Recent Developments in Criminal Law and Evidence in 2015

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The task given to us when we were asked to give this paper was to talk about recent developments in the criminal law and evidence, concentrating on 2015. Necessarily because of the rate of developments in criminal law and evidence, this survey of some recent cases will be incomplete, and the choices of cases may be idiosyncratic. Although the focus of this paper is on decisions in 2015, it is necessary to give some background by reference to earlier cases, to make the significance of the recent cases more understandable. Inevitably that means that fewer recent cases are discussed in this paper than in other reviews of recent decisions. Many of the areas dealt with in this paper would be worthy of a paper on their own; of necessity, in a broad paper such as this, they will be dealt with only briefly.

Identification of witnesses in CCTV footage by 'experts'

An area of the law of evidence of considerable practical importance for criminal lawyers is the question of whether the Crown can call 'expert' evidence that the accused is a person who was an offender in close circuit television footage of an offence. This area of the law needs to be seen in the context of the increasingly ingenious devices of the prosecution to ensure convictions of people they believed to be criminals. For a very long period of time, particularly in prosecutions of alleged armed robbers, the prosecution relied on alleged unsigned, unadopted verbal admissions. Over a long series of cases including Carr v The Queen (1988) 165 CLR 314 the High Court expressed increasing scepticism over the reliability of this evidence. Eventually this scepticism found its way into legislation, which has finally found its home in s. 281 Criminal Procedure Act.

This seems to have led to the popularity of calling police officers to give opinion evidence that the person depicted in a CCTV photo of a crime in progress was the accused. That line of evidence was authoritatively terminated by the High Court in Smith v The Queen ('Mundarra Smith') (2001) 206 CLR 650.

It seems, not coincidently, shortly afterwards there was an upsurge in cases in which the prosecution relied on 'expert' witnesses who gave evidence that the accused was the person depicted in CCTV footage based on their expertise. In nearly every case, the witnesses relied upon were Professor Henneberg, or Dr Sutisno. In a number of cases both of them would express an opinion about the identity or non-identity of a comparison of the accused with CCTV images with a very high degree of certainty, but frequently their opinions were to the opposite effect.

In Morgan v Regina [2011] NSWCCA 257 the Court of Criminal Appeal allowed an appeal against the conviction of the appellant based on the evidence of Professor Henneberg to the effect that the appellant in that case was 'similar to' the photograph of the offender in CCTV footage. The Court of Criminal Appeal unanimously held that the 'expert evidence' was inadmissible as evidence that the accused was similar to the image of the offender, although evidence that the accused shared features with the offender was admissible.

That might have been thought to be the end of the matter. However, the matter was re-agitated in Honeysett v Regina [2013] NSWCCA 135 where there was an appeal against the admission of evidence from Professor Henneberg that the person depicted in CCTV footage was the accused. A differently constituted bench of the Court of Criminal Appeal found that the evidence from

Professor Henneberg that there was a 'high degree of anatomical similarity' between the man depicted in CCTV footage and images of the accused was admissible.

The matter went to the High Court. On 13 August 2014 the High Court held that the evidence of Professor Henneberg was wrongly admitted: Honeysett v The Queen (2014) 253 CLR 122.

The High Court also raised the question of whether or not the line of authority admitting evidence of 'ad hoc experts' was correct. The High Court said in a joint judgment (at para [48]):

> In *Butera v Director of Public Prosecutions (Vict)* this Court endorsed the statement of Cooke J in *R v Menzies* that a person may "be a temporary expert in the sense that by repeated listening to the tapes he has qualified himself ad hoc". In issue was the admission of the transcript of a tape recording as an aid to assist the jury in its understanding of an indistinct recording. *Butera* and *Menzies* concerned the common law of evidence. The particular problem that they addressed is the subject of provision under the Evidence Act. Whether the New South Wales Court of Criminal Appeal is right to consider that the repeated listening to an indistinct tape recording or viewing of videotape or film may qualify as an area of specialised knowledge based on the listener's, or viewer's, experience does not arise for determination in this appeal. The respondent acknowledged that Professor Henneberg had not examined the CCTV footage over a lengthy period before forming his opinion. In this Court, the respondent does not maintain the submission that Professor Henneberg's opinion was admissible as that of an ad hoc expert.

Whilst the High Court in Honeysett provided some guidance on the statutory interpretation of 'specialised knowledge' under s.79 of the Evidence Act, it did not need to decide what ad hoc expertise is. However, it is clear from the extract above that the High Court recognised that 'ad hoc expertise' is a common law concept, which arose in Butera v The Queen (1987) 164 CLR 180 where the High Court approved the New Zealand decision of Menzies [1982] 1 NZLR 40. Further, the High Court recognised that 'the particular problem' that Butera and Menzies addressed is now the subject of provision under the Evidence Act. Section 48 addresses the common law concept about the production and use of transcripts as an aid to the jury. The High Court has yet to determine this issue of the admissibility of ad hoc expert opinion evidence.

'Off the record' conversations with police

A question of some practical importance is whether or not an 'off the record' conversation with police is admissible. At common law there were a number of cases which suggest that under common law principles, such conversations were inadmissible: see for example The Queen v Noakes (1986) 42 SASR 489 (at 492-3) and Walsh v Regina (1996) 6 Tas R 70.

The first case that we are aware of under the Evidence Act where this question was considered is Regina v Simmons and Moore [2015] NSWSC 189. In that case evidence of an 'off the record' conversation with police, which was not electronically recorded, was sought to be led from Moore's step-father, who was present during the conversation, thus avoiding the prohibition on police not giving evidence of conversations with suspects which were not electronically recorded.

Hamill J said (at paras [145] to [147]):

> [145] On careful reflection, I have reached the conclusion that the circumstances do **not** make it unlikely that the truth of the admission was adversely affected. In the precise terms of s 85(2), I am not satisfied that "the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected".
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> [146] In reaching that conclusion, I have given effect to my finding that the accused was induced by a statement that the conversation was "off the record" and his belief that this meant it could not be used against him or disclosed to Simmons. I have also taken into account the fact that the accused was told that he was under arrest for murder and that, after he exercised his right to silence, he was engaged in a "heated discussion" with his mother. He was thereafter told by his step-father that he had to help himself and tell the police what he knew or, on the accused's account, tell them something. On either account the accused was under considerable pressure to say something and, with the inducement and pressure of the murder charge hanging over him, I am not satisfied that the circumstances were such that it is unlikely that the truth of the admission was adversely affected.
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> [147] Having reached that conclusion, s 85 is in mandatory terms. The evidence is not admissible.

Directions on lies

The question of how a jury should be directed in relation to lies is a problematic one. Where the alleged lies of the accused are relied upon as corroboration of the Crown case, there is High Court authority (Edwards v The Queen (1993) 178 CLR 193) for the proposition that the jury be directed that the alleged lies can only be used if the four preconditions set out in Regina v Lucas (1981) QB 720 at 724 are satisfied, that is:

> To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness.

These directions, although designed to afford protection to an accused, are thought by many defence lawyers to have the opposite effect. The directions tend to over focus the attention of the jury on the alleged lies of the accused, making that issue in effect a trial within a trial. In addition, as the High Court recognised in Edwards, there is an element of circularity in the reasoning required, particularly as to the third requirement that the lie be told out of a realisation of guilt and a fear of the truth. Generally, that conclusion could only be reached if the jury was satisfied that the accused was guilty, but the jury is also being asked to use the alleged lie as evidence of guilt.

In Gall v Regina [2015] NSWCCA 69 the Crown relied on the alleged post offence conduct of one of the appellants in disposing of evidence as evidence of consciousness of guilt. No Edwards direction was sought by counsel or given. The absence of such a direction was relied

upon as a ground of appeal. The ground was not made out. Hoeben CJ at CL said (at para [87]):

> Before her Honour commenced her summing up, there was a discussion with trial counsel as to its content. The overwhelming inference is that no counsel at trial considered that a consciousness of guilt direction was necessary, otherwise they would have raised the issue. It is trite to observe that not every case in which evidence of post offence conduct is adduced requires a consciousness of guilt direction. The direction is only required when it is necessary in order to ensure a fair trial in the light of the issues and evidence in the trial.

The possible demise of the 'Murray' direction

The 'Murray' direction (based on Regina v Murray (1987) 11 NSWLR 12) is a direction which may be given when the sole evidence relied upon by the prosecution to implicate the accused is the evidence of a single witness. In Murray, Lee J said (at 19):

> In all cases of serious crime it is customary for judges to stress that where there is one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in, but a direction of that kind does not of itself imply that the witness' evidence is unreliable.

Murray was a sexual assault case.

However, subsequent to Murray, the NSW Parliament enacted s. 294AA of the Criminal Procedure Act which is in the following terms:

> **294AA Warning to be given by Judge in relation to complainants' evidence**
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> (1) A judge in any proceedings to which this Division applies must not warn a jury, or make any suggestion to a jury, that complainants as a class are unreliable witnesses.
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> (2) Without limiting subsection (1), that subsection prohibits a warning to a jury of the danger of convicting on the uncorroborated evidence of any complainant.
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> (3) Sections 164 and 165 of the *Evidence Act 1995* are subject to this section.

In Ewen v Regina [2015] NSWCCA 117, Simpson J, with whom the other judges of the Court of Criminal Appeal agreed, said (at paras [145] to [146]):

> [145] But, as has frequently been observed, sexual offences typically are committed in private, when only the perpetrator and the victim are present. In that case, a direction concerning the absence of corroboration has little to do except suggest unreliability on the part of the complainant.
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> [146] Since it was only the absence of corroboration that was said to give rise to the requirement of a "*Murray* direction", this ground must fail. Not only was such a direction not required, it was prohibited by s 294AA (2).

As noted above, Murray was a sexual assault case. However, it now appears that a 'Murray direction' should be given in every case except a sexual assault case. Arguably, a judge can still be asked to and can still give a 'Murray' direction.

Tendency evidence and the possible demise of the 'Hoch' rule

In relation to the question of the admissibility of what used to be called similar fact evidence, and is now referred to as 'tendency evidence', there is authority for the proposition that for the evidence to be admissible, the reasonable possibility of concoction between the witnesses must be excluded by the prosecution.

In Hoch v The Queen (1988) 165 CLR 292 Mason CJ, Wilson and Gaudron JJ said (at para [11]):

> 11. Thus, in our view, the admissibility of similar fact evidence in cases such as the present depends on that evidence having the quality that it is not reasonably explicable on the basis of concoction. That is a matter to be determined, as in all cases of circumstantial evidence, in the light of common sense and experience. It is not a matter that necessarily involves an examination on a voir dire. If the depositions of witnesses in committal proceedings or the statements of witnesses indicate that the witnesses had no relationship with each other prior to the making of the various complaints, and that is unchallenged, then, assuming the requisite degree of similarity, common sense and experience will indicate that the evidence bears that probative force which renders it admissible. On the other hand, if the depositions or the statements indicate that the complainants have a sufficient relationship to each other and had opportunity and motive for concoction then, as a matter of common sense and experience, the evidence will lack the degree of probative value necessary to render it admissible.

Brennan and Dawson JJ said (at para [7]):

> 7. If there be any difference between what was said by Lord Cross and what was said by Lord Wilberforce, the difference would seldom produce divergent results in practice. The criterion of admissibility of similar fact evidence is that its probative force clearly transcends its merely prejudicial effect (Perry v. The Queen [1982] HCA 75; (1982) 150 CLR 580, at pp 585, 604, 609; Sutton v. The Queen [1984] HCA 5; (1984) 152 CLR 528, at pp 534, 547-549, 560, 564) and if there is a real chance that the evidence is a concoction born of a conspiracy, the trial judge can hardly be satisfied that it possesses the probative force which alone warrants its admission.

Hoch was decided before the introduction of the Evidence Act (1995). However, the ultimate test for the admission of tendency or coincidence evidence tendered by the prosecution under the Evidence Act appears to adopt precisely that referred to by the High Court in Hoch v The Queen as a reason for requiring that if evidence of different complainants be admissible as evidence of tendency, the prosecution must establish that there is no real chance or reasonable possibility of concoction.

However, there have been a number of conflicting decisions of the NSW Court of Criminal Appeal as to whether the court can or must take into account the reasonable possibility that multiple complainants had 'put their heads together' and concocted their account. These cases culminated in Jones v Regina [2014] NSWCCA 280, a case which was not available on the

Supreme Court website until late last year, because the trial had not been held. Judge Berman of the District Court referred to the case in the June 2015 edition of *Criminal Law News* as 'Killing a zombie - the repeated death of Hoch v R' (2015) (5) Crim LN 79. In that case Bellew J (with whom Gleeson JA and Schmidt J agreed) said (at para [75]):

> [75] In my view, the reliance placed by the applicant in the present case upon *Hoch* and those cases which followed it was (as Hoeben CJ at CL described it in *BJS No.* 2) problematic. Such an approach tends to overlook the decisions in *Ellis* and *Saoud.* As Bell JA (as her Honour then was) stated in *AE v R* [2008] NSWCCA 52 at [44]:
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> > "…*Hoch* was concerned with the admission of similar fact evidence under the common law and propounded the "no other rational view" test that was adopted in *Pfennig v The Queen* (1995) 182 CLR 461 at 482-483 per Mason CJ, Deane J and Dawson J. This is not the test for the admission of tendency or coincidence evidence under the Act; *R v Ellis* [2003] NSWCCA 319…"

In BC v Regina [2015] NSWCCA 327 there was an appeal against the decision of Judge Syme DCJ not to sever a number of counts involving a number of different complainants of both sexes ranging in dates from when BC was about 11 years old until he was about 25 to 28 years. The judge did not undertake the balancing exercise under s. 101 because her Honour said that counsel for BC had not identified any relevant prejudice. Her Honour found that although two of the complainants were sisters there was no evidence of concoction. An appeal to the Court of Criminal Appeal was dismissed. In a short judgment, Beech-Jones J (with whom Simpson JA agreed) said that there was no prejudice in the matters being heard together which could not be cured by directions. In relation to the possibility of concoction his Honour said (at para [121]):

> [121] There is no authority that this Court was referred to, including *AE* or *BJS*, for the proposition that a trial judge is obliged to consider whether the mere existence of an opportunity for concoction is relevant to determining whether proposed tendency evidence satisfies s 97(1)(b) or should be excluded under s 101(2).

Adams J gave a powerful dissenting judgment which is 69 paragraphs in the judgment. In the dissenting judgment his Honour said (at para [14]):

> [14] It is clear that in this context the "prejudicial effect" is not a reference to the rational and appropriate use of the evidence, adduced for the purpose of proving the Crown case and adversely to the interests of the accused. The prejudice here is prejudice that is unfair in the sense that the jury might, because it shows the accused as guilty of disgusting, criminal or morally reprehensible conduct, give the prosecution case greater or the defence case less weight than it rationally deserves or distract them from the true issues in the case, in short to put a thumb on the scales.

In Hughes v Regina [2015] NSWCCA 330 the appellant, a well-known television actor who appeared in the 'Hey Dad' series, had been convicted of a number of charges of sexual assault against a number of complainants. The trial judge, Zahra SC DCJ, had admitted tendency evidence. Hughes was convicted. He appealed to the NSW Court of Criminal Appeal on a number of grounds, including the admission of tendency evidence.

The Court of Criminal Appeal considered the question of the admissibility of the evidence under s. 97. The Court (Beazley P, Schmidt and Button JJ) in a joint judgment said (at para [182], [184] to [185]):

> [182] Thus, in summary, the law in this State is that whether the Court thinks that evidence has significant probative value for the purposes of s 97 involves an assessment by the Court as to whether a jury could treat it of importance in supporting an inference of guilt of the accused on the count charged. It is an assessment of the capacity of the evidence to have that effect. In undertaking that task, the Court must consider, having regard to the evidence adduced, whether there is a real possibility of an alternate explanation consistent with innocence.
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> …….
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> [184] The critical point made in these authorities is that tendency evidence need not show a tendency to commit acts that constitute the crime or crimes with which the accused is charged. There only needs to be a "tendency … to act in a particular way" (s 97(1)) relevant to the conduct subject of the charge. Relevance is determined by reference to the *Evidence Act*, s 55, that is, evidence which, if accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.
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> [185] When regard is had to the inferential nature of tendency evidence and the requirement that it be relevant evidence, it is apparent that tendency evidence is not only directed to the particular type of conduct that constitutes an element of the charge. There is a wide range of evidence relevant to the determination of the guilt of a person of a particular crime. When the question of admissibility of tendency evidence arises the question is whether conduct said to exhibit a tendency allows, by an inferential process of reasoning, that the person was more likely to act in a particular way or have a relevant state of mind on the particular occasion that is the subject of the charge or charges: see *Gardiner* at [124] per Simpson J.

The Court referred to the decision of the Victorian Court of Appeal in Velovski v The Queen [2014] VSCA 121, in which that Court had criticised the NSW approach and had stressed that similarity or commonality of features was still an essential requirement for the admissibility of tendency evidence. The NSW Court of Criminal Appeal then said (at para [188]):

> [188] For the reasons we have given, we do not accept that the language used by the Victorian Court of Appeal represents the law in New South Wales. We recognise, however, that although s 97, unlike s 98, does not use the language of similarity, the greater the similarities, the more readily will a court find that that the evidence has significant probative value. Nor, as we have already examined above, does s 97 require that there be an "underlying unity", a "pattern of conduct", or the like. That is the language of the common law relating to similar fact evidence.

In summary, although the NSW Court of Criminal Appeal rejected the concept that a similarity between the offence charged and the events relied on as tendency evidence was a pre-condition for the admission of tendency evidence, the greater the similarities, the more likely the tendency evidence was to be admitted. Presumably the converse is also true.

We should also note that the High Court has heard argument in an appeal relating to the admissibility of tendency evidence in the matter of IMM v The Queen but reserved its judgment. A transcript of the argument can be found on Austlii at: http://www.austlii.edu.au/au/cases/cth/HCATrans/2016/8.html.

Jury notes disclosing the numbers

Smith v The Queen [2015] HCA 27 was a case where the appellant was found guilty by majority verdict in Queensland. In the course of the jury's deliberations, notes were sent from the jury to the judge, which disclosed the pattern of voting in the jury room. The judge informed the parties of the contents of the notes, but did not disclose the voting pattern. The appellant appealed partly on the ground that the numbers should have been disclosed. The High Court found that this ground of appeal was not made out. Gordon J (with whom the other judges of the High Court agreed) said (at paras [32] to [35]):

> Jury votes or voting patterns should not be disclosed
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> [32] Jury deliberations should, so far as possible, remain confidential. That is a principle of the highest significance in the criminal justice system. When conveying to a trial judge that they are having difficulty in reaching a verdict, juries should not reveal their votes or voting patterns. It would be a sensible measure for trial judges to give a direction to juries that they should not communicate or reveal to the court their votes or voting patterns in favour of conviction or acquittal, to lessen the risk of any such disclosure before delivery of a verdict. And in that connection a trial judge should not inquire of a jury as to its votes or voting patterns.
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> [33] The purpose of the confidentiality of jury votes or voting patterns is twofold. First, it maintains confidence in the jury system. It enables jurors to approach their task through frank and open discussion knowing that what is said in the jury room remains in that room. It permits the exchange of views which contributes to the development, over time, of the individual and collective views of the jurors. That process is fluid, not static.
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> [34] The fluidity arises because the process is a human endeavour. The development of each juror's assessment and understanding of the questions to be answered is necessarily unique. It does not happen at the same time and in the same manner. The fluidity in the process also arises because of the nature of the jury's task. A jury is usually required to consider not only the ultimate question of whether guilt has been established beyond reasonable doubt, but also particular questions that are steps along the way to the final conclusion reflected in a verdict, or the inability to reach a verdict. As a juror's understanding of one question changes, so might their understanding of others. Indeed, until the final verdict, each juror is entitled to change their mind and they do.
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> [35] The second purpose of the confidentiality of jury votes or voting patterns, directly related to the first purpose, is that it protects the finality of the verdict. The process by which the jury reached its verdict is not relevant. It is the final verdict of the jury, or the inability of the jury to reach a verdict, that is relevant.

Bail

In writing this section we acknowledge the fact that Steve Boland drew our attention to most of these cases.

Apparently as a result of a review of the Bail Act (2013) undertaken by Judge Hatzistegos DCJ, a number of amendments to the Bail Act were made including the introduction of s. 16A of the Bail Act which is in the following terms:

> **16A Accused person to show cause for certain serious offences**
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> (1) A bail authority making a bail decision for a show cause offence must refuse bail unless the accused person shows cause why his or her detention is not justified.
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> (2) If the accused person does show cause why his or her detention is not justified, the bail authority must make a bail decision in accordance with Division 2 (Unacceptable risk test—all offences).
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> (3) This section does not apply if the accused person was under the age of 18 years at the time of the offence.

The offences to which s. 16A apply are set out in s. 16B. To say the least, very many offences now have a 'show cause' requirement. In particular, by virtue of s. 16B (1) (h) and (i), a serious indictable offence committed while the accused is on bail, parole, or an indictable offence committed whilst the accused is on a supervision order, are 'show cause' offences.

In DPP v Tikomaimaleya [2015] NSWCA 83 there was an application for bail before Button J in a 'show cause' offence, namely sexual intercourse with a child under 10 under s. 66A of the Crimes Act. An application was made for the matter to be referred to the Court of Appeal which was acceded to.

The Court (per Beazley B, RA Hulme and Adamson JJ) held that the practice of referring matters to the Court of Appeal should have ceased in 2008 and had no place under the Bail Act (2013) (at para [13]). The Court made it clear that the accused has an onus, on the balance of probabilities, to show cause why bail was justified, when it said (at paras [24] to [26]):

> [24] We accept that in many cases it may well be that matters that are relevant to the unacceptable risk test will also be relevant to the show cause test and that, if there is nothing else that appears to the bail authority to be relevant to either test, the consideration of the show cause requirement will, if resolved in favour of the accused person, necessarily resolve the unacceptable risk test in his or her favour as well.
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> [25] It is important, however, that the two tests not be conflated. Determination of the unacceptable risk test is not determinative of the show cause test. The show cause test by its terms requires an accused person to demonstrate why, on the balance of probabilities (s 32), his or her detention is not justified. The justification or otherwise of detention is a matter to be determined by a consideration of all of the evidence or information the bail authority considers credible or trustworthy in the circumstances (s 31(1)) and not just by a consideration of those matters exhaustively listed in s 18 required to be considered for the unacceptable risk assessment.

> [26] The present case provides an example of why it is important to bear in mind the two-stage approach Parliament has prescribed in relation to bail applications concerned with offences of the type listed in s 16B in that here there is a matter that is relevant to the show cause test that is not available to be considered in relation to the unacceptable risk test. The jury's verdict of guilty is not within any of the matters listed in s 18; yet it is plainly germane to the question whether cause can be shown that his continuing detention is unjustified, since the presumption of innocence, which operated in his favour before the jury returned its verdict, has been rebutted by that verdict.

In Regina v Brooks [2015] NSWCCA 190 Brooks had been charged with murder. He was 19 years old, had no prior convictions, and strong community ties. He was granted Supreme Court bail by Beech-Jones J. The Crown made a detention application to the Court of Criminal Appeal. The Court found that Brooks had not 'shown cause', and granted the detention application. In a joint judgment (Hoeben CJ at CL, Johnson J, and RA Hulme J) the Court said (at para [22]):

> [22] As was submitted by the Crown, there is nothing particularly special or unusual in what the respondent has put before the Court. Age, lack of criminal antecedents, ties to the community and strong family support do not amount to showing cause. This is particularly so when one has regard to the seriousness of the offence with which the respondent has been charged and the apparent strength of the Crown case. In view of the conclusion which we have reached, it is not necessary to consider the question of unacceptable risk.

For a short time, this decision was regarded as authority for the proposition that a strong subjective case could not overcome the need to 'show cause'. Brooks was decided on 17 July 2015. On 21 August 2015 there was another detention application made to the Court of Criminal Appeal in the matter of DPP v Mawad [2015] NSWCCA 227. Mawad was charged with a number of armed robbery and firearms offences. Hamill J granted Mawad Supreme Court bail. On the Crown's detention application, the Crown called in aid the decision in Brooks. By majority (Gleeson JA and Beech-Jones J, Adams J dissenting), the detention application was granted. However, all the judges referred to the Crown's assertion that the decision in Brooks was authority for the proposition that a strong subjective case alone could not make out the 'show cause' requirement.

Two of the judges commented on the Brooks submission. Gleeson JA said (at para [2]):

> [2] I would add the following observation in relation to the show cause requirement under s 16A of the *Bail Act 2013* (NSW). I do not regard the passage from *Director of Public Prosecutions (NSW) v Brooks* [2015] NSWCCA 190 at [22] (set out at [40] below) as impermissibly attempting to place an additional hurdle upon an accused person to show cause why his or her detention is not justified. The description of the material put before the Court by the respondent in *Brooks* as "nothing particularly special or unusual", is to be understood as explaining the application of the show cause requirement in that case. The use of language such as "special or unusual" merely conveyed that the circumstances relied upon by the respondent in *Brooks* did not amount to showing cause.

Beech-Jones J said (at paras [41] to [44]):

> [41] *Brooks* was a detention application. The Respondent had been charged with murder.

> [42] I do not understand *Brooks* to have stated that either "special or unusual" or "particularly special or unusual" circumstances must be demonstrated before cause can be shown. If it did then I disagree. This Court has no authority to add glosses to statutory tests. This is particularly so when s 22(1) of the Act specifically imposes a requirement to establish "special or unusual circumstances" when an appeal is pending in this Court or from this Court to the High Court against a conviction on indictment or a sentence imposed after conviction on indictment. In such case, the establishment of special or unusual circumstances is deemed to satisfy the show cause test where it is otherwise applicable (s 22(2)). These provisions are inconsistent with any suggestion that in all cases where the show cause test applies, special or unusual circumstances must be shown (*JM* at [39] to [41] per Garling J; see also *El-Hilli v Melville v R* [2015] NSWCCA 146 at [11] per Hamill J).
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> [43] Equally I do not understand *Brooks* to be stating that "age, lack of criminal antecedents, ties to the community and strong family support" could never amount to showing cause, only that they did not amount to cause in that case. Again if *Brookes* did state that then I disagree for the same reason. Each case must turn on its own circumstances. A test posited in terms as to whether detention is "justified" or not necessarily defies any judicial attempt to circumscribe the circumstances in which it can be met.
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> [44] It is clear that the relative strength of the Crown case is relevant to whether cause has been shown but it is not determinative (*JM* at [41]). In this case and notwithstanding the strength and seriousness of the Crown case I considered that Mr Mawad had shown cause. The evidence as to the particular vulnerability of his family in his absence was compelling.

The Court also considered the question of the admissibility of a letter from a police officer setting out the police officer's view that Mr Mawad should be refused bail. The letter was objected to at the bail application before Hamill J and the representative of the Crown indicated that only the following passages were relied upon (see Mawad at para [32]):

> "*This investigation has uncovered evidence that the Accused has contacts with known criminals who have access to firearms. Police are of the view that firearms can easily be sourced by the Accused and he would have a reason/ motive to do so against parties involved in this investigation particularly *** *** and his family.*
> ...
> The Accused can easily find the whereabouts of *** *** and his immediate family as *** *** currently remains at his normal residential address with his partner and children. These concerns have previously been expressed by *** *** and his family ... *The Accused is well known by myself as the officer in charge of this investigation ... to have a lot of criminal connections in the suburbs where the *** *** ... family reside.*"

Beech-Jones J said of this letter (at para [35]):

> I respectfully agree with his Honour that the opinion of a police officer that bail should be refused is a matter that is "unable to be considered". This is the view that was adopted by Hamill J. However, the present issue concerns police opinions and assertions on factors affecting bail such as the bail applicant's ability to access weapons and his alleged "criminal connections".

His Honour noted that under s. 31 of the Bail Act the rules of evidence did not apply to bail applications. However, his Honour went on to say (at para [39]):

> In this case the objected to opinions of the police officer can be considered at least "trustworthy" in that there is no reason to doubt the bona fides of its author. However, just because this Court is not bound by the rules of evidence does not mean it is obliged to ignore the policy and rationale underlying those rules (*R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* [1933] HCA 30; (1933) 50 CLR 228 at 256 per Evatt J). This includes scepticism of conclusions unsupported by any factual detail. In my view, the absence of any detail setting out the basis for what are otherwise potentially damaging assertions warrants this Court not attributing any weight to those assertions. They played no part in my deliberations.

Provocation and the 'guardsman's defence'

Sir Owen Dixon, writing extra-curially in 1935, discussed the special features of a verdict of manslaughter on a trial of an indictment of murder (Dixon, "The Development of the Law of Homicide", in Jesting Pilate, (1965) 61 at 65):

> [T]he difference between murder and manslaughter was not the difference between two distinct felonies, but the difference between two descriptions of the one felony. They were differentiated only because the consequences of a conviction had, by statute, ceased to be the same. But the fact that the two descriptions formed only one felony is reflected in one consequence which profoundly affects the practical conduct and often the result of a murder trial of today. For it is because homicide is a single felony, that, upon an indictment of murder, a verdict of manslaughter may be found.

After setting out the above extract, it was observed by the High Court in a joint judgment (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) in James v The Queen (2014) 253 CLR 475 at [19] that (footnotes omitted):

> [19] The practical conduct of the trial of an indictment of murder at the time Sir Owen Dixon was writing was understood to require a trial judge to leave manslaughter in any case in which the accused or the jury asked about the matter notwithstanding that the facts did not support it. That understanding was corrected in *Gammage v The Queen*, which held that the jury did not have a right to return a "merciful" verdict of manslaughter. The obligation to leave manslaughter in most, although not all, cases was identified by Barwick CJ as arising from the necessity to satisfy the jury of the elements of murder. [28] This was so whether the element in issue was proof of the intention accompanying the unlawful and dangerous act causing death or whether the prosecution had negatived a partial defence.

Lindsay v The Queen [2015] HCA 16 was a case from South Australia where Lindsay was a 28 year old Aboriginal male charged with murder. He had been drinking at his home with his de facto wife, a friend, and the deceased. There were two incidents between the appellant and the deceased. The first incident was that the deceased straddled the appellant and moved his hips backwards in a sexually suggestive manner. The appellant said 'I'm not gay' and told the deceased that he did not like that and not to do it again or he would hit him. The deceased apologised and the appellant said 'That's OK just don't go doing stuff like that'. Later the deceased said he was tired. The appellant told him he could sleep in a spare bedroom. The

deceased said he did not want to sleep alone and offered to pay the appellant money for sex. The appellant said 'What did you say cunt?' The deceased repeated his proposition. The appellant kicked and punched the deceased, then took a knife, and stabbed the deceased repeatedly. The defence of provocation was left to the jury, albeit with insufficient direction and Lindsay was convicted of murder.

Lindsay appealed to the South Australian Court of Criminal Appeal. In that Court the majority held that although errors had been established in relation to the directions on provocation, there had been no substantial miscarriage of justice and the proviso could be applied because their Honours were of the 'firm view' that in 21st century Australia the evidence taken at its highest in favour of Lindsay was such that no reasonable jury could fail to find that an ordinary person could not have so far lost his self-control as to attack the deceased in the manner that Lindsay did.

Lindsay appealed to the High Court. The High Court unanimously allowed the appeal, quashed the conviction and ordered a retrial. In their judgment French CJ, Kiefel, Bell, and Keane JJ said (at paras [37] to [38], footnotes omitted).:

> [37] The capacity of the evidence to support a conclusion that the prosecution might fail to negative the objective limb of the partial defence did not turn upon the appellate court's assessment of attitudes to homosexuality in 21st century Australia. It was open, as the appellant submits, for the jury to consider that the sting of the provocation lay in the suggestion that, despite his earlier firm rejection of the deceased's advance, the appellant was so lacking in integrity that he would have sex with the deceased in the presence of his family in his own home in return for money. And as the appellant submitted on the hearing of the appeal in this Court, it was open to a reasonable jury to consider that an offer of money for sex made by a Caucasian man to an Aboriginal man in the Aboriginal man's home and in the presence of his wife and family may have had a pungency that an uninvited invitation to have sex for money made by one man to another in other circumstances might not possess.
>
> [38] Dixon J pointed out in *Packett* that it may be open to entertain a reasonable doubt concerning provocation although it would be unreasonable to find affirmatively that provocation existed and was sufficient, a consideration which illustrates the need for caution before deciding to take the partial defence away from the jury. The need for that caution has particular force in a case where, as here, there was evidence capable of supporting the subjective limb of the partial defence.

The reference to the judgment of Dixon J in Packett is a reference to this passage in Packett v The King (1937) 58 CLR 190 at 213 to 214 where his Honour said (footnotes omitted):

> If the judge presiding at the trial of an indictment of murder is of opinion that the evidence discloses no matter capable of forming provocation, or that the matter alleged by the prisoner as provocation is not capable of doing so, it is, of course, proper for him to direct the jury to that effect. But, under the code as at common law, it remains within the power of the jury to find a verdict of manslaughter, even although it means disregarding the direction. To tell the jury that they have not such a power is to state what is not correct in law and a prisoner is entitled to complain in a Court of Criminal Appeal of such a direction. There is all the difference between such a direction and a direction that the evidence given upon a trial for murder does not support a verdict of manslaughter. If a judge is of opinion that because such a verdict implies findings of fact

> that are not reasonably open the jury ought not to return it, he may so direct them without necessarily usurping the functions of the jury, and, if his opinion is correct in law, the verdict may stand. Lawyers have no difficulty in apprehending the distinction between, on the one hand, the impropriety of finding without evidence facts amounting to manslaughter, and, on the other hand, the existence of a right to return a verdict of manslaughter although it be a wrong verdict. But it is easy to believe that a jury would not make the distinction and would treat a direction that they ought not to find manslaughter as meaning that they had not power to do so, unless it was very clearly expressed. Yet the jury must not be led to understand that to find a verdict of manslaughter is actually beyond their power. Further, upon the question whether a finding of manslaughter on the ground of provocation would in a given case be unreasonable, the ruling of the House of Lords in Woolmington's Case has, of course, an important bearing. For it may be open to entertain a reasonable doubt of provocation although it would be unreasonable to find affirmatively that provocation existed and was sufficient. These are all considerations showing the need of caution before a judge undertakes to direct a jury against finding manslaughter.

Using a motor vehicle as an offensive instrument

In Harkins v Regina [2015] NSWCCA 263 Harkins was charged with using a motor vehicle as an offensive implement with the intention to avoid apprehension under s. 33B of the Crimes Act. He was acquitted of a similar charge relating to an earlier incident but pleaded guilty to, and was convicted of, an offence of driving a motor vehicle without the consent of the owner, whilst another person was in the motor vehicle (see s 154C (1)).

The facts in relation to the charge of which Harkins was convicted were that he had hijacked a car while fleeing from police. While a passenger in the car wrestled with him and a police officer outside the car grabbed him and attempted to get control of the car from him he drove off. Harkins appealed to the Court of Criminal Appeal. The Court of Criminal Appeal rejected the appeal. However, in the present case McFarlan JA (with whom the other judges of the Court agreed) appeared to adopt a different and much broader definition of 'offensive'. His Honour said (at paras [23] to [24]):

> [23] By accelerating the vehicle, he successfully used it to break himself free of the police officers' holds. In my view, that constituted the appellant's use of the vehicle as "an offensive weapon" regardless of the fact that he may not have intended that use to harm the police officers.
>
> [24] Whilst the use of an offensive weapon is most commonly accompanied by an intent to injure or threaten someone, the expression has a broad meaning that encompasses what occurred in this case, namely, using an instrument in a positive fashion to achieve an object which, in the case of s 33B, is the prevention or hindrance of lawful apprehension. Thus "[t]o go on the offensive" is an expression commonly used in sporting and other fields to refer to positive action to achieve an objective. An intention to harm is not required. Use of an offensive weapon or instrument can therefore occur without an intent to cause or threaten harm. The following parts of the Oxford English Dictionary definition of "offensive" are consistent with this approach:
>
> > "The position or attitude of attack; aggressive action; an aggressive act; forceful or aggressive action or movement directed towards a particular end, a sustained campaign or effort."

The approach taken by the Court of Criminal Appeal appears to be inconsistent with the scheme of the Crimes Act, in which the use of an offensive weapon instrument is an aggravating factor for many offences, in particular armed robbery. It also appears to be inconsistent with earlier authority as to the meaning of 'offensive instrument'.

In Regina v Rodney Lawrence Hamilton (1993) 66 A Crim R 575 it was alleged that Hamilton had stolen a motor vehicle in a transport yard. Police gave chase. There was a collision between the vehicle driven by Hamilton and two police vehicles. The stolen vehicle ended up with its rear end against a tree. One of the police officers walked towards the stolen motor vehicle. Suddenly, the vehicle moved towards him while he was in front of it. The officer's evidence was that he moved out of the way and the vehicle driven by Hamilton missed him by about a foot. Hamilton was charged with a number of offences including using an offensive instrument to avoid apprehension. He was convicted. On appeal, it was argued that a motor vehicle was incapable of being an offensive instrument.

The appeal was dismissed. Gleeson CJ (with whom Hunt CJ at CL and Ireland J agreed) said (at 577):

> The noun "instrument", in this context, means a thing with or through which something is being done, or effected. The adjective "offensive" means something that is adopted or used for the purpose of attack. The question whether an object or article is an offensive instrument raises for consideration the nature of the object, the uses of which it is capable, and the intention of the person who is using it on the occasion in question. An object which in its nature and in its ordinary use is not offensive may become an offensive instrument by reason of the use to which a person puts it, and the intent which accompanies such use.

After referring to Considine v Kirkpatrick [1971] SASR 73 his Honour said (at 577-8):

> Similarly, in the present case if the jury were satisfied beyond reasonable doubt that, whilst he was in control of the stolen motor vehicle, the appellant formed the intention of driving it at Constable Brown, and of thereby preventing or hindering arrest by Constable Brown then it was open to the jury to conclude that, by his conduct and his intention, the appellant had made the motor vehicle an offensive instrument, and was using it as such.

Attempt to pervert the course of justice

In The Queen v Beckett [2015] HCA 38 Ms Beckett had been charged with attempting to pervert the course of justice. Ms Beckett was a solicitor who was authorised to stamp transfers of real property as having paid stamp duty on the basis that she had received payment for the stamp duty and would lodge returns and pay the tax at specified periods. She was interviewed by the Office of State Revenue over her not payment of stamp duty on a conveyance where she had stamped the transfer. During the interview she gave a false account and produced photocopies of forged cheques. She was later charged with committing an act intending to pervert the course of justice under s. 319 Crimes Act. She was convicted in the NSW District Court before Judge Sweeney. She appealed to the NSW Court of Criminal Appeal which allowed her appeal because no proceedings were on foot when she gave the false account and produced the photocopies of forged cheques.

The DPP appealed to the High Court. The High Court unanimously allowed the appeal. In a joint judgment, French CJ, Kiefel Bell and Keane JJ said (at paras [37] to [38], footnotes omitted):

> [37] Part 7 abolishes a number of common law offences against public justice, including perverting the course of justice and attempting or conspiring to pervert the course of justice. Perverting the course of justice and attempting to pervert the course of justice are each substantive offences. Each has in common the doing of an act, or the making of an omission, with the intention of obstructing, preventing, perverting or defeating existing or contemplated curial proceedings. They are distinguished by result. There is nothing in the language of s 319 or the scheme of Pt 7 to suggest that the abolition of the common law offences, and the enactment of a single offence having as its elements the doing of an act or the making of an omission with the intention of obstructing, preventing, perverting or defeating the course of justice, had as its object confining liability to acts done or omissions made with the requisite intention in respect of *existing* proceedings.
>
> [38] It was an error to distinguish the offence created by s 319 from the common law offence of attempting to pervert the course of justice on the basis that s 319 creates a substantive offence. Contrary to the Court of Criminal Appeal's reasoning, nothing in *Rogerson* supports a conclusion that the s 319 offence is confined to conduct that is intended to pervert an existing course of justice. The Court of Criminal Appeal erred in concluding that the prosecution case, if established by admissible evidence, is incapable of establishing liability for the offence charged in count one. Sweeney DCJ was right to dismiss the respondent's notice of motion.

Later their Honours helpfully set out the elements of an offence under s. 319 (at para [46]):

> [46] On the trial of a count charging a s 319 offence it suffices for the judge to instruct the jury in the terms of the section: the prosecution must prove that the accused did the act, or made the omission, and that, at the time of so doing, it was the accused's intention in any way to obstruct, prevent, pervert, or defeat the course of justice.

On this point only Nettle J dissented. His Honour said (at para [64]):

> In the result, until and unless this Court has had the benefit of full and convincing argument on the point in a case in which the issue truly arises, I should not be disposed to depart from *Charles*. I consider that, for the time being, trial judges should continue to charge juries, consistently with *Charles*, that proof of an offence under s 319 requires proof beyond reasonable doubt that the accused did the act or omission alleged, that the act or omission had a tendency to pervert the course of justice and that the act or omission was intended to pervert the course of justice.

Aggregate sentencing

Aggregate sentencing was a reform which was intended to make sentencing for multiple offences a simpler, less mistaken-ridden process. It spares judges from the process of setting start and end dates for multiple sentences which, under the interpretation of Pearce v The Queen (1998) 194 CLR 610, were thought to be required to be in many cases partly concurrent and partly cumulative. This led to many cases where many errors occurred in sentencing due to simple arithmetical errors.

The aggregate sentencing provision introduced is s. 53A of the Criminal Procedure Act which is in the following terms:

> **53A Aggregate sentences of imprisonment**
>
> (1) A court may, in sentencing an offender for more than one offence, impose an aggregate sentence of imprisonment with respect to all or any 2 or more of those offences instead of imposing a separate sentence of imprisonment for each.
>
> (2) A court that imposes an aggregate sentence of imprisonment under this section on an offender must indicate to the offender, and make a written record of, the following:
>
> (a) the fact that an aggregate sentence is being imposed,
>
> (b) the sentence that would have been imposed for each offence (after taking into account such matters as are relevant under Part 3 or any other provision of this Act) had separate sentences been imposed instead of an aggregate sentence.
>
> (3) Subsection (2) does not limit any requirement that a court has, apart from that subsection, to record the reasons for its decisions.
>
> (4) The term, and any non-parole period, set under this Division in relation to an aggregate sentence of imprisonment is not revoked or varied by a later sentence of imprisonment that the same or some other court subsequently imposes in relation to another offence.
>
> (5) An aggregate sentence of imprisonment is not invalidated by a failure to comply with this section.

Although the legislation was intended to simplify sentencing for multiple offences, it has been the subject of many appeals. In JM v Regina [2014] NSWCCA 297 the Court of Criminal Appeal decided a case where the unrepresented appellant had been sentenced to an aggregate sentence for a number of sexual assault offences. He appealed on a number of quite intelligently articulated grounds against the severity of his sentence. The appeal was dismissed, but Hulme J, with whom the other members of the Court agreed, gave a useful summary of the principles which have been established in this cases. Hulme J said (at para [39]):

> [39] A number of propositions emerge from the above legislative provisions and the cases that have considered aggregate sentencing:
>
> 1. Section 53A was introduced in order to ameliorate the difficulties of applying the decision in *Pearce v The Queen* [1998] HCA 57; 194 CLR 610 in sentencing for multiple offences: *R v Nykolyn* [2012] NSWCCA 219 at [31]. It offers the benefit when sentencing for multiple offences of obviating the need to engage in the laborious and sometimes complicated task of creating a "cascading or 'stairway' sentencing structure" when the principle of totality requires some accumulation of sentences: *R v Rae* [2013] NSWCCA 9 at [43]; *Truong v R; R v Le; Nguyen v R; R v Nguyen* [2013] NSWCCA 36 at [231]; *Behman v R* [2014] NSWCCA 239; *R v MJB* [2014] NSWCCA 195 at [55]-[57].
>
> 2. When imposing an aggregate sentence a court is required to indicate to the offender and make a written record of the fact that an aggregate sentence is being

imposed and also indicate the sentences that would have been imposed if separate sentences had been imposed instead (the indicative sentences): s 53A(2). The indicative sentences themselves should not be expressed as a separate sentencing order: *R v Clarke* [2013] NSWCCA 260 at [50]-[52]. See also *Cullen v R* [2014] NSWCCA 162 at [25]-[40].

3. The indicative sentences must be assessed by taking into account such matters in Part 3 or elsewhere in the *Crimes (Sentencing Procedure) Act* as are relevant: s 53A(2)(b).

There is no need to list such matters exhaustively, but commonly encountered ones in Part 3 include aggravating, mitigating and other factors (s 21A); reductions for guilty pleas, facilitation of the administration of justice and assistance to law enforcement authorities (ss 22, 22A and 23); and offences on a Form 1 taken into account (Pt 3 Div 3). Commonly encountered matters elsewhere in the Act are the purposes of sentencing in s 3A, and the requirements of s 5 as to not imposing a sentence of imprisonment unless a court is satisfied that there is no alternative and giving a further explanation for the imposition of any sentence of 6 months or less.

SHR v R [2014] NSWCCA 94 is an example of a case where a sentencing judge took pleas of guilty into account only in relation to the aggregate sentence, and not in relation to the indicative sentence. This was held (at [35]-[43]) to be in breach of the requirement in s 53A(2)(b). *Khawaja v R* [2014] NSWCCA 80 is another example. *Martin v R* [2014] NSWCCA 124 is a case in which a sentencing judge was held (at [17]) to have correctly taken into account pleas of guilty in relation to the indicative sentences.

In *JL v R* [2014] NSWCCA 130 at [54] it was said by way of conclusion in an appeal against the asserted severity of a sentence that "The starting point for the aggregate sentence of 24 years before the allowance of a discount of 25 per cent to reflect the utilitarian value of the early pleas of guilty was not excessive". This must be understood as a broad assessment within the conclusion rather than indicating that it is the aggregate sentence to which the discount should be applied. *Stoeski v R* [2014] NSWCCA 161 is anomalous in that at [33]-[34] it rejected a complaint that the sentencing judge had not discounted the aggregate sentence for the plea of guilty rather than rejecting the assertion that the discount applied to the aggregate sentence at all.

4. It is still necessary in assessing the indicative sentences to have regard to the requirements of *Pearce v The Queen* [1998] HCA 57; 194 CLR 610. The criminality involved in each offence needs to be assessed individually. To adopt an approach of making a "blanket assessment" by simply indicating the same sentence for a number of offences is erroneous: *R v Brown* [2012] NSWCCA 199 at [17], [26]; *Nykolyn v R*, supra, at [32]; [56]-[57]; *Subramaniam v R* [2013] NSWCCA 159 at [27]-[29]; *SHR v R*, supra, at [40]; *R v Lolesio* [2014] NSWCCA 219 at [88]-[89]. It has been said that s 53A(2) is "clearly directed to ensuring transparency in the process of imposing an aggregate sentence and in that connection, imposing a discipline on sentencing judges": *Khawaja v R*, supra, at [18].

> 5. The imposition of an aggregate sentence is not to be used to minimise the offending conduct, or obscure or obliterate the range of offending conduct or its totality: *R v MJB*, supra, at [58]-[60].
>
> 6. One reason why it is important to assess individually the indicative sentences is that it assists in the application of the principle of totality. Another is that it allows victims of crime and the public at large to understand the level of seriousness with which a court has regarded an individual offence: *Nykolyn v R*, supra, at [58]; *Subramaniam v R*, supra, at [28]. A further advantage is that it assists when questions of parity of sentencing as between co-offenders arise: *R v Clarke*, supra, at [68], [75].
>
> 7. Non-parole periods need not be specified in relation to indicative sentences except if they relate to an offence for which a standard non-parole period is prescribed: ss 44(2C) and s 54B(4); *AB v R* [2014] NSWCCA 31 at [9].
>
> 8. Specification of commencement dates for indicative sentences is unnecessary and is contrary to the benefits conferred by the aggregate sentencing provisions: *AB v R*, supra, at [10]. Doing so defeats the purpose of a court availing itself of the power to impose an aggregate sentence: *Behman v R* [2014] NSWCCA 239 at [26]. See also *Cullen v R*, supra, at [25]-[26].
>
> 9. If a non-custodial sentence is appropriate for an offence that is the subject of the multiple offence sentencing task, it should be separately imposed as was done in *Grealish v R* [2013] NSWCCA 336. In my respectful view, there was error involved in *Behman v R* [2014] NSWCCA 239 where an offence with an indicative, but unspecified, non-custodial sentence was included in an aggregate sentence imposed by this Court. The provision for imposing an aggregate sentence in s 53A appears within Part 4 of the *Crimes (Sentencing Procedure) Act* which is headed "Sentencing procedures for imprisonment", and within Division 1 of that Part which is headed "Setting terms of imprisonment".

There have been difficulties in understanding what is required when an 'indicative sentence' is given. In McIntosh v Regina [2015] NSWCCA 184 Basten JA (Wilson J agreeing) said that the indicative sentence should represent the non-parole period for the sentence. Hidden J, dissenting on this point, thought that the sentence indicated should be the head sentence. As indicated in JM v Regina and quoted above at point 4, the indicative sentence should take into account matters such as the plea of guilty if there was one.

Use of victim impact statements to establish aggravating factors

In Tuala v Regina [2015] NSWCCA 8 Tuala had been convicted after trial of three counts of discharging a firearm with intent to cause grievous bodily harm to a Mr Cats. He had also pleaded guilty to two firearms offences. A victim impact statement of Mr Cats was tendered, stating amongst other things that he was unable to practice his trade of carpentry and building, his income had been reduced by two thirds, and that

> "Unless they are subjected to it, no one can ever imagine the toll this has taken on me mentally and physically. I don't wish this on anyone and I believe that we as a community need to stand up to mindless thugs who victimise innocent people who try to make a living. MY LIFE WILL NEVER BE THE SAME.

Judge Robison sentenced Tuala to an overall sentence of 8 years 7 months and a non-parole period of 4 years 10 months. The Crown appealed. One of the matters relied on by the Crown was an argument that the shooting offences were aggravated, and the respondent was liable to a more severe penalty, because the injuries, emotional harm and loss and damage suffered by Mr Cats were substantial in that he was rendered incapable of future work in his trade and that hardship was inflicted on him and his family.

The Crown appeal was dismissed. Simpson J (with whom Ward JA and Wilson J agreed) said of victim impact statements (at paras [78] to [81]):

> [78] In some of the cases considered above, considerable weight was attached to the manner in which the sentencing process was conducted. Where no objection was taken to the victim impact statement, no question raised as to the weight to be attributed to it, and no attempt made to limit its use, the case for its acceptance as evidence of substantial harm has been considered to be strengthened. (It is, perhaps, a little unfair to take into account that no objection to the admission of the statement was taken, given that such statements are admissible by statute, but that does not preclude argument as to the weight to be attributed to them.)
>
> [79] Further, where the statement tends to be confirmatory of other evidence (either in a trial, or in the sentencing proceedings) or where it attests to harm of the kind that might be expected of the offence in question, there is little difficulty with acceptance of its contents.
>
> [80] Difficulties can arise, for example, where:
>
> - the facts to which the victim impact statement attests are in question; or
> - the credibility of the victim is in question; or
> - the harm which the statement asserts goes well beyond that which might ordinarily be expected of that particular offence; or
> - the content of the victim impact statement is the only evidence of harm.
>
> *RP* is an example of the third of these.
>
> [81] In these cases, considerable caution must be exercised before the victim impact statement can be used to establish an aggravating factor to the requisite standard.

Commonwealth sentencing: the need to look at Australian comparative cases

In Pham v The Queen [2015] HCA 39, Pham had pleaded guilty to importing the marketable quantity of heroin in Victoria, an offence under the Commonwealth Criminal Code. He was sentenced by a Victorian County Court judge. Pham successfully appealed to the Victorian Court of Appeal. In the course of allowing the appeal, Maxwell P said that Pham 'pleaded guilty in the reasonable expectation that he would be sentenced in accordance with current sentencing practices in Victorian courts.' The appeal was allowed unanimously and two of the three judges in the Victorian Court of Appeal did so on the basis that the sentence imposed on Pham was out of line with the pattern of sentences for this offence in Victoria.

The Commonwealth Director of Public Prosecutions appealed to the High Court. The first ground of appeal was that the Victorian Court of Appeal erred:

(1) determining that the respondent should be sentenced in accordance with current sentencing practices in Victorian courts, to the exclusion of sentencing practices throughout the Commonwealth;

The High Court unanimously allowed the Crown appeal. In a joint judgment French CJ, Keane and Nettle JJ said (at paras [30] and [31]):

> [30] Maxwell P was not correct in stating that the respondent was entitled to assume that he would be sentenced in accordance with current sentencing practices in Victoria as opposed to current sentencing practices throughout the Commonwealth. It is apparent from Kyrou JA's reasons for judgment that Kyrou JA was also significantly influenced by the fact of what Maxwell P identified as a considerable difference between Victorian and other States' current sentencing practices with respect to the offence of importation of a marketable quantity of a border controlled drug. Osborn JA's reasons show that he was less concerned with sentences imposed in comparable cases than the range of legitimate sentencing considerations which he identified, but nevertheless that he too considered the identified disparity to be in itself a relevant sentencing consideration and thus that, to some extent, the fact of the disparity informed his conclusion that the sentence was manifestly excessive.
>
> [31] Accordingly, the first ground of appeal should be upheld.

Their Honours said in relation to the use of comparative material in sentencing (at para [28], footnotes omitted):

> [28] Previous decisions of this Court have laid down in detail the way in which the assessment of sentences in other cases is to be approached. It is neither necessary, therefore, nor of assistance to repeat all of what has previously been said. But, in view of the way in which the Court of Appeal approached the task in this case, it is appropriate to re-emphasise the following:
>
> (1) Consistency in sentencing means that like cases are to be treated alike and different cases are to be treated differently.
>
> (2) The consistency that is sought is consistency in the application of the relevant legal principles.
>
> (3) Consistency in sentencing for federal offenders is to be achieved through the work of intermediate appellate court.
>
> (4) Such consistency is not synonymous with numerical equivalence and it is incapable of mathematical expression or expression in tabular form**.**
>
> (5) For that and other reasons, presentation in the form of numerical tables, bar charts and graphs of sentences passed on federal offenders in other cases is unhelpful and should be avoided.
>
> (6) When considering the sufficiency of a sentence imposed on a federal offender at first instance, an intermediate appellate court should follow the decisions of other intermediate appellate courts unless convinced that there is a compelling reason not to do so.

> (7) Appellate intervention on the ground of manifest excessiveness or inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle.

Appeals against sentence: can you have two rolls of the die?

In Lowe v Regina [2015] NSWCCA 46 Lowe and a co-offender Sinkovich were sentenced for a number of drug and firearms offences. Lowe appealed, and not only was the appeal dismissed, but leave to appeal was refused. Subsequently, after an application under s. 79 of the Crimes (Appeal and Review) Act, Sinkovich's sentence was reduced, on account of the sentencing judge having incorrectly dealt with the way to deal with the standard non-parole period of the offence, following the High Court's decisions in Muldrock v The Queen (2011) 244 CLR 120.

Lowe appealed again. The Crown argued that on the basis of Grierson v The King (1938) 60 CLR 431. Grierson had his appeal dismissed. His application to appeal again, partially based on fresh evidence, was rejected by the New South Wales Court of Criminal Appeal on the grounds that only one appeal was authorised under the Criminal Appeal Act. The High Court unanimously rejected an appeal from this decision. Dixon J appeared to say obiter that this applied whether the appeal was heard on the merits or where leave to appeal was refused. However, the later decision of Postiglione v The Queen (1997) 189 CLR 295 made it clear that the principle that there could only be one appeal only applied where the appeal was heard and dismissed on its merits. In Lowe v Regina the Court of Criminal Appeal held that because leave to appeal had been refused, Lowe was entitled to appeal again.

John Stratton SC

Maeve Curry

Sir Owen Dixon Chambers

2 March 2016