Recent decisions in the Court of Criminal Appeal

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Introduction

This year marks one hundred years since the establishment of the New South Wales Court of Criminal Appeal. Before turning to consider some recent decisions of that Court, I thought I would spend a little time tracing its history and some of the debate attending its proper constitution.

The Court was established by the *Criminal Appeal Act* 1912. Section 3 of the Act as originally passed provided:

> **3 Constitution of court**
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> (1) The Supreme Court shall for the purposes of this Act be the Court of Criminal Appeal, and the court shall be constituted by such three or more judges of the Supreme Court as the Chief Justice may direct.

The Bill was introduced by a Labor Government in 1911. It was based on the English model, which had then been in force for three years. The Bill was read in the Lower House by William Holman, then Attorney-General and later Labor Premier of NSW. Holman believed that New South Wales needed a statutory mechanism for bringing criminal appeals that protected Australia from the "awful spectacle of American jurisprudence".

[1] I would like to acknowledge extensive borrowing for the purpose of this paper from the work of R A Hulme J and his tipstaff, Mr Eliot Olivier (with their kind permission). I would also like to acknowledge the substantial assistance of my own tipstaff, Ms Joanna Laidler, in the preparation of the paper.

Interestingly, clause 3 of the Bill as introduced in the Lower House provided that the Court would be constituted by the Chief Justice and such of the judges of the Supreme Court and the District Court as may be appointed by the Chief Justice. The inclusion of District Court judges was opposed by the Opposition and was hotly debated. Holman argued that the Chief Justice should be at liberty, if he thought fit, to avail himself of the strength of the District Court bench. The clause survived debate in the Lower House but was struck down in the Upper House. Holman would have seen this as depriving the Chief Justice of a valuable source of hands-on trial experience.

The main features of the *Criminal Appeal Act* 1912 mirrored those of its English counterpart. However, there were important differences. Perhaps the most significant departure from the English model was the conferral in s 8 of the Act of the power to order a new trial if the Court thought that a miscarriage of justice had occurred. Similar provision had not been made in the English Act, and there were several cases in which "notorious criminals" had been acquitted following misdirection to the jury by the trial judge.

Ancillary to that power was the power in s 24 of the Act to detain prisoners following a decision by the Court but pending an appeal by the Crown to the High Court. This was introduced to ensure that a prisoner did not flee the country immediately following a successful appeal.

Of historical interest is s 10 (3) of the Act, which allowed the court to grant an extension of time for leave to appeal in all instances except convictions involving the death penalty. Also of interest is s 18(3) of the Act, which provided that the time that passed before an appeal was heard did not count as part of the sentence. That section was touted by Holman in the parliamentary debate as an appropriate deterrent against frivolous or vexatious appeals. It is almost unthinkable that such a provision would survive debate today.

The original act conferred no right on the Crown to appeal. In his second reading speech, Holman stressed that "the initiation of an appeal does not lie with the Crown in any way" and intended that the right of appeal would lie solely with the convicted person. Section 5D, conferring a right on the Crown to appeal against sentence, was introduced in 1924. Another historically interesting feature of the Act was the provision for the appellant to have legal aid assigned to him "if he desires it". Section 13 stated that "the Attorney General may at any time assign to an appellant a solicitor and counsel, or counsel only, in any appeal or proceedings preliminary or incidental to an appeal in which, in his opinion, it appears

desirable in the interests of justice that the appellant should have legal aid, and that he has not sufficient means to enable him to obtain that aid".

The next significant institutional development was the creation of the New South Wales Court of Appeal with effect from 1966. In 2008, Michael Kirby wrote that the new appellate court "produced sharp feelings of resentment" among Supreme Court judges as "suddenly and unexpectedly their seniority within the Supreme Court was disturbed, affecting the work they did and perceptions of their status in the legal profession and the community".

Twenty years after the establishment in New South Wales of a permanent Court of Appeal, the then Chief Justice, Sir Laurence Street, was moved to publish a policy statement as to his approach to his task, under s 3 of the Act, of determining the composition of the Court of Criminal Appeal.

Sir Lawrence emphasised the importance of preserving an element of continuity in the personnel on the court and the need for its judges to have current trial experience. He stated that he saw the "advantages in Judges of Appeal in this state participating in the work of the CCA, provided that they fulfil the criterion recommended by the 1965 *Donovan Committee*, that is to say, spending a few weeks each year trying criminal cases themselves". The policy Sir Lawrence announced was that, ordinarily, the Chief Justice would preside; that the two other judges should have current trial experience and would ordinarily be regular trial judges; that judges of appeal having current trial experience derived from spending a few weeks each year trying criminal cases at first instance would be invited to participate from time to time and that the President would be invited ex officio from time to time.

Obviously, Sir Lawrence is no longer the Chief Justice. So far as my researches have revealed, his policy statement has not been superseded, at least not expressly, but I am not aware of any judge of appeal having volunteered to try a criminal case in recent times.

Finally, section 3 was amended without controversy in 2008 to provide that the Chief Justice could also direct (with their consent) that the Chief Judge of the Land and Environment Court or the Chief Judge of the District Court (or both) act as Judges of the Court of Criminal Appeal.[2]

[2] *Courts and Crimes Legislation Amendment Act 2008*, schedule 10.

Turning to more current matters, let me come at last to the topic that was advertised. I should say that I do not by any means purport here to give a comprehensive review of significant decisions of the CCA of recent times. What follows is a small and in some ways obscure selection from the veritable smorgasbord of issues that has come before the Court in the past year or so.

Preparation for an appeal

The first is not a matter arising from any published decision of the court but rather a matter of my own perception when sitting on the Court. An issue of increasing irritation to the Court is the growing delay in bringing appeals, in both the frequency and the length of the delay. The time for filing notice of an appeal, or notice of an application for leave to appeal is limited under rule 3B of the Criminal Appeal Rules to three months after the conviction or sentence.

There is power under rule 3B(2) to extend that period before or after the expiry of the period. It may be acknowledged that, generally speaking, it seems unlikely that the Court would refuse to grant an extension unless the appeal appeared hopeless, at least in the case of an applicant or appellant in custody. However, the Court expects evidence explaining the delay. In the case where legal practitioners have contributed to the delay, counsel should of course be frank in acknowledging any delay on their own part or that of those instructing them. I would be confident in predicting that there will come cases where an extension of time is refused for want of an adequate explanation.

In the case of an appeal against an interlocutory judgment or order under section 5F(3) of the Act, it should also be noted that the time for giving notice of an application for leave to appeal is 14 days: rule 5B of the Criminal Appeal Rules.

Identifying cogent grounds

Under s 5 of the Act an appeal against conviction lies as of right on a ground which involves a question of law alone. All other grounds require leave or certification by the trial judge. It should not be assumed that leave will be granted for the asking. The Court is under increasing pressure and, to my perception, is inclined to refuse leave more readily than was perhaps once the case.

As to appeals against interlocutory orders under s 5F of the Act, the Attorney General or the DPP may appeal as of right, whereas accused persons are confined to an appeal with leave

of the CCA or if the judge or magistrate certifies that the judgment or order is a proper one for determination on appeal: section 5F(2) and (3).

Rule 4:

I imagine most of you would be acutely aware of the constraint imposed by rule 4 of the Criminal Appeal Rules, which provides:

> **4 Exclusion of certain matters as grounds for appeal etc**
> No direction, omission to direct, or decision as to the admission or rejection of evidence, given by the Judge presiding at the trial, shall, without the leave of the Court, be allowed as a ground for appeal or an application for leave to appeal unless objection was taken at the trial to the direction, omission, or decision by the party appealing or applying for leave to appeal.

Although confined in terms to grounds based on directions or evidence, rule 4 has been analysed as reflecting a broader rule of common sense: *Darwiche v R; El-Zeyat v R; Aouad v R; Osman v R* [2011] NSWCCA 62 at [169]-[171] per Johnson J:

> There are a number of fundamental difficulties with this ground of appeal. The Court of Criminal Appeal is a court of error. The Court determines grounds of appeal, whether relied upon as of right or by leave, in accordance with ss.5 and 6 *Criminal Appeal Act 1912*. Rule 4 *Criminal Appeal Rules* requires the leave of the Court for a ground of appeal to be taken with respect to a direction, omission to direct, or decision as to the admission or rejection of evidence unless objection was taken at the trial to the direction, omission, or decision by the party appealing.
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> The *Criminal Appeal Act 1912* does not exist to enable an accused who has been convicted on the basis of one set of issues to have a new trial under a new set of issues which he could and should have raised at the first trial: *R v Abusafiah* (1991) 24 NSWLR 531 at 536. This ground, and a number of other grounds relied upon by the Appellant Darwiche, have the flavour of an *"armchair appeal",* where counsel not involved in the trial has gone through the record of the trial in minute detail looking for error or possible arguments without reference to the manner in which the trial was conducted: *R v Fuge* [2001] NSWCCA 208; 123 A Crim R 310 at 319-330 [40]-[45]; *Ilioski v R* [2006] NSWCCA 164 at [155]. The Appellant Darwiche's first ground is a clear example of such an approach.
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> It may be that the present ground does not fall within the technical limits of Rule 4. However, it suffers from a more fundamental deficiency. How can it be said that there was error in the trial court in failing to permanently stay a criminal prosecution where the trial Judge was not asked to exercise that power? There may be a most exceptional case where an offence charged is not one which is known to the law or which is incapable of being established by the proven facts so that an intermediate appellate court may decide to allow the appeal, quash the conviction and order an acquittal under ss.6(1) and (2) *Criminal Appeal Act 1912*: cf *Fingleton v The Queen* [2005] HCA 34; 227 CLR 166. However, such a case is far removed from the circumstances posed by this ground of appeal.

A similar principle has been stated with respect to appeals against sentence. In *BT v R* [2012] NSW CCA 128, an argument that the sentence imposed on one count was manifestly

excessive was sought to be sustained by the contention that the judge had not adequately accounted for the effect of the applicant's mental illness. In the proceedings on sentence, however, counsel had expressly conceded that there was no causal relationship between mental illness and the offence. In dismissing the appeal, the Court said at [20]:

> An appeal to the [Court of Criminal Appeal] is not an opportunity to recast the case presented to the sentencing judge.

Adamson J referred to *Zreika v R* [2012] NSWCCA 44 where the Court said at [81]:

> The Court will not lightly entertain arguments that could have been put, but were not advanced on the plea, and will have an even greater reluctance to entertain arguments that seek to resile from concessions made below or are a contradiction of submissions previously made.

Finally, and again this is more a matter of my own perception than a point derived from any decided case, it is not uncommon particularly in sentence appeals to see a measure of overlap or confused thinking in the grounds brought forward (eg failure to distinguish between patent and latent error).

Bail pending an appeal

In *Miles v R* [2012] NSWCCA 88, RS Hulme J considered an application for bail pending an appeal. Bail was refused. However, his Honour took the opportunity to remark upon the difficulties faced by accused and appellants in custody in preparing for their appearances in court and in obtaining legal advice. Those are relevant considerations under section 32 of the *Bail Act* 1978. Hulme J said at paragraphs [3] to [5]:

> 3. Recently I had occasion to grant bail to someone who would not otherwise have received it because on the evidence in that case the Corrective Services Department was not providing reasonable facilities for the applicant to prepare his case. The applicant today makes a similar complaint. He subpoenaed from the Corrective Services Department his file and, although it has not been formally tendered, in anticipation of the hearing today I skimmed through the many hundreds of pages which were there.
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> 4. It is apparent that since December of last year the applicant has made a number of representations to the authorities for access to a legal library or cases contained therein and for time in which to prepare his appeal. Although in the documentation it is clear that to some degree the applicant's requests have received favourable treatment, it is by no means apparent that he has been provided with reasonable time and facilities. The limited evidence which the applicant put before the Court in this connection was not such as to inspire or require a response by the Corrective Services Department and accordingly I make no concluded judgment on the topic. However, what I have seen does tend to reinforce the impression I have derived in other cases that the Corrective Services Department do not provide what an outsider would regard as reasonable facilities for someone such as the applicant in the circumstances that he is in.

5. The Department must realise that if the only way that an accused person or appellant can prepare his case is by being granted liberty then that is the course which the Court might have to take.

His Honour urged the Department of Corrective Services to ensure that an applicant in an appeal is provided with sufficient time and sufficient facilities in which to prepare his case. That recommendation was endorsed by Hoeben JA at [1].

However, noting that bail may only be granted pending an appeal if it is established that special or exceptional circumstances exist justifying the grant of bail (section 30AA of the Bail Act), the Court was not satisfied that the applicant had discharged his onus: Schmidt J at [27]. The needs of the applicant to be free to prepare for his appearance were relevant but did not of themselves establish the special or exceptional circumstances required under section 30AA.

On the topic of bail, although it is not a decision of the Court of Criminal Appeal, it is worth noting the decision of Garling J in *Lawson & Dunlevy* [2012] NSWSC 48 in which his Honour held at [48] that a condition of bail that the applicant was "not to consume alcohol for any reason, and is to submit to a breath test when requested by a police officer" was not permitted by s 37 of the *Bail Act* 1978. His Honour made a declaration that the condition was unlawful.

Admissibility of evidence

DNA evidence

In *Aytugrul v R* [2010] NSWCCA 272, the appellant was convicted of murder. The Crown had adduced evidence of a hair found stuck (with blood) to the thumbnail of the deceased. The DNA of the hair matched the DNA of the appellant. The expert evidence at the trial interpreted the results of the DNA analysis in two ways, referred to as a frequency ratio and an exclusion percentage. Expressing the analysis as a frequency ratio, one expert said that one in 1600 people had the same DNA profile as that found in the hair. Expressing the matter as an exclusion percentage, it was said that 99.9% of people would not have a matching DNA profile.

In the CCA, the appellant submitted that the presentation of the evidence using an exclusion percentage was prejudicial and had resulted in a miscarriage of justice.

McClellan CJ at CL would have allowed the appeal on that basis. His Honour held at [99] that the Judge should have excluded the exclusion percentages from the evidence "all of which invited a subconscious 'rounding up' to 100". His Honour held that the exclusion

percentages were “too compelling” and that the risk of unfair prejudice to the appellant would not have been eliminated by the judge’s directions.

Simpson J agreed that the evidence was prejudicial but did not think that it was unfairly so. Her Honour said at [198]:

> The evidence, put as it was, was prejudicial: all Crown evidence is intended to be prejudicial. That is why it is tendered. I have been able to discern nothing that suggests that the evidence before the jury, framed as it was, was unduly or unfairly prejudicial, or confusing or misleading such as to raise for consideration of s 135 or s 137 (of the Evidence Act).

Fullerton J agreed with Simpson J on that ground: at [238]. An appeal to the High Court was dismissed: *Aytugrol v R* [2012] HCA 15.

Admission by a juvenile to a support worker

In *JB v R* [2012] NSW CCA 12 a 15 year-old Sudanese boy was convicted of murder after the trial judge admitted evidence of an admission the boy had made at the police station to a Sudanese youth liaison officer. The boy was alone with the worker when the worker asked “What happened?” Latham J at first instance declined to exercise her discretion under s 90 of the *Evidence Act* to exclude the evidence, which arises if “having regard to the circumstances in which the admission was made, it would be unfair to a defendant to use the evidence”.

An appeal against conviction was dismissed. Whealy JA noted that section 90 was described by the High Court in *Em v The Queen* [2007] HCA 46; 232 CLR 67 as a “safety net” provision. The discretion requires a balancing of the public interest and is critically concerned with the right of an accused to a fair trial. It includes consideration of whether any forensic advantage has been obtained unfairly by the Crown.

In dismissing the appeal, Whealy JA acknowledged at [37]:

> 37. Of course, it does not follow that every admission made to a support person, even if given freely, will be admissible in criminal proceedings against the juvenile. If the support person has cajoled or tricked the accused into making an admission, it may well be that s 90 has effective work to do. Similarly, if the support person has been acting at the direction of the police, there may emerge a powerful argument as to why the admission should not be allowed at the trial. There is no need to envisage or list the many possible circumstances that might be said to constitute unfairness so as to warrant the justified use of the safety-net provided by s 90 *Evidence Act*

Silence in the face of an allegation of sexual assault

McKey v R [2012] NSWCCA 1 was an appeal concerned with the admissibility of evidence of the appellant's silence in the face of an allegation of child sexual assault. The complainant was the younger sister of a woman who was about to be married. The appellant was the groom's best man. The complainant disclosed the offence to her sister who repeated it to the groom. The sister tried to call the appellant that evening. A few days later, the appellant rang the groom who said:

> We've been given some information about a few days before our wedding that involved [the complainant]. Can you tell me more?

The appellant said that he was driving and would call back soon. He did not. The sister sent text messages to the appellant to which he did not reply. The groom sent him a text message saying, "I want to know both sides of the story". About a month later the appellant replied, saying, "you won't believe me anyhow. You will only believe what your sister tells you".

The prosecutor cross-examined the appellant at the trial to the effect that, if the allegations were untrue, he would have wanted to protest his innocence "long and loud". It was put to him that he did not do so because the allegations were in fact true.

On appeal, Latham J held that the cross examination had invited consciousness of guilt reasoning. Her Honour said that there should have been a direction given as to the care with which the jury should approach such an issue before they could draw an inference adverse to the appellant. The appeal against conviction was allowed and a verdict of acquittal was entered.

In reaching her conclusion, Latham J contrasted the case with *El Masri v R* [2010] NSWCCA 11. That was a case involving the robbery of a security guard. There was evidence to suggest that the robber had received directions by telephone from Mr Said Yatim as to the identity of the security guard and the description of his vehicle. Yatim was the father of a part time employee at the store. There was no suggestion that he knew who the security guard was at any time prior to the robbery and he had evidently received that information from somebody else some time after the guard had arrived at the store and before the robbery, relaying that information to Baghdadi. Yatim was arrested. At a later stage he agreed to give evidence against the appellant.

In that context, an issue arose as to the admissibility of the following evidence:

[24] The appellant described sitting at the first table outside the store when he was having his cigarette. He said there was no-one with Yatim when they went to have a look at the car. He indicated where Yatim's car had been parked a short distance away from the store. After some further conversation there was this:

Det Bourke: Have you seen him since then?

Appellant: No

Det Bourke: Do you know his name?

Appellant: *No I don't even know his phone number. I've never spoken with him on the phone before*. (Emphasis added).

R A Hulme J described the unprompted denial as "a very minor and peripheral point": at [62] and held that leave to rely on that ground should be refused. McClellan CJ at CL and Price J agreed at [1] and [2] respectively.

Admissibility of body-mapping evidence

Morgan v R [2011] NSWCCA 257 was concerned with the admissibility of the evidence of a "biological anthropologist and anatomist", Dr Maciej Henneberg. Dr Henneberg gave evidence as to the anatomical similarity between the accused and the offender depicted in CCTV images. The evidence was admitted at the trial of the accused over objection and after a voir dire. The defence called three experts on the voir dire, each of whom was critical of Dr Henneberg's approach.

In the CCA, it was held that the comparison of the images on the CCTV with the appearance of the accused was a task which the jury could have undertaken themselves and that the evidence should not have been admitted.

The observations of Dr Henneberg as to the offender depicted in the CCTV images were as follows.

> Person of interest is an adult male of heavy body build. His shoulders and hips are wide. He has a prominent abdomen but his upper and lower limbs, especially in their distal segments, are not thick. This suggests centripetal pattern of body fat distribution. This pattern consists of the deposition of most body fat on the trunk while limbs remain relatively thin. His head and face were covered by a garment well adhering to the surface of the skin. This enabled me to make observations of the head shape, nose and face profile. His head is dolichocephalic (elongated) in the horizontal plane (viewed from above). His nose is wide and rather prominent while his face has straight profile (orthognathic). He is right-handed in his actions and carries himself straight.

Dr Henneberg's observations of the accused were as follows:

> Mr Morgan is an adult male of darkish colour skin. He is heavily build (sic), but the bulk of his body fat is concentrated on the trunk while his distal limbs are not fat (see especially lower legs). His shoulders and hips are wide. He has straight posture. His face is orthognatous

> (straight profile, without protruding jaws). His nose is wide and rather prominent. Since during the forensic procedure no photographs showing his head from above were taken the assessment of his head shape is uncertain. Judging from head width shown on posterior (taken from behind) photographs and head length on profile photographs, his head seems to be dolichocephalic (elongated oval rather than a shape approximating a circle).

Based on those observations, Dr Henneberg expressed the opinion that:

> There is a high level of anatomical similarity between the offender and the suspect (Mr Morgan). My opinion is strengthened by the fact that I could not observe of the suspect any anatomical detail different from those I could discern from the CCTV images of the offender.

Interestingly, Dr Henneberg had on a previous occasion been asked to compare images of the former politician, Ms Pauline Hanson, with an image of a person said to be her published in the newspaper. The judgment of Hidden J records that Dr Henneberg was cross examined about that event at Morgan's trial: at [117]. He expressed the opinion that he was "99.2% sure" that the person depicted in the newspaper was Ms Hanson. Putting it another way, he said that there was 8.8% probability that two random people would have such closely matching characteristics. The Crown Prosecutor later produced material establishing that the newspaper had subsequently acknowledged that the person depicted was not Ms Hanson and had published an apology to her.

Hidden J concluded at [145] that the evidence carried the risk of "white coat effect", tending to cloak the comparison of the CCTV images with the appearance of the accused under a mantle of expertise which was likely to influence the jury.

The Court, however, was split as to whether, leaving aside the evidence of Dr Henneberg, there was an adequate circumstantial case against the appellant to warrant ordering a new trial rather than entering a verdict of acquittal. By majority, a new trial was ordered: at [29] per Beazley JA; at [155] per Harrison J; Hidden J contra at [154].

Plea of guilty where elements of offence misunderstood

Lawton v R [2012] NSWCCA 16 was a case in which the appellant had pleaded guilty to an offence of recklessly causing grievous bodily harm contrary to section 35(2) of the Crimes Act 1900. The appellant's account of the offence was that he had impulsively struck the victim when the victim entered his field of vision during a fight with a third person. The victim fell to the ground and hit his head, causing serious injury. The appellant's solicitor advised him that a plea of guilty was appropriate on that version of event.

Three weeks after the appellant was sentenced, the decision of the CCA in *Blackwell v R* [2011] NSWCCA 93 was handed down. In that case, it was explained that, in order to prove recklessly causing grievous bodily harm, it is necessary for the Crown to establish that the

accused had foresight that his recklessness might cause grievous bodily harm to the victim. Beazley JA said at [81] to [82] (James J agreeing at [120]; Hall J contra at [214] to [216]):

> [81] It is convenient to refer again to the direction given by her Honour in this regard. The direction in MFI 27 in respect of the alternate charge was, relevantly: " *Maliciously means intending to cause some physical injury* ". On the Crown's submission, had the correct alternate charge been left to the jury, the direction should have been to the effect that they had to be satisfied of reckless foresight of the possibility of some physical injury. The Crown submitted that the direction required for an offence against s 35(2) as amended involved a lower threshold than the direction that was given to the jury, which required that they be satisfied of intention to cause some physical harm, rather than recklessness as to the possibility of some physical harm.
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> [82] This submission may have had some force if the suggested direction as to recklessness for the purposes of s 35(2) as amended was correct. However, I do not think that it is. The Crown's submission fails to disengage with the statutory jurisprudence prior to the amending legislation. Both the word 'maliciously' and its defined concepts have disappeared from the statute. Relevantly for present purposes, the statute provides for a offence of " *recklessly [causing] grievous bodily harm* ". There is no definitional construct within the terms of the provision which governs its meaning. There is a requirement of recklessness, which I have addressed. That is, there must be a foresight of the possibility of something. The recklessness must cause something. That which it must cause is grievous bodily harm. In my opinion, there is no basis upon which that term can be read down to mean " *some physical injury* ". Although the purpose of the amending legislation was to remove the 'archaic' fault element of offences done maliciously, there is a difference of substance between an intention to inflict some physical harm (the former s 35) and recklessness as to whether grievous bodily harm would be inflicted (s 35(2) as amended) as I have explained.

In *Lawton,* Schmidt J held at [32] that the legal advice given to Mr Lawton was not in accordance with the position stated in *Blackwell*. The Court held that there had been a miscarriage of justice on the basis that the plea of guilty was entered without a full understanding of the nature of the charge or an admission as to all elements of the offence. Leave was granted to withdraw the plea and the conviction and sentence were set aside.

Judges and juries

In *R v Belghar* [2012] NSWCCA 86, a decision of a judge to order that the trial proceed by judge alone was overturned following a Crown appeal. Section 132 of the *Criminal Procedure Act* 1986 provides:

> **132 Orders for trial by Judge alone**
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> (1) An accused person or the prosecutor in criminal proceedings in the Supreme Court or District Court may apply to the court for an order that the accused person be tried by a Judge alone (a **"trial by judge order"**).
> (2) The court must make a trial by judge order if both the accused person and the prosecutor agree to the accused person being tried by a Judge alone.
> (3) If the accused person does not agree to being tried by a Judge alone, the court must not make a trial by judge order.

(4) If the prosecutor does not agree to the accused person being tried by a Judge alone, the court may make a trial by judge order if it considers it is in the interests of justice to do so.

(5) Without limiting subsection (4), the court may refuse to make an order if it considers that the trial will involve a factual issue that requires the application of objective community standards, including (but not limited to) an issue of reasonableness, negligence, indecency, obscenity or dangerousness.

(6) The court must not make a trial by judge order unless it is satisfied that the accused person has sought and received advice in relation to the effect of such an order from an Australian legal practitioner.

(7) The court may make a trial by judge order despite any other provision of this section or section 132A if the court is of the opinion that:
(a) there is a substantial risk that acts that may constitute an offence under Division 3 of Part 7 of the *Crimes Act 1900* are likely to be committed in respect of any jury or juror, and
(b) the risk of those acts occurring may not reasonably be mitigated by other means.

Mr Belghar was charged with attempted murder, attempt to inflict grievous bodily harm with intent to do grievous bodily harm (in the alternative), intimidation (in the further alternative) and assault occasioning actual bodily harm. The offences were alleged to have been committed against his sister-in-law, who had taken his wife (her sister) to the beach without his knowledge. When Mr Belghar learned of this, he rang the sister-in-law and said:

> You slut, I am going to kill you. I am going to fuck you up. I am going to find you and kill you. You fucking slut, how dare you take my wife to the beach.

About two months later, Mr Belghar encountered the sister-in-law by coincidence at Broadway Shopping Centre. She was sitting on an internal rail in the car park. According to the Crown case, he threatened her again, picked her up and carried her to the external railing where he held her over the railing to the extent that she could see the roadway below. She was crying uncontrollably and believed she was going to die. Her brother tackled Mr Belghar and freed her.

In his interview with police, Mr Belghar denied assaulting the complainant and stated that he had only picked her up from her seated position on the internal railing because she started to lose her balance while swearing at him. He said that he feared she would fall and did not want her to injure herself.

The trial judge granted the application for a trial by judge order over opposition by the prosecutor, accepting that Mr Belghar had a reasonable apprehension that he may not receive a fair trial. His Honour's conclusion was based on the following reasoning:

> The attitude of [Mr Belghar] regarding the sister-in-law victim is based on a religious or cultural basis and in light of the fact that there has been adverse publicity regarding persons who hold extreme Muslim faith beliefs in the community.

His Honour expressed concern that the direct reference in the case to aspects of the Muslim faith:

> may cause a jury to take their mind off the central issue which is a single issue, that is, what was the intent of the applicant at the point in time that he came in contact with the victim at the Broadway Shopping Centre.

The primary judgment was given by McClellan CJ at CL. His Honour's judgment contains a comprehensive and interesting summary of relevant decisions throughout Australia.

His Honour concluded that, although section 131 of the *Criminal Procedure Act* provides for trial by jury "except as otherwise provided", the section does not create a presumption that the trial should be with a jury, thereby casting a burden of proof on an accused person (at [96]). His Honour concluded, however, that the order made was not open to the Judge (at [107] to [108]):

> 107 It may be accepted that from time to time adverse publicity is given to events which have occurred, generally outside Australia, where the strict application of a form of Muslim law or Islamic tradition has given rise to the treatment of a woman or women in a manner which is generally unacceptable to ordinary Australians. It may also be that some people in the Australian community harbour prejudice against persons who adhere to the Muslim faith, particularly against those holding "conservative" views about the place and role of women in marriage or in wider society. However, without evidence that such views are widespread in the Australian community and would be likely to influence jurors, it must be assumed that the protection afforded an accused person in the ordinary course of a trial will protect him or her from an unjust result. Those protections include the practice that before jurors are selected, each member of the panel will be reminded of their obligation to bring an impartial mind to the decision, and after being informed of the alleged offence, the identity of the accused, and the nature of the issues in the trial, asked to consider whether they can fairly consider the relevant issues. In the present case the jury would be told that the accused is a Muslim and that an issue in the trial is whether his actions in respect of his wife's sister were motivated by his attitude to the role of women in marriage. There will of course be extra protection afforded to the appellant by the trial judge's directions to the jury, which will remind them that they must decide the case having regard to the evidence and be careful not to let any prejudice they may have influence the decision. The jury may conclude that the respondent acted as he did because of his strict Muslim views, but this would be a conclusion founded upon the evidence and not resulting from any prejudice against Muslim people. The respondent's conservative views in relation to women may be an important element in the Crown case, but not because of any inherent prejudice in the community against persons who hold those views.
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> 108 The primary judge did not approach the issue in this manner. There was no evidence of the existence in the community of the prejudice which was asserted. His Honour did not consider whether, if such a prejudice exists, it could be neutralised or removed by the directions of the trial judge. Although I recognise the caution which this Court must take when asked to reconsider the decision of a trial judge made under s 132, I am satisfied that in the present case the decision which his Honour made was not open. His Honour did not have evidence to allow him to make the finding which he did. Furthermore, his Honour did not consider whether by following the conventional procedures for trial by jury the prejudice which the respondent

> feared could be avoided. For these reasons the appeal must be upheld and the decision of the primary judge quashed.

Hidden and Hislop JJ agreed with McClellan at [116] and [121] respectively. However each, whilst appreciating the Chief Judge's examination of the wider issues considered by his Honour, expressly preferred to express no concluded view about those matters.

On the subject of judge-alone trials, *FB v R*; *R v FB* [2011] NSWCCA 217 was an appeal from a judge-alone trial in which one of the grounds concerned the trial judge's questioning of certain witnesses during the trial. Whealy JA rejected that ground, finding at [110] that the Judge's interventions were "moderate, balanced, necessary and proper in every respect". His Honour observed that most of the authorities underlining the caution to be exercised by a trial judge during a criminal trial relate to the presence of a jury. In criminal trials conducted without a jury, in appropriate circumstances, a judge will be entitled within reasonable limits to explore issues of fact with both Crown and defence witnesses (at [90]).

On the issue of empanelment of juries, in *DS v R* [2012] NSWCCA 159 it was argued that the appellant had not been arraigned in accordance with the mandatory requirements of the *Criminal Procedure Act* 1986, s 130(3)(b). The appellant had been arraigned in the absence of the jury panel before pre-trial argument. Two days later he was arraigned again in the presence of the whole jury panel, as customarily occurs at the outset of a trial. The trial judge then empanelled a jury and did not arraign the accused again.The basis for the appeal was that, in s 130(3)(b), the phrase "*when the jury is empanelled*" on its proper construction means "*after the jury is empanelled*". The CCA rejected that argument.

Sentencing

Simpson J gave the *Fernando* principles a shot in the arm in *R v Millwood* [2012] NSWCCA 2. The Crown appealed against the leniency of a sentence imposed for aggravated dangerous driving causing death and grievous bodily harm. One of the grounds of appeal was that the sentencing judge had given excessive weight to respondent's subjective case. Her Honour recorded at [24] that the respondent "was the third of four siblings; his mother and stepfather were heroin addicts who neglected the family. His stepfather was physically abusive and often intolerant of the children's needs. At the age of 16 the respondent witnessed the death of his mother from a heroin overdose, having failed in attempts to resuscitate her. He did not receive any counselling following this traumatic event. His sister's letter expanded on the circumstances of his childhood and youth, and his consequent behaviour. She also spoke of the respondent's deep regret for what he had done."

Simpson J rejected the Crown's argument on that ground (at [68]-[69]; Bathurst CJ and Adamson J agreeing at [1] and [77] respectively), stating:

> 68 The submission went on:
>
> " ... there is little in the circumstances of the respondent that assist him by way of mitigation. He is not young, being 27 years old at the time of sentencing. He has a lengthy criminal history ... the victims were strangers to him. His plea of guilty was not entered at the earliest opportunity."
>
> 69 I would reject the proposition contained in the first sentence. I am not prepared to accept that an offender who has the start in life that the respondent had bears equal moral responsibility with one who has had what might be termed a "normal" or "advantaged" upbringing. Common sense and common humanity dictate that such a person will have fewer emotional resources to guide his (or her) behavioural decisions. I should not be taken as implying that such a person bears no moral responsibility; but I consider that the DPP's submission significantly underestimates the impact of a dysfunctional childhood. Indeed, it sits uneasily with the immediately preceding acknowledgement that his upbringing had been "tragic and dysfunctional". That his background is a relevant consideration affording some (although limited) mitigation is entirely consistent with the approach taken by Wood J (as he then was) in *R v Fernando* (1992) 76 A Crim R 58, a decision which has repeatedly been followed in this Court. If that were not so, there would be no purpose in sentencing courts receiving, as they invariably do, evidence concerning the personal background of offenders.

In other sentencing news, the High Court has found that the decision of the Court of Criminal Appeal in *R v Way* [2004] NSWCCA 131 was wrongly decided: *Muldrock v The Queen* [2011] HCA 39. It is now almost a year now since *Muldrock* was decided. Some of the issues the decision raises have come forward for consideration by the CCA; no doubt there are others in the wings.

The Legal Aid Commission has apparently undertaken a review of sentences passed before *Muldrock* and is said to have identified approximately 100 cases thought to be infected by *Muldrock* error.

It is clear, however, that the establishment of two-step reasoning or reasoning revealing that the sentencing judge tethered himself or herself to the sign-post on too short a leash will not necessarily result in an appeal being allowed. The task is to identify whether the erroneous reasoning was operative: cf section 6(3) of the *Criminal Appeal Act*.

See for example *Williams v R* [2012] NSWCCA 172 per Allsop P at [4] to [5]:

> To approach the matter thus may be seen to involve a degree of tethering to the standard non-parole period requiring justification for movement away from the "reference point", or "benchmark", or "guidepost": cf *R v El Helou* [2010] NSWCCA 111; 267 ALR 734 at [70] ff. Reference points, benchmarks or guideposts imply a degree of precision to a process which

> necessarily lacks such precision. Metaphors are apt to conceal as much as illuminate. Here the sentencing judge in her otherwise careful and precise remarks can be taken to be following perspicaciously the approach then required by this Court. That said, as the reasons of Price J reveal, her Honour dealt with all the circumstances attending the sentencing process in a way which in form and expression might not reflect error even after *Muldrock*. The assessment of the approach taken, however, is not a formal one, rather it is substantive. At [78], her Honour spoke of the offence as "just above the mid-range". This appears to involve a degree of precision that might be seen as chimeric, though faithful to such cases as *McEvoy* and *R v Knight* [2007] NSWCCA 283; 176 A Crim R 338. The expression of reasons should be assessed by a fair reading of them in the context of the then perceived orthodoxy of approach, as McCallum J (with whom Beazley JA and Harrison J agreed) said in *Bolt v R* [2012] NSWCCA 50 at [35]-[36]. Here the non-parole period, taking into account the 25 per cent utilitarian discount applied, was a little above 21 years (what might be seen to be "just above" the standard non-parole period).
>
> It is unnecessary for me to reach a final view about the approach employed by her Honour. This is so because, like Price J, I am unpersuaded that a lesser sentence is warranted in law: *Criminal Appeal Act 1912* (NSW), s 6(3).

An issue which has arisen from Muldrock is the question of whether matters personal to an offender are relevant to an assessment of the objective seriousness. In *Yang v R* [2012] NSWCCA 49, RA Hulme J stated at [28] that the decision in *Muldrock* appears to overturn the principle stated in *Way* that personal characteristics such as mental illness affect the objective seriousness of the offence. However, his Honour noted that his interpretation had not universally accepted: cf *MDZ v R* [2011] NSWCCA 243 and *Ayshow v R* [2011] NSWCCA 240.

In *Williams*, Price J said at [42]:

> [42] The objective seriousness of an offence is to be determined wholly by reference to the "*nature of the offending*". I do not think that the nature of the offending is to be confined to the ingredients of the crime, but may be taken to mean the fundamental qualities of the offence. In my view, where provocation is established such that it is a mitigating factor under s 21A(3)(c) *Crimes (Sentencing Procedure) Act*, it is a fundamental quality of the offending which may reduce its objective seriousness. It seems to me, that in those circumstances, there cannot be a realistic assessment of the objective seriousness of the offence unless the provocation is taken into account. The absence of provocation is not a factor of aggravation and does not increase the objective seriousness of the offence.

It should not be thought that the significance of a standard non-parole period has been completely diluted. Interestingly, in *Cassidy v R* [2012] NSWCCA 68 the guidance provided by a standard non-parole period was determinative in the resolution of the appeal. The appellant was sentenced after pleading guilty to intentionally destroying property with intent to endanger life contrary to section 198 of the *Crimes Act* 1900.

In determining the seriousness of the offence, the sentencing judge took into account evidence that showed the offender had wanted the people in the destroyed property to die. It was argued on appeal that the rule in *R v De Simoni* [2981] HCA 31 had been breached.

The Crown argued that the appeal should fail because the maximum penalty for both section 198 and attempted murder was the same (25 years). Blanch J rejected the Crown's argument, stating that the Crown had failed to account for the impact of the standard non-parole period of ten years for attempted murder. The offence under section 198 carried no standard non-parole period. Accordingly, although the offences carried the same maximum penalty, the offence of attempted murder was "more serious" and thus it was established that the rule in *De Simoni* had been breached (at [26]).