall J (at [50] – [56]) referred to a number of authorities on the point before confirming that the Court can only intervene if, after making its own independent assessment of the evidence, it concludes that it was not open for the trial judge to have been satisfied beyond reasonable doubt of the guilt of the appellant. In undertaking that task, the credibility findings of the trial judge with respect to witnesses remain significant.

What constitutes a ruling "on the admissibility of evidence" under s 5F(3A) of the Criminal Appeal Act 1912

In **R v Jennings [2010] NSWCCA 193** the trial judge ruled that certain evidence could be used as tendency evidence but later revoked that ruling. The Crown appealed pursuant to s 5F(3A) of the *Criminal Appeal Act 1912*. A question arose as to whether a ruling revoking an earlier ruling was "on the admissibility of evidence" pursuant to s 5F(3A). The appeal was allowed because the trial judge had misconstrued the meaning of "prejudicial effect" in s 101 of the *Evidence Act 1995*. On the preliminary point, the respondent contended that the evidence had been admitted and the Crown's complaint was only as to its use. Latham J referred (at [18]) to the judgment of Howie J in *R v Harker [2004] NSWCCA 427* at [32]. Her Honour concluded that the trial judge's ruling was "in respect of the admissibility of evidence" and thus amenable to a s 5F(3A) appeal.

Conviction appeals in circumstances where the court has already ruled on an issue under s 5F of the Criminal Appeal Act 1912

The trial judge in **DAO v R [2011] NSWCCA 63** ordered that the accused be tried on an indictment containing allegations made by three separate complainants. The accused appealed under s 5F. A five judge bench was convened (Spigelman CJ, Allsop P, Simpson, Kirby and Schmidt JJ). In considering whether to grant leave to appeal, consideration was given to whether arguments advanced by the applicant and decided adversely on a s 5F appeal could be considered in any subsequent conviction appeal. Different views were expressed.

Spigelman CJ (at [15]) was of the view that a decision under s 5F does not preclude further consideration of the same issue under ss 5(1) and 6(1) of the Act. Allsop P expressed the view, inter alia, (at [107]) that his reasons for dismissing the appeal "should not have an effect on the scope of any argument or issues in any appeal under ... ss 5 and 6". He found it unnecessary to decide the relationship, if any, between reasons for dismissal of a s 5F appeal and the disposition of any final appeal under ss 5 and 6. Simpson J, however,

disagreed with Spigelman CJ and said that “once leave is granted, the Court has before it an appeal in the usual way” (at [206]). Her Honour felt that “a real question exists as to whether, if leave is granted, and the appeal dismissed, that issue is foreclosed, in the event of conviction, from any appeal against that conviction” (at [207]). Schmidt J (at [213]) was of the view that if the same issue as to admissibility of evidence be raised in a post-conviction appeal, considerations of issue estoppel would appear to arise for consideration.

DAO v R is also significant for its consideration of the principles guiding the review by the Court of Criminal Appeal of a trial judge’s decision under ss 97 and 101 of the *Evidence Act* 1995. The court examined the conflicting authorities on the subject and held that such a review should follow the principles stated in *House v R* (1936) 55 CLR 499 and not the approach first raised in *Warren v Coombes* (1979) 142 CLR 531.

Does an assertion of manifest inadequacy of a sentence raise a question of law alone?

The prosecutor in ***David Morse (Office of State Revenue) v Chan and Anor* [2010] NSWSC 1290** brought an appeal to the Supreme Court against sentences imposed in the Local Court on the ground that the sentences (s 10 bonds) were manifestly inadequate. Other grounds were that the magistrate failed to have sufficient regard to a potentially aggravating factor and failed to have sufficient regard to the principal of totality. The appeal was brought pursuant to s 56 of the *Crimes (Appeal and Review) Act* 2001 which provides for such an appeal to the Supreme Court “but only on a ground that involves a question of law alone”. (There is a general provision for prosecution appeals against inadequate sentences from the Local Court to the District Court in s 23 of the Act). It was common ground between the parties that the appeal raised questions of law alone. Reliance was placed upon *Road and Traffic Authority of New South Wales v Fletcher International Exports Pty Ltd* [2008] NSWSC 936. However, Schmidt J referred to a number of subsequent authorities (*R v PL* (2009) NSWCCA 256; 199 A Crim R 199 and *Kostas v HIA Insurance Services Pty Ltd t/as Home Owners Warranty* [2010] HCA 32) before concluding that none of the grounds of appeal raised a question of law alone.

Stated case procedure under the Criminal Appeal Act 1912

It is beyond the scope of this paper to refer at any length to ***Talay v R* [2010] NSWCCA 308**. However it should be noted as a useful resource in relation to the correct procedure to be followed in invoking the stated case procedure in s 5B(2) of the *Criminal Appeal Act* 1912.

The meaning of ‘some other sentence’ under s 6(3) of the Criminal Appeal Act 1912

In ***McMahon v R* [2011] NSWCCA 147**, a severity appeal in respect of sentences imposed for 81 offences, the Court was invited to determine the interpretation of the phrase “some other sentence” in s 6(3) of the *Criminal Appeal Act* 1912. Different views had been expressed by Basten JA and Price J in *Arnaout v R* [2008] NSWCCA 278; (2008) 181 A Crim R 149 as to whether the phrase referred to the individual sentences or to the overall effective sentence. As the appeal in *McMahon v R* was dismissed it was unnecessary for the issue to be resolved. However, Hodgson JA did note (at [3]) that even if the phrase referred to each individual sentence, it was not correct to say that the Court, in considering whether some other sentence is warranted, could not take into account other sentences imposed on the appellant. In support of this proposition his Honour provided some examples, including where the appeal

raises questions of concurrency or accumulation, and where other sentences are directly relevant to the criminality of the particular offence (i.e. a planned ongoing criminal activity). His Honour further noted (at [4]) that where an appeal is successful in showing error in one sentence but the practical result is that there would be no change in the total sentence, the court could refuse leave to appeal.

Erroneous consideration of a ground asserting that a verdict was unreasonable and not supported by the evidence

In **SKA v The Queen [2011] HCA 13**, the appellant was convicted of a number of counts of sexual assault against a child. He appealed to the Court of Criminal Appeal on the ground that the verdicts of the jury were unreasonable and not supported by the evidence but the appeal was dismissed.

There was a real issue in the trial as to when two of the offences were alleged to have incurred. The indictment alleged a period of 25 days but the complainant suggested, without being dogmatic, that they occurred on a particular day. SKA adduced alibi evidence that accounted for his movements on that day and the days either side of it. The Court of Criminal Appeal did not make any finding as to when the offence had occurred. It did find that the complainant's evidence, if accepted, was sufficient to enable the jury to conclude that the offence had occurred. It was concluded that it was open to the jury to arrive at the verdicts that it did. Simpson J added, "to the extent that it is relevant, I would also be satisfied beyond reasonable doubt, on the evidence, that the [applicant] committed each of the offences charged."

An appeal to the High Court was upheld by a majority (French CJ, Gummow and Kieffel JJ). It was held that there had been a failure to determine the issue as to when the offences in question occurred and then to adequately evaluate the competing evidence which was the task required in determining whether the verdicts were unreasonable or unsupported.

Two other issues were considered in SKA: (a) whether the Court of Criminal Appeal was in error in not viewing a recording of the police interview of the complainant which amounted to the complainant's evidence in chief; and (b) whether regard should have been had to a report by the trial judge. As to (a), it was held that it was correct for the Court to have not viewed the recording. As to (b), it was said that a report by a trial judge should be confined to matters that are not apparent from the record. The judge's view of the evidence was irrelevant when it was the task of the Court to make its own assessment.

DEFENCES

Automatism and unsound minds

Woodbridge v R [2010] NSWCCA 185 raised for consideration the meaning of sane, as opposed to insane, automatism and what constitutes an unsound mind, a disease of the mind, or insanity. The case involved motor manslaughter. The appellant's version was that she was intoxicated at the time of driving because she had commenced drinking excessively after receiving distressing telephone calls from her ex-husband. Psychiatrists gave evidence for the Crown and the defence.

Professor Quadrio, called by the defence, said the appellant was in a state of dissociation at the time of driving and that this was triggered by her reaction to the phone calls. She opined that the appellant suffered from a major depressive disorder, a dissociative disorder, a post-traumatic stress disorder and a cluster B personality disorder. She was of the view that the appellant had manifested symptoms of these disorders for some time. In her opinion, the case involved *sane automatism*, which she said was generally a product of external stimuli, whereas insane automatism was not. She was also of the view that it was not a case of insane automatism because the mental disorders were not mental illnesses or conditions that constituted insanity. She regarded the latter as encompassing psychotic disturbances such as schizophrenia and bipolar disorders.

On the other hand, Dr Allnutt was of the view that if the appellant was acting in an automatic state at the time of driving, the case was one of *insane automatism*. The trial judge withdrew sane automatism from the jury and that constituted the ground of appeal.

Davies J held that the trial judge was correct to withdraw sane automatism. On the difference between the two forms of automatism he referred to a number of authorities, but most particularly to *Radford v R* (1945) 42 SASR 266 where King CJ, in a passage subsequently approved by the High Court in *R v Falconer* (1990) 171 CLR 30, described the distinction being “the reaction of a unsound mind to its own delusions or to external stimuli on the one hand and the reaction of a sound mind to external stimuli, including stress producing factors, on the other hand”. Adopting that distinction Davies J concluded that Professor Quadrio’s understanding of the concept was incorrect.

Davies J also held that the professor was wrong on the question of whether a mind is sound or unsound. He noted that what constitutes a mental disease or natural mental infirmity is a matter of law: *R v Falconer* per Deane and Dawson JJ at [60]. After referring to other authorities, Davies J (at [92]) concluded that the expression “disease of the mind” is not to be narrowly construed and is not restricted to the psychotic disturbances of which the professor had spoken. “The expression encompasses a temporary mental disorder or disturbance prone to recur. The dichotomy is not between a mind affected by psychotic disturbances and a mind affected by less serious ailments but between those minds which are healthy and those suffering from an underlying pathological infirmity”.

Provocation – suddenness and temporariness of loss of control

In ***Pollock v R* [2010] HCA 35**, the appellant was convicted of murder, having unsuccessfully raised the partial defence of provocation. The trial judge directed the jury that the prosecution would have succeeded in excluding provocation if it established any one of seven matters. The fifth was “the loss of self-control was not sudden” and the seventh was whether there had been time for the loss of self-control to abate by the time of the killing. The directions were consistent with authority in the Queensland Court of Appeal. The High Court held that the directions wrongly invited the jury to exclude provocation if they had found there had been any interval between the deceased’s provocative conduct and the act causing death. It was held (at [54]) that the law requires the killing occur while the accused is in a state of loss of self-control that is caused by the provocative conduct, but this does not necessitate that the provocation is excluded in the event that there is any interval between the provocative conduct and the accused’s response to it. The explanation provided by the trial judge of the

word 'sudden' contained within the fifth direction, erroneously invited the jury to exclude provocation on the basis of there being some delay in the response by the accused. Similarly, the focus on time in the seventh direction had the potential effect of diverting the jury's attention away from the central determination.

EVIDENCE

"Fresh in the memory" in s 66 of the Evidence Act 1995

In ***R v XY [2010] NSWCCA 181***, it was alleged that the accused committed four offences of sexual intercourse with a child under the age of 10 in a period from June 2003 to September 2005. Evidence of complaints by the complainant to a friend in late 2007 and to his parents in June 2009 was held to be inadmissible as they were not made at a time when the occurrence of the asserted fact was fresh in his memory. The trial judge referred to discrepancies as to when the offences occurred, and the period over which they occurred and held that for reasons of such "inexactness" it was difficult to know how much time elapsed from the occurrence of the alleged offences and the making of the complaints. Accordingly, there was uncertainty as to whether the incidents were "fresh in the memory".

The Crown successfully appealed pursuant to s 5F(3A) of the *Criminal Appeal Act 1912*, contending that the judge had misconstrued s 66(2A) of the *Evidence Act 1995*. Whealy J held that the phrase "fresh in the memory" is no longer to be taken as an indication that it means "recent" or "immediate" (as was the position in *Graham v R (1998) 195 CLR 606*, prior to the insertion of s 66(2A)). The "nature of the event concerned" is now an important consideration in the factors to be considered. In this case the representations to the friend and to the complainant's parents were sufficiently detailed and consistent with the account he had provided to the police shortly after the latter to indicate that the events were indeed "fresh in the memory" on both occasions.

Admissibility of recorded evidence of complainant at special hearing

In ***EK v R [2010] NSWCCA 199***, an issue arose as to whether evidence given by a complainant during trial proceedings (which were ultimately aborted) could be tendered pursuant to s 306I of the *Criminal Procedure Act 1986* in a subsequent special hearing. The appellant contended that a special hearing was not a trial, and that the section only enabled the prosecutor to tender the recording in "new trial proceedings". Simpson J found that the evidence was admissible. Section 21(1) of the *Mental Health (Forensic Provisions) Act 1990* provides that a special hearing is to be conducted "as nearly as possible as if it were a trial of criminal proceedings". It follows, in the absence of any compelling reasons to otherwise find, the evidentiary rules applicable to a "new trial" (including s 306I) apply to a special hearing.

Privilege against self-incrimination when party giving evidence in chief

In ***Song v Ying [2010] NSWCA 237***, Hodgson JA held that a party to proceedings, who gives evidence in chief in response to questions from that person's lawyer, and who wishes to give that evidence but only after a certificate under s 128 of the *Evidence Act 1995* has been granted, does not "object" to giving that evidence within the meaning of s 128(1). This is because there is no element of compulsion or potential compulsion which makes the

expression “objects” apposite. It follows that s 128 cannot be relied upon in such circumstances to obtain a certificate against self-incrimination.

Relevance of bullets found in a car in which there were drugs alleged to be in the driver’s possession for supply

The appellant in ***Radi v R [2010] NSWCCA 265*** was charged with an offence of supplying a commercial quantity of a prohibited drug. The drugs had been found in his car together with four mobile phones, \$2800 in cash and a box of bullets. No firearm was found. The appellant denied possession of the drugs and denied knowledge of the presence of the bullets. It was contended on appeal that the evidence concerning the bullets was not relevant and should not have been admitted because it disclosed only a tendency to engage in some irrelevant criminal behaviour. Reliance was placed on *Thompson and Wran v R [1968] HCA 21; 117 CLR 313*. The appeal against conviction was dismissed. Hoeben J held that the evidence of the finding of the box of bullets was relevant because it constituted an indicium of the offence with which the applicant had been charged. It had been implicitly accepted by the appellant that if a firearm had been found, then evidence of such would have been admissible. Hoeben J could not see any real distinction as both a firearm, and bullets which could only be used in a firearm, had the same relevance. In separate judgments, Simpson J and I provided slightly different analyses leading to the same conclusion.

DNA evidence - description of statistical conclusions

The appellant in ***Aytugrul v R [2010] NSWCCA 272*** was linked to a murder by a strand of hair found on the body of the deceased. DNA recovered from the hair matched the appellant’s DNA. The significance of the evidence was explained to the jury in two ways: “random occurrence ratios” and “exclusion percentages”. The former involved evidence that 1 in 1600 people had the same DNA profile. The latter involved the description that 99.9 per cent of people not be expected to have that DNA profile. Simpson J, with whom Fullerton J agreed, referred to the contention that the evidence should have been rejected pursuant to either s 135 or s 137 of the *Evidence Act 1995*. There was no question that the evidence of the DNA analysis was correctly admitted. What was in contention was the interpretation of the evidence. Both of the formulations were mathematically accurate. Accordingly, Simpson J held that either forms of interpretation of the evidence were appropriately before the jury.

McClellan CJ at CL dissented. He regarded the expression of the interpretation of the evidence by way of exclusion percentages as being “too compelling” (at [99]). In his Honour’s view this involved prejudice which substantially outweighed the probative value of the evidence. On the other hand, Simpson J posed the question (at [177]) “how can evidence expressed in one way be such as not to attract the operation of s 135 or s 137 ... but, when expressed in another way, become unfairly prejudicial?” (On 2 September 2011 the High Court of Australia granted special leave to appeal).

Comments by prosecutor on failure of accused’s spouse to give evidence

In ***DJF v R [2011] NSWCCA 6***, the appellant was charged with a number of counts involving the alleged sexual assault of a child. During the trial, the Crown Prosecutor made the following statement concerning the failure of the accused’s then-wife to give evidence:

You've heard the evidence from the officer that there's no statement [having] been obtained from ... the wife of the accused who you may have ... expected would have been called, considering the incident which is alleged to have occurred in the spa.

Following his conviction, the appellant appealed to the Court of Criminal Appeal on the ground that the Crown Prosecutor's comment contravened s 20(3) of the *Evidence Act* 1995 and resulted in a miscarriage of justice. The appeal was allowed. Giles JA held that the statement contravened s 20. His Honour was of the view that the statement did not confine itself to failure by the Crown to call the appellant's then-wife, but rather could also be taken to include the defence's failure to call her.

Confession to custody manager – whether made in the course of “official questioning”

In ***Bryant v R* [2011] NSWCCA 26**, the appeal enlivened the question of whether evidence of a confession by an accused to a custody manager was considered to be made in the course of “official questioning” and therefore inadmissible pursuant to s 281 of the *Evidence Act* 1995. Under the Act, “in the course of “official questioning”” means “in connection with the investigation of the commission or possible commission of an offence”. Howie AJ (at [139]) was prepared (albeit with heavy reservation) to accept that the police officer was “questioning” the suspect. However, giving effect to the broad meaning of “questioning” contemplated by s 281, his Honour rejected the proposition that the confession was made in the course of “official questioning”. The police officer had no involvement in the investigation of the offences in question other than to ask the suspect the formal questions at the end of the recorded interview and as custody manager. Furthermore, his Honour found that the questions asked were, in essence, merely a part of supplying the appellant with information about the bail proceedings.

Fingerprints and photographs taken of a juvenile suspect in custody

The three juveniles in ***R v SA; DD and ES* [2011] NSWCCA 60** were arrested for allegedly committing an offence of causing grievous bodily harm with the intent. Whilst in custody, police took photographs for inclusion in an array of photographs to be shown to witnesses. Fingerprints were taken for comparison with those left at the crime scene. The trial judge held the evidence to be inadmissible. The Crown appealed under s 5F(3A) of the *Criminal Appeal Act* 1912. It was necessary for the Court to consider the interplay between the provisions of the *Criminal (Forensic Procedure) Act* 2000 (CFPA) which prohibit the carrying out of forensic procedures upon a child without an order from a magistrate or authorised officer, and s 133 of the *Law Enforcement (Powers and Responsibilities) Act* 2002 (LEPRA) which provides that police may take “all particulars necessary to identify a person who is in lawful custody for any offence” over the age of 14 (including the taking of fingerprints and photographs).

The appeal was allowed. Blanch J held, in effect, that suspects in custody are governed by the LEPRA, in this case s 133, and that the prohibition of forensic procedures on a child under the CFPA did not apply because of s 112 of the LEPRA. His Honour also rejected (at [38]) a submission that the police powers under s 133 were limited to establishing the identity of the suspect. Longstanding authority established that police had power under the *Crimes Act* 1900 to take fingerprints and photographs not only to establish the identity of a suspect but also to use that evidence to prove the suspect had committed the crime. That proposition remains after the enactment of the LEPRA.

Exclusion of evidence where unfairly prejudicial despite no objection to admissibility

Chand v R [2011] NSWCCA 53 concerned an alleged offence of violence committed by the appellant against a neighbour. A police officer gave evidence regarding a number of COPS entries concerning complaints made by the appellant against neighbours. Notwithstanding that no objection was taken to the evidence, Hoeben J held that the evidence should have been excluded. There was a risk of unfair prejudice in that the jury could have been led to believe that the appellant was a vexatious complainant; a person suffering from some paranoia or otherwise undiagnosed mental illness; a person who felt victimised by neighbours; or a person whose credibility due to his beliefs was diminished. No reference was made to *R v FDP* (2008) 74 NSWLR 645; [2008] NSWCCA 317, where it was held that there was no duty upon a trial judge to reject evidence where no objection was taken.

Tendency evidence and related issues

In **Jiang v R [2010] NSWCCA 277**, there was evidence of inappropriate touching by the appellant during the course of giving the complainant a massage. Some, but not all, of this touching was relied upon as supporting various sexual assault charges. It was raised for the first time on appeal that the judge should have warned the jury against substitution or tendency reasoning. It was concluded that there was no possibility of the jury having adopted any form of impermissible reasoning. The evidence was relevant as to the appellant's state of mind at the time. Rule 4 was applied.

RG v R [2010] NSWCCA 173 concerned a trial for aggravated indecent assault. The 11 year old daughter of the appellant alleged that he slept in the same bed with her during an access visit and that during the night he touched her indecently. She also gave evidence that he regularly touched her indecently when they slept together. The trial judge gave appropriate directions for "context" evidence and warned against the use of the evidence as establishing a "tendency" on the part of the accused to commit an offence of the type charged. No exception was taken to this approach but on appeal it was contended that the evidence was, in reality, tendency evidence and so subject to s 97 of the *Evidence Act 1995*.

Simpson J held (at [26] – [44]) that the evidence was admitted, not to establish a tendency on the part of the appellant, but to establish the context in which the event occurred. So much was made clear in the atmosphere of the trial where the Crown's express purpose for tendering the evidence (being as contextual or relationship evidence) was made manifestly clear. While it is open to a court to test the true purpose of the evidence (that is, whether it is indeed adduced to establish a tendency), there was no reason to do so in this case. The evidence, if believed, established a pattern of behaviour in which the complainant was relatively unsurprised by the conduct the subject of the charge, and made no response, nor any subsequent report. In that respect, it explained the complainant's behaviour, which may otherwise have appeared surprising and therefore implausible to the jury.

In **RWC v R [2010] NSWCCA 332**, the appellant was convicted of three counts of aggravated sexual intercourse without consent and one of aggravated act of indecency against the complainant, being his daughter aged 9-11 at the time. Evidence was tendered from the complainant's sister, older by 18 months, of the appellant favouring the complainant over herself and that there was inappropriate physical conduct between the two, such as holding

hands, cuddling on the couch, him touching her thighs affectionately and kissing her on the lips. During the trial, the Crown did not identify the purpose for which the evidence was tendered. The appeal was allowed. Simpson J held (at [130]) that the evidence was tendered for a tendency purpose, that being the only relevance the evidence could have had in the circumstances.

In **DJS v R [2010] NSWCCA 200**, the appellant was charged with various sexual assault offences against the complainant, his step daughter. The Crown relied on tendency evidence to support a finding that DJS had a sexual interest in the complainant. The trial judge did not direct the jury that, before they could use that tendency evidence to support the Crown case, they must be satisfied of those matters beyond reasonable doubt. An appeal against conviction was dismissed by application of the proviso in s 6 of the *Criminal Appeal Act 1912*. In respect of the tendency direction, Hodgson JA held (at [55]) that where particular incidents are relied on by the Crown to establish a sexual interest of an accused in the complainant, the jury should be directed that they cannot treat those incidents as supporting such a finding unless they are satisfied beyond reasonable doubt that those incidents occurred.

BP v R [2010] NSWCCA 303 provides an interesting and useful analysis of the probative value and prejudicial effect of tendency evidence that was said to establish that the appellant had a sexual interest in young children. See particularly the judgment of Hodgson JA at [106] to [115].

In **Stubley v Western Australia [2011] HCA 7**, the appellant, a psychiatrist, stood trial in the Supreme Court of Western Australia and was convicted of multiple sexual offences committed against two female complainants during treatment sessions. The Crown sought to lead evidence of three other women who alleged that the appellant engaged in sexual activity with them as patients. The prosecutor contended that the evidence was relevant to establish a tendency to act in a particular way namely “bringing about a situation where sexual activity occurs, without consent in its legal sense but without opposition or resistance from the particular complainant” The trial judge held the evidence to be admissible as propensity or relationship evidence within the meaning of s 31A of the *Evidence Act 1906* (WA). That section is in different terms to s 97 of the *Evidence Act 1995* (NSW) but in common is the requirement for “significant probative value”.

The High Court (Gummow, Crennan, Kiefel and Bell JJ in a joint judgment; Heydon J dissenting) allowed the appeal and set aside the convictions. It was noted that the only live issue at trial was the consent of the complainants and so the evidence ceased to have probative value once the fact that these sexual acts took place was no longer challenged.

LEGISLATION

Court Suppression and Non-publication Orders Act 2010

This Act, which came into force on 1 July 2011, confers a statutory power on all courts exercising criminal jurisdiction to make non-publication and suppression orders. A non-publication order is defined to mean an order that prohibits or restricts the publication of information, but that does not otherwise prohibit or restrict the disclosure of information. A

suppression order is defined to mean an order that prohibits or restricts the disclosure of information, by publication or otherwise. Information includes any document.

An order can be made where it is necessary to prevent prejudice to the proper administration of justice; to prevent prejudice to national or international security; to protect the safety of any person, or to avoid causing undue distress or embarrassment to a party or a witness in proceedings concerning sexual offences. The legislation also provides for the exercise of the power when it is otherwise necessary in the public interest if that interest significantly outweighs the public interest in open justice. In deciding whether to make an order, the court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice. It is an offence to contravene an order.

Section 292 (power to prohibit publication of evidence in prescribed sexual offence proceedings) and s 302(1)(c) and (d) (power to prohibit publication relating to a protected confidence) of the *Criminal Procedure Act 1986* are repealed. Statutory provisions which of their own force prohibit publication of certain matters (e.g. s 578A of the *Crimes Act 1900* and s 15A of the *Children (Criminal Proceedings) Act 1987*) are unaffected.

Courts and Crimes Legislation Amendment Act 2010

A variety of Acts were amended but of particular note was an amendment to s 94 of the *Criminal Procedure Act 1986*. Section 93 of that Act provides that a magistrate may not direct the attendance of the alleged victim at committal proceedings in which the accused is charged with an offence involving violence unless satisfied that there are special reasons in the interests of justice for that person to attend to give oral evidence. Section 94 contains a list of offences that are within the meaning of “offences involving violence” for the purposes of s 93. The first six items listed refer to prescribed sexual offences and offences against ss 27–30, 33, 35(b), 86–91 and 94–98 of the *Crimes Act 1900*. A new item (paragraph (f1)) is added to include “an offence the elements of which include the commission of, or an intention to commit, an offence referred to in any of the above paragraphs”.

Courts and Crimes Legislation Further Amendment Act 2010

A variety of Acts were amended. They included amendments to the *Criminal Procedure Act 1986* in relation to judge alone trials. A new s 132 provides that either party may apply to the court for a “trial by judge order”. An order cannot be made unless the accused agrees. If the prosecution does not agree an order can be made if the court considers that it is in the interests of justice to do so. There is also provision for the court to make a trial by judge order on its own motion if of the opinion that there is a substantial risk of an offence being committed against a juror. Section 132A provides that an application for a trial by judge order must be made not less than 28 days before the date fixed for the trial except with leave of the court.

Another amendment of note was the increase in the maximum value of property stolen or damaged in a breaking and entering offence in Table 1 of Schedule 1 of the *Criminal Procedure Act* from \$15,000 to \$60,000. The provisions were proclaimed to commence on 14 January 2011.

Crimes Amendment (Murder of Police Officers) Act 2011

A new section 19B provides for mandatory life sentences to be imposed for the murder of a police officer. In addition to the mens rea and actus reus specific to the offence, knowledge (actual or constructive) that the victim was a police officer is specifically an element of the offence. The provision does not apply if the offender is under 18 at the time of the murder or had a significant cognitive impairment at the time. The provision applies to offences committed on or after 23 June 2011.

Crimes (Sentencing Procedure) Amendment Act 2010

Section 22 of the principal Act was amended so as to include a requirement that the court taken into account the “circumstances” in which an offender indicated an intention to plead guilty as well as the existing requirement that the Court take into account that an offender has pleaded guilty and when the plea was entered or was indicated. It is also now provided in this section that a lesser penalty imposed because of a plea of guilty must not be unreasonably disproportionate to the nature and circumstances of the offence.

Section 23 was amended so as to require a court to indicate that a sentence is being reduced for assistance either in the past, or in the future, or both. The court is required to state the penalty that would otherwise have been imposed and where both past and future assistance is involved, the court is required to state the amount by which it has been reduced for each.

Another amendment of note was the insertion of s 35A which provides restrictions upon a court taking into account any agreed facts or offences listed on a Form 1 that is the result of charge negotiations unless the prosecutor files a certificate verifying that consultation with any victim and the police has taken place, or explaining why it has not. The certificate must also verify that any agreed facts constitute a fair and accurate account of the objective criminality of the offender.

Perhaps the most significant amendment is the creation of a method for a court to impose an “aggregate sentence of imprisonment” when sentencing for multiple offences. New s 53A provides that a court may impose an aggregate sentence of imprisonment and by new s 44(2A) may impose a single non-parole period in respect of that aggregate sentence. There are ancillary provisions, including that if an aggregate sentence is imposed the court must indicate the sentence that would have been imposed for each offence if separate sentences had been imposed. There is no requirement to indicate the non-parole period of individual sentences. If any of the offences the subject of an aggregate sentence attract a standard non-parole period the court must indicate what non-parole period would have been set if a separate sentence had been imposed with the usual indication of whether it would have been the standard non-parole period or something greater or lesser, with reasons given for any departure.

Criminal Case Conferencing Trial Amendment (Extension) Regulation 2011

The trial scheme under the *Criminal Case Conferencing Trial Act 2008* was extended for a further 12 months to 1 July 2012. Similarly, the *Criminal Procedure Amendment (Briefs of Evidence) Regulation 2011* extended the trial scheme under the *Criminal Procedure Regulation 2010* whereby, in certain nominated proceedings, prosecutors are not required to serve briefs of evidence, or given shorter briefs of evidence, to 1 July 2012.

Evidence Amendment Act 2007

Amendments were made to ss 128 and 128A of the principal Act as part of a scheme to provide mutual recognition in uniform evidence law jurisdictions of certificates granted to witnesses who object to giving self-incriminatory evidence. An amendment was also made to cl 4 of Pt 2 of the Dictionary to provide that a person is also to be regarded as unavailable to give evidence if the person is “mentally or physically unable to give the evidence and it is not reasonably practicable to overcome that inability”.

Evidence Amendment (Journalist Privilege) Act 2011

A new Division 1C was inserted in Part 3.10. The new division provides that a journalist, or his/her employer, is not compellable to disclose an informant’s identity unless the public interest in favour of disclosure outweighs any adverse effect on the informant or third party and/or the public interest in the communication of facts and opinion by the news media.

OFFENCES

Attempt to set fire to a person with intent to murder - an offence known to law?

The appellant in ***Park v R [2010] NSWCCA 151*** was found guilty by a jury in respect of a charge that he did attempt to set fire to his wife with intent to murder her. He contended on appeal that the indictment did not disclose an offence known to law because it did not plead an allegation of “attempt to murder” as required by s 30¹ of the *Crimes Act 1900*. It pleaded an attempt to do an act with the intent of murder.

McClellan CJ at CL held that despite the indictment not specifically alleging an attempt to murder, the offence was sufficiently pleaded. Reference was made (at [39]) to the obligation of the Crown when pleading an indictment to identify the essential factual ingredients of the offence: *John L Pty Ltd v A-G (NSW)* (1987) 163 CLR 508 per Mason CJ, Deane and Dawson JJ at 519; *Lodhi v R [2006] NSWCCA 121*; (2006) 199 FLR 303 per McClellan CJ at CL at [97]. Here the essential ingredients consisted of the elements identified by the definition of murder contained in s 18 of the *Crimes Act 1900*. The indictment satisfied those elements.

Conspiracy - conflict between state and federal law

In ***Dickson v R [2010] HCA 30***, the appellant was tried in Victoria on an allegation of conspiracy to steal contrary to s 321(1) of the *Crimes Act 1958* (Vic). It was alleged that he was a party to a conspiracy to steal cigarettes. The cigarettes had been seized by, and were in the possession of, Customs. An appeal to the Victorian Court of Appeal failed. A point was raised for the first time in the High Court where the appellant argued that there was an inconsistency between state and federal law per s 109 of the Constitution in that s 321 renders conduct criminal that

¹

Attempts to murder by other means

30 Whosoever, by any means other than those specified in sections 27 to 29 both inclusive, attempts to commit murder shall be liable to imprisonment for 25 years.

was not caught by, and indeed deliberately excluded from, s 11.5 of the *Criminal Code* 1995 (Cth). In short, the common law crime of conspiracy which is picked up by s 321 is broader in scope than is s 11.5. The High Court allowed the appeal, holding (at [30]) that in the present case, in its concurrent field of operation in respect of the conduct (conspiracy to steal), s 321 *Crimes Act* attaches criminal liability to conduct which falls outside of s 11.5 of the *Criminal Code* and in that sense alters, impairs or detracts from the operation of the federal legislation and so directly collides with it.

Conspiracy – underlying agreement formed before the period alleged in the indictment

The accused in ***Agius v R* [2011] NSWCCA 119** were charged with two counts of conspiracy. Count 1 was said to have existed from 1 January 1997 to about 23 May 2001 whilst count 2 was said to have existed from 24 May 2001 to about 10 April 2008. The trial judge refused an application for a permanent stay of count 2 upon a contention that it was foredoomed to fail because the agreement was alleged to have been entered before the dates specified in the indictment. An appeal was brought under s 5F of the *Criminal Appeal Act* 1912. Johnson J agreed (at [62]) with the observations of the trial judge as to the nature of conspiracy being a “continuing offence” such that the offence depends upon the existence of, or participation in, an agreement, and not the precise timing of its formation.

There was also discussion of the differences between the common law offence of conspiracy and s 11.5 of the *Criminal Code* 1995 (Cth). Counsel for the accused argued that the provision had the effect such that it was necessary for the Crown to establish that the agreement was entered into after the date of its commencement. Johnson J observed that “the only presently relevant alteration to the common law [by the provision enacted in the *Criminal Code* 1995 (Cth)] is that effected by s 135.4(9)(c), which requires proof of the commission of an overt act pursuant to an agreement”. His Honour concluded [(at 74)] that to suggest that an agreement entered into before the commencement of the provision, but that then continued thereafter, could not be prosecuted because the conspirators failed to renew their agreement would lead to a highly artificial and absurd result.

Entering inclosed lands without consent of the owner and without lawful excuse

In ***Director of Public Prosecutions (DPP) (NSW) v Strang* [2011] NSWSC 259**, the accused was notified that he was prohibited from entering any Best & Less store due to some unspecified inappropriate behaviour. He was later found to have entered a Best & Less store that was located within a shopping mall. At the conclusion of the Crown case, a magistrate held that there was no prima facie case. The issue on appeal was whether the premises were “inclosed lands” under the definition in s 3 of the *Inclosed Lands Protection Act* 1901. Johnson J held that while the premises did not fall within the meaning of “prescribed premises” in s 3(a), they were within the more general description in s 3(b). His Honour applied an expansive construction of the definition and found (at [64]) that the definition of inclosed lands does not purport to exclude commercial or retail premises; nor does it purport to exclude premises which are contained within a larger building such as a commercial shopping centre or complex; nor does it require that the boundaries exclude members of the public. The appeal was allowed and the matter remitted.

Indecent assault/act of indecency - evidence of surrounding circumstances is relevant to whether an act is indecent

In ***Eades v Director of Public Prosecutions (NSW)* [2010] NSWCA 241**, the appellant was the subject of a charge of inciting a person under the age of 16 years to an act of indecency. The circumstances were that the appellant had exchanged text messages with a 13 year old girl, in the course of which he incited her to send him a nude photograph of herself. The issue on appeal was whether the act of indecency (the sending of the nude photograph) should be considered in isolation from its context. Campbell JA held that there may be surrounding circumstances that are relevant to the determination of whether an act is indecent (that is, whether it is contrary to community standards of decency), and that it is the task of the fact-finder to assess whether a right-minded person would take such circumstances into account. His Honour proceeded to identify in a non-exhaustive way some circumstances that could be relevant where an act is performed in response to a request, such as the terms of the request; the identities of the addresser and addressee of the request; their respective ages; their relationship or social roles; and the like.

Manslaughter – gross criminal negligence where drug supplier owes duty of care to a person to whom drugs are supplied

In ***Burns v R* [2011] NSWCCA 56**, the appellant was tried, inter alia, for manslaughter. One of the bases for this count that was relied upon by the Crown was gross criminal negligence arising from an alleged duty of care owed by the appellant to the deceased. It was contended that the appellant failed to provide reasonable assistance to the deceased when he became ill and died as a result of the effects a drug supplied to him by the appellant.

On appeal it was contended that the trial judge should have removed the charge from consideration by the jury and erred in directing the jury that there was a duty of care owed by the appellant. A question for resolution by the Court was whether “the supplier of a prohibited drug owes a duty of care to a person to whom they supply a drug and who, in their presence, ‘takes’ the drug” ([105] of the judgment of McClellan CJ at CL and Howie AJ, with whom Schmidt J agreed). The approach taken in the United Kingdom in analogous circumstances (in particular, that of *R v Evans (Gemma)* [2010] 1 All ER 13; [2009] 1 WLR 1999) was adopted. The submission that no duty of care arose from the circumstances of this case was rejected. Their Honours observed some of the relevant circumstances:

[114] The provision of methadone to the deceased was a breach of the law. The drug was known to the appellant to be dangerous and it was plainly open to the jury to conclude that the deceased was vulnerable, both because of his naivety as a user of methadone and his physical condition at the time...

It was further held (at [118] – [119]) that the trial judge’s direction was appropriate and that the existence of a duty of care is a matter of law for the judge to determine, whose responsibility it also is to give instructions to the jury as to the elements of the duty. The appeal was dismissed.

Perverting the course of justice

The accused in ***Regina v OM* [2011] NSWCCA 109** was charged with offences concerned with the damaging of property as well as two offences of doing an act with the intention of

perverting the course of justice (s 319 of the *Crimes Act 1900*). When police were investigating the former offences, it was alleged that the accused had asked two people to give false evidence to the investigators. The accused sought an advance ruling pursuant to s 192A of the *Evidence Act 1995* that the evidence was incapable of establishing a prima facie case. The judge, in effect, agreed with that contention. The Crown appealed.

The Court was compelled to dismiss the appeal for lack of jurisdiction (because the trial judge had not in fact made an advance ruling, or any order amenable to appeal). Nevertheless, Whealy JA held that the trial judge had made a clear and substantial error in relation to the scope of s 319. His Honour referred to the decisions of *Einfeld v R* (2008) 71 NSWLR 31 and *The Queen v Rogerson* (1992) 174 CLR 268 and observed that whilst the scope of the offence under s 319 had not been enlarged beyond the common law concept, neither had it been diminished.

[49] In other words, if the Crown, in the present matter, could establish that the respondent's actions were intended to deflect the police from prosecuting him for the criminal offence that he had allegedly committed, or from adducing evidence of the true facts relating to the alleged offence, the prosecution was clearly capable of being maintained. The fact that no judicial proceedings had been commenced at the time when the respondent spoke to Ms Ullah and Mr Sundarjee, did not preclude the finding of a prima facie case. ...

PRACTICE AND PROCEDURE

Browne v Dunn

In ***Khamis v R* [2010] NSWCCA 179**, the accused was tried before a jury in respect of an alleged sexual assault. During his evidence in chief he attempted to give evidence about a matter that had not been put in cross-examination to the complainant or to members of her family. The trial judge upheld an objection by the Crown and refused to allow the accused to give such evidence. Issues relating to this ruling comprised grounds of appeal against conviction. Whealy J (at [42] – [46]) discussed various consequences of a breach of the rule in *Browne v Dunn*. He held (at [53]) that the rule in *Browne v Dunn* is not a preclusive rule of evidence. Its breach does not necessarily dictate that evidence may not be called in contradiction. It should not be used, except as a last resort, to exclude evidence going to the question of a person's guilt of a criminal charge. In this case the trial judge erred in failing to consider any option other than exclusion of the evidence.

In ***Llewellyn v R* [2011] NSWCCA 66**, the appellant was tried for an offence of sexual intercourse without consent. The appellant's defence at trial was that the complainant was a willing participant. In cross-examination, counsel for the appellant put it to the complainant that one of a number of ways in which she had indicated her consent was that she had "helped push down his pants", without actually putting to her the manner in which she had done so. The appellant subsequently gave evidence that the complainant had used her feet on the outer sides of his legs to remove his jeans. The Crown Prosecutor put to the appellant that there was no suggestion in the cross-examination of the complainant that this is what had occurred, a question which was objected to but allowed by the trial judge. In re-examination, the appellant confirmed that he had given instructions to his counsel before the trial consistent with his evidence. The Crown Prosecutor never suggested that the appellant's evidence was a recent invention.

Hall J (McClellan CJ at CL agreeing, Garling J also but with different reasoning) held that the rule of *Browne v Dunn* was not breached by the appellant's counsel in failing to put to the complainant whether she had used her feet in pushing down the appellant's pants. His Honour reasoned that the proposition as to whether the complainant had helped the defendant remove his pants was squarely put to the complainant, despite not expressly putting to her the alleged use of her feet.

Indictments - consequences of failure to present indictment within time

Section 129 of the *Criminal Procedure Act 1986* provides that an indictment is to be presented within 4 weeks after the committal. If an indictment is presented out of time, the court has the discretion to proceed with the trial, adjourn, or take such other action as it thinks appropriate. In determining how to exercise the discretion not to proceed with the trial, the question is whether it was in the interests of justice to allow the trial to proceed notwithstanding that the indictment was out of time: ***JSM v R [2010] NSWCCA 255***. In this case the delay was caused by protracted and ultimately unsuccessful negotiations on questions of the accused pleading guilty to lesser charges and giving evidence against co-offenders. McClellan CJ at CL (at [43]) identified some of the considerations relevant to the issue, such as the public interest in the appellant facing trial; the propriety in negotiation between an accused and the prosecutor and any agreement arising; and the potential prejudice to the appellant. The appeal against the trial judge's refusal of a permanent stay of proceedings was dismissed; the finding being that there was no relevant prejudice to the appellant.

Judgments - failure to give reasons in respect of a separate trial application

In ***Madubuko v R [2011] NSWCCA 135***, the appellant was tried with two co-accused in relation to the importation of border controlled drugs. Evidence of a police interview of one of the co-accused was admitted (with directions that it was only admissible in respect of that co-accused). Following the admission of the evidence against the other co-accused (with his consent), the appellant applied for a separate trial but was refused. The trial judge indicated that reasons would be published later but they never were. The appellant appealed against the trial judge's failure to give reasons. Hodgson JA held that while the failure to give reasons generally constitutes an error of law, it does not necessarily require that an appeal be upheld. For that to be the case there needed to be "such a fundamental procedural irregularity... to warrant the setting aside the appellant's convictions" (at [24], citing *Evans v R [2006] NSWCCA 277* at [272]). In this case, the Court could determine for itself whether the decision was correct. It was.

Jury misconduct - failure of a judge to investigate

In ***Smith v R* [2010] NSWCCA 325**, the appellant was tried for offences of violence committed during the course of a relationship with the complainant. The complainant gave evidence that the appellant had a previous involvement with “some Falun Gong or Buddhism type of religion”. During the trial, it became apparent that a juror may have accessed material from the internet concerning Falun Gong. The Crown Prosecutor indicated that there was material available on the internet that referred to Falun Gong as “an evil cult”. Counsel for the appellant applied to have the juror discharged. Ultimately the trial judge refused the application and elected to proceed with the trial. In my judgment, I noted that the act of a juror making inquiries concerning any matters relevant to the trial is prohibited under the *Jury Act 1977*; amounts to “misconduct” as defined; and requires discharge of the juror. The information the trial judge had was second hand (the juror had mentioned it to a court officer who had mentioned it to the judge). The judge had the power to examine the juror in order to determine whether the juror had in fact made a prohibited inquiry, but failed to do so. An aspect of my decision was a consideration (at [34]-[39]) of a number of authorities that had discussed the subject of non-compliance with mandatory provisions governing the constitution and authority of a jury. I observed that such non-compliance will ordinarily result in the setting aside of a conviction.

Power of the District Court to make screening orders

In ***BUSB v Director-General of Security* [2011] NSWCA 49**, the appellant was charged with a number of offences arising out of an allegation that he shot at a police officer. At trial, the judge ordered that, inter alia, certain witnesses being ASIO officers give their evidence in such a way that the witnesses could not be seen by the appellant, but could be seen by all other persons permitted to be present in court. Ultimately, the jury could not agree on a verdict and the so a re-trial was ordered. Similar screening orders were made in respect of those witnesses by the new trial judge, and the orders were challenged by way of an appeal under s 5F of the *Criminal Appeal Act 1912*.

Spigelman CJ held (at [36]) that since the appellant accepted that the District Court had the power to make screening orders, it was unnecessary to consider the issue further. The Chief Justice observed (at [54]) that the question was “not one of power, but of the exercise of a power”, and proceeded to consider whether the trial judge had erred in making the orders. His Honour (at [83] – [85]) outlined some of the competing interests involved, including the right to a fair trial (i.e. the prejudice to the accused, the protection of witnesses) and the administration of justice.

The Chief Justice at [81] rejected the submission that the orders impinged upon the effective cross-examination of the witnesses:

The only identified effect of the accused seeing the faces of the two ASIO eyewitnesses was the possibility that the accused’s memory may be triggered about their ability to observe what they say they observed. I am not satisfied that the degree of impingement of effective cross-examination in the present case is of significance.

Procedural fairness

In **Trujillo-Mesa v R [2010] NSWCCA 201**, the parties had agreed on a discount of 25% for an early plea of guilty. The trial judge noted that concession, but his Honour said nothing of the prospect that he might not act upon it. In light of this, the defendant made no submissions on the topic. His Honour later determined a discount of 20% was more appropriate. The defendant appealed. Fullerton J, allowing the appeal, held that the defendant had been denied procedural fairness.

SENTENCING – GENERAL ISSUES

Agreed facts – serious miscarriage where agreed facts inconsistent with offender’s version

In **Loury v R [2010] NSWCCA 158** the appellant and his brother were involved in a violent incident outside a hotel. They each pleaded guilty to three charges of using an offensive weapon with intent, in company, to commit the indictable offence of assault occasioning actual bodily harm. The sentencing judge regarded their culpability as being equal participants in a joint criminal enterprise, primarily because he accepted a submission by the prosecutor that the appellant had handed a baseball bat to his brother that was then used by the brother in the course of the incident. The appellant had provided a version of events in a police interview, which he consistently maintained thereafter, which was to the effect that he was not a participant in a joint enterprise with his brother. He admitted culpability for assaults but less in number and of a significantly lesser degree of gravity than those committed by his brother. An agreed statement of facts was tendered by consent and was inconsistent with the appellant’s version. Both brothers were sentenced to identical terms of imprisonment. The appellant’s convictions were quashed on appeal. Whealy J held that a serious miscarriage of justice had occurred in that the pleas of guilty had been entered without the charges having been explained by the appellant’s solicitor and he had no awareness of the details of negotiations between the solicitor and the Crown. The appellant’s evidence as to what transpired with his solicitor was accepted, including that he had never seen the statement of agreed facts nor had its contents explained to him.

There are useful remarks in this case by Whealy J (at [107] – [109]) as to various shortcomings in the conduct of both solicitor and counsel who represented the appellant at first instance.

Amendment of commencement dates of sentences pursuant to s 59 of the Crimes (Sentencing Procedure) Act 1999

In **Allan v R (No 2) [2011] NSWCCA 27**, the appellant was convicted of multiple offences and sentenced by two different judges. He successfully appealed against the sentences imposed by one judge, the result of which was that he was due for parole on those sentences 6 months earlier. Despite this, due to the commencement dates for the other sentences, the effect was that his earliest release date did not change. An application was made pursuant to s 59 for the commencement dates of the sentences imposed by the second judge to be varied. The Crown opposed the application, contending that s 59 only applied where it was necessary to rectify a hiatus in periods of imprisonment. That argument was rejected by Price J (at [18]). He referred, inter alia, to the characterisation by Spigelman CJ in *Regina v Pham* [2004] NSWCCA

269 of s 59 as a provision designed to serve pragmatic purposes, to ensure the efficiency and expedition of the administration of justice.

Comparable cases – use of

In striving for consistency in sentencing, the court may examine comparable cases to determine whether patterns exist and to shed light on the proper sentence in any case under consideration: *Director of Public Prosecutions (Commonwealth) v De La Rosa* [2010] NSWCCA 194 per Basten JA at [123] – [124] and McClellan CJ at CL at [197]. The question in ***Wilcox v R* [2011] NSWCCA 42** was whether a sentence of 19 years (non-parole of 14 years) imposed in relation to multiple offences including robbery with a dangerous weapon (s(97(2) of the *Crimes Act* 1900) was manifestly excessive. Barr AJ endorsed the above remarks of the court in *De La Rosa* and annexed to his judgment a very useful schedule of cases concerning sentences for offences under s 97(2).

His Honour also examined the circumstances in which the Court of Criminal Appeal determines the limits of appropriate sentence ranges:

[108] When this court allows an offender’s appeal against sentence and reduces the sentence it enters upon the sentencing process a second time, and it becomes manifest that the substituted sentence lies within the range the court considers appropriate. The substituted sentence does not indicate the limits of the range, however, unless the court says so. When the court dismisses an offender’s appeal against what is claimed to be an excessive sentence it does not thereby imply where the sentence lies, or whether it lies, within the appropriate range. It simply declares that the sentence is not excessive.

[109] There are cases, however, where the remarks of the court indicate the upper limits of the appropriate range. Two such cases are *Penfold & Ward* and *McKeon*.

[110] When the court allows a Crown appeal against the inadequacy of a sentence, the substituted sentence will often indicate the lower limit of the appropriate range.

Desirability of co-offenders being sentenced by the same judge at the same time

In ***Dwayhi v R; Bechara v R* [2011] NSWCCA 67**, three co-offenders were sentenced by different judges. Two who were sentenced in 2008 and 2009 raised a parity ground in relation to the sentencing of the third offender who was sentenced in 2010. Johnson J provided a useful discussion of the difficulties that emerge when co-offenders are sentenced by different judges, and held that it is necessary for sentencing courts and prosecutorial bodies to take steps to ensure as far as is reasonably possible that related offenders are sentenced by the same judge at the same time in a single sentencing hearing. His Honour proffered the following opinion:

[45] It ought to be appropriate... for sentencing and appellate courts to enquire of counsel for an offender, who seeks to rely upon the parity principle, as to the steps taken by that offender or his legal representatives to ensure that he or she was sentenced by the same Judge, and at the same time, as any related offender, if the case is one where there were different sentencing judges.

Hardship to third parties

It is settled that hardship to members of an offender's family is generally irrelevant and can only be taken into account in "highly exceptional circumstances" per *R v Edwards* (1996) 90 A Crim R 510: ***Mokhaiber v R* [2011] NSWCCA 10** per Price J at [30]. Following the sentencing of the appellant, the appellant's daughter was diagnosed with metachromatic leukodystrophy, a deteriorative and terminal condition requiring increasing care. The court held that fresh evidence that the appellant's wife, as full-time carer for the daughter in addition to caring for their other two children, would suffer overwhelming hardship as a result of the appellant's incarceration, could be regarded as exceptional circumstances. The court also gave modest weight to the appellant's distress at being unable to assist his wife. Together these justified a reduction in the appellant's sentence.

In contrast, the court in ***Winter v R* [2011] NSWCCA 59** rejected an appeal seeking a reduction in sentence based on "fresh evidence" of hardship to one of the appellant's sons. The fresh evidence led was that since the appellant's sentencing proceedings, the appellant's son had undergone an operation to correct his spinal problems and that his prospects of walking again were very slim. The evidence also indicated that the appellant's son was cared for by his grandmother and younger brother, both of whom had their own health problems. These circumstances gave rise to the submission that the appellant needed to care for her son. The Court took into account the authorities on hardship to third parties and emphasised the proposition that hardship to third parties must be "highly exceptional", before concluding that the evidence did not meet the threshold. Blanch J (at [17]) noted that the son was being cared for; he was eligible for rehabilitation treatment; and he was living in a house modified to assist with his needs. Further, the applicant had her own health problems which did not make her an ideal carer.

The circumstances in ***R v NJK* [2011] NSWCCA 151** were somewhat different to the two aforementioned cases. The offender was convicted for the indecent assault and the use for pornographic purposes of his 5 year old step-daughter. The sentencing judge imposed a suspended sentence. One of the matters referred to in the sentencing remarks was that the offender was continuing to make payments on the mortgage of the marital home occupied by the victim and her mother, as well as on a loan relating to renovations of the home. Since his arrest he had separated from the victim's mother and had moved elsewhere. The Crown appealed, submitting that the sentencing judge had placed excessive weight on this matter in deciding to suspend execution of the sentence and that the alleged hardship did not amount to the "exceptional" kind necessary as per *R v Edwards*.

The appeal was dismissed. Hoeben J was of the view that there were a number of other factors in addition to this which the sentencing judge had taken into account. As to the question of hardship, Hoeben J concluded that the circumstances were unique in that victim was one of the beneficiaries should the offender be able to continue working and paying off the mortgage in that she could continue to live in the home.

General deterrence in sentencing for alcohol-fuelled offences of violence

In ***R v West* [2011] NSWCCA 91**, the appellant pleaded guilty to the manslaughter of his sister's partner, an act that resulted from an argument between the two that escalated into a fight following from a day of drinking and using cannabis. The judge imposed a sentence of 6 years

with a non-parole period of 2 years. A Crown appeal was upheld by a majority of the Court (Johnson J, Whealy JA agreeing, Hidden J dissenting). It was found (at [52]) that the sentencing judge's failure to refer to general deterrence supported the conclusion that the appellant's subjective circumstances (aged 18 and in need of rehabilitation for long standing alcohol and drug abuse issues) dominated the calculation of the non-parole to an impermissible extent. Johnson J then noted importance of general deterrence in sentencing for manslaughter resulting from alcohol fuelled violence:

[52] This Court has observed, in the context of sentencing for manslaughter by unlawful and dangerous act, that alcohol-fuelled offences of violence are frequently committed by young men and that general deterrence has a particular application for this reason: *R v Carroll* [2010] NSWCCA 55; 200 A Crim R 284 at 299 [61].

Mental condition of offender

In ***Watts v R* [2010] NSWCCA 315**, the appellant was convicted of, and sentenced for, an offence of maliciously damaging a house owned by the Department of Housing by means of fire. There was evidence that the appellant suffered from at least one mental disorder, albeit there was no consensus between the psychiatric experts on the severity of his mental condition. The sentencing judge gave consideration to the evidence only in respect of the question of mitigation. The appellant appealed on the grounds that the sentencing judge erred in her treatment of this evidence.

McClellan CJ at CL and Howie AJ (Schmidt J agreeing) allowed the appeal, finding that the sentencing judge had incorrectly applied the evidence. Their Honours held that a person's mental disorders, which need not amount to a serious psychiatric illness to be relevant to the sentencing process, transcend a matter of mitigation in sentencing. Their Honours endorsed the position of the Court in *DPP (Cth) v De La Rosa* [2010] NSWCCA 194 (at [177]) as to the significance of an offender's mental disorder in sentencing.

Non-parole periods and special circumstances - accumulation of sentences

In ***Flynn v R* [2010] NSWCCA 171**, a sentencing judge expressly found that there were "special circumstances" but ordered that the sentences be partially accumulated. The result was that the non-parole period exceeded 75% of the total term. On appeal the appellant argued, inter alia, that the finding of special circumstances was not reflected in the total effective sentence. Price J held that it was apparent that the judge overlooked the effect of accumulation on the ratio of the effective non-parole period to the total term of the sentence.

This case is but one illustration of a situation that has been commonly encountered in the Court of Criminal Appeal since the *Sentencing Act* 1989 introduced the notion of what is sometimes referred to as a "statutory norm" or "statutory ratio" and the need for there to be "special circumstances" for imposing an additional term, now the "balance of the term of the sentence", that exceeds one-third of the non-parole period. Another commonly encountered situation is where there is no finding of special circumstances and individual sentences conform to the statutory ratio but accumulation results in an effective non-parole period that exceeds three quarters of the total term.

Non-parole periods and special circumstances - effective non-parole period exceeding 75 per cent of total term

The offender in ***Russell v R* [2010] NSWCCA 248** was sentenced for multiple sexual assault offences to a term of imprisonment that resulted from a partial accumulation of individual sentences. The effective non-parole period was 79 per cent of the total term. It was argued on appeal that the sentencing judge had erred by failing to give reasons justifying the departure from the statutory ratio. Price J held that there was no such error. The sentencing judge had intended to set a non-parole period that was more than three quarters of the sentence. Section 44 of the *Crimes (Sentencing Procedure) Act 1999* does not require the giving of reasons for setting a parole period that is less than one third of the non-parole period.

By way of contrast, in ***Maglis v R* [2010] NSWCCA 247** there was found to be error when a sentencing judge imposed an effective non-parole period which was 77 per cent of the total term of the sentence. Again this followed the partial accumulation of individual sentences. The error was more pronounced when regard was had to another sentence earlier imposed by another judge upon which these sentences were accumulated. The effect was to have a non-parole period which was 80 per cent of the combined total. Error was found in this case because it had been the intention of the sentencing judge to find special circumstances and to reflect that in the overall period of custody for all of the offences. This, of course, was not reflected in the final result.

Non-parole periods and special circumstances - delay leading to an effective non-parole period that exceeds 75 per cent of the total term

A slightly different situation to that in the above cases arose in ***Thorpe v R* [2010] NSWCCA 261**. The offender committed two offences in April 2007 for which he was sentenced in January 2008. While serving that sentence she was charged with a further offence that she had committed in May 2007. She was not sentenced for that matter, however, until August 2009. The judge on that occasion was aware of the earlier offences and sentences. Reference was made to the principal of totality and a finding of special circumstances was made that went beyond the partial accumulation that he proposed. However with the accumulated term then imposed the overall sentence became one in which the non-parole component was just under 82 per cent of the total term.

In this case it was the delay in charging the offender with the May 2007 offence which created the difficulty. Kirby J referred to authorities concerned with delay in sentencing (*R v Todd* (1982) 2 NSWLR 517 and *Mill v R* (1988) 166 CLR 59). His Honour referred to the fact that that it would have been preferable if the offender had been charged with the May 2007 offence before the sentence hearing in January 2008. If that had been done the sentence under appeal would probably have been dealt with by way of a fixed term with partial accumulation upon the sentences imposed in respect of the other more serious charges. Obviously that was not possible when it came to sentencing in August 2009. The appeal was allowed and the non-parole period for the May 2007 offence was reduced so as to render the overall non-parole period about 73 per cent of the total term.

Non-parole periods and special circumstances – small reductions in non-parole periods where a finding of special circumstances

In **Caristo v R [2011] NSWCCA 7**, the appellant pleaded guilty to two drug manufacturing offences, one relating to ecstasy and other to cocaine. The sentencing judge imposed a non-parole period that was 70.6% of the total sentence. In my judgment, I found that any intervention to reduce the non-parole period was unnecessary. The sentence was consistent with the findings provided by the sentencing judge which sought to extend the parole period for the ecstasy offence “because a longer period of supervision following release from custody was required” (at [36]), distinguishable from the circumstances in *R v Sutton* [2004] NSWCCA 225.

The decision was endorsed in **Chen v R [2011] NSWCCA 85**. The appellant had pleaded guilty to maliciously inflicting grievous bodily harm with intent and the sentencing judge imposed a non-parole period that was 60% of the total sentence. The severity appeal was dismissed. Garling J noted (at [50]) that the Court is slow to intervene in relation to findings of special circumstances, which are of a discretionary nature. The issue again emerged in **Kwong v R [2011] NSWCCA 58**, where it was argued that a sentence of 13 years with a non-parole period of 9 years for two offences of drug supply, a ratio of 69.2% of the overall sentence, did not reflect the judge’s finding of special circumstances. The Court again demonstrated its reluctance to interfere in the circumstances, Harrison J noting at [44] that there is “no arithmetical or mathematical precision [that] can be applied to the exercise of the sentencing discretion”.

Non-parole periods and recognizance release orders for Commonwealth sentences

For some years it has been regarded as the “norm” for the period of mandatory imprisonment under a Commonwealth sentence to be between 60 and 66 per cent of the total term. However in **Hili v R; Jones v R [2010] HCA 45**, the High Court of Australia held (at [44]) that there neither is, nor should be, a judicially determined norm or starting point for the period of imprisonment that a federal offender should actually serve in prison before release.

Non-parole periods and special circumstances – the fact that offences were committed whilst on bail is an irrelevant consideration

In **Bellchambers v R [2011] NSWCCA 131**, the offender committed two of the four offences for which he was sentenced whilst on bail for the other two offences. Hoeben J held that the sentencing judge was wrong to have declined to make a finding of special circumstances for this reason. It was an irrelevant consideration.

Objective seriousness assessment for offences that do not carry standard non-parole periods

There was a spate of decisions of the Court of Criminal Appeal, particularly in the latter half of 2010, in which comments were being made to the effect that it is unnecessary for a sentencing judge to analyse where an offence lay in the range of objective seriousness where no standard non-parole period is prescribed. One example is **Dagdanasar v R [2010] NSWCCA 310** where the sentencing judge held that the offence was “slightly above the mid-range of offending of its type”. Price J commented that the finding was unnecessary and referred to the remark by Howie AJ in *Georgopolous v R* [2010] NSWCCA 246 at [30] that making such a finding was,

“likely to lead to confusion and misinterpretation when the offence does not carry a standard non-parole period”.

Other cases in which similar criticisms have been made include *Civell v R* [2009] NSWCCA 286; *Okeke v R* [2010] NSWCCA 266; *Gore v R*; *Hunter v R* [2010] NSWCCA 330; *Black v R* [2010] NSWCCA 321; and *King v R* [2011] NSWCCA 46.

In ***Khoury v R* [2011] NSWCCA 118**, the applicant was critical of the sentencing judge’s finding that non-standard non-parole period offences were “well above the mid-range” of objective seriousness for offences of their type. Simpson J observed (at [70]) that this reflected a practice developed and sponsored by the introduction of the standard non-parole period legislation. It was erroneous, however, to assess objective gravity, select a sentence, and then step down bit by bit to take into account mitigating person circumstances: *Markarian v R* [2005] HCA 25; 228 CLR 357. Reference was made to authorities for the proposition that an assessment of the objective gravity of an offence has traditionally been an essential element of sentencing. *R v Way* [2004] NSWCCA 131; 60 NSWLR 168 introduced the additional step: evaluation of where, on a putative or notional scale of objective gravity an offence falls. The remarks of Howie AJ in *Georgopolous v R* should not be read as discouraging judges from undertaking the traditional task of making an evaluation of objective gravity. They ought to be taken as suggesting that the two-step approach mandated by the standard non-parole period legislation is inappropriate where that legislation did not apply to the offence at hand.

Objective seriousness of standard non-parole period offence- finding based only upon a Crown submission and without providing reasons for the finding

In ***R v AZ* [2011] NSWCCA 43**, the Crown appealed against a head sentence of 5 years 6 months with a non-parole period of 2 years 9 months imposed upon the respondent for the offence of supply of a large commercial quantity of a prohibited drug (maximum life imprisonment; standard non-parole period 15 years). The Crown submitted on appeal that the sentencing judge’s assessment of the offence at “somewhat below the mid-range” did not reconcile with such a low sentence that suggested the offence was close to the bottom range of objective seriousness.

The appeal was allowed. Johnson J found (at [57]) that there was no explanation by the sentencing judge of the basis for the finding that the offence lay “somewhat below the mid-range”, other than what can be characterised as a bare acceptance of the Crown’s submission to that effect. His Honour concluded that upon a consideration of the undisputed facts, the respondent having led little evidence at the sentencing hearing, the respondent “ought reasonably to have been found to be a large commercial quantity drug supplier with all necessary paraphernalia of a drug supplier being located knowingly under his control in various parts of his house”. His Honour then went on to make an assessment of the objective seriousness of the offence, finding that, at its lowest, it was just below the mid-range of objective seriousness. The notional starting point of 11 years, before reduction for assistance to authorities and guilty plea, was impossible to reconcile with the finding of “somewhat below the mid-range”. The conclusion was reached that the judge did not have any real regard to the standard non-parole period as a benchmark or guidepost in sentencing.

Objective seriousness assessment - murder

The Court considered the assessment of the objective seriousness for the offence of murder in ***Tran v R [2011] NSWCCA 116***. Hidden J reviewed a number of decisions on the subject and observed:

[39] What emerges from these cases is what one would expect. Whether a killing was premeditated or, in any event, whether it was accompanied by an intention to kill are important questions in an assessment of where a murder lies in the range of objective gravity, but of themselves are not necessarily determinative. Invariably, there will be other circumstances in the particular case bearing on that assessment.

Johnson J made similar observations at [44] when comparing the objective criminality for an intention to inflict grievous bodily harm with an intention to kill. The former is generally less culpable than the latter, but that is not always so.

Objective seriousness assessment – recklessly causing grievous bodily harm

In ***Reberger v R [2011] NSWCCA 132***, the offender was sentenced to the offence of recklessly causing grievous bodily harm. The circumstances were that the offender glassed the victim, an act that resulted in the victim losing an eye and suffering significant scarring of the face. Evidence was led that the offender was mildly to moderately retarded and also suffered from attention deficit disorder. The evidence also indicated that the act was impulsive and was, to an extent, caused by the offender's mental deficiencies. The sentencing judge primarily focused her consideration on the injuries sustained.

Campbell JA held that the sentencing judge erred in her Honour's consideration of the objective seriousness of the offence by having regard exclusively to the injury. His Honour found that the sentencing judge failed to consider such matters as the mental capacity of the offender, the absence of premeditation in the act and that it involved only one blow. Reference was made to the principles for assessing objective seriousness set out in *R v Way [2004] NSWCCA 131; (2004) 60 NSWLR 168 at [85] - [88]*.

Parents report child's offending

A rather unusual factor fell for consideration in ***R v Barlow [2010] NSWCCA 215***. The offender's guilt of an offence of supplying a commercial quantity of ecstasy only came to the attention of police when his parents alerted them to their suspicions. Police attended the home and asked the offender if he had anything that he should not have. He disclosed the presence of \$120,000 in cash in the boot of his car and subsequently made admissions of involvement in drug supply. The Crown appealed against a sentence of 2½ years to be served by way of periodic detention. One contention raised was that the sentencing judge had erred by taking into account that parents should not be deterred from bringing attention to illicit behaviour of their children. McCallum J was of the view that the disclosure by parents of criminal conduct on the part of their children ultimately promotes the purposes of sentencing (s 3A *Crimes (Sentencing Procedure) Act 1999*), it being conducive to the protection of the community from the offender; promoting his/her rehabilitation; and potentially making the offender accountable for his/her actions. In concurring judgments, Allsop P and Price J expressed their agreement with this reasoning.

Plea of guilty - discount when entered after capture following escape

The appellant in **Visser v R [2011] NSWCCA 146** pleaded guilty in 6 March 2009 to drug supply offences for which he was charged on 3 April 2007. Between 5 April 2007 and 14 May 2008, he was at large following an escape. He complained on appeal that he was entitled to a reduction of 25 per cent, rather than 12.5 per cent, because of his waiver of committal proceedings and his early plea. The submission was rejected. Grove AJ held (at [19]) that “utilitarian benefits are collateral to the efficiency and effectiveness of the criminal justice system as a whole”, and that because of the delay caused by the appellant’s escape, there was an absence of any benefit to the efficiency and effectiveness of the system.

Re-opening sentence proceedings to correct errors

In **Davis v DPP [2011] NSWSC 153**, the appellant was convicted of a drink-driving offence that carried an automatic disqualification period of 12 months, although there was discretion to order a longer or shorter period, but not less than 6 months. The appellant’s licence had been suspended upon his arrest on 14 June 2008. On 19 November 2008 a magistrate imposed no penalty pursuant to s 10A of the *Crimes (Sentencing Procedure) Act 1999*, and ordered that the appellant’s licence be returned to him. He stated his intention, for the benefit of the RTA, that there should be no disqualification. Subsequently, however, because of the absence of any order as to disqualification, the RTA recorded the automatic 12 month period against the appellant’s licence.

On three subsequent occasions the magistrate purported to re-open the sentencing proceedings, first to make an order specifying a period of disqualification, then to reduce the period ordered, then to revoke such orders. Both the defendant and the prosecutor appealed.

Hoeben J dismissed the defendant’s appeal (and allowed the cross-appeal), finding that there was no jurisdiction to re-open the original sentence proceedings as the decision had not been contrary to law. His Honour concluded as well that there was no inherent or general jurisdiction for a Local Court to review, rehear, vary or set aside a judgment or order once formally made.

Section 21A - general remarks concerning s 21A and Ponfield now having limited utility

In **Mapp v R [2010] NSWCCA 269**, Simpson J took the opportunity to make some general observations about s 21A and whether the guideline judgment in *R v Ponfield* [1999] NSWCCA 435; 48 NSWLR 327 has any continuing utility. Her Honour (at [6] – [8]) made comments about the complexity that s 21A had added to the sentencing task and how it had on many occasions been productive of technical errors which often did not have perceptible impact upon the sentencing outcome. Her Honour then proceeded (at [9] – [11]) to comment to the effect that *R v Ponfield* appears now to have been “largely overtaken by statute”. *Ponfield* was decided before the insertion of s 21A in the *Crimes (Sentencing Procedure) Act 1999*. The section lists more comprehensively the matters that are relevant as both aggravating and mitigating a sentence to be imposed. *Ponfield* lists a variety of factors which are suggested to “enhance” the seriousness of an offence of break, enter and steal. The combination of *Ponfield* and s 21A can lead to confusion and error. For example, the first of the factors listed in the guideline in *Ponfield* is that the offence was committed whilst the offender was on conditional liberty.

That has led some judges to include it in an assessment of the objective gravity of an offence, a matter to which it is, of course, not relevant.

Section 21A - offence committed in company (s21A(2)(e))

In ***Gore v R; Hunter v R* [2010] NSWCCA 330**, the sentencing judge was held to have erred in taking into account as an aggravating factor the fact that the offences were carried out in company. Merely because the offences were carried out together, and the factor is listed in s 21A(2), does not mean it should have an effect on the sentence; regard must be had to ordinary sentencing principles. In this case, the presence of one appellant during the commission of the offence was found not to have added significant culpability to the other appellant, and visa versa (per Adams J at [29]).

Section 21A - without regard for public safety (s 21A(2)(k) and planned or organised criminal activity (s 21A(2)(n))

In ***Mansour v R* [2011] NSWCCA 28**, the appellant was sentenced for a number of drug supply offences which included ongoing supply for financial or material reward, contrary to s 25A *Drug Misuse and Trafficking Act* 1985. The offences involved sales of relatively small quantities of drugs to undercover police officers, either directly or via members of his family. The issue on appeal was whether the sentencing judge erred in taking into account as aggravating factors that the offences were committed without regard for public safety and were part of a planned or organised criminal activity (s 21A(2)(i) and (n)).

Price J held (at [46] – [56]) that the offence of ongoing supply of cocaine is of a kind for which the failure to have regard for public safety, and the element of planning and organisation, are both inherent features which are not to be taken into account as aggravating factors unless their nature or extent in a particular case is unusual. His Honour found (at [51] and [56] respectively) that in neither respect did the nature or extent of the act exceed the norm to warrant a finding that they were aggravating factors.

Section 21A - remorse (s 21A(3)(i))

The offender in ***Pham v R* [2010] NSWCCA 208** pleaded guilty to an offence of knowingly taking part in the supply of not less than the large commercial quantity of pseudoephedrine. There was an issue on appeal as to whether the sentencing judge was in error in finding that the offender was “not truly remorseful for his conduct”. Simpson J observed (at [29]) that remorse and contrition are taken into account in sentencing because they are thought to be indicative of prospects of rehabilitation. She added (at [32]) that, “Despite the often ritual incantation of remorse and contrition as relevant to sentencing, it is seldom that they have any real bearing upon the sentencing outcome except ... where they can be taken to indicate good prospects of rehabilitation”.

Standard non-parole periods - irrelevant in sentencing a child

Section 54D(3) excludes the operation of Div 1A Pt 4 *Crimes (Sentencing Procedure) Act* 1999 in the case of an offender who was under 18 years of age at the time of the offence. In ***AE v R* [2010] NSWCCA 203**, the offence in question was robbery in company with wounding for which a standard non-parole period of 7 years is prescribed. The offender, however, was aged

15. The sentencing judge had erred when he used the standard non-parole period as a factor or guidepost *indicating parliament's intention as to the seriousness of the offence*. Basten JA held (at [26]) that it was erroneous for the sentencing judge, whilst not imposing the standard non-parole period, to have taken it into account by using it "as a factor indicating Parliament's intention as to the seriousness of [the] offence, thereby justifying a higher sentence than might otherwise have been thought appropriate".

Standard non-parole periods - relevance that offence with a standard non-parole period could have been dealt with in the Local Court

The Court in **Bonwick v R [2010] NSWCCA 177** was required to consider the principle that a judge should take into account in certain circumstances that an offence dealt with in the District Court could have been the subject of sentencing in the Local Court where the offence in question carried a prescribed standard non-parole period. In this case, the offences were aggravated indecent assaults for which the maximum penalty is 10 years and the standard non-parole period is 8 years. Davies J, applying *Palmer [2005] NSWCCA 349*, held that the prescription of a standard non-parole period does not displace the principle and the fact that a matter could have been dealt with in the Local Court remains a relevant consideration.

Statistics

The decision of the court in **McCarthy v R [2011] NSWCCA 64** evinces the continuing utility of the Judicial Commission's sentencing statistics despite the High Court's observations in *Hili v R; Jones v R [2010] HCA 45*. Adams J interpreted the High Court's criticisms towards the use of sentencing statistics as being confined to the context of the case in which the decision was made, where it held that the number of offences each year were very small and the circumstances varied widely. This was distinguished from the available statistics for armed robberies, which his Honour observed to "demonstrate a marked similarity of characteristics, both in respect of facts and the subjective features of the offenders though, of course, there are also substantial variations". On this point, his Honour concluded:

[42]... It seems to me that in this area of crime the cases are of such a kind, the experience of the court in respect of them so extensive and the numbers of cases in the sample so substantial that the statistics are indeed useful.

Summary disposal – having regard to the possibility of

In **Ruano v R [2011] NSWCCA 149**, the appellant was sentenced in the District Court for three offences of stealing from the person. The offences have a maximum penalty of 14 years imprisonment but if finalised in the Local Court, depending upon the amount of money involved, were subject to jurisdictional ceilings of imprisonment for either 12 months or 2 years. Grove AJ rejected a contention that the sentencing judge erred by not having regard to the fact that the appellant could have been sentenced in the Local Court. Having regard to such a matter does not require a reduction in sentence. In this case, having regard to the penalties that could be imposed in the Local Court would have been erroneous. The offender, and his co-offenders, had been working as a part of a highly organised syndicate of thieves across Sydney.

Uncharged offences - De Simoni principle breached

The *De Simoni* principle (*R v De Simoni* [1981] HCA 31; (1981) 147 CLR 383 at 389.7 per Gibbs CJ) was recently considered in **Tu v R [2011] NSWCCA 31**, where the appellant was sentenced for the offences of possessing prohibited imports, and attempting to possess prohibited imports (substantial trafficable quantities of crystal methamphetamine).

The appellant submitted that, in finding the offences to be in the worst category and imposing the maximum penalty for each offence, the sentencing judge had breached the *De Simoni* principle by taking into account the appellant's involvement in the importation of the prohibited imports, even though he was not charged with such an offence. The appellant relied on the remarks of the sentencing judge, who said, "but as far as importing of trafficable quantities of drugs is concerned it must be regarded in that way [as an offence of the worst type]". McCallum J (McClellan CJ at CL agreeing, Hall J dissenting on this point but agreeing as to the result) allowed the appeal and reduced the appellant's sentences. Her Honour (at [140]) reasoned that there did not appear to be any conceivable basis for determining that the offences fell within the worst category without having regard to the appellant's involvement in the importation.

Uncharged offences - error in taking into account injuries inflicted in a separate, uncharged, assault

In **Adams v R [2011] NSWCCA 47**, the appellant was convicted of an offence of malicious wounding with intent to cause grievous bodily harm for his part in the joint attack on the victim with two other offenders in which he was found to have struck the victim on the top of the head using a baseball bat. The appellant, however, was also responsible for fracturing the victim's left forearm with a blow using a curtain rod. That incident took place soon after, when the other two offenders had exited the dwelling in which the attacks had taken place.

On appeal, it was contended that the sentencing judge had erred in taking into account the injuries from this later incident in imposing a higher sentence on the appellant. The appeal was allowed. Latham J noted that the injuries to the victim in the later incident were independent of the joint assault and needed to be the subject of a separate charge for which the appellant was convicted to be taken into account. Her Honour at [31] drew distinctions between this case and that of *Bourke v R* [2010] NSWCCA 22 on the basis that in *Bourke* the "relevant grievous bodily harm was inflicted at the same time as, and as a consequence of, the blows causing the wounding".

SENTENCING - SPECIFIC OFFENCES

Drug offences – Relevance of drug being a precursor in the manufacture of another prohibited drug

Pham v R [2010] NSWCCA 208 involved sentencing for an offence of knowingly taking part in the supply of not less than the large commercial quantity of a prohibited drug (pseudoephedrine). It was submitted that the sentencing judge erred when assessing the objective seriousness of the offence by failing to take into account that the drug was a precursor in the manufacture of another prohibited drug and that there was no evidence to

suggest that he was involved in the manufacture of that drug. Simpson J held (at [44] – [45]) that the submission was misconceived. The relative harmfulness of the drug has been taken into account by the legislature in the determination of what constitutes the large commercial quantity of any drug, and is built into the penalties provided. Having so differentiated by reference to harmfulness, the legislature has determined that the penalty for supply of the relevant quantities shall not vary according to the nature of the drug.

Drug offences - general principles concerning serious federal drug offences

In the course of determining a Crown appeal against inadequate sentences imposed in **R v Nguyen; R v Pham [2010] NSWCCA 238**, the Court was required to consider general principles applicable to sentencing for serious offences arising from a drug importation. A useful collection of such principles and relevant factors appears in the judgment of Johnson J at [72].

Drug offences – the continued utility of R v Wong and Leung

The Court in *R v Nguyen; R v Pham* also endorsed the utility of the range of sentences referred to in the decision of *R v Wong and Leung* [1999] NSWCCA 420; 48 NSWLR 340. Six days later, a differently constituted Court in **R v Cheung and Choi [2010] NSWCCA 244** rejected that proposition. This difference of views was considered by Davies J in **Youssef v R [2011] NSWCCA 104**. Ultimately, his Honour expressed a preference for the view of the Court in *R v Cheung and Choi* and preferred having regard to the cases collected by McClellan CJ at CL in *Director of Public Prosecutions (Cth) v De La Rosa*. Simpson J agreed with Davies J. Grove AJ, however, was of the view that the contrast in views should not be resolved, given that the parties had not made submissions on the point.

Drug offences - trafficking in drugs to a substantial degree

In **Zahrooni v R [2010] NSWCCA 252** the offender was found in possession of 69 grams of opium. The drug was concealed in 48 individual sachets. He was also in possession of just over \$1000 in cash, a small knife, and two mobile phones, one of which had received a text message from somebody placing an order for “a quarter of an ounce”. It was argued on appeal that there should not have been a full-time custodial sentence as the judge had not made any finding as to whether or not the offender was involved in “trafficking in drugs to a substantial degree”. However, Simpson J referred to the fact that the judge had made specific mention of the extent of the offender’s involvement in drug supply. He referred to the quantity of the drug, more than double the trafficable quantity; the packaging into individual sachets; the relatively large sum of money in his possession (having regard to his financial circumstances); the possession of two mobile phones; and the text message on one of those phones. Having regard to the judge’s acceptance of those matters it was inevitable that if he had turned his mind to it he would have concluded that there was “trafficking to a substantial degree”.

Drug offences - exceptional circumstances permitting a non full-time custodial sentence where there is “trafficking to a substantial degree”

In **R v Pickett [2010] NSWCCA 273**, it was not suggested that there was not “trafficking to a substantial degree” but the issue was whether there were “exceptional circumstances” which could permit a non full-time custodial sentence being imposed. The offender in this case was

sentenced for an offence of ongoing supply of cocaine which related to the supply of a total of 6.5 grams in three transactions with an undercover police officer. Taken into account were two further offences of supplying cocaine, each involving the supply of about 10 grams to an undercover officer. Mr Pickett was supplying the drug at the behest of another person who was well entrenched in drug supply activity. He owed that person a substantial amount of money and felt beholden to him as a result. The offender's evidence, which was accepted, was that all of the proceeds of the sales were returned to the other person. The offender became unwilling to continue with this activity and, so as to avoid further importuning by the other person, he went to the Northern Territory. The sentence which was imposed was imprisonment for 1 year 8 months with execution of the sentence suspended. The Crown appealed.

Simpson J referred (at [63]) to the well established principle that drug dealing "to a substantial degree" will, in the absence of exceptional circumstances, demand a sentence of full-time imprisonment. She concluded that the respondent's voluntary cessation of his criminal activity prior to arrest along with other circumstances of the case took it into the exceptional category. The Crown appeal was dismissed.

Drug offences – When is a person a "principal"?

In ***Hanh Thi Nguyen v Regina* [2011] NSWCCA 92**, the appellant pleaded guilty to an offence of cultivating cannabis plants by enhanced indoor means. 317 plants (more than double the large commercial quantity) were found growing in a house that the appellant was renting. The appellant gave evidence at trial that she became involved in the operation at the behest of another man who had convinced her to lease the premises and it was supposedly he who had set up the electrical and hydroponic systems. The judge ultimately accepted that the appellant did not have the skills to install the systems, but was satisfied that she had intended to profit from the venture, was involved in the day-to-day management of it, and had recruited an assistant. The sentencing judge concluded that there were at least two principals involved in the operation, the appellant being one of them.

On appeal, the Court was divided on the question of whether the appellant was a principal. Grove J distinguished conceptually between "principal roles" and "subordinate roles" and concluded that the evidence of the appellant's activities in the operation supported the sentencing judge's findings. Simpson J, with whom Davies J agreed on this point, held that the sentencing judge had erred. Her Honour at [4] set out a non-exhaustive list of the characteristics that may indicate that an offender's role was that of a principal and went on to conclude that the evidence fell short of establishing those characteristics. The characteristics included, but were not limited to: the extent to which the offender contributed financially to setting up the operation; stood to share profits (as distinct from receiving payment); participated in day-to-day management; and had a hand in decision-making.

Murder – worst case and life imprisonment where no intent to kill

A life sentence was imposed in ***Tan v R* [2010] NSWCCA 207** for engagement in a joint criminal enterprise that resulted in a most heinous murder. On appeal it was submitted that Tan had organised for the infliction of grievous bodily harm upon the victim. He intended that hydrochloric acid would be used to cause grotesque disfigurement of the victim and those who carried out the act went beyond the scope of the joint criminal enterprise. The appeal

was dismissed. R S Hulme J held (at [56] – [62]) that a lesser sentence was not necessarily warranted where murder is committed with an intention to inflict grievous bodily harm rather than to kill. Other matters such as motivation and the infliction of cruelty or demonstrated criminality going beyond the necessary incidents of the killing are matters also to be taken into account. It follows that there is no blanket rule precluding a finding that a murder falls into the worst case category where the intention is to inflict grievous bodily harm.

Sexual assault upon a child - the younger the child the more serious the offence

Case law on the subject over the last two decades supports the general proposition that, in sexual offence cases, the younger the child, the more serious the criminality: **PWB v R [2011] NSWCCA 84**, per Beazley JA at [11]. Her Honour also observed (at [12]) that case law recognises that where the age of the victim is an element of the offence (i.e. indecent assault), while the court must endeavour to avoid double counting, a judge may still take into account the age of the child within the ranges of ages specified in the offence. Her Honour's analysis also involved a consideration of psychological research relating to a child's memory in the context of sexual abuse. Her Honour concluded:

[15] ... it seems to me that if a 6 year old child's memory is reliable, the likelihood that the child, both at the time and more particularly later in life, will have a real sense of violation, is a real one. I see no basis for differentiation, in this regard, in the impact on children of different ages.

The appellant in *PWB* was sentenced for offences of indecent assault against his younger sisters, aged somewhere between 10-12 and 5-6 respectively at the times of the respective offences.

The above in the judgment of Beazley JA may be contrasted with the view of RS Hulme J:

[85] ... I am also not persuaded that a 5 or 6 year old would have the same sense of violation as would a child of, say 9, or 15. Although I do not suggest the circumstances are on all fours, in that connection one has only to reflect on the glib abandon with which young children are prepared to run around naked and those at, or approaching puberty, guard their personal privacy with zeal.

Harrison J agreed with the reasoning of Beazley JA. There was a slight divergence in views as to the appropriate re-sentence; in that respect, Harrison J agreed with RS Hulme J.

Using a carriage service to groom a person under the age of 16 for sexual activity

It was contended in **Ramsey v R [2010] NSWCCA 293** that an offence against s 474.27(1) of the *Criminal Code* 1995 (Cth) of using a carriage service to transmit a communication to another person, the communication containing indecent material, with the intention of making it easier to procure the recipient to engage in sexual activity, with the recipient believed to be under the age of 16, was less serious because the person with whom the offender was communicating was, unbeknown to him, a police officer attached to a "Cyber Predator Team". The submission was made that sexual activity was neither positively intended nor objectively possible. McClellan CJ at CL rejected the submissions. His Honour (at [37]) regarded the offence as no less reprehensible when the offender is communicating with a fictitious person who they believe to be real than when communicating with a real person. His Honour also noted that the legislature had in mind that the offence could be committed in

the manner in which it was in this case and that detection of such offences served an important objective of deterrence.

SUMMING UP

Grievous bodily harm – intent to do - error in directing jury that offence could be proved on the basis of recklessness

The trial judge in ***Davies v R* [2011] NSWCCA 19** was held to have fallen into error when he misdirected a jury about the element of intent to do grievous bodily harm under the offence of malicious wounding with intent to do grievous bodily harm (s 33 of the *Crimes Act* 1900, as it was at the time of the offence). The judge directed the jury that they could find the accused guilty if satisfied either that the accused intended to do grievous bodily harm or that the accused was reckless, “reckless” meaning a realisation of the possibility of some physical harm (not necessarily grievous bodily harm) resulting from the action and following through with the action. James J said (at [76]), “the jury should have been directed that they could not convict the accused of the s 33 offence, unless they were satisfied that the accused had the intent to do grievous bodily harm. Recklessness, although it might be sufficient to satisfy the element of “maliciously” in the offence would not be sufficient to satisfy the element of “intent to do grievous bodily harm”. Notwithstanding the misdirection, the Court applied the proviso and dismissed the appeal.

Grievous bodily harm – recklessly inflicting - directions as to mental element

In ***Blackwell v Regina* [2011] NSWCCA 93**, the appellant was charged with the offence of maliciously inflicting grievous bodily harm with intent (s 33 *Crimes Act* 1900). It was open to the jury to convict of the alternative offence in s 35. Shortly prior to the offence having allegedly occurred, s 35 had been amended. The offence of malicious wounding or maliciously inflicting grievous bodily harm was replaced with reckless wounding or recklessly inflicting grievous bodily harm. Notwithstanding the amendment, the earlier form of the s 35 offence was presented to the jury as the alternative. The jury convicted the appellant of the primary count.

The issue on appeal was whether there was a miscarriage of justice because the jury had been directed on the wrong alternative count. The Court was required to examine whether the mental element for the new offence under s 35 was the same as for the repealed offence. Beazley JA held (at [82]) that the mental element for “reckless grievous bodily harm” does not involve foresight of the possibility of “some physical harm” but rather, foresight of the possibility of *grievous bodily harm*.

The Court allowed the appeal and order a new trial, endorsing the observation of Callinan J in *Gilbert v The Queen* [2000] HCA 15; (2000) 201 CLR 414 that “where there is a choice of decisions to be made [in this case, for the jury], the choice actually made will be affected by the choices offered” and accepted that there had been a denial of procedural fairness “of a significant kind”.

Hansard records that when the *Crimes Amendment Act* 2007, which brought about, inter alia, the removal of “maliciously” from the principal Act, was introduced in the Legislative

Assembly, it was said that, “It is not intended that the elements of any offence, or the facts that the prosecution needs to establish to prove the offence, will change substantially”. The decision in *Blackwell* demonstrates what appears to have been an unforeseen legislative consequence. The offence in s 35 previously only required proof of foresight of *some* harm.

Majority verdicts

In the Criminal Trials Bench Book, the suggested direction in relation to the need for a jury verdict to be unanimous includes mention of the law providing in certain circumstances, which may not arise, for the judge to accept a majority verdict. Where it becomes necessary for the judge to give a *Black* direction (*Black v R* (1993) 179 CLR 44 - to persevere when the jury indicate that it cannot reach a verdict) the suggested direction includes that “the circumstances in which I may take a verdict which is not unanimous have not yet arisen and may not arise at all” and an exhortation to reach a unanimous verdict.

There have been a number of recent cases dealing with this issue. But first, some background. In *RJS v R* [2007] NSWCCA 241; 173 A Crim R 100 and *Hanna v Regina* [2008] NSWCCA 173; (2008) 191 A Crim R 302, error was found in the trial judge giving an indication to the jury as to the time at which a majority verdict could be accepted. In *Ngati v R* [2008] NSWCCA 3, directions were given in accordance with the Bench Book, which did not give any indication that a majority verdict would be accepted within a certain time. The issue in each case was whether anything was said which undermined the effect of the *Black* direction.

In ***Doklu v R* [2010] NSWCCA 309**, the trial judge gave a direction in accordance with the Bench Book suggestion. After the jury had been deliberating for six hours a note was received to the effect that a unanimous verdict could not be reached. The judge reiterated to the jury that the circumstances in which a majority verdict could be taken had not yet arisen and that their verdicts must be unanimous. She then proceeded to give the jury a direction in accordance with *Black v R* (1993) 179 CLR 44. The preconditions in s 55F(2) of the *Jury Act* 1977 for receiving a majority verdict had not at that stage been met. Later, when those preconditions were met, and the jury were told they could return a majority verdict, they did so.

On appeal it was contended that the trial judge had erred by telling the jury of the possibility that a majority verdict was an option before the time at which such a verdict could be accepted. Macfarlan JA held that there was no undermining of the *Black* direction. There was no lessening of the encouragement given to the jury to reach a unanimous verdict. He did, however, indicate (at [79]) his view that “it is better not to mention the possibility unless there is a reason to do so”.

In ***Ingham v R* [2011] NSWCCA 88**, the trial judge made reference in Bench Book terms to majority verdicts in the summing up and again in the course of giving a *Black* direction. The contention on appeal was confined to the reference in the latter. McClellan CJ at CL held (at [84] – [85]) that the trial judge’s direction was in terms almost identical to those in *Ngati*. He noted that in contrast to *RJS v R* and *Hanna v Regina*, there had been no reference to the time or circumstances in which a majority verdict might become acceptable. For this reason there was no undermining of the effect of the direction to persevere in striving for a unanimous verdict.

In a joint judgment in ***Hunt v R* [2011] NSWCCA 152**, Tobias AJA, Johnson and Hall JJ held that the trial judge had undermined the effect of the *Black* direction. The jury had indicated that they were deadlocked well before the time at which acceptance of a majority verdict could be considered. In answer to a question from the judge, there was an indication that there was a possibility of a majority verdict. The judge told them that the circumstances in which he could accept such a verdict had not yet arisen. A short time later the jury sent a note indicating that they still could not reach a unanimous verdict but could return an 11/1 verdict. The jury returned to court and were told that such a verdict could not be accepted for another 1 hour 50 minutes. They were directed to return to the jury room and, in effect, wait for that period. 1 hour 55 minutes later, a majority verdict was returned.

For a thorough examination of the issues and the authorities on this topic, it is respectfully suggested that recourse should be had to the judgment of McClellan CJ at CL in *Ingham v R*.

Manslaughter by criminal negligence – relevance of cultural factors to the “reasonable person test”

The appellants in ***Thomas Sam v R; Manju Sam v R* [2011] NSWCCA 36** were convicted of manslaughter by criminal negligence. They were the parents of the victim, the case against them being that they neglected to properly care for their child and obtain appropriate medical attention concerning her eczema, which combined with malnutrition, were antecedent to septicaemia, the cause of death. On appeal it was contended that the trial judge erred in failing to give directions to the jury that in applying the “reasonable person test” they should take into account the cultural background of the accused.

The appeal was dismissed. McClellan CJ at CL held (at [54]) that it *may* be that, in some circumstances, the fact that a parent comes from a culture which approaches the nurture of infants in a different way to what is expected in Australia, may be relevant to the standard of care. Notwithstanding, his Honour found that the evidence did not support such a finding in this case. There was nothing in the evidence to suggest that the fact that the appellants were born and educated in India, or that the father was educated as a homeopath, could justify the expectation which the law imposed on their conduct as being different from that of the ordinary Australian. (An application for special leave to appeal to the High Court of Australia has been lodged).

Unreliability of evidence of a co-accused

In ***Oliveri v R* [2011] NSWCCA 38**, the appellant was convicted of a drug supply offence after a joint trial with three co-accused. Evidence given by one of the co-accused was damaging to the appellant’s case. It was submitted on appeal that the trial judge erred in not cautioning the jury to take great care with the evidence of the co-accused as he had an interest in seeking to direct away from himself and towards the appellant. The appeal was dismissed. McClellan CJ at CL held (at [18]) that a warning was unnecessary since it would have been patently obvious to the jury that the appellant and the co-accused were trying to escape criminal liability and blame each other.