Trends in sentencing: an examination of some recent cases from the CCA over the last year:
Young Lawyers 2010

There are common themes that appear in sentencing practice and procedure that are seen in the Court of Criminal Appeal. This paper just picks up on those themes to see where they have taken us in the last year. Some of them will be familiar to you from previous papers.

Placing matters on forms

Placing offences on Forms pursuant to s 33 of the *Crimes (Sentencing Procedure) Act* 1999 ("the Act") is a popular and useful tool to both the defence and prosecution alike. Some sentencing judges are happy to have matters dealt with that way as it can make the sentencing task easier. However, the CCA has noted "inappropriate" uses of the Form practices on a number of occasions, over the past year.

***C-P v The Queen* [2009] NSWCCA 291**

In this case the appellant was charged with three offences, two counts of armed robbery and one count of being an accessory after the fact to a serious indictable offence. There were eight additional offences included on a Form 1. One of these offences was an armed robbery that involved threatening a hotel manager at gunpoint and the robbery of approximately $38,000. Another Form 1 offence was the concealing of a further armed robbery of a hotel where a patron was shot in the stomach at close range.

> [7] It is the responsibility of the prosecutor to determine the offences to be listed on the Form 1. In making that decision careful consideration must be given to the seriousness of the offences as well as the number of offences to be listed. The Prosecution Guidelines emphasise that "the decision to place offences on a Form 1 should be based on principle and reason, not administrative convenience or expedience alone." (pg 39) The guidelines continue, at page 40:
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> > "The counts on indictment should reflect such matters as the individual victims, range of dates, value of property and aggravating factors. Where there are multiple offences...Generally speaking, the maximum penalty of offences placed on a Form 1 should be less than the maximum penalty available for the principal offence. An obvious exception to this is the situation where multiple counts for the same or similar offences (such as a series of counts for break, enter and steal or robbery) have been laid against an accused person."

McClellan CJ at CL encouraged the court to take on a supervisory role in the use of forms. At [8]

> Although a court should recognise the many considerations which may inform a prosecutor's decision to include matters on a Form 1, when an entirely inappropriate arrangement is proffered and because of it a court would be denied the opportunity to

> impose a proper sentence, the discretion provided by s 33(2)(b) should be invoked and the court should decline to accept the Form 1.

His Honour felt that the inclusion of both an armed robbery offence and the concealing robbery offence on the Form 1 was inappropriate. The number of offences and the serious nature of the armed robbery offences meant that the sentence imposed could not adequately reflect the seriousness of the totality of the appellant's conduct.

***El Youssef v Regina* [2010] NSWCCA 4**

Mr Youssef pleaded guilty to 2 counts of robbery and one count of larceny and one count of armed robbery. The last count of robbery had attached to it a form on which a further offence of armed robbery and robbery were attached. The count on the form involved an offence that was more serious than the first 3 counts on the indictment. Despite the fact it was not as serious as the fourth count, which had attached to it the form, it was still held to be inappropriate. The CCA referred to this as "another incident of inappropriate matters being placed onto a form 1": resulting in the inability of the sentencing judge to impose a sentence to reflect the seriousness of the offence. The Court reminded judges of their power to reject a Form 1 which contains inappropriate matters.

The use of forms in **sexual assault cases** has also come under scrutiny.

***Eedens v The Queen* [2009] NSWCCA 254**

Justice Howie in this case took the opportunity to express his view about the use of Forms in child sexual assault cases generally. In this case the applicant had been charged with an offence pursuant to S66A of the *Crimes Act*, namely sexual intercourse with a child under the age of 10 years. The offence carries a maximum penalty of 25 years and attracts a standard non-parole period of 15 years.

Additionally, the applicant asked the court to take into account two matters on a Form 1 being an offence contrary to s66A and an offence contrary to s66C(1). His Honour disapproved of that practice, particularly in respect of matters that carried standard non-parole penalties.

> 17 Before dealing with the grounds of appeal I should express my view that the course adopted by the Crown, apparently as a result of negotiations in the Local Court, to place two of the offences on a Form 1 appears on the information before this Court to have been inappropriate. These were distinct offences against three vulnerable complainants and each was a separate act of criminality of great seriousness. In fact one of the offences on the Form 1 was objectively more serious than the offence for which the applicant was being sentenced because the child was aged 8 years. The younger the child, the more serious the offence: *Shannon v R* [2006] NSWCCA 39. Had the applicant been sentenced for each of the offences, there would clearly have been a measure of accumulation as the offence against any one child could not have embraced the criminality involved in the offence against another child.
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> 18 I appreciate that in some cases of child sexual assault there may be concerns about

> proving a particular charge were it not placed on a Form 1, but in light of the very recent complaints made in this case and the admission allegedly made to the two mothers, a conviction would have been highly likely. The use of the Form 1 reduced considerably the punishment that could be imposed upon the applicant because of the limited use that could be made of the matters being taken into account upon proper sentencing principles in accordance with the guideline judgment on s 33 of the *Crimes (Sentencing Procedure) Act* 1999, *Attorney General's Application No 1 of 2002* [2002] NSWCCA 518; 56 NSWLR 146. This is notwithstanding that taking offences into account can result in a substantial increase to the sentence otherwise appropriate for the offence for which sentence is passed: *R v Grube* [2005] NSWCCA 140 and that in a general way the sentence imposed represents the whole of the criminality before the court.
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> 19 But the sentence imposed for one offence even taking the other two offences into account, could not replicate the sentence that would have been imposed had the applicant been sentenced on all three charges. The use of the Form 1 meant that the sentence imposed could not, in my opinion, sufficiently reflect the seriousness of the totality of the applicant's conduct nor could it properly denounce the fact that three children had been abused in the way that they were. This is particularly so having regard to the fact that one of the offences also carried a standard non-parole period. The significance of the standard non-parole provisions loses its impact when the offence is placed on a Form 1. I am of the opinion that generally it is inappropriate to have a matter taken into account that carries a standard non-parole period. Of course, there may be situations where that procedure can be justified, for example where the offender is being sentenced for a number of offences similar to those placed on the Form 1.

His Honour concluded that the use of the Form 1 meant that the sentence imposed could not sufficiently reflect the seriousness of the totality of the applicant's conduct nor could it properly denounce the fact that three children had been abused in the way that they were.

Pleas of guilty: an ongoing theme

We have watched this debate move in several directions over the last 10 years. This case is Justice Howie's attempt to put down some much needed guidelines.

***R v Borkowski* [2009] NSWCCA 102**

B was charged with manslaughter after killing Mr and Mrs Howle, in their 70's, when it was hit by a car driven by Borkowski's vehicle. B was found to be speeding, over the limit of alcohol as well as to have cannabis in his blood. It was believed he was racing another car at the time.

B pleaded guilty to two charges of manslaughter on arraignment in the Penrith District Court. There had been a committal proceeding in the Local Court where witnesses were called because the Crown had alleged that he had travelled through a red light. That allegation was subsequently dropped.

The Judge sentencing B allowed a 25% discount for the timing of the plea.

The Crown appealed against the sentence imposed against B. One of the grounds of appeal alleged error in allowing a discount of 25 per cent for the respondent's plea.

Discount for guilty plea

It was agreed that the Judge and the prosecutor made a number of errors, including:

- That a plea in the Local Court is only a matter relevant to remorse.
- That there was a discount attributable to remorse either by itself or together with the plea of guilty.
- That a practice set up by a particular judge or a particular court could affect the amount of discount that should be awarded for the utilitarian value of the plea of guilty.

It became apparent that the Judge had set up a regional practice whereby the maximum discount was available when the plea of guilty came at arraignment regardless of when that occurred or whether there were committal proceedings in the Local Court. His Honour commented at [29]-[30]:

> There is no place in the administration of the criminal law in this State for sentencing variations, including the amount of discount to be given for the plea of guilty, between District Courts or judges depending on where the court is sitting or whether there is in place a particular practice… regional courts and judges may develop practise for the better management of their lists and the early determination of the issues at trial and they should be encouraged to do so. But those practices cannot be founded upon rewards for compliance, such as sentencing discounts, that do not accord with the general law of this State as determined by the judgments of this Court unless that variation has been prescribed by the legislature.

But his Honour recognised that there were exceptions to where a discount might be given for a late plea.

> [31] As a matter of general practice, the maximum discount for the utilitarian value of the plea of guilty should be awarded only to those accused persons who plead guilty in the Local Court and continue that plea of guilty in the District Court. **There may be a valid reason in the exercise of discretion for awarding the maximum discount where the plea of guilty does not occur until the District Court but that would be exceptional and arise from the peculiar factual situation in a particular case.**

At [32] his Honour set out some points of principle as follows:

1. The discount for the utilitarian value of the pleas will be determined largely by the timing of the plea so that the earlier the plea the greater discount: *Thomson* at [154]; *Forbes* [2005] NSWCCA 377 at [116].

2. Some allowance may be made in determining the discount where the trial would be particularly complicated or lengthy: *Thomson* at [154].

3. The utilitarian discount does not reflect any other consideration arising from the plea, such as saving witnesses from giving evidence but this is relevant to remorse:

Thomson at [119] to [123]; nor is it affected by post-offending conduct: *Perry* [2006] NSWCCA 351.

4. The utilitarian discount does not take into account the strength of the prosecution case: *Sutton* [2004] NSWCCA 225.

5. There is to be no component in the discount for remorse nor is there to be a separate quantified discount for remorse: *MAK and MSK* [2006] NSWCCA 381; *Kite* [2009] NSWCCA 12 or for the "Ellis discount"; *Lewins* [2007] NSWCCA 189; *S* [2008] NSWCCA 186.

6. Where there are multiple offences and pleas at different times, the utilitarian value of the plea should be separately considered for each offence: *SY* [2003] NSWCCA 291;

7. There may be offences that are so serious that no discount should be given: *Thomson* at [158]; *Kalache* [2000] NSWCCA 2; where the protection of the public requires a longer sentence: *El-Andouri* [2004] NSWCCA 178.

8. Generally the reason for the delay in the plea is irrelevant because, if it is not forthcoming, the utilitarian value is reduced: *Stambolis* [2006] NSWCCA 56; *Giac* [2008] NSWCCA 280.

9. **The utilitarian value of a delayed plea is less and consequently the discount is reduced even where there has been a plea bargain**: *Dib* [2003] NSWCCA 117; *Ahmad* [2006] NSWCCA 177; **or where the offender is waiting to see what charges are ultimately brought by the Crown**: *Sullivan and Skillin* [2009] NSWCCA 296; **or the offender has delayed the plea to obtain some forensic advantage**: *Stambolis* [2006] NSWCCA 56; *Saad* [2007] NSWCCA 98, **such as having matters put on a Form 1**: *Chiekh and Hoete* [2004] NSWCCA 448.

10. **An offer of a plea that is rejected by the Crown but is consistent with a jury verdict after trial can result in a discount even though there is no utilitarian value**: *Oinonen* [1999] NSWCCA 310; *Johnson* [2003] NSWCCA 129

11. The discount can result in a different type of sentence but the resulting sentence should not again be reduced by reason of the discount: *Lo* [2003] NSWCCA 313.

12. The amount of the discount does not depend upon the administrative arrangements or any practice in a particular court or by a particular judge for the management of trials or otherwise.

(See also *Tazelaar v R* [2009] NSWCCA119 on discount after lengthy negotiations.)

In ***R v Nicholson*** **[2010] NSWCCA 80** the sentencing judge allowed for a discount of 15% for a plea to manslaughter as an alternative to murder on the day before trial. In evidence the applicant stated that he had not pleaded guilty earlier because of investigations being carried out by his solicitor with experts on the question of his mental state at the time of the stabbing. As soon as those investigations were completed, he pleaded guilty.

Howie J stated at [35]-[36]:

> I do not believe that a discount of 15 per cent was justified. As I stated in *R v Stambolis* [2006] NSWCCA 56; 160 A Crim R 510 at [11];
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> "...Rarely if ever, will the reason why the accused has withheld the plea of guilty be a relevant matter in determining the utilitarian discount".
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> 36 Generally speaking a sentencing court should not be investigating why a plea of guilty was not given earlier than it was. The policy for the discount is to encourage early pleas on the basis of saving court time and the need for the prosecution to prepare for trial. That policy means that the earlier the plea, the greater the discount. This was made perfectly clear in *R v Thomson and Houlton* [2000] NSWCCA 309; 49 NSWLR 383. It has been restated by this Court in numerous cases, see for example *R v Borkowski* [2009] NSWCCA 102. If the plea of guilty has little utilitarian value because it was given late in the proceedings, it does not matter why the plea was not made earlier. The simple fact in the present case was that, for whatever reason, the plea had little utilitarian value, because the prosecution had prepared for trial and the trial avoided by the plea would have been relatively short. Therefore, it should have attracted a discount at the bottom of the range.

His Honour stated that no more than 10 per cent discount was appropriate.

Case/Statute	Bench
The fairness approach	
R v Oinonen [1999] NSWCCA 310 (29 September 1999)	Spigelman CJ, Grove J and Sully J Judgment of Grove J, others in agreement
S22 *Crimes (Sentencing Procedure) Act 1999*	
R v Thomson; R v Houlton [2000]NSWCCA 309	Spigelman CJ, Wood CJ at CL, Foster AJA Grove J and James J. Judgement written by Spigelman CJ, others in agreement
R v Pennisi [2001] NSWCCA 326	Joint judgment of Beasley JA, Wood CJ and Carruthers AJ
Cameron v The Queen [2002] HCA 6	Gaudron, Gummow and Callinan JJ
R v Sharma [2002] NSWCCA 142	Spigelman CJ, Mason P; Barr J; Bell J, McClellan, judgment written by Spigelman, others in agreement
Notional Utility	
R v Cardoso [2003] NSWCCA 15	Meagher J, Hidden J and Greg James J. Judgement of Hidden (first instance judge Hulme J), Meagher disagreed, Greg James J agrees with Hidden J
The literal approach	
R v Dibb [2003] NSWCCA 117	Hodgson JA, Dowd J and Barr J Judgment by Hodgson, Dowd disagrees on principal of Hodgson and follows Cameron v R (2002), Barr doesn't address issue
R v Katz [2005] NSWCCA128	Giles JA, Hoeben J and Johnson. Judgment of Giles JA, others agree
R v Harmouche [2005] NSWCCA 398	Sully J, Hulme J and Latham J. Judgment by Hulme J, others agree.
R v F.D and ors [2006] NSWCCA 31	Sully J, Hulme J and Hall J, judgement of Sully J, literal approach adopted but note words of Sully at [138]. Hulme J writes own judgment and adopts strict literal approach, Hall J agrees with Sully
A different approach?	
R v Stambolis [2006] NSWCCA 56	Giles JA, Howie J and Hoeben J. Separate judgements written by Howie, and Hoeben, Giles.
Ahmad v R [2006] NSWCCA 177	McClellan CJ, Hislop and Johnson JJ, McClellan writes judgment, others agree
R v Borkowski	Howie J with whom McClellan CJ at CL; Simpson J agreed: ' may still give max discount in exceptional circs ie. Where

	offer made but rejected by R and is consistent with jury verdict. Adopts *Oinonen* at [10]

S21A FACTORS

As is usual since the introduction of this provision, the CCA continues to deal with further refining when a factor contained within the S21A provisions of the *Crimes (Sentencing Procedure) Act* 1999 may be used as either an aggravating or mitigating factor on sentence.

Financial Gain

***Cicciarello v The Queen* [2009] NSWCCA 272**

In this case the applicant gave evidence that he was selling drugs to support his addiction to the drug known as "Ice". He testified that he was not making any profits from his supply in the sense that all the proceeds went into obtaining drugs for his own use. The sentencing judge appeared to accept the applicant's claim that all the proceeds of his supplies went to support his own drug habit.

The Court at [15] referred to the case of *Bowden* [2009] NSWCCA 45 at [55]- [60] where a distinction was drawn between selling drugs for commercial gain and feeding a habit.

At [17] the Court stated:

> Whilst one should be careful about generalising in relation to such factors outside the circumstances of any particular case, here, quite clearly, when one understands the background of this young man and what he was doing, he was not selling for greed or for financial gain, he was selling to feed a drug habit that he had acquired. **This does not detract from the fact that he committed a serious offence, but what it does mean is that it was an error, and an important one, to characterise this as selling for financial gain and thus to characterise it as an offence falling within the mid-range.** In our view, that latter conclusion must clearly have been affected by the finding of financial gain because no other basis in the facts could found such a conclusion.

Remorse

See above *Borkowski*, and also *Kite v R* [2009] NSWCCA12 above.

But also see the following case as whether a discount for remorse is determined by whether one gives information regarding co-accused.

***Morrison v R* [2009] NSWCCA 211**

In this case the sentencing judge took into account a number of mitigating factors including that the applicant was remorseful and had acknowledged the loss caused by

his offence (namely the offence of break, enter and steal). In that respect, his Honour went on to say in his remarks on sentence:

> However, his remorse is limited to the extent that it did not involve him, as I understand it, informing the authorities as to the details of the disposal of the stolen items so that some attempt could be made to retrieve them; nor did it extend to the naming of the other person in the motor vehicle.

At [23] Counsel submitted that the "error" here was similar to that identified in *Regina v Baleisuva* [2004] NSWCCA 344. In that case the sentencing judge held that there was a lack of genuine contrition because the applicant refused to identify his co-offenders to the police and maintained that refusal in court. Initially he had explained that he did not wish to give up his friends but at the end of his evidence he said that it was because he was afraid for his life. Hoeben J, with whom the other members of the Court agreed, said:

> 29 In relation to the applicant's failure to identify his co-offenders to the police and to the court during the sentencing hearing, I agree that this ought not be taken into account as an aggravating feature or as something which should lead to an adverse finding against the applicant. This is particularly so when the questions were put to the applicant in open court in a situation where a full-time custodial sentence was inevitable.
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> 30 The applicant's failure to identify his co-offenders to the police was relevant to the issue of contrition and rehabilitation in that an important part of the applicant's case on those issues was the cessation of contact with his previous "bad companions" who had led him astray. The fact that he was unwilling to reveal the identity of those persons to the police and may still have regarded them as his friends was relevant to that question. His failure to identify those persons in open court in answer to direct questioning by his Honour involves quite different considerations. In my opinion his Honour erred in taking into account adversely to the applicant on the issues of contrition and rehabilitation the applicant's refusal to name his co-offenders when asked to do so by his Honour in court. (Emphasis added).

Counsel for the Crown cited the following passage from the judgment of Dowd J in *Regina v Proud* [2002] NSWCCA 219 in support of this proposition:

> 24 It was submitted by the applicant, that he demonstrated a high level of remorse. The showing of remorse however, is not just simply about expressing regret but rather involves an offender co-operating with the authorities in explaining what happened to the funds and about other persons involved in the criminal activity, in which respect, the applicant did not give assistance to the police.

But R A Hulme J distinguished *Proud* at [29] as an ex tempore judgment delivered in a two-judge bench sitting in the CCA, stating that: "what was said in *Proud* must be read with some circumspection".

His Honour clarified the situation at [30]-[32]:

> [30] Remorse shown by an offender for an offence, where established, is one of the mitigating factors listed in s 21A(3) of the *Crimes (Sentencing Procedure) Act* 1999

> that a court is required by s 21A(1) to take into account. It may be established upon proof on the balance of probabilities of the two matters specified in s 21A(3)(i):
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> (i) the offender has provided evidence that he or she has accepted responsibility for his or her actions, and
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> (ii) the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both).
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> [31] Accordingly, an offender is entitled to a finding in his or her favour of remorse upon proof of both of those matters. The absence of the additional matters mentioned in the passage quoted above at [25] from the judgment of Dowd J in *Proud* does not disentitle an offender to this mitigating factor. However, in my opinion, where those additional matters are established an offender, generally speaking, would be entitled to expect that the weight to be attributed to the mitigating factor will be greater. Such an offender, again generally speaking, would also expect weight to be given to the additional mitigating factor of having assisted law enforcement authorities (s 21A(3)(m) and s 23) and, if that is so, a sentencing judge would undoubtedly need to exercise caution in not double counting the significance of the issue.
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> [32] Nothing I have said should be taken as meaning that an offender who establishes both of the matters in s 21A(3)(i) but does not provide information to law enforcement authorities should have the mitigating value of remorse reduced. I am simply making the point, as I believe the judge in this case was making, that remorse can have even greater value if matters over and above those in s 21A(3)(i) are established.

I have noted that it is now to be expected that a *Qutami* [2001] NSWCCA 353 criticism will be made when any offender declines to get into a witness box on sentence and still make a claim for a remorse mitigation under S21A(3)(i) of the Act.

***Butters v The Queen* [2010] NSWCCA 1**

This was a *Qutami* situation. The applicant had not entered the witness box but reference had been made to material contained in the sentencing material where the offender had expressed remorse to the Probation and Parole officer and psychiatrist. A letter of apology to the victim of the violent offence was given to the victim on the day, although not tendered to the Court by way of evidence.

The sentencing judge referred to remorse as a mitigating factor in his sentencing remarks in the following way:

> "…It was said by the prosecutor in address that Mr Butters did not enter the witness box to give voice to his remorse and it is a fact that in the absence of sworn and tested evidence in respect of such matters the court is entitled to be appropriately discriminating in accepting statements from the bar table as to the level of remorse of the particular person." and later: ".. he claims to be remorseful through his counsel and indeed he claims to have sent a letter today to the complainant expressing that remorse. But again such remorse might have been more forthcoming in my view."

The prosecution had submitted at sentence that no discount should be given for remorse pursuant to s 21A(3)(i) of the Act as it required an offender who is claiming

the benefit of remorse in mitigation of sentence to give evidence in the sentence proceedings, and that in the absence of such evidence little weight ought attach to out of court statements of remorse by the offender.
Her Honour Justice Fullerton at [16] referred to this as a "misstatement of the law" stating: .

> Contrary to the prosecutor's submission there is no statutory requirement that an offender give evidence before remorse can be taken into account in the calculation of sentence. Furthermore, the prosecutor's reliance on *R v Thomas* [2007] NSWCCA 269 as authority for the proposition he advanced was in error.

Her Honour went on to add:

> [17] On a proper construction, s 21A(3)(i) requires an offender to *provide* evidence that he or she has accepted responsibility for his or her actions and has acknowledged any injury, loss or damage caused by his or her actions or any reparation for such injury, loss or damage (or both), as a statutory precondition to any reliance on remorse as a mitigating factor. The requirement to *provide* evidence before remorse can be relied upon does not equate with a requirement that an offender *give* evidence either of remorse generally or of the matters set out in the section.
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> [18] In the present case the statutory precondition in s 21A(3)(i) was satisfied in any event. There was ample evidence in the tendered material that the applicant accepted responsibility for his actions and acknowledged the very significant injury suffered by victim as a result of his actions. However, as is clear from the remarks on sentence extracted at [15] above, his Honour did not disregard the evidence bearing upon remorse because the applicant did not go into the witness box and give evidence. Rather he considered that in assessing the weight of evidence of remorse, sourcing as it did solely from the tendered material, he was entitled to take into account the fact that the applicant did not give evidence. This was a course properly open to him. It is an approach that is consistent with this Court cautioning against an uncritical reliance on material contained in tendered reports (or other third party statements) for evidentiary purposes where an offender has not given evidence (see *R v Qutami* [2001] NSWCCA 353; 127 A Crim R 369 and *TS v R* [2007] NSWCCA 194 at [30]).

Regardless of these findings, her Honour stated it was within the sentencing judge's discretion to give lesser weight to these statements of remorse "in all the circumstances"

Mental Health

Again there is another common practice to only allow for mental health factors to be taken into account if there is an established nexus between the condition and the offending in question.

TC v The Queen [2009] NSWCCA 296

The applicant, was aged 15 years and two months at the date of the offence. The victim was, at that time, aged 14 years and 10 months. The applicant entered the victim's house, assaulted her, tied her up, splashed petrol around the house and set the

house on fire. He then left the house. The victim managed to free herself from her bindings and fled the burning house.

The sentencing judge noted that the applicant was 16 years of age at the time of sentencing and observed that, *"For one so young, he has an appalling record of offending"* (Remarks on Sentence, p.13).
One ground of appeal was that the sentencing Judge had erred in failing to adequately take into account the applicant's mental health condition.

The evidence disclosed that the applicant was diagnosed in January 2008 with a psychotic condition, namely, schizophrenia. However the sentencing judge proceeded upon the basis that there was no evidence that the applicant suffered from such a condition at the time of the offence and sentenced him upon the basis that the evidence did not support the existence of a mental or psychological disorder linked or causally associated with the offence.

Justice Hall stated:

> [59] The sentencing judge examined and recorded the Juvenile Justice background reports in some detail in his Remarks on Sentence, in particular, that of Mr Ian Nisbet, psychologist, the clinical psychological assessment report of Associate Professor Hayes and the psychological report of Ms Seidler. However, in the circumstances of this case, in my respectful opinion, his Honour was required, particularly with a young offender, to go further and determine whether the evidence established the existence of a psychological or psychiatric disorder and, if so, how it was to be taken into account for the purpose of determining an appropriate sentence.
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> [60] As I have earlier indicated, the evidentiary material plainly established that, from a very young age, the applicant had an extremely disturbed and abnormal juvenile history. Whilst, as I have indicated, his Honour did refer to the history and analysis of the relevant reports, he did not express any conclusion as to the nature and extent of the applicant's psychological status or condition and its relevance as a subjective factor in the sentencing process.

At [66] his Honour stated that the sentencing judge's approach was "an unduly narrow one". His Honour stated at [68] that psychological conditions, such as depression, have been accepted as a form of mental disorder and may, depending upon the evidence, be taken into account in sentencing for an offence, even though such conditions have not been found to be causative of the offending. His Honour cited *Regina v Benetiz* [2006] NSWCCA 21*; R v Champion* (1992) 64 A Crim R 244; and *R v Wright* (1997) 93 A Crim R 48.

His Honour at [69] took the view that the applicant's "multiplicity of psychological disorders" which including hyperactive – impulsive disorder; low average intelligence, a history of aggressive, and at times, self-harming behaviour and his substance abuse problem were all relevant factors.

> [70] I am of the opinion that the sentencing judge was in error in confining consideration of the evidence bearing upon the applicant's psychological condition to the question as to whether it was causative or linked to the offending behaviour. The applicant did have psychological or psychiatric problems and, on the authorities, his

> Honour was required to have regard to them in evaluating the subjective circumstances of the applicant at the time of offending. This, his Honour did not do.

***Merceal v R* [2010] NSWCCA 36**

This case involved an applicant who had pleaded guilty to maliciously wounding his wife. Several psychiatric reports had been obtained showing that the applicant was fit for trial, did not have a mental illness but was "likely severely depressed mood at the time of the incident". The sentencing judge accepted that the applicant had been suffering from a major depressive illness and that he was having "difficulties adjusting to changes in his life" [53] but went on to say:

> ..In the courts view, that anger goes a long way to explaining his crimes but, in the absence of evidence of a causal connection between it and his depression and adjustment problems, does not provide an excuse for them….The court has found that , out of anger, the offender decided to punish the victim and took the knife with him to achieve that end. It also found no causal connection between his mental illness issues and his crimes. In the court's view, it is appropriate to reflect general deterrence in this case. In light of his failure to alter his ways in response to the criminal justice systems earlier interventions, it is also appropriate to reflect personal deterrence in the sentences.

The Court rejected the submission on appeal that the sentencing judge had failed to take into account that a causal connection existed between the offending and the offence, as the psychiatric evidence on this point was inadequate to establish the connection: citing *Wilmot v R* [2007] NSWCCA 278, that a "bare assertion" of a connection, without elaboration, is inadequate to establish such a connection [74].

The Court found that no error existed on this ground given the sentencing judge had taken into account the mental condition in the sentencing process: in that his period of incarceration would be more onerous for him [77].

<u>Use of Victim Impact Statements to establish aggravating features.</u>

***Aguirre v R* [2010] NSWCCA 115**

In this case the sentencing judge referred to matters raised in the victim's impact statement concerning the effect of the offences of carjacking and armed robbery on the victims in determining whether there was evidence of substantial emotional harm under s 21A(2)(g). The CCA discussed the contradictory ratio on this issue that appears in *R v Slack* [2004] NSWCCA 128, *R v Thomas* [2007] NSWCCA 269 and *R v Wilson* [2005] NSWCCA 219. Sperling J at [62] of *Slack* stated:

> The court is required to be satisfied of the facts in question beyond reasonable doubt. In these circumstances, substantial weight cannot be given to an account of harm in an unsworn statement, not necessarily and almost certainly not in the victim's own words, untested by cross-examination and, in the nature of things, far from being an objective and impartial account of the effect of the offence on the victim.

However the Court in *Thomas* held at [37]:

> In *R v Slack* [2004] NSWCCA 128 at [60] Sperling J noted there is further implicit recognition of the entitlement of a sentencing judge to rely upon a victim impact statement in s 28(4), dealing with the use of a victim impact statement given by a family victim "in connection with the determination of the punishment of the offender". It is unfortunate that the Act gives no greater guidance as to the appropriate use of such a statement, especially where untested, for the purposes of determining sentence. However, it will often be appropriate to give weight to a victim impact statement where the conduct of the offender is otherwise established beyond reasonable doubt and the statement is restricted to subsequent effects on the victim. There is some doubt in the present case as to what weight the sentencing judge gave either to the physical effects of the assault or its psychological sequelae

In *Wilson*, Simpson J with the agreement of the other members of the Court stated:

> It may be, in an appropriate case, that a sentencing judge would decline to accept a victim impact statement, or attribute to it less weight than otherwise might be the case. This could arise where (as, arguably, happened here) the Crown sought, by way of a victim impact statement, to establish matters seriously going to the assessment of the objective gravity of the offence that were either in issue or not conceded. That really provides the answer to the issue taken here. The victim impact statements were tendered without objection. No argument was addressed to whether their contents should be attributed weight or not. Experienced counsel who appeared for the applicant on sentencing made no attempt to limit the use his Honour was to make of the quite substantial matters contained in the statements, particularly that relating to Mr Gresham.

Accordingly the Court in this case determined that the sentencing judge was entitled to take into account the matters raised in the victim impact statement given they were tendered and admitted without objection. At [77] James J, with whom Barr and Simpson J agreed, stated:

> No submissions were made in the proceedings on sentence that the use of the victim impact statements should be limited or that the evidentiary weight to be given to them should be limited. In these circumstances the sentencing judge could properly use the victim impact statements to establish the aggravating factor in s 21A(2)(g).

Standard non-parole period

We are now truly seeing the effect of the standard non-parole provisions in both the JIRS statistics as well as the case law illustrating changing sentencing patterns being established in the CCA.

Making a finding of the hypothetical or notional “mid-range” is a complex business, and crucial when dealing in particular with sentencing a person after a finding of guilt.

The process was clearly explained by reference to *R v Way* [2004] NSWCCA 131 as recently referred to in *SKA v R v SKA* [2009] NSWCCA 186 at [133]-

> In **R v Way** [2004] NSWCCA 131; (2004) 60 NSWLR 168, this Court analysed Division 1A in considerable depth. *Inter alia*, it held that, in sentencing for offences

> to which Div 1A applies, it is necessary, firstly, to determine what is a notional offence in the mid-range of objective seriousness, and, secondly, to evaluate the objective seriousness of the offence in question relative to that notional offence. The Court pointed out that, while prior to the introduction of Div 1A, a routine part of the sentencing exercise was the evaluation of objective seriousness of the offence under consideration, it had not previously been necessary to approach that exercise with the same degree of analysis as is required by Div 1A; it was not necessary clearly to separate circumstances or features that were relevant to the objective gravity of the offence as distinct from the personal circumstances or features of the offender; and judges had gone about the task in a largely intuitive fashion.
>
> 134 Post Pt 4 Div 1A, however, it is necessary for sentencing judges to take a more clinical approach. It is necessary, in every case, to evaluate the objective seriousness of the offence in question alongside and against the yardstick of a notional offence of its kind that falls into the mid-range of objective seriousness (**Way** [76]). Accordingly, in **Way**, analysis of the meaning of "objective seriousness" was undertaken. Factors relevant to the assessment are:
>
> - the *actus reus;*
> - the consequences of the conduct;
> - factors that might properly be said to have impinged upon the *mens rea* of the offender
> - the mental state of the offender at the time of the commission of the offence (eg intention as distinct from recklessness)
> - mental illness or intellectual disability where causally related to the commission of the offence.

***KAF v The Queen* [2009] NSWCCA 184**

In this case it was submitted that because the sentencing judge had not undertaken a comparative exercise between the instant offences and an hypothesised abstract offence in the middle of the range of objective seriousness her Honour had fallen into error. It was submitted that her Honour should have undertaken the analysis suggested by Simpson J in *R v Huynh* [2005] NSWCCA 220 where her Honour said at [27]:

> "The assessment of where the offence lies in the range of offences of its type is to be made by reference to all of the facts and circumstances of the offence, and to the range of offences of its kind which come before the court."

The court stated however at [20] that "the process must be approached intuitively" and is "based upon the general experience of the courts in sentencing for the particular offence" (at [74]-[75]). The court said that the process of reasoning would:

> "depend upon a combination of sentencing experience, which is based upon the range of incidents which go to make up cases of the relevant kind that come before the courts, combined with an understanding of the facts which are necessary elements of the offence, as well as those that are concerned with its consequences and the reason for its commission (at [79])."

Stating at [21] that "the assessment of where an offence falls in the range of objective seriousness "involves a subjective judgment, based on experience, as well as information, which cannot be precisely and comprehensively articulated" *R v JCE* [2000] NSWCCA 498 at [19]; [2000] NSWCCA 498; (2000) 120 A Crim R 18 at [19]."

***Dunn v R* [2010] NSWCCA 128**

This was a case that involved a plea to the offence of s 35(2) of the *Crimes Act* of recklessly causing grievous bodily harm attracting a maximum penalty of 10 years and a standard non-parole period of 4 years. The applicant argued that the sentencing judge had failed to make a finding as to the objective seriousness of the offence or to meaningfully compare the objective seriousness of the offence with abstract offences in the middle of the range; and was in error in his assessment of the objective seriousness of the offence. The foundation of this submission was derived from the observation at para 75 in *Way* (Spigelman CJ, Wood CJ at CL and Simpson J) that it was incorrect to propose that there is no need for a judge to determine, in any given case, what is "an abstract offence" in the middle of the range of objective seriousness [14]. But the Court went on state:

> 16 I do not regard a sentencing judge as obliged to put into descriptive words some purely hypothetical offence. I am conscious that it has been said, for example, in *R v AJP* (2004) 158 A Crim R 575 at 580 that a sentencing judge will be required to hypothesize "an abstract offence" in the middle of the range of objective seriousness in order to determine where a subject offence lies. I do not understand this to mean that a sentencing judge must incant some description of a hypothetical offence but rather that the judge must bear in mind that there lies within the mid range, an offence or offences, which are not affected by the particular facts pertinent to an offence under consideration.

However, the Court did state that it was an error of process not to make any reference to scale other than that the matter fell "somewhat below the mid range for offences of this kind". The Court agreed that the sentencing judge failed to state whether the offence "fell substantially, significantly, or slightly below the notional mid-range offence".

***Hristovksi v R* [2010] NSW CCA 129**

The applicant had pleaded guilty to 4 counts of supply commercial and large commercial quantities of various drugs carrying a standard non-parole period of 10 and 15 years. The applicant submitted on appeal that the judge's sentencing discretion had miscarried because he failed to meaningfully compare the objective seriousness of the offences with abstract offences in the middle of the range of objective seriousness and had erred by assessing the objective seriousness of the offences constituted as being within the mid range.

In support of Ground 1, Mr Boulten SC, for the Applicant, submitted that the sentencing Judge had expressed a bare conclusion concerning the objective seriousness of the two offences of supplying a large commercial quantity of drugs without disclosing any further reasoning that grounded the decision. The sentencing Judge did not describe any particular characteristics of the offending conduct which justified the conclusion that the offences fell within the mid-range. Nor did he undertake what was submitted to be the necessary exercise of considering what constitutes an abstract mid-range offence and then comparing that offence with the instant offences [24]. In respect of the second ground it was submitted that the sentencing Judge's failure to compare salient features of the instant offences with

putative or abstract mid-range offences may well have led his Honour to over value the objective seriousness of the two offences [25].

The Court rejected the applicant's argument citing *Ali v R* [2010] NSW CCA 35 emphasising the importance of the sentencing judges discretion on sentence:

> This Court has emphasised that characterisation of the degree of objective seriousness of an offence is classically within the role of the sentencing judge in finding facts and drawing inferences from those facts: *Mulato v R* [2006] NSWCCA 282 at [37], [46]. This Court is slow to determine such matters for itself or to set aside the judgment made by a first instance judge exercising a broadly based discretion, and the question must be whether the particular characterisation was open: *Mulato v R* at [37], [46]-[47].

Even error in the process of the exercise may not lead the finding of an appellable error on the sentence passed, at [38]:

> It is not an essential requirement when sentence is being passed for a standard non-parole period offence that the sentencing Judge must erect an abstract offence in the middle of the range of objective seriousness for the purpose of then comparing that abstract offence with the actual offence before the Court. The authorities make clear that the characterisation of the objective seriousness of the instant offence will involve an assessment by the sentencing Judge of features of the offence which bear upon an assessment of its objective seriousness. **That is what the sentencing Judge did in this case. Even if there was some error in his Honour's approach (and I do not think that there is), it would be an error of process only and it would not necessarily follow that there was error in the sentence passed: *R v McEvoy* [2010] NSWCCA 110 at [89]; *Dunn v R* at [20].**

Parity

Attempts to extend parity principle to similar cases, or to co-offenders where they are sentenced on the same factual basis but in respect of different offences, have failed.

Xue v The Queen [2009] NSWCCA 227

In this case the applicant tried to argue that parity principles could apply even where the applicant and another person were not co-offenders. At [66] the Court held:

> As the Applicant and Mr Chandra were not co-offenders, the parity principle reflected in *Lowe v The Queen* [1984] HCA 46; (1984) 154 CLR 606 and *Jones v The Queen* [1993] 67 ALJR 376 has no application.
>
> 67 This Court has held that the parity principle is not to be applied when a ground of appeal invites comparison between sentences imposed upon two offenders, who are not co-offenders, simply because the two offenders may have similar characteristics and may have committed similar crimes.
> ...
>
> 70 Similar sentiments have been expressed by this Court when arguments have been advanced on appeal comparing sentences imposed for offences of dishonesty or fraud committed by persons who are not co-offenders: *R v Hawker* [2001] NSWCCA 148

at paragraphs 17-18; *R v Swadling* [2004] NSWCCA 421 at paragraphs 29, 54; *R v Martin* [2005] NSWCCA 190 at paragraph 56. In each of those cases, the Court has emphasised that far greater assistance is derived from references to general sentencing policy.

***Meager v The Queen* [2009] NSW CCA 215**

This case concerned co-offenders who were charged with the same offence, namely supply heroin pursuant to s25(1) of the *Drug Misuse and Trafficking Act* 1985 although in respect of different quantities of the drug and over different periods of time. The parity issue was raised on appeal.

The applicant maintained that as Ms Collier was a co-offender, the parity principle applied to the sentence of the applicant. In the alternative it was contended that the Court should strive to produce consistency in sentencing as between offenders who commit related offences relying upon the judgment of Blanch J in *Mitchell v R* [2008] NSWCCA 192 at [8] – [10].

This argument was rejected:

> 67 This Court has held that the parity principle is not to be applied when a ground of appeal invites comparison between sentences imposed upon two offenders, who are not co-offenders, simply because the two offenders may have similar characteristics and may have committed similar crimes. In *R v Morgan* (1993) 70 A Crim R 368, Hunt CJ at CL (Allen J and Loveday AJ agreeing) said at 371:
>
> > *"It is quite wrong to compare the sentence under challenge directly with that imposed upon another offender (who is not a co-offender) simply because the two offenders may have similar characteristics and may have committed similar crimes. What must be looked at is whether the challenged sentence is within the range appropriate to the objective gravity of the particular offence and to the subjective circumstances of the particular offender, and not whether it is more severe or more lenient than some other sentence (other than that of a co-offender) which merely forms part of that range."*
>
> 68 In *R v F* [2002] NSWCCA 320; (2002) 132 A Crim R 308, it was submitted on behalf of an offender that the Court should treat the sentence imposed in a different case upon a different offender as being a *"benchmark"* which ought be followed. The Court rejected this argument. Simpson J said at 315:
>
> > *"Consistency in sentencing may be achieved by the slavish adoption, by a subsequent court, of a sentence selected by an earlier court when the facts are comparable. However, that would be consistency purchased at the cost of the sacrifice of the proper exercise of judicial discretion. Within the bounds of the appropriate range of sentences, each sentencing judge (either at first instance or following appeal) must bring to bear his or her own independent assessment of the particular case.*

> *I do not find the argument in relation to the desirability of consistency in sentencing persuasive in this case. Consistency is not derived from a single case. Consistency in sentencing will be achieved from a range of cases involving similar features, and also variables. It depends upon the accumulated wisdom and experience of sentencing judges. In my opinion a single case is inadequate to enable a principled consistent approach.*

See also *Pham v R* [2009] NSWCCA 25

This was an application for leave to appeal against a sentence imposed in the District Court by Walmsley SC DCJ (the Judge). The applicant was convicted by a jury of an offence of knowingly take part in the supply of a prohibited drug being not less than the large commercial quantity applicable to that drug.

The parity principle arose in respect of two co-accused who had been charged and pleaded in respect of different offences following charge negotiation. Latham J determined that it was not up to the sentencing court to correct any disparity that resulted following charge negotiation. The relevant portions are as follows:

> 19 It is established that disparity so called can arise when a co-offender is sentenced after the aggrieved offender has been sentenced: *Postiglione v The Queen*. In such cases there can be no error on the part of the judge sentencing the offender later aggrieved: *Lowe v The Queen* [1984] HCA 46; (1984) 154 CLR 606 at 610-611. It is also recognised that the parity principle is of wide application and is not to be applied or withheld in a technical or pedantic way. It is indeed part of or a reflection of the wider principle that consistency in sentencing by the courts overall is to be aimed at as desirable in the public interest. Perfect consistency is a goal that can never be reached because of the infinite variety of the circumstances of offences and offenders. However there is a danger that it may be compromised by the selection of differing charges so that one offender may be charged with a serious offence and given punishment at the top of an acceptable range for that offence, and a co-offender charged with another less serious offence and dealt with at the very bottom of the acceptable range for that other offence. There may be no impropriety in that course, which will often arise from negotiation between co-offenders and law enforcement authorities. Sometimes, however, and it is not necessary to put it higher than that, the result may have the appearance of injustice.
>
> 20 In other words when it is known that a person implicated in the offence for which an offender is being sentenced has already been convicted and sentenced, care needs to be taken to ensure that as far as possible the sentence about to be imposed is not so severe as to generate, not only a sense of grievance in the offender but also a sense of disquiet in the disinterested observer. The observer must of course be reasonably acquainted with the circumstances. Sometimes such a situation may be unavoidable. A co-offender may be given immunity in exchange for testifying against the accused. That does not in itself require leniency to be extended to the offender being sentenced let alone a sentence that is so lenient that it is out of the range of what is appropriate.

And later:

> 41 The effect of the submissions made on behalf of the applicant (and the decision in **Kerr** is at least capable of giving them some support) is that the principle of parity in

sentencing is broad enough to extend to redressing disparities or discrepancies in the charging process as well as in the sentencing process.

44 I do not understand either **Lowe** or **Postiglione** to suggest that the parity principle extends to correcting any imbalance in the manner in which co-offenders are charged. I would be very cautious before proposing or adopting any such principle.

[36] In my opinion, if *Kerr* has any applicability, it must be in a very limited class of case. This Court is not generally concerned with addressing the consequences of prosecutorial discretion as it impacts upon the sentences imposed upon offenders. As Miles AJ recognised, it could not be seriously argued that a person should receive a reduction in sentence because a co-offender is not charged or where, for some reason, the charge does not proceed. Why then should a sentence be reduced because another offender is charged with a less serious offence or a lesser number of offences? How does the court inform itself of the reasons why the prosecutor acted as he or she did? Does the court interfere even if the prosecutor's actions were completely justified?

[37] If the disinterested observer is to be consulted then that observer should understand the reasons why the prosecutorial discretion was exercised as it was. If this observer also understands that the courts do not generally supervise the legitimate exercise of prosecutorial discretion or seek to address the results of its exercise, then the observer would feel no disquiet about the different sentencing outcomes. But if such disquiet does arise, it is a result of the prosecutor's actions and not the sentences imposed by the court.

Sophia Beckett
Barrister