A survey of appellate authority relevant to the Commonwealth Director of Public Prosecutions between 1 January 2012 and 31 December 2012

Presented by

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1. The purpose of this paper is to provide an overview of the past year's appellate cases which are likely to be relevant to the office of the Commonwealth Director of Public Prosecutions (CDPP).

2. By way of overview, the CDPP was involved in 45 appeals to either intermediary courts of appeal or the High Court. In all but five of those the Crown was the respondent. The jurisdictional break down is:

    a) High Court - 3
    b) Victoria – 17
    c) NSW – 15
    d) Queensland – 6
    e) South Australia – 3
    f) Tasmania – 1
    g) Western Australia, Northern Territory and ACT - Nil

3. Twenty six matters were severity appeals. I have largely put the sentencing appeals to one side given that they tend to turn on their own facts. I have reviewed each of the three High Court cases but have not attempted to review each of the forty five cases.

THE HIGH COURT OF AUSTRALIA

***Kieu Thi Bui v Commonwealth Director of Public Prosecutions* (2012) 244 CLR 638**

4. The appellant, Kieu Thi Bui, was an Australian citizen who imported a border controlled substance into Australia from Vietnam, contrary to s 307.2 of the *Criminal Code* (Cth). She was apprehended on 11 February 2009 and co-operated with the police and gave an undertaking to assist in further enquiries. The appellant pleaded guilty to importing a marketable quantity of a border controlled drug in the Victorian County Court.

5. The Crown appealed the sentence on the ground that it was manifestly inadequate. The sentencing judge did not order a term of immediate imprisonment on the basis that:

   - the appellant had co-operated with authorities;
   - she had undertaken to continue co-operating with police;
   - she faced danger if placed in custody as a result of her co-operation; and
   - the risk of hardship to the appellant's infant twins.

6. At first instance the appellant was sentenced to three years' imprisonment with an immediate release upon entering into a recognisance in the amount of $5000 and agreeing to comply with the condition that she be of good behaviour for three years.

7. The Crown appealed the perceived leniency of the sentence to the Victorian Court of Appeal, which identified errors in the sentencing judge's reasons by reference to s 16A of the *Crimes Act* 1914, which as you know, states that a court must impose a sentence that is of an appropriate severity in all the circumstances of the offence. The Court of Appeal accepted the Crown's submission that the sentence imposed was inadequate and re-sentenced the appellant to four years' imprisonment and fixed a non-parole period of two years. The offender then appealed that sentence.

8. At issue on appeal to the High Court was a single issue. The appellant submitted that when the Court of Appeal re-sentenced her and applied s 16A of the Crimes Act, it should have applied an automatic discount on the sentence because there was an issue of double jeopardy. The appellant submitted that the Court of Appeal should have had regard to 'the principle double jeopardy' which required the Court of Appeal to take account of the presumed distress and anxiety of the appellant occasioned by having to stand for sentence again.

9. The appellant submitted that the words of s 16A(1*) '…a severity appropriate in all the circumstances of the offence'* and the words of s 16A(2) '*…[i]n addition to any other matters'* are sufficiently broad to encompass the common-law concept of double jeopardy. The appellant submitted that the 'mental condition' of the person to be sentenced, which condition s 16A(2)(m) requires to be taken into account, is broad enough to refer to the anxiety and distress to which it may be presumed that person will suffer on re-sentencing.

10. Section 289(2) of the Victorian *Criminal Procedure Act 2009* (Vic) (which is in almost identical terms to s 68A of the *Crimes (Appeal and Review) Act 2001* (NSW)) states that when considering whether an appeal should be permitted the Court must not take into account any element of double jeopardy involved in the respondent being sentenced again, if the appeal is allowed.

11. The Victorian Court of Appeal stated that the Victorian Act is not relevant to sentencing with respect to a federal offence except to the extent that s 80 of the *Judiciary Act* provides for the application of it: *'…by the statute law in force in the State ... in which the Court in which the jurisdiction is exercised is held.'*

12. The Court of Appeal held that the Victorian provisions modified any common law rights with respect to double jeopardy and excluded any application of such a rule to Commonwealth appeals relating to sentencing federal offenders.

13. The High Court dismissed the appeal, with the effect that the Court of Appeal's sentence stands, but it did not follow the Court of Appeal's reasoning.

14. The High Court held that the provisions of the *Criminal Procedure Act* on which the Court of Appeal relied, do not apply to appeals by the CDPP for re-sentencing under the *Crimes Act* because it essentially 'covers the field'. Moreover, the Court of Appeal should have concluded that there was no basis for it to have found that s 16A of the *Crimes Act* incorporated a concept of 'double jeopardy' in the context of federal offenders.

15. Further, the High Court held that s 16A(2) of the *Crimes Act* does not refer to the stress and anxiety presumed to be suffered by convicted persons facing re-sentencing, but to such a mental condition which is demonstrated to exist in fact.

***R v Khazaal* [2012] HCA 26**

16. The respondent was charged under s 101.5(1) of the *Criminal Code* with making a document *"connected with ... assistance in a terrorist act"* while knowing of that connection. Section 101.5(1) states:

(1) A person commits an offence if:

(a) the person collects or makes a document; and

(b) the document is connected with preparation for, the engagement of a person in, or assistance in a terrorist act; and

(c) the person mentioned in paragraph (a) knows of the connection described in paragraph (b).

17. Section 101.5(5) of the Code provides that no offence is committed under s 101.5(1) *"if the ... making of the document was <u>not</u> intended to facilitate ... assistance in a terrorist act"* (my emphasis).

18. Section 13.3 of the Code requires an accused to bear the burden of proof (on the balance of probabilities s. 13.5) by adducing evidence that would suggest a reasonable possibility that, in this specific case, the making of the book was not intended to facilitate assistance in a terrorist act ('…the evidential burden').

19. The respondent stood trial in relation to an e-book book he wrote called *Provisions on the Rules of Jihad: Short Judicial Rulings and Organizational Instructions for Fighters and Mujahideen Against Infidels.* He did not give evidence at the trial and relied on the Crown's evidence in an unsuccessful attempt to demonstrate that, as a journalist and researcher with an interest in Islam, the circumstances in which he made the e-book suggested a reasonable possibility that the making of the e-book was *'not intended to facilitate assistance in a terrorist act'.* The respondent was convicted and sentenced to 12 years' imprisonment, with a non-parole period of 9 years.

20. The respondent successfully appealed to the Court of Criminal Appeal. A majority of the Court of Criminal Appeal held that the evidence pointed to by the respondent was sufficient to discharge the evidential burden imposed by ss 13.3 and 101.5(5) of the Code and that the trial judge should have directed the jury that it could consider that defence.

21. By special leave, the prosecution appealed to the High Court arguing that the evidence relied upon by the respondent was insufficient to discharge the *evidential burden* imposed by ss 13.3 and 101.5(5) of the Code. By notice of contention, the

respondent argued that the trial judge had misdirected the jury by not giving adequate directions in relation to the words *"connected with ... assistance in a terrorist act"* in s 101.5(1).

22. Counsel for the respondent sought a direction from the trial judge in the following terms:

> *"In the event that the jury are satisfied beyond reasonable doubt of the essential ingredients of the offence, the summing up should contain a direction to the jury that if there is a reasonable possibility that the accused did not make the [e-book] with the intention of facilitating assistance in a terrorist act, then they must be satisfied beyond reasonable doubt that the making of the [e-book] was intended to facilitate assistance in a terrorist act."*

23. Counsel for the respondent submitted that the direction was necessary because sufficient evidence had been adduced at trial to discharge the evidential burden imposed on the respondent in relation to the exception from liability in s 101.5(5) of the Code. In particular, it was argued that the respondent's status as an accredited journalist and researcher with an academic interest in Islam, and the circumstances in which he made the e-book (at short notice, at the behest of "the brothers"), were sufficient to suggest the "reasonable possibility" required by s 13.3(6) of the Code that, in making the e-book, the respondent did not intend to facilitate assistance in a terrorist act. Counsel for the respondent claimed that the respondent intended, by lawful means, "to support the Islamic religion by compiling a reference book containing the views of authors concerning the role and rules of jihad in the Islamic religion."

24. The trial judge rejected the respondent's argument and determined that the exception from liability in s 101.5(5) did not arise for consideration by the jury.

25. The High Court unanimously upheld the Crown's appeal and found that the evidence relied upon by the respondent did not suggest a reasonable possibility that the making of the e-book was *not intended* to facilitate assistance in a terrorist act. In relation to the notice of contention, the Court held that no error had been shown in the trial judge's directions.

26. In examining what was required by an accused to satisfy the evidential burden required by the Code, the Court held that the operative words in s 13.3(6), *'..adducing or pointing to evidence that suggests a reasonable possibility'* in relation to the relevant negative state of affairs in s 101.5(5) required no more

than slender evidence but that for the purposes of establishing whether the evidential burden (as defined in s 13.3(6)) has been discharged, the evidence may be taken at its most favourable to the accused. The problem, ultimately, was not that the trial judge had applied the test of the evidentiary burden, but simply that on the evidence the respondent had not done enough to displace the burden.

27. Heydon J (in a single judgment) wrote that the accused was attempting to mount a positive defence and while this was possible to do by relying or discrediting evidence in the Crown case, the respondent's decision only to rely on evidence that the prosecution had adduced led to what he is on described as a 'self-inflicted problem' because the s 101.5(5) exception demands that an accused point to evidence of a negative, that is, if it was not intending the document to be used for a proper purpose. By not giving evidence, the respondent had substantially weakened his position in discharging the evidentiary burden.

***Mansfield v R; Kizon v R* [2012] HCA 49**

28. This is a judgment from a bench of five. It was a unanimous decision to reject the appeal, with Hayne, Crennan, Kiefel and Bell JJ writing together and Heydon J separately.

29. The appellants were tried together in the District Court of Western Australia on an indictment alleging five counts of conspiracy under s.11.5(1) of the *Criminal Code* to commit offences against the insider trading provisions of the *Corporations Act*, which at the relevant time was s 1002G[1].

30. Section 1002G provided that:

> *(a) a person (in this section called the insider) possesses information that is not generally available but, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of securities of a body corporate; and*
>
> *(b) the person knows, or ought reasonably to know, that:*
>
> *(i) the information is not generally available; and*
>
> *(ii) if it were generally available, it might have a material effect on the price or value of those securities..*

[1] That section has since been repealed and replaced with ss 1040A – 1044A.

31. The Crown alleged that the appellants were given information concerning a company known as Adultshop.Com Limited and used that information to buy shares in the company (the amount is not specified). The Crown relied on three key pieces of information allegedly passed to the appellants by the managing director of Adultshop:

    a. The expected profit for AdultShop for the 2002 financial year had risen from $3 million to $11 million;

    b. The expected turnover for AdultShop for the 2002 financial year had risen from between $30 million and $50 million, to about $111 million;

    c. James Packer had recently bought 4.9% of the company.

32. It turned out that each one of those statements was wrong.

33. The issue on appeal was whether the appellants possessed *"information"* that was not generally available and therefore a breach of s 1002G. The appellants argued that to establish a contravention of s 1002G the prosecution must prove that the information which the appellants possessed was a '…factual reality'. The appellants submitted that because the inside information they relied upon in purchasing the shares was false it could not constitute information within the meaning of the *Corporations Act.*

34. At first instance the trial judge ruled that the relevant provisions of the *Corporations Act* were contravened only if the information alleged to be not generally available, and to have been acted upon by the accused, was "a factual reality" and he entered judgments of acquittal on all of the counts of the indictment that related to trading in the securities of AdultShop. That decision was overturned on appeal by the WA Court of Appeal and the appellants sought leave to the High Court.

35. The appellants had three arguments as to why the *information* referred to in s 1002G must be accurate in order for an offence to occur.

36. The <u>first</u> submission was that the word "information" in the relevant provisions of the *Corporations Act* takes its ordinary meaning and implies the truthfulness and accuracy of the statement. The ordinary meaning of information was that it contained some *fact*. That submission was rejected, with Heydon J sighting a

number of authorities to the effect that the term information can include information that is in fact wrong. Similarly, the balance of the Court held at para. 29:

> *'The word "information" in its ordinary usage is not to be understood as confined to knowledge communicated which constitutes or concerns objective truths. Knowledge can be conveyed about a subject-matter (whether "fact, subject, or event") and properly be described as "information" whether the knowledge conveyed is wholly accurate, wholly false or a mixture of the two. The person conveying that knowledge may know or believe that what is conveyed is accurate or false, whether in whole or in part, and yet, regardless of that person's state of mind, what is conveyed is properly described as "information"'*

37. The second submission was that when the word "information" is used in the Corporations Act, it assumes the information is correct. For example, the Act's provisions which prohibit a company from disseminating false and misleading statements. Those provisions penalise the maker of a misleading or deceptive statement and enables recovery by the person misled or deceived. The appellants' submitted it would be anomalous if that same person who could on the one hand be awarded damages for being misled about a fact and for relying on a misleading statement, could simultaneously be prosecuted because they sought to rely on those false statements in circumstances where the information was confidential.

38. The High Court rejected that argument, making it clear that the purpose of the anti-insider trading regime was not about protecting an individual from loss because they have relied on false information (and should not be prosecuted). The Court stated at paras. 44 to 46 that the securities market can only operate freely and fairly if all participants have equal access to relevant information. Investor confidence depends importantly on the prevention of the improper use of confidential information.

39. The third submission was that international regulatory approaches to insider trading was consistent with the requirement for the inside information to be a matter of fact. That submission was met with what could only be described as a fairly cursory, 'that's all very interesting but so what?' response from all five judges. The Court held that what other jurisdictions may be doing was not relevant when it came to interpreting the Act.

40. By way of obiter, his Honour Justice Heydon at para.69 makes an important point about the increased difficulty of prosecuting insider trading offences if the Crown was also required to prove that the statements relied upon by the accused were true:

> *"…enforcement of the law would have depended on extensive inquiry in each case as to whether the alleged "inside information" was true, for unless it were true it could not be "information". This would have placed a burden of proof on the prosecution which might be very difficult to discharge. It would have involved an assessment of criminal guilt in hindsight that would have left accused persons unsure whether or not, at the time they traded in securities, their conduct was or was not lawful."*

***Cooper v The Queen* [2012] HCA 50**

41. This is not a matter involving a Commonwealth offence but it is a useful authority because it addresses how an appellate court should apply the 'proviso' in considering whether an error made by trial court warrants a rehearing.

42. Section 6(1) of the *Criminal Appeal Act 1912* (NSW) states that:

> *(1) The court on any appeal under section 5 (1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.* (My emphasis).

43. In *Cooper*, a bench of five heard that the appellant was on trial in the NSW Supreme Court for murder. A witness gave evidence that she saw the appellant beat the deceased to death by hitting him with his fists, a child's baseball bat and a small axe. The appellant's niece, known in the trial as 'C', gave evidence that in fact that witness had told her that she was the one who had struck the deceased. At trial, the Crown's primary case was that the appellant alone had hit and killed the deceased. But, as an alternative case, the prosecution submitted that even if

the witness had struck the fatal blow or blows, the appellant was guilty of murder because the witness had been part of a joint criminal enterprise with the appellant.

44. The appellant was convicted and the appeal against conviction was dismissed by the NSW CCA. It held that while the trial judge (Buddin J) had incorrectly directed the jury that if it was not persuaded beyond reasonable doubt that the appellant had struck the fatal blow or blows, the jury might nonetheless convict the appellant of murder if satisfied that the appellant and the witness had been engaged in a joint criminal enterprise to kill or do grievous bodily harm to the deceased. Although there had been an incorrect decision on a question of law, the CCA concluded that no substantial miscarriage of justice had actually occurred and that the proviso to s 6(1) of the *Criminal Appeal Act 1912* (NSW) applied.

45. French CJ, Hayne, Crennan and Kiefel JJ. allowed the appeal and ordered a new trial. Heydon J dissented on the basis that there was sufficient evidence before the jury to convict the accused of murder irrespective of the misdirection as to how a joint criminal enterprise could be established.

46. At paras. 20–21 of the judgment, their Honours French CJ, Hayne, Crennan and Kiefel JJ applied the case of *Weiss v R* (2005) 224 CLR 300 at 315 which held:

> *"…there are three propositions which are fundamental to the application of the proviso to the common form criminal appeal statute. First, the appellate court must itself decide whether a substantial miscarriage of justice has actually occurred. Second, the task is objective, and is to be performed with whatever are the advantages and disadvantages of deciding an appeal on the record of the trial. Third, the standard of proof of criminal guilt is proof beyond reasonable doubt.*
>
> *[21] Performance of the appellate court's task requires the court to undertake its own independent assessment of the evidence and it further require in the court to determine whether, making due allowance for the "natural limitations" that exist in the case of an appellate court proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty.*
>
> *And although no single universally applicable description of what constitutes 'no substantial miscarriage of justice' can be given", it …cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence*

properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty.

47. The court did not seek to define the term 'serious miscarriage of justice' but it did in the decision of *Baini v R* (2012) HCA 59, albeit in the context of the Victorian *Criminal Procedure Act* 2009 (Vic), s 276. In *Baini* the court examined the decision of *Weiss* referred to above and held that it did not strictly apply because the NSW *Criminal Appeals Act* provided that an appeal be disallowed if there was no "substantial miscarriage of justice", whereas s 276 of the Victorian Act provides that an appeal be allowed on demonstration of a "substantial miscarriage of justice" – in other words there is a different default position and a different onus.

48. The NSW approach is to allow the appeal if there is an error and it falls to the Crown to prove no "substantial miscarriage of justice".

49. By contrast, in Victoria the default position is that the appeal will fail even if there is an error unless the appellant can establish a substantial miscarriage of justice. Having said that, they then said that, in reality, differences of onus of proof do not matter a great deal.

50. The court then on to look at the meaning of the term 'significant miscarriage of justice' and held that there are three key types of miscarriage: (a) where the jury have arrived at a result that cannot be supported; (b) where there has been an error or an irregularity in, or in relation to, the trial and the Court of Appeal cannot be satisfied that the error or irregularity did not make a difference to the outcome of the trial; or (c) where there has been a serious departure from the prescribed processes for trial. This was not to be an exhaustive list because whether there has been a "substantial miscarriage of justice" ultimately requires a judgment to be made. It follows that a "substantial miscarriage of justice" encompasses not only cases identified by reference to inaccuracy of result but also cases identified by reference to departure from process even if it can be shown that the verdict was open or it is not possible to conclude whether the verdict was open.

NEW SOUTH WALES COURT OF CRIMINAL APPEAL

***R v Nolan* [2012] NSWCCA 126,**

51. This appeal dealt with a single charge of aiding and abetting an importation of a Tier 1 good (pseudoephedrine) pursuant to s 233BAA(4) of the *Customs Act 1901*

(Cth) and s. 11.2(1) of the *Criminal Code*. The Crown case alleged that an individual imported a series of marble items including three stools which were found to contain a quantity of pure pseudoephedrine - slightly below 2 kgs. The pseudoephedrine was replaced by Customs officials with self-raising flour before the stools left Customs and a controlled delivery arranged. Nolan was not alleged to have any role in the organisation of the importation, but he was alleged to have assisted and encouraged the endeavours of another person, Simpson, to take delivery of the consignment at a third person's house and to have undertaken counter-surveillance on the property for Simpson on 4 May 2010 and to have collected Simpson from the airport and driven him to the property where the stools were collected on 5 May 2010. At trial the prosecution accepted that prior to 4 May 2010 there was no evidence of Nolan being involved in the importation.

52. The trial judge directed an acquittal following an application from the accused that there was no case to answer on the basis that at the time he became involved in the criminal enterprise the drug had already been substituted with flour and he could not be convicted of aiding and abetting a completed offence.

53. The Crown appealed the trial judge's direction to the jury to acquit Nolan. The CCA agreed with the trial judge's analysis. After a discussion of other cases dealing with the term 'imported' (including *Campbell* and *Calderwood* (2007) 172 A Crim R 208)*,* his Honour McClellan CJ at CL (with whom Rothman and Davies JJ agreed) held at para. 28 that the meaning of the term *imported* in s 233BAA(4) of the *Customs Act:*

> *… is plain. The section does not contemplate that there can be separate behaviour being an "importation" which is an offence beyond the prohibited "importing" of goods. The noun "importation" in sub-section (c) refers to the event to which the verb "imported" refers. For this reason the authorities which I followed in Calderwood and the approach that I took in that case is in my view applicable to the proper construction of s 233BAA(4).*

54. The Court held that in contrast to the CCA's judgment in Campbell which was a *Code* offence, importation under the Customs Act could include activities that followed the arrival of goods entering Australia provided they are related, proximate and incidental to the bringing of goods into Australia.

55. In this instance, by the time Nolan became involved in the activity the drugs had been confiscated and substituted with flour, there could not be an offence of aiding and abetting an offence which had already been completed. His Honour concludes at para. 37 that Nolan: *"... could have been successfully charged with an attempt to commit an offence, probably the offence of attempting to possess. But his actions could not constitute the offence of aiding and abetting the importation of the drugs."*

R v Pogson; R v Lapham; R v Martin [2012] NSWCCA 225

56. The respondents each pleaded guilty to offences arising from the making of false or misleading statements in a prospectus issued to raise funds to be used in a property development. The Crown appeals raised for consideration the correctness of statements made by the CCA in *R v Boughen; R v Cameron* [2012] NSWCCA 17 *("Boughen")* concerning the appropriateness of an intensive correction order for a *"white-collar"* offender.

57. *Boughen* is another case from 2012. Briefly, the CCA imposed custodial sentences on two television producers who had been involved over a lengthy period of time in significant tax evasion. The men were aware of the illegality of their actions and failed to desist. The CCA held that the sentencing court's decision to order that the offenders serve their custodial sentences by means of 'intensive corrections orders' were entirely inappropriate because ICO's focused on rehabilitation which was irrelevant in the circumstances of such an offence. An ICO is an available sentencing alternative by operation of s.20AB *Crimes Act 1914 (Cth)* and failure to comply with an ICO is addressed by s.20AC of that Act.

58. An ICO is a form of sentencing measure introduced in NSW in 2010. It can apply in circumstances where a court has sentenced an offender to imprisonment for a term of not more than 2 years. Part 5 of the *Crimes (Sentencing Procedure) Act* applies to the making of such an order. The court can only make such an order where the offender has been assessed as suitable (note it is not available in cases involving sexual assault). An ICO is to be served in the community, where offenders can be subject to a range of stringent conditions including 24 hour monitoring, regular community work and a combination of tailored educational, rehabilitative and other related activities.

59. At the time of its introduction, ICOs were designed to replace periodic detention, a form of sentence which was previously available throughout NSW which provided no case management or therapeutic or rehabilitative support for offenders. ICOs were intended to have a rehabilitative focus *"from beginning to end"* and, for that reason, a judge making an ICO could not provide for a period of parole.

60. In *Boughen,* Simpson J., writing for the Court, concluded that in relation to an offender who has *"no or minimal"* prospect of reoffending, with no issues of abuse which require attention, rehabilitation is an irrelevant consideration. As the "*principal focus"* of an ICO is rehabilitation, an ICO is not relevant and accordingly not available to an offender assessed as unlikely to reoffend and with good prospects of rehabilitation.

61. *R v Pogson, Lapham and Martin* overturned *Boughen*. In *Pogson, Lapham and Martin* the CCA held that it was unnecessary for rehabilitation to be an issue in order for the Court to be justified in making an ICO. The CCA held that an ICO is not a soft option and was in fact a significant sentence which had a real impact upon the life of an offender.

62. The CCA was also somewhat critical of what they regarded as a rather literal interpretation of the term rehabilitation, stating that the term *"rehabilitation"*, in the context of sentencing, was not confined to those who are regarded as being ill or predisposed to crime by environmental factors, including alcohol or drug abuse, therefore it is potentially open to any offender (except sex offenders.)

63. The CCA held that the ICO's did not accurately reflect the criminality of the offences and held that a full time custodial sentence should have been imposed. However, it exercised its discretion not to resentence the offenders.

***Clark v R* [2012] NSWCCA 158**

64. This appeal concerned an appellant convicted of murder and prosecuted by the NSW ODPP. Although it is a state offence, the case examines the CCA's approach to an appellant who seeks to appeal their conviction in circumstances where they have already pleaded guilty.

65. The appellant, Ben Richard Clark (now known as Stephanie Elizabeth Clark) sought leave to appeal with respect to a conviction and sentence passed by Patten AJ on 24 August 2007, following a plea of guilty to a charge of murder four years earlier. The appeal was lodged in 2011. At issue, essentially, was whether the appellant had been properly legally represented at the time, causing the plea to be void. A second issue was the alleged admission into evidence before the sentencing judge of inadmissible evidence.

66. Relying on *Thalali* (2009) 75 NSWLR 307 at 312–313, *R v Liberti* (1991) 66 A Crim R 120 at 122, *R v Parkes* [2004] NSWCCA 377 at [48] and *R v Birks* (1990) 19 NSWLR 677 the CCA summarised the position as being that:

a) The appellate Court may quash a conviction entered upon a plea of guilty in the sentencing court if it is demonstrated that a miscarriage of justice will occur if the Applicant is not permitted to withdraw the plea.

b) The onus lies upon the Applicant to demonstrate that leave should be granted.

c) The Applicant must establish a good and substantial reason for the Court taking the course of granting leave to withdraw the plea.

d) An application to withdraw a plea of guilty is to be approached with caution.

e) The plea of guilty itself is a cogent admission of the ingredients of the offence – in fact, it has been described as the most cogent admission of guilt that can be made: *Charlesworth v R* [2009] NSWCCA 27 at [25].

f) a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred, and this will normally only arise where the accused person did not understand the nature of the charge, or did not intend by his plea to admit his guilt of it: *Meissner v R* (1995) 184 CLR 132 at 157.

67. To the extent that the appellant submitted that the plea of guilty was entered without her instructions, and sentencing proceedings were conducted upon bases which did not comply with her instructions, the CCA referred to the following principles which apply where a challenge to conviction is made by reference to the conduct of legal representatives at first instance.

a) A Court of Criminal Appeal has a power and a duty to intervene in the case of a miscarriage of justice, but what amounts to a miscarriage of justice is something that has to be considered in the light of the way in which the system of criminal justice operates.

b) As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence.

c) However, there may arise cases where something has occurred in the running of a trial, perhaps as the result of 'flagrant incompetence' of counsel, or perhaps from some other cause, which will be recognised as involving, or causing, a miscarriage of justice. It is impossible, and undesirable, to attempt to define such cases with precision. When they arise they will attract appellate intervention.

68. The CCA rejected the appeal. This decision was followed in *Han v R* [2012] NSWCCA 257.

VICTORIAN COURT OF APPEAL

Director of Public Prosecutions (Cth) v JM [2012] VSCA 21

69. This appeal concerned a stated case referred to the Court from the Supreme Court. The stated case reserved three questions for determination concerning the construction of s 1041A of the *Corporations Act 2001* (Cth) — the provision under which the accused is charged – and the application of the Criminal Code's fault element.

70. Section 1041A of the Corporations Act states that:

> *A person must not take part in, or carry out (whether directly or indirectly and whether in this jurisdiction or elsewhere):*
>
> *(a) a transaction that has or is likely to have; or*
>
> *(b) 2 or more transactions that have or are likely to have;*
>
> *the effect of:*

> *(c) creating an artificial price for trading in financial products on a financial market operated in this jurisdiction; or*
>
> *(d) maintaining at a level that is artificial (whether or not it was previously artificial) a price for trading in financial products on a financial market operated in this jurisdiction.*

71. The parties were in dispute about the meaning of 'artificial price'. The Crown contends that for a price to be 'artificial' it is enough that the price is the result of a transaction entered into for the sole or dominant purpose of setting a particular price. The accused disputes this construction, submitting that 'artificial price' is an economic concept related to abuse of market power. The reserved questions, in effect, ask whether the Crown's construction of s 1041A is correct.

72. In a nutshell, the Court redefined 'artificial price' as an outcome rather than a purpose test.

73. At its simplest, the accused was alleged to have artificially maintained the price of certain shares in which he had an interest. The Crown alleged that the accused had entered into an arrangement with family members who agreed to buy the relevant shares but that the accused would pay for the purchases. It was alleged that these transactions were designed to maintain the price of the stock in order to prevent margin calls being made on the accused.

74. The accused objected to the matter being referred to the Court of Appeal at all on the basis that what was being sought by the Crown was, in his submission, an advisory opinion. That argument (taking up 35 pages of an 86 page judgement) failed.

75. Dealing with the more substantial issues, the Court examined the term artificial price in the context of the previous authority of *ASIC v Soust* [2010] FCA 68. In *Soust,* the managing director of a company purchased shares in his mother's name on 31 December 2007, shortly before the close of the market for the calendar year, with a view to increasing the market price of the company's shares and thereby earning a larger bonus under his service contract. He was found to have engaged in market manipulation in contravention of both s 1041A and 1041B of the *Corporations Act*.

76. In *Soust,* Goldberg J held that the expression 'artificial price' in s1041A means *a price created not for the purpose of implementing or consummating a transaction between genuine parties wishing to buy and sell securities, but rather for a*

purpose unrelated to achieving the outcome of the interplay of genuine market forces of supply and demand.

77. The three bench court was split on this point. Warren J followed *Soust.* His Honour held that irrespective of the underlying purpose of the impugned transaction, s 1041A could only be breached if the subsequent behaviour of other genuine market participants was affected. If it was not, then there might still be a breach, but it would be a breach of s. 1041B (the creation of a false and misleading appearance as to price), not s. 1041A, provided the sole or dominant purpose of the accused in entering into the transaction originally had been to set or maintain the price. His Honour rejected the submission that an artificial price concerned market power. At para. 248 his Honour stated:

> *An artificial price is a 'real' price in the sense that it is one that genuine market participants are willing to buy or sell at, but it has not come about as a result of genuine forces of supply and demand. Thus one way in which an artificial price is created when genuine buyers and sellers are 'fooled' by the mirage that is the false or misleading appearance of a price. The actual price that genuine buyers and sellers are willing to buy or sell at has been successfully created by the manipulator, not created by genuine market forces. This might be viewed as a change in the behaviour of market players. Section 1041A captures transactions that are likely to have this effect of creating an artificial price also.*

78. In their joint judgment, Nettle JA and Hansen JA did not answer the question of whether the accused's purpose in taking part in the impugned transactions was manipulative, because this was a matter of fact properly left to the jury. However, they held that the term "artificial price" in s.1041A had a legal meaning represented by "cornering"[2] or "squeezing"[3] the value of a share. An "artificial price" is one which, although it reflects the forces of supply and demand, results from one party having a monopoly or domination of the market for that security

[2] 'Corner' - in the context of equities, means buying up all of the available liquidity in a stock to force short sellers trying to cover their short position to buy from you at artificially high prices (also referred to as 'squeezing the shorts'). In the case of futures, buying up all of the available liquidity in the underlying commodity so that a person with a 'sold' position is forced to pay artificially high prices to make delivery or close out their position.

[3] 'Squeeze' - in the case of futures, taking advantage of a natural shortage in the underlying commodity (eg because of a flood or drought) so that a person with a sold position is forced to pay artificially high prices to make delivery or close out their position.

which takes unfair advantage of that market power to extract a price different to that which would have applied if there was adequate supply.

79. On that analysis, the Crown would need to prove that the accused was in a position to dominate the market in such a way that his or her dealings alone would affect the market. Secondly, that the accused used their dominant rule for an improper purpose, ie, was an artificial price had been created by the exercise of that power.

80. During the late stages of the appeal an issue arose regarding the correct characterisation of the elements of an offence under s 1041A. It seems that the parties had initially agreed on the elements, only for the Crown to change its position during oral submissions. The majority, Nettle JA and Hansen JA, did not decide the issue on the grounds that it was not a question referred to them by the trial judge.

81. Warren CJ did examine the issue. The competing arguments were the Crown's submission that the fault element is the intention to enter into a transaction; no intention or recklessness is required with respect to what the 'artificial price' is. By contrast, the accused's position was that the fault element would be an intention to take part in a transaction the effect or likely effect of which would be to create an artificial price. The significance of the difference is clear – if the Crown interpretation was correct it would merely need to prove that the fault element was satisfied once it could prove that the accused had the intention to enter into the transaction. The accused's interpretation added a separate issue, that is that the purpose of the transaction was likely to have the effect of creating or maintaining an artificial price.

82. Warren CJ rejected the Crown's interpretation stating that a proper interpretation of section 5.6 of the Code with respect to the default fault elements meant that there must be a fault element in relation to the likely effect of the impugned transaction. His Honour's view was that essentially there were two steps.

- Firstly, the actual undertaking of the impugned transaction. The physical element was conduct and the corresponding fault element was intention.
- Secondly, the effect of the transaction was the effect or the desired creation of an artificial price. The physical element is a circumstance of the conduct with the fault element being recklessness.

83. Critically, special leave was granted by the High Court on 14 December 2012 in relation to both the correct elements of the offence and the meaning of the term artificial price.

***PJ v The Queen* [2012] VSCA 146**

82. This case concerned an appeal from an accused who had been charged with the 'aggravated offences' of people smuggling' under s 233C of the *Migration Act 1958*.

83. At issue was the construction of the phrase within s 233C of the *Migration Act* that the accused *'...facilitated bringing for coming to Australia of a grip of at least five persons.*' The Victorian Court of Appeal needed to resolve whether proof of the offence required the prosecution to establish that the applicant was aware that the destination of the journey that he was alleged to have facilitated was Australia. The defendants submitted that this was necessary, the Crown submitted that it was sufficient if it could establish that the intended destination was a place within Australian territory, whether or not the applicant was aware that the place was in fact a part of Australia. At first instance the trial judge upheld the Crown submission.

84. At paras. 65 to 73 and 86 the Court of Appeal considered in some detail the decision of the NSW CCA *R v JS* (2007) 175 A Crim R 108, in particular, the statements of principle about the attachment of a fault element to a matter of legal status or character. The Court held that on the authority of *JS*, it is no answer to assert that the status of the destination as Australia is a question of law. The Court said at [76]:

> *"What must be established is an intention 'to do the whole act that is prohibited'. That means, in our view, that the defendant must be proved to have been aware that what he was organising or facilitating was a conveyance of the relevant persons to, or their (proposed) entry into, Australia."*

85. The Court noted at para. 41 that it was insufficient for the defendant to simply have the intention *'to go to a place that is in fact a part of Australia'* because '*Parliament should not be taken to have made the efficacy of its people smuggling*

provisions contingent upon the accuracy or otherwise of the geographical understandings of those who engaged in the activity.'

86. The Court held that a critical requirement was for the Crown to prove beyond reasonable doubt that the accused had been reckless that is, that the non-citizens being conveyed *'had, or have, no lawful right to come to Australia.'* By requiring proof of the defendant's recklessness as to the absence of that lawful right, Parliament intended to require proof that the accused was *'aware of a substantial risk'* that none of the relevant persons had a lawful right to come to Australia. That is, the defendant must have turned his mind to the existence of that risk, in relation to that particular country, and decided, unjustifiably, to take the risk. On this view *"Australia"* does not mean *'the intended destination of the voyage, provided that it is in fact part of Australia'*, it means a place known to the accused as Australia.

87. Having noted the standard approach of legislative construction, that is, that the language used in any part of an offence provision must be construed in the context of the provision, and the Act, as a whole, the Court held at para. 47 that the language of s.233C(1)(a) prohibits the intentional organisation, or facilitation, of conduct directed at conveying the non-citizens to, or into, Australia, the accused being aware of the substantial risk that they have no lawful right to enter that country.

88. This authority was adopted by the NSW CCA in its decision of *Sunada v R; Jaru v R* [2012] NSWCCA 187, which has not been reviewed as part of this paper.

***SAJ v R* [2012] VSCA 243**

89. This appeal also concerns a prosecution under the Corporations Act, specifically, s 184(2)(a). Section 184(2)(a) provides that:

> *(2) A director, other officer or employee of a corporation commits an offence if they use their position dishonestly:*
>
> *(a) with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or*
>
> *(b) recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.*

90. The Crown alleged that the appellant dishonestly used his position as director of companies associated with Opes Prime, a finance and stock-broking company, with the intention of directly or indirectly gaining an advantage for another company.

91. The issue on appeal was whether the word "dishonestly" in s 184(2) imports the objective test of dishonesty adopted by the High Court in *Peters v R* (1998) 192 CLR 493 and more recently reiterated in *McLeod v R* (2003) 214 CLR 230 or the two part objective and subjective test adopted by the English Court of Appeal in *R v Ghosh* [1992] QB 1053. The Crown favoured the test for dishonesty set out *Peters v R*, while the appellant favoured the dishonesty test set out in *R v Ghosh*.

92. The competing tests were:

Peters: The test to be applied in deciding whether the act done is properly characterised as dishonest will differ depending on whether it was dishonest according to ordinary notions or dishonest in some special sense.

If the question is whether the act was dishonest according to ordinary notions, it is sufficient that the jury be instructed that that is to be decided by the standards of ordinary, decent people. However, if "dishonest" is used in some special sense in legislation creating an offence, it will ordinarily be necessary for the jury to be told what is or is not meant by that word in that context.

Ghosh: The prosecution had to satisfy two components to establish dishonesty. *First*, it had to show that the accused had acted dishonestly according to the standards of reasonable and honest people. *Second*, the accused must have realised that his conduct was dishonest according to those standards. In other words, there was both an objective and subjective component to the test.

93. The appellant submitted that for the Crown to make out the offence under s 184(2)(a), it needed to establish that the appellant's use of position was both dishonest towards standards of ordinary people and, secondly, known by accused to be dishonest according to those standards as per *Ghosh*. The Crown submitted

that in the absence of any statutory definition of 'dishonestly' specifically applying to s 184(2)(a), the term should be interpreted in strict accordance with *Peters.*

94. In this case, the Victoria Court of Appeal held that nothing in legislative history indicated that Parliament intended 'dishonestly' in s 184(2)(a) to mean anything other than it would normally – there was no 'special meaning' and there was no requirement that the Crown prove two discrete elements. It was sufficient for the Crown to prove that the accused's behaviour was dishonest as assessed by ordinary standards. The Court of Appeal made the point that often the fact in issue will be whether the accused was dishonest in a "special sense" (because there was an express legislative definition or it was clear from the Act that something other than common dishonesty was required) and the trial judge must direct the jury as to what is, or is not, meant by that word in the particular context in which it appears.

95. On one view, the Victorian Court of Appeal's decision to follow the High Court's judgment in *Peters* does not seem surprising. However, it was not that straightforward. As Nettle JA points out in his separate (though still concurring judgement) a problem arises between the two tests because in some other sections of the *Corporations Act*, (see ss 1041F(2) and 1041G(2)) and Chapter 4 at s 73.9(3), Chapter 7 at s 130.3 and Chapter 10 at ss 470.2, 471(2), 474.1 and 480.2 of the *Criminal Code*, it is specifically provided that, for certain defined purposes, "dishonest" means dishonest according to the standards of ordinary people and known by the accused to be dishonest according to the standards of ordinary people, following the Ghosh approach. As his Honour noted at para. 4 of his judgment:

> *Logically, it is difficult to imagine that Parliament intended the Ghosh test to apply the offences to which those sections are directed but not also the offence for which s 184(2) provides. That sense of disquiet is heightened by the preference for the Ghosh test expressed in the Explanatory Memorandum to the Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999 (Cth).*

96. However, that is the conclusion the Court reached. Their Honours Weinberg JA and Davies AJA held that Chapter 2 of the Criminal Code applies to s 184 of the Corporations Act and Chapter 2 does not state that any of the definitions of

'dishonest' found in Chapters 4, 7 or 10 of the Criminal Code apply to s 184(2) of the Corporations Act. The Court held that by expressly including Ghosh-type definitions of "dishonest" in ss 1041F(2) and 1041G(2) of the Corporations Act that it implied that such a definition is not intended to apply to s 184(2) – that is, the Parliament would have expressly stated that application.

97. Their Honours Weinberg JA and Davies AJA held there is also nothing in the legislative history of s 184(2)(a) to indicate that the word "dishonestly" is used in any "special sense" – therefore the trial judge was not required to provide the jury with a definition.

98. The appeal was dismissed.

QUEENSLAND COURT OF APPEAL

R v Van der Zyden [2012] QCA 89

99. This matter was both a Crown appeal on sentence and an appeal regarding the conviction. There were six grounds of appeal in total and all were dismissed. The case is a reminder of the limits imposed upon the Crown when either cross-examining an accused about a witness's lack of motive in giving their particular evidence or in making a submission to the jury about a witness's lack of motive.

100. The appellant, an Australian citizen, was convicted of eight counts of committing an act of indecency on a person under 16 in contravention of s 50BC of the *Crimes Act 1914* (Cth) and seven counts of engaging in sexual intercourse with a person under 16, in contravention of s 50BA of the *Crimes Act*, while overseas.

101. The appellant was a former officer in the Australian Navy who had been stationed in Kiribati between 1996 and 1998. The appellant challenged his conviction on grounds concerning the adequacy of the *Longman direction*, the absence of a direction from the judge about identification evidence, the absence of a direction about 'propensity reasoning', none of which is controversial. Of particular interest is the appeal ground brought in relation to the Crown prosecutor's submissions in his closing address. The Crown's closing address said, in part:

> *What I suggest to you is that there is an important respect in which this case is if not unique, it is certainly very unusual. Looking at the history of this matter and also taking cultural factors into account, one can say confidently that none of the complainants is driven by any desire for or sense of retribution or vengeance.*
> …
>
> *These people are not motivated by any desire for retribution, they have no motive to lie or to embellish, their only motivation out of all of this was when confronted by police as to give their account as to what happened, they did it as honestly as they can.*

102. At the conclusion of the prosecutor's address, defence counsel referred to *Palmer v R* (1998) 193 CLR 1 and submitted that it was improper of the prosecutor to suggest to the jury that the complainants had no motive to make false complaints. He observed that motives for a false complaint are often '… not identifiable, if they exist'. He argued that it was not for the defence to prove absence of motive for a complainant to make a false complaint. The prosecutor asserted that motive was raised by him in response to an allegation put by defence that the witnesses were liars. By way of background, the High Court held in *Palmer* held that a complainant's account gains no legitimate credibility from the absence of evidence of motive. If there was credibility which the jury would have attributed to the complainant's account because an accused was unable to furnish evidence of a motive for a complainant to lie, it creates an inappropriate expectation on the accused. The correct view is that absence of proof of motive is entirely neutral.

103. The Queensland Court of Appeal held at para. 22 that the Crown should not have asserted that the complainants had no motive to lie and that, on the contrary, they were motivated to give their honest accounts of what had happened. Although the Court held that the appellant's contention that the complainants had given false evidence as a result of pressure applied by the AFP was found to be unpersuasive, it did not follow that its rejection led to the conclusion that the complainants had no other motive to give false evidence – there may have been motives the parties were unaware of. By his submissions, the prosecutor implicitly invited the jury to accept the complainants' evidence unless there was some demonstrated motive to lie and such reasoning was impermissible.

104. Despite that, the Court held that the trial judge had sought to correct any incorrect impression the jury may have had by way of a direction. The appellant submitted that the direction was inadequate. The Court of Appeal held that in the absence of raising it at the time (possibly for tactical reasons) the appellant cannot raise it on appeal unless he can demonstrate that the failure to give a re-direction by the judge may have affected the verdict. The ground of appeal was dismissed.

105. A second issue raised on appeal was whether the jurys' verdict was unsafe and unsatisfactory based on the evidence. The appellant had submitted that the complainants' evidence was inconsistent with one another's in certain important aspects including the time and place of the sexual assaults.

106. The Court of Appeal held that there were inconsistencies in the complainants' evidence, but it was generally consistent and usually corroborated. The Court referred to *MFA v R* (2002) 213 CLR 606 at 634 where McHugh, Gummow and Kirby JJ remarked that it was '..not uncommon in most trials' for '..some aspects of the evidence [to be] less than wholly satisfactory'. Their Honours stated:

> *Experience suggests that juries, properly instructed on the law (as they were in this case), are usually well able to evaluate conflicts and imperfections of evidence. In the end, the appellate court must ask itself whether it considers that a miscarriage of justice has occurred authorising and requiring its intervention.*

107. The Court held that it was open to the jury on the whole of the evidence to be satisfied beyond reasonable doubt of the appellant's guilt.

108. Briefly, the Crown's sentencing appeal stated that the head sentence of five years and six months and non-parole of three years was inadequate based on the objective seriousness of the offence and the trial judge placing too much weight on mitigating factors. The Court dismissed the grounds and deemed the sentences were within the range.