

**COURT OF CRIMINAL APPEAL UPDATE**  
**REVIEW OF 2016**  
**2017: THE STORY SO FAR**

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## **INTRODUCTION**

In 2016 there were a significant number of restricted decisions which are included in this paper.

Restricted NSWCCA judgments are those judgments of the Court of Criminal Appeal which have not been published on the internet and are not available to the general public. They are made available on a limited basis for the profession in order to avoid trial courts falling into error. The judgments, however, can be accessed on the Judicial Commission's Judicial Information Research System (JIRS) by legal practitioners only for use in connection with legal proceedings.

We have confirmed with the Judicial Commission that there is no issue in citing and using a case (Restricted Decision, then year and number) on a point of principle but without reference or a very minimal reference to the facts. The importance of access to restricted judgments is that the profession must know the law, and lower courts must apply and follow appellate decisions. The need for access to the restricted decisions was triggered by the profession not being aware of the CCA position on the High Court decision of *HML* (2008) 245 ALR 204 (articulated in the then restricted judgment of *DJV* (2008) 200 A Crim R 206) and later the issue of ss 97,98 *Evidence Act* and concoction (when *BJS* (2013) 231 A Crim R 537 was inaccessible). If the description of the case is framed in terms of principle with no or restricted facts the "potential jurors" problem will not arise.

## **NSW CCA SENTENCE CASES 2016**

### **1. GENERAL SENTENCING**

#### ***Reasons for judgment***

In *Lee* [2016] NSWCCA 146 the CCA reiterated the judicial obligation to give proper reasons for judgment. First, failure to give proper reasons is an error of law. Second, the reasons must be adequate to demonstrate the absence of a real "possibility" the judge failed to apply correct legal principle. Thus where the possibility of error was open, the appellate court should not have assumed that, because the legal principle was well known and fundamental, it had been applied: at [24]-[26]; *Douglass v The Queen* (2012) 86 ALJR 1086 at [14].

In *Van Ryn* [2016] NSWCCA 1 the sentencing judgment comprised statements of general principles but exposed very little reasoning: at [123]. The sentencing process miscarried, either by the judge failing to make any assessment of the seriousness of the offences or, if he did, failing to say anything about his reasoning and conclusions as a result of such assessment: at [141].

#### ***Degree of specificity required when determining objective seriousness of an offence***

In *Van Ryn* [2016] NSWCCA 1 the CCA emphasised a sentencing judge's duty to assess the objective seriousness of an offence: at [133]-[137]. Apart from reciting the facts of the offences the judge made no assessment of their objective seriousness or, if he did, said nothing about it: at [133]. The assessment of objective seriousness is a critical component of the sentencing process - there is nothing in *Muldock* (2011) 240 CLR 120 that cuts across this principle: at [134] citing *Campbell* [2014] NSWCCA 102 at [27] per Simpson J.

Whilst acknowledging the importance of an assessment of objective seriousness, in *Ridgeway* [2016] NSWCCA 184 the CCA said that caution has also been expressed about prescribing too closely the use of a particular verbal formula in making an assessment of the objective seriousness. In *Ridgeway*, the CCA found that the judge did not expressly determine the objective criminality but did so implicitly and clearly gave careful consideration to the nature of the offending and the circumstances in which it occurred: at [20], [24]-[26]; applying *Delaney* (2013) 230 A Crim R 581.

## 2. MITIGATING FACTORS

### **Aboriginal offender – *Bugmy* (2013) 249 CLR 571 - disadvantaged background**

In *Ingrey* [2016] NSWCCA 31 the applicant, of Aboriginal background, was sentenced for armed robbery. The background history was that his extended family were involved in a criminal milieu and he was exposed to that influence from a young age. The sentencing judge disregarded these matters on sentence.

The CCA allowed the applicant's appeal on the basis that the applicant's social disadvantage was not adequately taken into account: at [36]-[37]. The CCA referred to what the High Court said in *Bugmy* (2013) 249 CLR 571 at [40] that:

*“the circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way.” (emphasis added).*

The use of the word “may” does not suggest this factor is optional, rather, there are factors which may reduce or eliminate its effect. Per Hoeben CJ at CL:

*“[35] My understanding of that statement is that it refers to the ultimate effect of that factor. The plurality were not saying that a consideration of this factor was optional. What the plurality clearly had in mind was that even when that factor is taken into account, there may be countervailing factors (such as the protection of the community) which might reduce or eliminate its effect. In other words, this factor where it is present should be taken into account in the exercise of the sentencing discretion. That is something which his Honour did not do.”*

### **Drug addiction from young age - may be a mitigating factor in particular circumstances of individual case**

In *Hayek* [2016] NSWCCA 126 the CCA affirmed that there is no principle that drug addiction commenced when an offender was young is a mitigating feature for crime committed thereafter: at [75]. Cases such as *SS; JC* [2009] NSWCCA 114 and *Todorovic* [2008] NSWCCA 49 do no more than allow for the possibility there will be exceptions to the general rule that drug addiction is not a mitigating feature. One exception may be that an addiction to drugs was formed in youth, but that is dependent upon the circumstances of the case: at [76]. An addiction formed as a child may be a mitigating factor in the particular circumstances of a case, but it is an entirely different proposition to suggest it will always operate in that way, and for any person who began using drugs in youth: at [80]. In *SS; JC*, JC was introduced to cannabis at 12 by an abusive uncle who assaulted and threatened him: at [77]. The present case has different circumstances: at [81]-[83].

## 3. AGGRAVATING FACTORS

### **s 21A(2)(e) - in company**

*White* [2016] NSWCCA 190 considered the meaning of “in company” in s 21A(2)(e). A was sentenced for armed robbery. A walked with C towards a restaurant. A entered alone and C walked away. A committed the offence, fled and re-joined C. The CCA found that the sentencing judge erred in finding the offence aggravated by having been committed “in company” under s 21A(e).

The authorities dealing with the meaning of “in company” in the ‘sexual assault’ and ‘robbery’ aggravated offence provisions are relevant to the construction to be given to s 21A(2)(e): at [81]. They are not an exhaustive statement of what might be held to be “in company”. Each case will depend upon its own facts: at [94]. It is appropriate to focus on at least three questions:

- (i) whether the presence of the other person is such as to have a potential effect on the victim, by way of coercion, intimidation, or otherwise;
- (ii) whether the presence of the other person is such as to have a potential effect on the offender, by offering support or encouragement, or “emboldening” that person;

(iii) whether the evidence establishes that the other person is present, sharing a common purpose with the offender: at [94].

The offence was not committed “in company”. C was not in the presence of the victims, did not share a common purpose with A, there was no encouragement or support or emboldening by C. There was evidence C parted with A because she did not agree with A’s plan: at [96]-[97].

***s 21A(2)(eb) – offence committed in home of the victim or “any other person” – not restricted to circumstances where offender is an intruder***

The CCA put to rest conflicting views on the application of s 21A(2)(eb). In **Jonson** [2016] NSWCCA 286 a five judge bench held that s 21A(2)(eb) does not impose as a pre-condition for its operation that the offender be an intruder into the victim’s home. Further, it is not limited to the home of the victim but extends to the home of “any other person”. Thus, it would extend to persons (for example, children) visiting a relative’s home or persons in a domestic relationship at the home of the offender: at [40]-[42].

Those decisions restricting s 21A(2)(eb) to where the offender is an intruder are wrong and are overruled: at [50]. (*EK* (2010) 79 NSWLR 740; *Ingham* [2011] NSWCCA 88; *BIP* [2011] NSWCCA 224; *MH* [2011] NSWCCA 230, *Essex* [2013] NSWCCA 11, *DJM* [2013] NSWCCA 101, *Pasoki* [2014] NSWCCA 309 overruled).

This does not mean that in all cases the fact the offence occurred in a home will be an aggravating factor. It is necessary for the Court to conclude that, having regard to ordinary sentencing principles, it actually aggravates the offence: at [52]; *Gore* (2010) 208 A Crim R 353.

***s 21A(2)(eb) – offence committed in home of the victim or “any other person” – area adjacent to house can be considered a “home”***

In **Lulham** [2016] NSWCCA 287 (five judge Bench) the CCA held that s 21A(2)(eb) was correctly applied where the respondent had assaulted the victim in the victim’s driveway. “Home” would extend not only to the actual physical residence but to the area on the same premises, at least reasonably adjacent to that building: at [5]-[6].

***s 21A(2)(l) – vulnerable victim - engagement of s 21A(2)(l) does not depend upon a causal connection (in a case of murder) between vulnerability and death***

In **Sumpton** [2016] NSWCCA 162 the applicant was sentenced for murder. The applicant submitted that evidence the deceased victim was a woman with a slight build and walked with a limp, which led the sentencing judge to conclude the victim was vulnerable, did not support the conclusion that any such vulnerability contributed to her death. Any vulnerability the deceased had suffered at the time of her death ought to have been “a neutral sentencing factor”: at [133].

The CCA dismissed this argument. Section 21A(2)(l) is concerned with the weakness of a particular class of victim (*Betts* [2015] NSWCCA 39). It is the fact of a victim’s vulnerability which aggravates the offence. The fact that there may not have been evidence to support a conclusion that the deceased’s vulnerability contributed to her death is not to the point. The engagement of s 21A(2)(l) does not depend upon there being a causal connection (in a case of murder) between vulnerability and death: at [147].

***s 21A(2)(l) – vulnerable victim – error in finding victim vulnerable in context of domestic violence and Aboriginal background***

In **Drew** [2016] NSWCCA 310 the applicant seriously assaulted his female partner. The judge found the victim was vulnerable under s 21A(2)(l) in that: “there is a culture of silence within the Aboriginal

community .. such that those who complain tend to be ostracised” and thus “the victim was reluctant to seek help”: at [3]-[4].

The CCA held the judge erred in forming her opinion about vulnerability on the basis of generalisations concerning the culture of Aboriginal communities. Section 21A(2)(l) is only engaged where the victim is one of a class that is vulnerable by reason of some common characteristic: at [8]. However, an ultimate finding of the individual vulnerability of the victim in the more general sense of being under an impaired ability to avoid physical conflict with the applicant or to defend herself was open. That individual vulnerability had the same consequence for assessment of the objective seriousness as the judge found: at [5], [8].

#### 4. PROCEDURAL FAIRNESS

##### ***Refusal by judge to view CCTV footage tendered by Crown – fact finding***

In **Mulligan** [2016] NSWCCA 47 (Crown appeal) the accused was sentenced for an assault offence. It was a denial of procedural fairness for the sentencing judge to refuse to view CCTV material tendered by the Crown where part of the Crown submissions were based on the CCTV material and not taken from the tendered agreed facts. The CCTV footage was capable of being relied on by the Crown to rebut the respondent’s evidence he was provoked by the victim. It was also unfair to the Crown to adopt the position the Crown’s submissions were inaccurate if the judge was not at the same time prepared to permit the Crown to produce the very material that would arguably have justified those submissions: at [20]-[21].

#### 5. SENTENCING OPTIONS

##### ***Aggregate sentence cannot exceed sum of indicative sentences – indicative sentence is reference to overall sentence not NPP, unless judge expressly states indicative sentence is a fixed term***

In **Dimian** [2016] NSWCCA 223 the sentencing judge gave the applicant an indicative term of 2 years for Detain for advantage (s 90A *Crimes Act*) and an indicative term of 5 years, 6 months for Aggravated sexual assault (s 61J). The judge imposed an aggregate sentence of 9 years, NPP 6 years under s 53A *Crimes (Sentencing Procedure) Act* 1999.

Allowed the applicant's appeal, the CCA held:

- . The judge erred in imposing an aggregate sentence which exceeded the sum of indicative sentences. The indicative sentences referred to by the sentencing judge must be regarded as the head sentences for each of the offences, not the NPP. In 53A(2), the “sentence that would have been imposed” (the indicative sentence) is a reference to the overall sentence: at [41]-[49].
- . The only circumstance where an indicative sentence might be thought to equate with a NPP would be where the sentencing judge expressly states the indicative sentence was to be treated as a fixed term: at [47]; **McIntosh** [2015] NSWCCA 184 at [139].

##### ***Aggregate sentences - s.166 certificate offences can be included in aggregate sentence***

**Price** [2016] NSWCCA 50 (Crown appeal) held that sentences for offences placed before a judge on a “s 166 Certificate” pursuant to the *Criminal Procedure Act* 1986 may be included in an aggregate sentence.

The sentencing judge imposed an aggregate sentence for two serious culpable driving matters and three “related offences” on a s 166 Certificate – namely, possess prohibited drug, goods in custody (being wholly summary offences) and supply prohibited drug (which if dealt with in the Local Court has a jurisdictional limit of 2 years imprisonment). The CCA rejected the Crown submission that the

inclusion of the s 166 offences in the aggregate sentence was not in accordance to law. There is nothing to suggest a Local Court offence before the District or Supreme Court, pursuant to s 166, cannot be “picked up” by an aggregate sentence imposed under s 53A *Crimes (Sentencing Procedure) Act*: at [76]. In sentencing for offences on a s 166 Certificate, the maximum penalty or jurisdictional limit must be respected: at [80].

### ***No principle that District Court should not impose sentence in excess of jurisdictional limit of Local Court***

The CCA in **Turner** [2016] NSWCCA 208 observed there are many cases which reflect a view that the possibility a matter could have been dealt with in the Local Court is relevant to sentence. However, *how* the fact that a matter could have been dealt with in a Local Court contributes to mitigation is by no means clear: at [25] citing **Baines** [2016] NSWCCA 132 at [10]; also **SM** [2016] NSWCCA 171 at [26].

In **Turner** there was no error in the judge omitting to mention the possibility that the nature of the charge meant it could have been dealt with in the Local Court. Grounds of appeal claiming the jurisdictional limit of the Local Court was not taken into account can only be meaningful if this Court determines the total sentence for the offence should not have exceeded that limit. Unless it is plainly wrong that the offence is in the District Court, it is difficult to see how an offender can succeed on this ground: at [30]; citing **Zreika** (2012) 223 A Crim R 46]. (The appeal was allowed on manifest excess).

**SM** [2016] NSWCCA 171 held the District Court is not limited to the 2 year jurisdictional limit in the Local Court: at [23]; **Palmer** [2005] NSWCCA 349. The judge was not bound to accept the concession made by the prosecutor that it would have been appropriate for the matter to proceed in the Local Court: at [24]. If the judge is satisfied imprisonment exceeding 2 years is required, the prosecutor’s view would not be relevant: at [25]. The judge stated he took into account the jurisdictional limit and was not obliged to indicate in any arithmetical sense how it affected sentence: at [26].

### ***Special circumstances - rehabilitation***

In **Lulham** [2016] NSWCCA 287 the CCA said that in dealing with rehabilitation, a judge would be entitled to find special circumstances if there is evidence the offender has prospects of rehabilitation and that these prospects would be assisted if a longer NPP was allowed. It is not necessary that there exists significant positive signs which show that if the offender is allowed a longer period on parole, rehabilitation is likely to be successful, as opposed to a mere possibility: at [7], [8], [11], [65].

## **6. DISCOUNTS**

### ***Voluntary disclosure – Ellis discount to be quantified – CMB v Attorney General for NSW [2015] HCA 9 - s 23 Crimes (Sentencing Procedure) Act 1999***

It is an error of law not to quantify the discount allowed for voluntary disclosure under s 23(4) *Crimes (Sentencing Procedure) Act* 1999: **Panetta** [2016] NSWCCA 85; **Mooney** [2016] NSWCCA 231; **CMB v A-G for NSW** (2015) 243 A Crim R 282; [2015] HCA 9.

In **Panetta** [2016] NSWCCA 85 the CCA affirmed that **CMB** held the *Ellis* discount falls within s 23 *Crimes (Sentencing Procedure) Act*, in particular s 23(4), imposing a requirement to make explicit the nature and extent of any reduction of the sentence. That the High Court in **CMB** did not refer to s 23(4) does not affect this reasoning: at [33]-[34]. Failure to comply with s 23(4) is an error of law. Section 23(4) is in obligatory terms and it is not possible for this Court to correct the omission since the judge’s reasons do not indicate which penalty “would otherwise have [been] imposed” as required by s 23(4)(b). Moreover, this is information to which the offender has a right and the subsection reflects important public policy considerations: at [36].



Section 23(6) states failure of a court to comply with s 23(4) “does not invalidate the sentence”. However, s 101A permits the court to consider a failure to comply with it “in any appeal against sentence even if this Act declares that the failure to comply does not invalidate the sentence” (*Tuncbilek* [2004] NSWCCA 139): at [35].

In **Mooney** [2016] NSWCCA 231 the applicant, charged with sexual assault, made voluntary admissions to the police. Confessing to the offences constitutes assistance within s 23 (*CMB; Panetta*). The assistance given by the applicant was significant enough to entitle him to a discount under s 23(2). The CCA found it was not apparent from the sentencing judge’s reasons that the judge took s 23 into account, which led to the conclusion the judge erred: at [46]-[47].

### ***Guilty plea - mandatory consideration in reasons for judgment - whether omission always synonymous with legal error***

In **Lee** [2016] NSWCCA 146 the Crown had accepted the applicant was entitled to a 25% discount, however, there was no reference in the judge’s reasons to any discount. Allowing the appellant’s appeal, the CCA stated:

- . A sentencing judge “should explicitly state” a plea of guilty has been taken into account and how. Whether failure to do so will indicate the plea “was not given weight” falls into a different category: it will depend upon the circumstances of the case and content of the reasons. The issue is whether the omission is always synonymous with legal error: at [31]; *Thomson; Houlton* (2000) 49 NSWLR 383.
- . The plea is a mandatory consideration (s 22 *Crimes (Sentencing Procedure) Act* 1999). If the appellate court can be satisfied the plea was taken into account and a discount allowed, failure to so state in the sentencing judgment may be an immaterial error. Where there is a real possibility it was not properly considered, failure to refer to it in the judgment is treated as a material error: at [37].

The CCA referred to 2 cases: *Convery* [2014] NSWCCA 93: no reference was made to the plea of guilty, however, the Court found it was taken into account because had the relevant discount been applied, the starting point of the sentence would have exceeded the maximum penalty for the offence; *Woodward* [2014] NSWCCA 205: the consequence of the failure to identify the discount was not addressed, the Court accepting that the sentence was manifestly excessive: at [39]-[40].

### ***Guilty plea – delay – where attributed to mental illness – exceptional case – full discount***

In **Haines** [2016] NSWCCA 90 and **Shine** [2016] NSWCCA 149 the CCA found the entering of the guilty plea was delayed due to the applicants’ mental illness and having to await psychiatric assessments. The discount for the plea was insufficient and the Court allowed the full discount of 25%.

Generally the reason for the delay in the plea is irrelevant. However, there may be exceptional cases where a maximum discount might properly be awarded (*Borkowski* (2009) 195 A Crim R 1 at [32]). The principles have to be applied by reference to the “particular circumstances in any case” (*AB* [2011] NSWCCA 229 at [3]). Delay was for the purpose of awaiting psychiatric assessment and there was almost no delay in pleading guilty once the psychiatrist changed his opinion. In the exceptional circumstances the reason for the delay had to be taken into account: **Haines** at [24], [31]-[32].

In **Shine** the delay was similarly due to awaiting the outcome of psychiatric evaluation and conferring with counsel to consider his position. The delay can be attributed to the applicant’s mental illness and could not be said to be unreasonable: at [95]; [110]-[111] (**Haines** applied).

***Guilty plea to murder – insufficient discount - circumstances in which offender indicated intention to plead guilty - s 22(1)(c) Crimes (Sentencing Procedure) Act 1999***

In *Barbieri* [2016] NSWCCA 295 (murder) the CCA found applicant ought to have received a 15% discount for his guilty plea rather than the 10% provided by the sentencing judge: at [98].

The applicant stabbed a police officer acting in the execution of duties, an offence attracting mandatory life imprisonment (s 19B *Crimes Act*). An exception is where the offender has “significant cognitive impairment” (s 19B(3)(b)). The applicant offered to plead guilty to manslaughter on the basis of substantial impairment under s 23A *Crimes Act* which the DPP rejected. However, the DPP offered the concession that a life sentence was not mandated because the applicant had a “significant cognitive impairment” within s 19B(3)(b). The applicant thereupon pleaded guilty to murder on the first day of trial.

Section 22(1)(c) *Crimes (Sentencing Procedure) Act 1999* states:

*s 22(1):“(1) In passing sentence for an offence on an offender who has pleaded guilty to the offence, a court must take into account:*

*.....*

*(c) the circumstances in which the offender indicated an intention to plead guilty, and may accordingly impose a lesser penalty than it would otherwise have imposed.”*

The CCA said the reach of s 22(1)(c) has not been explored. Section 22 is susceptible of a less rigid interpretation than may appear to be derived from decisions such as *Thomson & Houlton* (2000) 49 NSWLR 383 and *Borkowski* (2009) 195 A Crim R 1: at [95].

In this case, the applicant was placed in a uniquely difficult position. He had psychiatric evidence on which to proffer a plea of guilty to manslaughter on the basis of substantial impairment but which was refused. Had the applicant gone to trial on that basis, and failed to persuade the jury of the defence of substantial impairment, he ran the risk of being subject to the mandatory life sentence. The evidence does not disclose when the prosecution indicated willingness to make the concession the applicant did suffer from a cognitive impairment (s 19B(3)) which was determinative in the decision to plead guilty. In these circumstances, a greater reduction was warranted: at [91]-[98].

NOTE: An application by the Crown for Special Leave to appeal to the High Court in this matter has been refused: [2017] HCATrans 111 (12/5/2017)

## **7. PARITY**

***Parity – aggregate sentences – indicative sentences may be a guide***

In *Thangavelautham* [2016] NSWCCA 141 the applicant was sentenced for conspiracy to defraud and three other offences for which he received an aggregate sentence. A ground of appeal was disparity with the lesser aggregate sentence imposed by the same judge upon cooffender J, sentenced for the same conspiracy to defraud offence, another conspiracy offence and further offences on a Form 1.

The CCA allowed the applicant’s appeal. The sentencing judge erred in making no reference to the sentence imposed on J and did not consider the question of parity: at [78]. It was not inappropriate to compare the respective indicative sentences for the conspiracy: at [73]. In considering the parity principle, it is necessary to have regard to the aggregate sentence. The indicative sentences may be a guide to whether the aggregate sentence is excessive: at [70]; *JM* [2014] NSWCCA 297.



## 8. MENTAL ILLNESS

### ***Failure to provide reasons for rejecting conclusion of psychiatrist - failure to consider effect of mental illness on moral culpability***

In **Shine** [2016] NSWCCA 149 (wound with intent to murder) a psychiatrist found the applicant suffered a psychotic illness which affected his ability to recognise his actions were wrong. The CCA allowed the applicant's appeal. The judge erred in finding, contrary to the psychiatric report, that the applicant knew what he was doing was wrong. If the sentencing judge was to reach a contrary conclusion on a critical matter, he should have set out his reasons and failure to do so was an error of law: at [70], [108], [115]; *Thomson & Houlton* (2000) 49 NSWLR 383 at [42]-[44]. The sentencing judge's reasons were inadequate: at [67].

The judge also failed to assess the extent to which the mental illness operated to reduce the sentence imposed – that is, whether and in what way the applicant's moral culpability was reduced by mental illness: at [74]-[77]; *Elturk* (2014) 239 A Crim R 584. The applicant's moral culpability was lessened by his mental illness. The psychiatrist's conclusion that the applicant did not know that what he was doing was wrong can be taken into account in assessing the gravity of his conduct: at [99]-[101].

## 9. VICTIM IMPACT STATEMENT

### ***Statement of support by victim for the applicant - did not meet definition of Victim impact statement (VIS)***

In **AC** [2016] NSWCCA 107 (persistent sexual abuse) the applicant and the 12 year old female victim had been married in an Islamic ceremony. The judge was correct in refusing to take into account as a VIS a statement by the victim supporting the applicant. Section 26 *Crimes (Sentencing Procedure) Act* defines a "victim impact statement" to mean "... a statement containing particulars of any personal harm suffered by the victim". The victim's statement did not disclose the victim suffered any harm, and did not identify the personal harm the victim suffered including an ectopic pregnancy and miscarriage. The statement could not be taken into account as a VIS as it did not comply with legislative requirements: ss 28, 30(3): at [42]-[45].

### ***Child sexual assault – presumption of substantial risk of emotional harm – Victim Impact Statement to be taken into account to either confirm or contradict presumption***

In **Nelson** [2016] NSWCCA 130 the applicant, aged 18-19, was sentenced for a number of child sexual assault offences against the female victims aged 13-14. The sentencing judge erred in omitting any reference to the VIS provided by one of the victims. There is a presumption that child sexual abuse causes a substantial risk of emotional harm: at [17]-[20]; *DBW* [2007] NSWCCA 236. The judge should be prepared to have regard to a VIS which may either confirm or contradict the presumption; and accept it in the absence of any challenge and rely upon it to support the presumptive position that significant harm was caused to the victim: at [20]-[22].

### ***Victim impact statements (VIS) – "impact" not to be narrowly construed – whether any part "offensive"***

In **Turnbull (No.24)** [2016] NSWSC 830 (Johnson J) the offender objected to parts of the VIS by the murder victim's wife (M) on the basis they went beyond what is the "impact" of the death of the victim and contained "offensive" content (Clause 10(6) *Crimes (Sentencing Procedure) Regulation 2010*).

Johnson J overruled the objections. "Impact" in s.26 *Crimes (Sentencing Procedure) Act 1999* (in the definition of "victim impact statement") should not be construed narrowly. The impact of the death of a person on members of immediate family extends to the influence or effect of the death. It is not confined to immediate impact or to immediate issues of grief. It can extend to thought processes which may involve strong feelings toward the perpetrator, and what (in their view) may have motivated the perpetrator. To exclude such matters would artificially confine the process by which VIS are made: at

[8]. Whether any phrase contained in a VIS may be “offensive”, it is necessary to bear in mind the context of the VIS. Strong feelings may be expressed: at [9].

## 10. PARTICULAR OFFENCES

### ***Offence committed in domestic setting — general deterrence – forgiveness of victim of little assistance***

In ***Eftithimiadis (No 2)*** [2016] NSWCCA 9 the applicant appealed against the sentence imposed for the offence of solicit to murder his wife. Dismissing the appeal, the CCA stated that general deterrence has significance in the present case. The community cannot tolerate violence in any domestic setting, but the community’s abhorrence of a crime intended to secure the custody of a young child by the murder of the mother needs to be expressed in the sentence to deter others: at [86]. The victim’s forgiveness cannot interfere with proper exercise of the sentencing discretion as the community is entitled to retribution: at [87]; *Palu* (2002) 134 A Crim R 174; *Eftithimiadis* [2013] NSWCCA 276.

### ***Domestic violence - phrase “worst category” should be avoided - Kilic [2016] HCA 48***

In ***Drew*** [2016] NSWCCA 310 the applicant was sentenced to 12 years 6 months imprisonment, NPP 9 years 4 months after pleading guilty to wound with intent to cause GBH (s 33(1) *Crimes Act*) committed against his female partner. The sentence was the third highest sentence imposed under s 33(1) since the introduction of SNPPs in 2003: at [92]. The judge found the offence fell into “the worst category of offences for offences of its kind”: at [10].

The CCA said that the use of the phrase “worst category” offence should now be avoided unless the finding is made in the context of imposing the maximum penalty, following ***The Queen v Kilic*** [2016] HCA 48 (handed down after the applicant had been sentenced): at [104]-[105]. However, although error had been established, no lesser sentence was warranted and the appeal was dismissed: at [128].

It was open to the judge to make her finding of objective seriousness for these reasons:

- . The serious nature of the victim’s injuries to particularly vulnerable areas of her body, resulting in the victim being airlifted to Sydney for treatment and in critical condition: at [106]
- . Although the injuries did not result in any permanent disability or disfigurement, it is not necessary for the injuries to be of the “worst type” for an offence to fall into the “worst case” category. The nature of the offender’s conduct can bring a case within that category (*Westerman* [2004] NSWCCA 161 at [17]): at [107].
- . The attack was sustained; and previous threats made to the victim: at [109]. The attack was prolonged with the victim begging the applicant to stop, escaping and being attacked again: at [110].
- . The offence occurred in the context of a domestic relationship marked by violence and committed in breach of an ADVO which increases objective seriousness: at [109]
- . The offence is aggravated by the fact it occurred in the victim’s home under s 21A(2)(eb) *Crimes (SP Act)* (***Jonson*** [2016] NSWCCA 286). Although there is a degree of overlap with this factor and the fact that the offence occurred within a domestic relationship, it is nonetheless a relevant consideration in assessing the objective facts overall: at [111].
- . Although the applicant was heavily intoxicated, the judge found by his words uttered before and after the stabbings he intended to inflict very serious injuries: at [112].

### ***s 33(1)(a) Crimes Act - Wound with intent to cause gbh - no error to take into account wound potentially fatal***

In ***Kiernan*** [2016] NSWCCA 12 it was not an error to take into account that the wound was potentially fatal in sentencing for ‘wound with intent to cause gbh’ (s 33(1)(a) *Crimes Act*). Although offences of

this kind are result based, the manner in which the wound was inflicted, the reason and circumstances of the wounding are relevant to seriousness of the offence: at [41]; *McCullough* [2009] NSWCCA 94. While the applicant is to be sentenced for what did occur and not for what might have occurred, it is a relevant factor that the deeper of the two wounds to the victim's neck could have been fatal. It is not without significance the applicant left the victim believing he was dead: at [42]-[44].

A cut to the throat may inflict the same or similar physical harm as a cut to the leg, however a judge is entitled to treat the former as far more serious than the latter. Section 21A(2)(ib) *Crimes (Sentencing Procedure) Act* specifies it is an aggravating factor that "the offence involved a grave risk of death to another person/s": at [46]; *Dennis* [2015] NSWCCA 297.

***Dangerous driving cause gbh – s 52A(3)(c) Crimes Act – applicant drove into back of group of cyclists - not a case of momentary inattention - speed and distance during which offender was inattentive aggravating factors***

In *Kerr* [2016] NSWCCA 218 the applicant was sentenced for Dangerous driving cause grievous bodily harm (s 52A(3)(c) *Crimes Act*). The appellant ran into the back of a group of cyclists. The appellant was travelling within the speed limit at 70 kp/h.

This was not a case of momentary inattention. Either the applicant did not see a group of seven cyclists because of inattention for at least 17 seconds, or, seeing them, he approached at a speed of 70 kp/h up until a point of momentary inattention, which caused the accident, making no attempt to slow down or avoid the cyclists. The latter finding would mean the applicant, being aware of the cyclists, did nothing to take account of them until momentary inattention led to the collision. The judge was correct in finding it was not momentary inattention: at [91]-[92].

The CCA also found that speed may be an aggravating factor where it is excessive in light of the surrounding circumstances. Although the applicant was within the speed limit, driving at 70 kp/h near a group of cyclists was excessive. The distance travelled (300 metres over 17 seconds) without regard to the cyclists ahead is also an aggravating factor: at [94]-98].

***s 66C Crimes Act - Sexual intercourse with child – offences not "consensual" – not a "boyfriend/girlfriend" relationship***

In *Nelson* [2016] NSWCCA 130 the CCA allowed a Crown appeal where the respondent received suspended sentences and good behaviour bonds for a number of counts of sexual intercourse without consent with a child (s 66C *Crimes Act*). The applicant was aged 18-19 and the three female victims aged 13-14.

The sentencing judge erred in referring to the sexual activities as "consensual." Lack of consent is not an element of such offences. Threats or force in overcoming resistance would be an aggravating factor; however, mere lack of opposition is irrelevant and not a mitigating factor in child sexual assault: at [23]. It was also highly misleading to describe the offender and each victim as being in a "boyfriend/girlfriend" relationship. The fact that the sexual aspect of the relationship was unlawful was a critical factor and ought to have been taken into account: at [26]-[27].

***Child sexual assault – historical offences***

*Flaherty* [2016] NSWCCA 188 referred to *Magnuson* [2013] NSWCCA 50 which reviewed sentencing patterns applicable to sexual offences against children in the late 1970s and early 1980s. The CCA said it must be recognised that the review in *Magnuson* does not constitute a statement of principle regarded as binding. Rather, the product of the review is closer to a finding of fact, dependent upon the evidence adduced in the particular case. The judgment contains useful historical data for subsequent courts. In those circumstances, *Magnuson* shows that at the times relevant to the current offences, sentencing for child sexual offences was significantly more lenient than at present: at [64].

## **Fraud offences**

A few notable fraud cases.

Insider trading: In **Curtis (No 3)** [2016] NSWSC 866 at [24] McCallum J referred to a number of authorities establishing it is wrong to regard white-collar crime as victimless. It causes loss (albeit unquantifiable) to individual traders and harm to the community by damaging the integrity of the market as a level playing field. Punishment by a sentence of imprisonment is a powerful deterrent to others in the case of white-collar crime, a field in which offending is often a choice freely made by well-educated people from privileged backgrounds, prompted by greed rather than poverty, mental illness or addiction: at [51].

Art dealing fraud: In **Coles** [2016] NSWCCA 32 (ss 117, 125, 178A-BA *Crimes Act*) a prominent art dealer dealt fraudulently with artworks held for clients worth around \$6 million. He received an aggregate sentence of 8 years 6 months, NPP 4 years 9 months. Objective seriousness was well above mid-range having been the result of a deliberate, well planned and systematic fraud over many years and a “brazen breach” of trust. The motivation was financial gain. Subjective circumstances, including good character, did not attract leniency: at [13]-[14].

Common law conspiracy to defraud - Maximum penalty for substantive offence: In **Thangavelautham** [2016] NSWCCA 141 the applicant intended to skim 1000 credit cards but was foiled due to police intervention. He received an aggregate sentence of 11 years, NPP 8 years 3 months. The applicant submitted that although the penalty for common law offence of conspiracy was at large, the proper approach was to have regard to the penalty imposed for the substantive offence (*Auimatagi* [2011] NSWCCA 248; 216 A Crim R 179) - being Obtain financial advantage by deception under s 192E *Crimes Act*, maximum penalty 10 years. The CCA held the sentence was not manifestly excessive. Although the attempt was foiled, it did not lessen the seriousness of what was intended to be achieved by the conspiracy, and did not require the applicant be sentenced by reference to a single offence under s 192E. The element of concert may justify a more severe penalty for conspiracy than the penalty imposed for the substantive offence (*Hoar* (1981) 148 CLR 32): at [80]-[84].

Credit card fraud: **Thangavelautham** - in the context of a conspiracy to defraud, there is need for general and specific deterrence for offences which have the potential to cause serious financial hardship and embarrassment to a large number of consumers and which also have the capacity to undermine confidence in this country’s financial system: at [86].

Identity fraud: **Thangavelautham** - the need for both personal and general deterrence, and imposition of severe punishment: at [37], [104]-[105].

## **Double punishment - offences of police pursuit and aggravated dangerous driving occasioning grievous bodily harm - elements in common between two offences**

In **Priovolidis** [2016] NSWCCA 201 the applicant received separate sentences for Fail to stop whilst under police pursuit (s 51B(1) *Crimes Act*) and Aggravated dangerous driving cause grievous bodily harm (s 52A(4) *Crimes Act*). The s 52A(4) offence occurred very shortly after police stopped their pursuit of the applicant. The applicant submitted the overlapping elements between the two offences meant the sentences involved double punishment as outlined in *Pearce* (1998) 194 CLR 610.

The CCA dismissed the appeal. The elements of dangerous driving and police pursuit are common to both offences, however, the existence of overlapping elements between the two offences does not itself engage the double punishment principle in *Pearce*. A closer examination of the facts is required: at [50]. The CCA said the critical issue is whether the applicant’s driving is a single act or episode (as the applicant contended) or two separate and discrete acts giving rise to two separate offences (as the Crown contended) and found the charges and facts supported the Crown: at [51]-[54].

This is not a case like *Pearce* where the two charges arose out of a single episode (the appellant having broken into the victim’s home and beaten him) or *Johnson* (2004) 205 ALR 346 (where two charges arose out of possession of one package of drugs): at [54]

***Money laundering – judge’s speculative consideration of intended use of money contemplated criminality significantly worse than encompassed in plea and Crown case.***

In *Islam* [2016] NSWCCA 233 the applicant was sentenced for dealing with money intending that the money would become an instrument of crime (s.400.3(1) *Criminal Code* (Cth)). The money (\$1 million) was found by airport Customs officers in the applicant’s luggage as he was attempting to leave Australia. The Crown adopted the approach that the future intended use of the money, as an “instrument of crime”, was the removal of the funds from Australia without report contrary to s.53(1) *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth). The Crown did not put its case on by reference to what may be done with the money once it reached overseas{ at [72]. However, the sentencing judge considered that the element of “instrument of crime” consisted of the future use of the money overseas in some “criminal activity”. The CCA held the judge’s finding was based upon the intended use of the money for a more serious unidentified criminal purpose than that which the Crown had relied upon at the sentencing hearing and had fallen into error: at [47], [73]-[74].

## **11. SENTENCE APPEALS**

***Appellant’s sentence appeal allowed on errors identified by Crown in Crown appeal***

In *Flaherty* [2016] NSWCCA 188 both the appellant and Crown appealed against sentence. The CCA found none of the appellant’s asserted errors were established but did find errors identified by the Crown were. The Crown appeal against sentence was dismissed, however, the CCA allowed the appellant’s appeal on the errors identified by the Crown. There is no reason why the statements in *Kentwell* (2014) 252 CLR 601 do not apply to sentencing affected by error of principle by whomever the error is exposed, or it would be a distortion of justice: at [90]-[96].

***Procedural fairness denied - extent of discount applied for guilty plea - appellate court must re-exercise sentencing discretion where only discrete component affected by error***

In *Lehn* [2016] NSWCCA 255 (five judge bench) there was denial of procedural fairness where the sentencing judge allowed a discount of only 20% for the applicant’s plea of guilty entered at the earliest opportunity in the Local Court. The Crown conceded error given it had not submitted that anything less than 25% was appropriate, and the sentencing judge had not indicated an intention to grant a lesser discount: at [45].

The CCA considered whether the failure to accord procedural fairness in determining the discount vitiated the entire sentencing discretion or only a discrete component. The CCA found that the error was not related to only a discrete component of the sentencing discretion. The discount given for the guilty plea was directly connected to a sentencing purpose, namely, ensuring that the penalty reflected the objective gravity of the offence: at [64] (Bathurst CJ); [118] (Beazley P); [128] (Schmidt J).

The CCA considered the application of s.6(3) Criminal Appeal Act and *Kentwell* (2014) 252 CLR 601 where an error affects only a discrete component of the sentence. The Court held that where the discretion has miscarried in respect of a discrete component of the sentencing process, as where it has miscarried generally, it is the duty of the Court to exercise the discretion afresh: at [68]-[71], [75]-[78], [80]-[87] (Bathurst CJ); [118] (Beazley P); [125] (R A Hulme J); [128]-[129] (Schmidt J); [141]-[142] (Wilson J).

***Zreika v R (2012) 223 A Crim R 460 - exception - where justice demands intervention***

In *White* [2016] NSWCCA 190 the sentencing judge erred in finding an armed robbery was aggravated by being committed ‘in company’ under s 21A(2)(e) when defence counsel mistakenly made this concession. The judge also erred in failing to take delay into account when counsel omitted to draw delay on sentence to the judge’s attention: at [98], [124].



The CCA found that both errors are of the kind which an appeal court will normally not entertain, an appeal not being the occasion for the revision and reformulation of the case below: at [126] citing *Zreika* at [81]. However, the intervention of this Court is not precluded where justice demands that it intervene; in rare circumstances, it may '*render a serious injustice*' if an offender was not able to correct the error in such a case: at [127]; *Zreika* at [82]. The CCA concluded that in this case both errors came within this exception referred to in *Zreika* and was a case where justice does demand intervention: at [128].

### ***Fresh evidence – Facebook photographs of victim not fresh evidence – pre-requisites for admission of fresh evidence***

In *Bajouri* [2016] NSWCCA 20 the applicant was sentenced for 'intentionally causing gbh' (s 33(1)(b) *Crimes Act*). A Victim Impact Statement (VIS) at sentence outlined the victim's injuries, ongoing pain and impact on work and sport. The applicant submitted there was a miscarriage of justice due to 'fresh evidence' of Facebook photographs of the victim trail bike riding and jet skiing 10 months after the offence.

The CCA dismissed the appeal. The material did not constitute 'fresh evidence'. In *Goodwin* (1990) 51 A Crim R 328 at 330 Hunt J outlined the pre-requisites for the admission of fresh evidence:

- "(1) that the additional material sought to be put before this Court is of such significance that the sentencing judge may have regarded it as having a real bearing upon his decision;
- (2) that, although its existence may have been known to the applicant, its significance was not realised by him at the time; and
- (3) that its existence was not made known to the applicant's legal advisors at the time of those sentencing proceedings."

The CCA noted recent authorities have taken the first pre-requisite in *Goodwin* as having a more restrictive effect: at [49]-[50]. - "it must be shown that the sentencing of the appellant in the absence of that evidence resulted in a miscarriage of justice": *Fordham* (1997) 98 A Crim R 359 at 377-378; "even if the evidence is fresh, it ought not be received by the Court unless it affects the outcome of the case": *Bland* (2014) A Crim R 51.

Irrespective of whether the first pre-requisite in *Goodwin* should be applied or some stricter criterion, the Facebook images would not qualify as fresh evidence: at [51]. The evidence not contradict the victim's VIS. He said he was unable to work and rarely left his house but did not assert he had been unable to return to outdoor activities: at [46].

### ***Fresh evidence – diagnosis of Alzheimer's disease***

In *Wright* [2016] NSWCCA 122 the applicant had been sentenced on the basis that his health was declining. On appeal the applicant submitted there was fresh evidence he had been subsequently diagnosed with Alzheimer's disease. The CCA refused leave to appeal.

RA Hulme J set out the principles in relation to fresh evidence and their application at [71]-[73] (taken from the written submissions of senior counsel for the Applicant):

- "1. "Fresh evidence" is to be distinguished from "new evidence": fresh evidence is evidence which was not available or which could not have been obtained with reasonable diligence at the time of sentence; new evidence is evidence which was available but not used or which could have been obtained with reasonable diligence: *Goodwin* (1990) 51 A Crim R 328 at 330.
- 2. Generally, neither fresh evidence nor new evidence is received on appeal, as a reflection of the principle of finality: *Cornwell* [2015] NSWCCA 269 at [39]. Fresh evidence or new evidence will only be received where a miscarriage of justice is shown: *Fordham* (1997) 98 A Crim R 359 at 377-378; or where it is in the interests of justice: *Cornwell* at [59].
- 3. Evidence of events or circumstances that have arisen entirely since sentence is not received. However, evidence may be received of events or circumstances which existed at the time of sentence but which were unknown, or the significance of which was unappreciated. The



rationale for reception of the evidence is that the court proceeded on an erroneous view of the facts: *Khoury* at [110]-[115].

4. The determination to receive the evidence is discretionary. Caution must be exercised and a proper basis for admission of the evidence must be established: *Khoury* at [117].

5. Factors relevant to the determination to receive the evidence include the circumstances of, and any explanation for, the failure to produce the evidence at first instance and the potential significance of the evidence to the outcome: *Khoury* at [121].”

Three examples of the application of the principle were set out in *Turkmani* [2014] NSWCCA 186 per Beech-Jones J at [66]:

“(a) Where the offender was diagnosed with a condition after sentence but was affected by it at the time of sentence.

(b) Where, although the symptoms of a condition may have been present, their significance was not appreciated at the time of sentencing.

(c) Where a person was sentenced on the expectation that they would receive a particular level of medical care and attention in custody but they did not.”

Although the evidence qualifies as fresh evidence that the Court *could* receive, the Court was not persuaded it should exercise its discretion to receive it because it is insufficient to warrant a fresh assessment of sentence. The applicant's advanced age, ill-health and that incarceration would be difficult already resulted in a lenient outcome: at [86].

## **NSW CCA CONVICTION APPEALS and OTHER CASES**

### **1. EVIDENCE**

#### ***ss 103, 104 – credibility - cross-examination of accused - prosecutor questioned accused as to prior convictions without leave of Court***

In *Tieu* [2016] NSWCCA 111; (2016) 92 NSWLR 94 the CCA allowed the appellant's appeal on the basis that the trial judge failed to consider the application of s 103 (*Exception: cross-examination as to credibility*) and s 104 (*Cross-examination of defendant as to credibility*) and applied the incorrect test regarding cross-examination of the appellant: at [123]-[127], [136]-142].

A general summary of s 104 is given at [26]-[47], [135]-[136]:

A defendant cannot be cross-examined about a matter relevant to the assessment of the defendant's credibility unless the court grants leave: s 104(2).

Leave to cross-examine a defendant by the prosecutor is *not* required where it is directed to whether the defendant: is biased or has a motive to be untruthful; is unable to recall matters to which his/her evidence relates; or, has made a prior inconsistent statement: s 104(3).

Leave must not be given for cross-examination by the prosecutor under s 104(2) unless evidence adduced by the defendant has been admitted that: tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and is relevant solely or mainly to the witness's credibility: s 104(4).

Once it is accepted that leave is required, it is necessary for the prosecutor to fall outside the prohibition on the grant of leave under s 104(4), on the basis that each limb of the exception was engaged: at [34].

There are other considerations which operate with respect to a grant of leave:

Section 192(2) prescribes certain matters to be taken into account in determining whether to give leave, including unfairness to a party or to a witness.

Section 135 - The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that it might be unfairly prejudicial to a party

Section 136 - The court must refuse to admit evidence if its probative value is outweighed by the danger of unfair prejudice: at [36].

In this case, cross-examination by the prosecutor of the accused on his criminal record ensued without an express grant of leave or ruling from the trial judge addressing the requirements of ss 103 or 104.

The judge did not turn his mind to the test under s 103 - the trigger to the exception to the credibility rule requires a determination that the evidence "could substantially affect the assessment of the credibility of the witness": at [124]. The cross-examination contravened s 104(2). Evidence led by the appellant's counsel from the appellant came out in the presence of the jury raising an awkward problem but it had to be addressed in an orderly way: at [128].

The cross-examination having proceeded without leave, the first task was for the judge to make a determination as to leave and to make any such determination in accordance with the requirements of the Act: at [126], [136]-[139]. The judge also failed to consider s 192(2) or s 137: [143], [149].

### **Coincidence evidence – evidence to be considered cumulatively - s 98 Evidence Act**

In *Matonwal & Amood* [2016] NSWCCA 174 the CCA allowed in part the Crown appeal against the trial judge's ruling that coincidence and tendency evidence was inadmissible. The Crown sought to rely on CCTV footage of robberies as tendency or coincidence for other counts. The CCA ruled the evidence was admissible as coincidence evidence but not as tendency evidence: at [86]-[92]. The following points were made *regarding coincidence evidence*.

#### *Separate or cumulative consideration.*

- . The authorities for the admissibility of coincidence evidence are discussed: at [70]-[71].
- . Further, it is necessary to give consideration to the evidence sought to be tendered as a whole, rather than separate consideration of each particular circumstance relied upon: at [72]-[73]; *MR* [2013] NSWCCA 236.
- . The trial judge stated he considered the cumulative factor of the evidence, however, his conclusion was not supported by any analysis so that he erred in considering the individual similarities separately: at [75].

#### *Considering the probative value of the evidence.*

- . In determining whether to admit evidence as coincidence evidence, regard must be had to all the evidence sought to be relied on by the party seeking to tender the coincidence evidence: at [71]; *DSJ* (2012) 84 NSWLR 758.
- . The trial judge erred in failing to take into account other evidence relied upon by the Crown, relevant to whether the proposed coincidence evidence had significant probative value: at [75].

#### *Whether the evidence should have been admitted as coincidence evidence.*

- . The task of the Court is discussed: at [70]-[71].
- . "Significant probative value" in s 98(1)(b) means probative value which is "important" or "of consequence". The significance of the probative value must depend on the nature of the facts in issue to which the evidence is relevant and the significance or importance which that evidence may have in establishing those facts. Thus the evidence must be influential in the context of fact-finding: at [77]-[78]; applying *IMM v The Queen* [2016] HCA 14; 90 ALJR 529.

### **s 59, s 106 Evidence Act – Hearsay – "not admissible" means "not admissible over objection" – forensic decision by trial counsel not to object – s 106 does not require a mechanistic approach whereby every proposition contained in the evidence is put to the witness**

In *Perish; Perish & Lawton* [2016] NSWCCA 89 the first appellant and others were charged with murder.

*Section 59 - Second hand hearsay.* At trial, counsel for the first appellant made a forensic decision not to object to the following second hand hearsay evidence: Witness C gave evidence Witness E told

him the deceased died before he got to him and the first appellant had said, that “it didn’t matter, that’s how he would have ended up anyway”.

The first appellant submitted a miscarriage of justice was occasioned by the admission of the evidence of Witness C; and that the trial judge erred in directing the jury that the second hand hearsay evidence was available as evidence of an admission by the first appellant. The CCA rejected the submissions.

*Admission of the second hand hearsay evidence.* Trial counsel made a conscious decision not to object to the evidence and there was, objectively speaking, a rational basis for not objecting to the evidence. In the circumstances, admission of the evidence did not mean the first appellant lost the chance of an acquittal fairly open to him: at [254]-[259]; *TKWJ v The Queen* (2002) 212 CLR 124.

*Trial judge’s direction regarding the second hand hearsay evidence.* There is a consistent line of authority that in s 59 *Evidence Act* the words “not admissible” mean “not admissible over objection”. This is consistent with the adversarial nature of a trial. The words “not admissible” may be contrasted against the use of words of prohibition, “shall not be adduced”, in s 118 and the obligation of the court to refuse to admit evidence if the preconditions in s 137 of the Act are met: at [261]-[269].

The trial judge still has an overriding obligation to ensure a fair trial according to law, to exclude inadmissible evidence or direct a jury not to take account of evidence if it would deny a fair trial: at [272]; *Pemble* (1971) 124 CLR 107.

Even if the decision not to object was not a rational forensic decision, and even if the judge’s direction was erroneous, the first appellant did not lose a real chance of acquittal. The Crown did not place reliance on the evidence, there was a caution regarding its use and both parties contended the witness was unreliable: at [274]-[277]; *ARS* [2011] NSWCCA 266; *Poniris* [2014] NSWCCA 100.

*Section 106 - (‘Exception [to the credibility rule s 102]: rebutting denials by other evidence’).* The third appellant submitted the recorded interview of Witness E, who was determined to be an unfavourable Crown witness, ought not to have been admitted into evidence (Ex AA). None of the trial counsel had objected to the tender of Ex AA. The third appellant submitted Ex AA was only admissible under s 106 but that the pre-requisites contained in s 106(1)(a) were not satisfied - namely the substance of the evidence be put to the witness; and the witness deny or not admit to the substance of the evidence. The CCA rejected the submission.

Given that Ex AA was admitted without objection, it was admissible irrespective of the provisions of s 106: at [475]; *WC* [2015] NSWCCA 5.

In any event there was compliance with the provisions of s 106. Prior to the admission of Ex AA, Witness E had refused to acknowledge what he had said to the police when previously interviewed.

*Section 106 does not require a mechanistic approach.* Section 106 does not require the adoption of a mechanistic approach, in which each and every proposition contained in the evidence in question is put to the witness. It requires only that the substance of the evidence be put. In the circumstances of the present case, that requirement was met: at [479]-[480].

***Section 165(1)(d) Evidence Act – warnings – witness criminally concerned in events – warning not requested by parties – warning not required - miscarriage of justice***

s 165(1)(d) *Evidence Act* 1995 states:

“This section applies to evidence of a kind that may be unreliable, including the following kinds of evidence:

... (d) evidence given in a criminal proceeding by a witness, being a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding,...

In **Decision Restricted** [2016] NSWCCA 44 applicant was convicted of murder after being tried jointly with co-accused. She gave evidence denying her involvement. The trial judge directed the jury that the appellant's evidence be treated with caution under s 165(1)(d). That no such warning had been requested by the parties was raised by the appellant's trial counsel in the jury's absence. The trial judge then gave the jury a second direction that it was the Crown submitting the appellant's evidence was unreliable and he had "no view or opinion about that."

As the s 165 warning was not requested by the parties, s 165 was not engaged. However, that is not determinative, given the judge is empowered by s 165(5) to give a warning regardless of any request. The question is whether a warning was appropriate and, if not, whether it was productive of a miscarriage of justice: at [57].

The CCA found that a s 165 warning was not required. The appellant's evidence was only relevant to the first co-accused who had been discharged to be tried separately. The appellant's evidence was not relied upon by the Crown in relation to the other co-accused and thus should have been assessed by the jury in the ordinary way: at [69]-[71]. The CCA allowed the appeal and ordered a new trial. It cannot be said there was no miscarriage of justice: at [74]. The second direction did not remove the damaging aspects of the earlier warning which gave the jury a variety of reasons why her evidence might be unreliable over and above what the jury might have considered when assessing her evidence. These further reasons were extraneous and irrelevant because this was not a "case in which the Crown relies upon the evidence of a witness who might reasonably be supposed to have been criminally concerned in the events ... ". Rather, the Crown vigorously disputed her evidence: at [73].

**Section 89 Evidence Act – right to silence – not impugned by Crown – relevance of silence of trial defence counsel**

In **Van der Vegt** [2016] NSWCCA 279 the appellant was convicted of possess child abuse material (s 91H Crimes Act). After being cautioned, the appellant voluntarily told the police that discs found at his home during a police search contained adult pornographic material only. At trial, the Crown asked during cross-examination: "You didn't at any time say to the police, 'Look, I've never seen that DVD before in my life,' did you?" and in closing address told the jury: "at no point in time did he say I've never seen that before, never seen that before, because he knew what was in them and he knew what was on them". The appellant submitted the Crown impugned his right to silence contrary to s 89 Evidence Act. The CCA dismissed the appeal. Section 89 states:

**"s 89 Evidence of silence generally**

(1) ..... an inference unfavourable to a party must not be drawn from evidence that the party ... failed or refused:

- (a) to answer one or more questions, or
  - (b) to respond to a representation,
- put ... by an investigating official ... ..

(4) In this section:

"inference" includes:

- (a) an inference of consciousness of guilt, or
- (b) an inference relevant to a party's credibility. "

The CCA held that applicant did not exercise his right to silence at all during the search warrant. Thus the Crown was not asking the jury to draw any inference from silence on the part of the applicant. It follows that the applicant's has not been wrongly impugned: at [40]. There was a continuous flow of discussion between police and the applicant by which the applicant exercised his right to silence neither completely (that is, by saying nothing at all about the contents of the safe), nor even partially (that is, by commenting on some items as they were produced, but not others). At no time during discussions did the applicant say he did not recognise any of the discs: at [40]-[42].

In particular, the Crown's closing address must be seen as being a submission that the applicant's version at trial (that he had never seen the discs before, and they must have been planted at his house) was not consistent with the version originally given to police (that the discs depicted adults,

drawing no distinction between discs he recognised and discs he did not): at [43]. The fact that neither defence counsel nor the trial judge interpreted the Crown's final address adversely supports this interpretation. Silence of defence counsel also plays a role in finding the Crown was drawing a distinction between two inconsistent versions, not between silence and a version subsequently given: at [46]-[47].

### **Sections 97, 101 Evidence Act – tendency evidence – risk of contamination or concoction**

In **Decision Restricted** [2016] NSWCCA 78 the CCA discussed, in relation to tendency evidence under s 97 and s 101 *Evidence Act*, how consideration should be given to evidence of a risk of concoction or contamination in a sexual assault matter and how such evidence should be treated: at [87]. The Crown sought to rely on the evidence of other complainants and witnesses as tendency evidence in a multiple child sexual assault trial. The trial judge ruled the evidence was inadmissible as tendency evidence within s 101 *Evidence Act*; that the risk of concoction or contamination significantly reduced the probative value of the evidence. The CCA allowed the Crown appeal against the judge's ruling (s 5F *Criminal Appeal Act*).

A number of authorities were discussed: *Hughes* [2015] NSWCCA 330; *Jones* [2014] NSWCCA 280; *Mcintosh* [2015] NSWCCA 184; *IMM v The Queen* [2016] HCA 14.

#### **Section 97**

- . If the possibility of concoction or contamination arises, it is a relevant consideration when determining whether evidence has significant probative value under s 97.
- . The judge erred in not taking that matter into account when considering whether the tendency evidence had significant probative value; it was an error to determine the issue of concoction or contamination separately from the issue of whether the tendency evidence had significant probative value. The judge made a number of further errors: see at [100]-[108].

#### **Section 101**

- . The difficulties with the correct test under s 101 were noted: see at [109]-[110].
- . The test under s 101 is: "Does the evidence in this matter amount to a real risk of contamination or concoction so as to give rise to a competing inference sufficient to deprive the tendency evidence of significant probative value. Put another way, is there a competing inference to be drawn from the evidence such as to render the tendency evidence inherently implausible. In carrying out that evaluative exercise, questions of credibility, reliability and weight should be disregarded": at [111]; *Mcintosh* [2015] NSWCCA 184; *DJW* [2015] NSWCCA 164.

The CCA assessed the evidence and concluded it did not meet this test: at [114]. The evidence of the complainants and witnesses, for the purposes of s 97 and s 101, was of significant probative value and has not been eroded by inherent implausibility nor is there a competing inference sufficient to deprive the tendency evidence of its significant probative value: at [121].

There is evidence which would enable cross-examination at trial as to the possibility of contamination or concoction. However, those are matters for the jury not for a trial judge ruling as to the admissibility of evidence at commencement of trial. This is particularly so when such a ruling of necessity would involve making of findings as to the credibility and reliability of that evidence: at [121]; (*IMM v The Queen* [2016] HCA 14 - discussed at [105].

The probative value of the tendency evidence does substantially outweigh any prejudicial effect on the respondent (s 101(2)). Just because the tendency witnesses are related and had the opportunity to talk, does not create unfairness of the type envisaged by the section, particularly when that evidence can be tested at trial: at [122]. In considering s 101, it must be kept in mind that clear directions would remove any potential unfairness: at [123].



## 2. PROCEDURE

### ***Trial by judge alone – appeal challenge to findings in judge-alone trial - whether verdict unreasonable - Filippou v The Queen [2015] HCA 29; 89 ALJR 776***

In **Gittany** [2016] NSWCCA 182 (murder) the CCA discussed the task of the appellate court on an appeal from a trial by judge alone. The CCA rejected the challenges to the trial judge's findings (Grounds 1 and 2): the judge did not err in discounting expert evidence nor failed to properly assess the reliability of the evidence of an eyewitness. The appeal was dismissed.

In rejecting that the verdict was unreasonable (Ground 3), the CCA stated:

- . The finding of guilt by a judge in a judge alone trial is to be equated “for all purposes” with a jury verdict (s 133(1) *Criminal Procedure Act 1986*). Thus the finding is not to be disturbed under the first limb of s 6(1) *Criminal Appeal Act* unless there is no or insufficient evidence to support the finding, or the finding is otherwise unreasonable, or the evidence was all the one way, or the judge has so misdirected himself or herself on a matter of law as to result in a miscarriage of justice”: at [111]; citing *Filippou v The Queen* [2015] HCA 29; 89 ALJR 776 at [12].
- . In most cases a doubt experienced by an appellate court will be a doubt the judge ought to have experienced. If the court is not satisfied the judge's advantage in seeing and hearing the evidence is capable of resolving the doubt, the appeal should be allowed: at [112].
- . Nevertheless, the manner in which an appeal is run in this Court may demonstrate the unreasonableness of the ultimate finding of guilt depends upon identifiable errors by the trial judge: at [113].
- . The manner in which an appeal under the first limb of s 6(1) is presented is of particular importance in considering the judgment of a trial judge sitting alone. A jury verdict is opaque in a way in which a judgment in a judge alone trial can never be, because s 133 *Criminal Procedure Act* requires the judge explain in reasons the law applied and findings of fact made: at [114].
- . Having rejected the challenges to the judge's findings (Grounds 1 and 2), including the specific errors raised by the applicant, there is no basis for concluding the judgment was “unreasonable” in the sense identified in s 6(1): at [115].

### ***Summing-up unbalanced – judge erred in asking why would Crown witness lie? – failure to put each defence case separately***

In **Decision Restricted** [2016] NSWCCA 202 the CCA allowed the applicants' appeals against their conviction for murder. The CCA held that the judge erred in posing to the jury the rhetorical question, “Why would “I” (who was a Crown witness) lie”? Further, that the summing-up was unbalanced.

The Crown relied on evidence by I, who had driven one of the applicants to the scene, and who was given an indemnity against prosecution.

Inviting the jury to consider whether I had a reason to lie was to deprive the warning under s 165(1)(d) *Evidence Act* (that he was criminally concerned) of any force. It also gave the jury the impression that if they could not identify another reason why he would lie, they should accept his evidence: at [221]. There were several reasons why he might have lied (he was criminally involved, there was a reward offered, he had been indemnified) but it was not for the judge to invite the jury to speculate as to whether there was any other reason or to understand that they ought to believe him unless they were able to identify a reason why he would lie: at [264]. The judge impermissibly instructed the jury as to how they could reason towards a verdict of guilt for each applicant by accepting I's evidence: at [269].

A summing-up must summarise the competing cases of the Crown and the accused fairly and adequately, particularly where the conduct said to implicate each accused was so different. The judge did not summarise the defence cases individually, referring to the “defence case” as if there was only one. This may have led the jury to consider all the accused were in the same position



notwithstanding the standard direction they needed to consider the case of each accused separately: at [224], [267]-[268]; *Towle* (1954) 72 WN 338.

The judge also made inappropriate remarks in raising a matter adverse to the accused which had not been relied on by the Crown: at [247].

### ***Prosecutor's duty to call witness – error of judgment in failing to call witness***

In ***Geitonia P/L v Inner West Council*** [2016] NSWCCA 186 the CCA held the prosecutor made an error of judgment in failing to call witness F because of his decision that F was unreliable. The prosecutor's decision was founded upon F's attempts to create false evidence. However, this conduct occurred more than three years before trial, F had not been conferenced by the prosecution and steps taken to contact F in 2015 fell short of what could have been done: at [78]. What F would have said could only be a matter of speculation and the prosecutor's decision was based on no more than intuition or suspicion: at [79].

It would have been sufficient for the prosecutor to call F so the appellants could cross-examine him and then, if necessary, be re-examined: at [80]; *Apostilides* (1984) 154 CLR 563. The prosecutor could also have questioned F as though he was being cross-examined about evidence by him unfavourable to the prosecution: at [81]; s 38 *Evidence Act*.

However, failure to call F did not result in a miscarriage of justice and the appeal was dismissed.

## **3. JURY**

### ***Defence appeal against discharge of whole jury – s 5G Criminal Appeal Act 1912 - a judge who is minded to discharge a juror or jury, over the opposition of one party, should stay his / her decision to allow an application to be made to this Court***

In ***Barber; Zraika*** [2016] NSWCCA 125 (murder) the CCA dismissed an appeal by the defence against the trial judge's order discharging the jury. The applicants were two of four accused on trial for murder. Due to evidence being admissible only against Barber and Zraika, the jury considered first their verdicts for co-accused H and SA only. H was convicted of murder. The jury were unable to reach a verdict on SA. The judge discharged the jury with respect to SA as well as Barber and Zraika. The applicants, who lost an opportunity for an acquittal following a lengthy trial, appealed the judge's order of discharge under s 5G(1) *Criminal Appeal Act 1912*.

The CCA held:

*Error to discharge jury.* Error in the sense of *House v The King* is established and leave to appeal is granted: at [24]. Barber and Zraik were entitled to have verdicts unless the trial had miscarried: at [29]. The trial judge was concerned about the length of the trial which had exceeded expectations and had the impression from the demeanour of the foreman and jury that "they had had enough": at [30]-[31]. The material before the Court did not warrant the discharge of the jury over the objection of the applicants: at [32].

*Not an appropriate case in which to intervene:* at [48]. After discharge, the jury may have considered extraneous material and it would be difficult to make the proper inquiries of jurors: at [43].

*A judge should stay his / her decision to discharge a juror or jury, over the opposition of one party, to allow an application to be made to this Court.* An application by Barber that the discharge be stayed was declined by the trial judge. The right to appeal the discharge or non-discharge of a juror or whole jury is to be dealt with expeditiously and a determination made "as soon as possible" (s 5G(2)). In all but exceptional cases, a judge who is minded to discharge a juror or the jury, over the opposition of one party, should stay his or her decision to allow an application to be made to this Court, if requested. There will be circumstances where the decision should be given effect immediately. However, those cases will be the exception to the rule: at [49].

### **Crown appeal against discharge of jury – s 5G Criminal Appeal Act 1912**

In **Lamb; Mason & Hill** [2016] NSWCCA 135 the trial judge discharged two jurors following some communication between them and the accused. The trial judge then decided to discharge the remaining jurors on the basis that to continue the trial would lead to a substantial miscarriage of justice. However, the judge did not formally discharge the jury but granted a short adjournment to allow the Crown to make an application for leave under s 5G *Criminal Appeal Act*.

The CCA dismissed the Crown appeal.

The procedure adopted by the trial judge was appropriate - it permitted the parties to exercise their rights with regard to the decision, and permitted this Court to exercise its jurisdiction: at [35]; *Barber* [2016] NSWCCA 125 at [49].

Only *House v The King* error will suffice to overturn a decision of this kind: at [36]; *Barber* [2016] NSWCCA 125 at [24] (above). Merely because a different judge may have come to a different view does not mean that the test in *House v The King* for appellate review of the exercise of judicial discretion (or the making of an evaluative judgment) has been made out. The trial judge would have been in an immeasurably better position than this Court to judge the atmosphere in the courtroom at the time when the decision needed to be made: at [38]-[40]; *Crofts* (1996) 186 CLR 427 at p 458.

### **Majority verdicts – s 55F(2)(b) Jury Act 1977**

Section 55F(2) *Jury Act 1977* states:

“(2) A majority verdict may be returned by a jury in criminal proceedings if:

(a) a unanimous verdict has not been reached after the jurors have deliberated for a period of time (being not less than 8 hours) that the court considers reasonable having regard to the nature and complexity of the criminal proceedings, and

(b) the court is satisfied, after examination on oath of one or more of the jurors, that it is unlikely that the jurors will reach a unanimous verdict after further deliberation.”

In **Tabalbag** [2016] NSWCCA 48 the appellant’s conviction appeal was allowed on the basis the trial judge failed to comply with the requirements in s 55F(2)(b) *Jury Act*.

The judge failed to state in the terms of the *Jury Act* that he was satisfied it was unlikely the jurors would reach a unanimous verdict after further deliberation. Not only does the *Jury Act* require that state of satisfaction in the trial judge but it needs to have been arrived at “after examination on oath of one or more of the jurors”. Although there was an examination of a juror, it could not be said the juror’s response (“We’d like to think we’re likely to get there” and “We’ll hopefully get there”) supported the proposition that it was unlikely that the jurors would reach a unanimous verdict after further deliberation. The requirement in s 55F(2)(b) for evidence to be taken from one or more jurors is not a mere procedural step and it did not occur in this case. It is only if the examination on oath produces a result consistent with the jury being unlikely to reach a unanimous verdict after further deliberation, that the next step can be taken, i.e. giving a majority verdict direction: at [59]-[62].

Moreover, the form in which the judge expressed the majority verdict direction was incorrect. The *Jury Act* requires the necessary state of satisfaction be experienced by the trial judge. The judge was not entitled to delegate to the jury the requirement to be so satisfied. The effect of directing the jury that “if it becomes clear that you are unable to reach unanimity” conferred on the jury a decision-making process which should be carried out by the trial judge: at [63].

### **Jury – discharge – jurors observed apparent threat to Crown witness by appellant**

In **Penfold** [2016] NSWCCA 101 the trial judge erred in refusing to discharge the jury after the jury had seen the appellant raise his fist at a Crown witness. The trial judge watched the incident on camera footage and directed the jury: “*I do not see his action in any way being intimidatory or any other matter .... It may be interpreted that way, but I don’t see it...*”

The judge’s direction was inadequate: at [27]. Its effect was to ignore the incident and put it entirely to one side. The fair-minded observer would also have noticed that in addition to the judge expressing

his personal view about the camera footage he also allowed for the possibility it was intimidatory conduct. Given the proximity of the jury to the incident compared to the disadvantage of the judge interpreting footage recorded from a distant camera, the direction did little to dispel concern the fair-minded observer might have had about the jury being prejudiced against the appellant: at [24].

The exhortation by the judge to decide the case on the evidence and not to take into account anything observed in the court room was appropriate and would in many circumstances be sufficient to avoid the risk of a miscarriage of justice: (for example, *Gilbert* (2000) 201 CLR 414 at [31]). But leaving it open to the jury to consider the judge thought their concern could be valid tainted the affair, such that it cannot be concluded the fair-minded informed observer could think the jury might not have an impartial mind: at [25].

#### 4. DEFENCES

##### ***Self-defence – ss 418, 419***

In ***Decision Restricted*** [2016] NSWCCA 268 the judge's written directions to the jury on self-defence were held to be incorrect. The judge directed that, in regards to the appellant, "the Crown had to prove beyond reasonable doubt that he did not act in self-defence either by proving that the accused did not believe the action he took was necessary or by proving that there was no reasonable grounds for holding that particular belief" (emphasis added). The CCA held the directions incorrectly referenced the old common law position (*Zecevic v DPP* (1987) 162 CLR 645 at 661).

The directions did not correctly set out for the jury the second of the conditions necessary for self-defence under s 418(2) *Crimes Act*, that is, that "the Crown must prove beyond reasonable doubt the appellant did not believe his conduct was necessary in order to defend himself or that the conduct was not a reasonable response to the circumstances as he perceived them (a question requiring an objective assessment of the proportionality of that response to the situation which the appellant actually believed he faced):" at [8].

The CCA held the misdirection amounted to a substantial miscarriage of justice. The conviction was quashed and new trial ordered.

##### ***Self-defence – ss 418, 419, 421 – erroneous directions as to manslaughter by excessive self-defence***

In ***Decision Restricted*** [2016] NSWCCA 275 the appellant at trial was found by jury to be not guilty of murder but guilty of manslaughter. The relevant provisions of the *Crimes Act* state:

*"418 Self-defence--when available*

*(1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.*

*(2) A person carries out conduct in self-defence if .. the person believes the conduct is necessary:*

*(a) to defend himself or herself or another person, .*

*.....*  
*and the conduct is a reasonable response in the circumstances as he or she perceives them."*

*419 Self-defence--onus of proof*

*In any criminal proceedings in which the application of this Division is raised, the prosecution has the onus of proving, beyond reasonable doubt, that the person did not carry out the conduct in self-defence.*

*421 Self-defence--excessive force that inflicts death*

*(1) This section applies if:*

*(a) the person uses force that involves the infliction of death, and*

*(b) the conduct is not a reasonable response in the circumstances as he or she perceives them,*

*but the person believes the conduct is necessary:*

*(c) to defend himself or herself or another person, .....*

*.....*  
*(2) The person is not criminally responsible for murder but, on a trial for murder, the person is*

*to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.*

The trial judge had given written directions to the jury in relation to s 418(2) as follows:

*“Para [5] For the Crown to eliminate self-defence as an issue, it must prove beyond reasonable doubt one or the other of these matters. It does not have to prove both of them. If you decide that the Crown has failed to prove at least one of them beyond reasonable doubt, then the appropriate verdict is one of “not guilty of murder” but you need to consider the alternative verdict of manslaughter.”*

By majority (Button J, Campbell J agreeing with additional comments, Hoeben CJ at CL dissenting) allowed the appeal and ordered a new trial on manslaughter. The judge’s directions were incorrect. From s 418(2), in the circumstances of this trial, self-defence had two relevant “legs”. The first leg was the question of whether the applicant believed her conduct was necessary to defend herself. The second leg was whether that conduct was a reasonable response in the circumstances as the applicant perceived them: at [95]-[97].

If the Crown failed on *both* legs of self-defence, the applicant was entitled to a complete acquittal; that is, a verdict of not guilty of murder and not guilty of manslaughter: see s 418(1), the statement of onus in s 419, and s 421 *Crimes Act* (which only plays a role if the Crown succeeds in satisfying the jury beyond reasonable doubt the conduct was *not* a reasonable response in the circumstances as the accused perceived them).

The last sentence of the judge’s directions (in para [5] above) is to the contrary effect: it instructed the jury that even if *“the Crown has failed to prove at least one of [the legs of self-defence] beyond reasonable doubt, then the appropriate verdict is one of “not guilty of murder” but you need to consider the alternative verdict of manslaughter”*: at [98]-[100]. The last sentence provided an erroneous pathway to the jury, whereby they could have come to a verdict of guilty of manslaughter (by way of excessive self-defence). If not satisfied the Crown had succeeded with regard to the first leg, and not satisfied that the Crown had succeeded with regard to the second leg, the appropriate verdict was simply not guilty of murder *and* not guilty of manslaughter: at [109].

This is an error with regard to a fundamental aspect of the structural interaction between complete self-defence (leading to a complete acquittal) and excessive self-defence (leading to a verdict of not guilty of murder but guilty of manslaughter): at [101]. In the particular context of the inter-relationship between homicide and self-defence, sequential reasoning (by the jury) generally is of significance. The significance of the erroneous sequence contained in the judge’s written direction is heightened: see at [106]-[108]. Sections 418 and 42, and the whole of the provisions relating to self-defence in Div 3, Part 11 *Crimes Act*, constitute an overarching statutory regime. The sections constitute, and must be explained to the jury as, an integrated conceptual whole: at [112].

### ***Criminal Code (Cth) ss 10.2, 13.3 - Duress***

In *Mirzazadeh* [2016] NSWCCA 65 the CCA allowed the applicant’s appeal against conviction for a Commonwealth drug offence. The trial judge applied the wrong test in determining that duress should not be left to the jury.

Section 10.2 of the *Criminal Code (Cth)* states the three limbs which must be proved for the defence of duress. Under s 13.3 the burden of proof for defences is an evidential burden only. The Code states: *“evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist”*: s 13.3(6).

The trial judge failed to apply s 13.3 and the decision in *The Queen v Khazaal* [2012] HCA 26; 246 CLR 610 to the evidence of duress. In accordance with *Khazaal*, s 13.3 merely requires consideration of whether the defendant is able to point to “no more than slender evidence” that suggests a reasonable possibility of each of the requirements of duress under s 10.2: at [55]. By not applying s 13.3 (and relying on other authority) the judge applied too stringent a test. By challenging in a number of respects the evidence of the applicant as to his process of reasoning, the judge went beyond what was required by s 10.2 and trespassed in part, on the function to be performed by the jury. *Khazaal* also required the judge to treat the evidence at its most favourable to the applicant, yet by setting out inferences favourable to the Crown his Honour did not do so: at [65]. The evidence at trial discharged the slender evidentiary burden required under s 13.3: at [70].

## 5. PARTICULAR OFFENCES

### ***Sexual intercourse without consent – s 61HA(3)(c) Crimes Act – reasonable grounds for believing the other person consents***

In **Lazarus** [2016] NSWCCA 52 the appellant's appeal against his conviction for sexual intercourse without consent was allowed. Under s 61HA(3) *Crimes Act*, knowledge as to lack of consent can be established where: (a) A knows the other person does not consent; or (b) A is reckless as to whether the other person consents; or (c) A has no reasonable grounds for believing that the other person consents. The trial judge erred in directing the jury to "consider whether such a belief [that the complainant was not consenting] was a reasonable one". The direction suggested the jury ask what a reasonable person might have concluded about consent.

The CCA said that the test under s 61HA(3)(c) is whether the Crown has proved *the accused* "has no reasonable grounds for believing" that there was consent. The correct test is what the accused himself might have believed in all the circumstances; and then to test that belief by asking whether there might have been reasonable grounds for it: at [155]. The test is not completely objective. Rather, the subjective element - that is, the claim to having an honest belief in consent - is to be tested against whether there are reasonable grounds to hold it. Whether that belief amounts to a guilty state of mind depends on whether the accused honestly held it, and if so, whether he had reasonable grounds for that belief: at [148]; citing *O'Sullivan & Ors* [2012] NSWCCA 45.

The case was returned to the District Court for retrial where the accused was acquitted in a judge alone trial.

### ***"Grievous bodily harm" – meaning - conviction quashed***

In **Swan** [2016] NSWCCA 79 the appellant was convicted of cause grievous bodily harm in company (s 35(1) *Crimes Act*). The CCA (Garling J; RA Hulme J agreeing; Wilson J dissenting) quashed his conviction on the basis that the injuries suffered by the victim did not constitute "grievous bodily harm" and the verdict was unreasonable.

The Crown case was that the victim had sustained grievous bodily harm by a fracture to the transverse process of the L3 vertebra. The treating doctor called by the Crown gave evidence the injury was "very minor", would not be permanent, and that there was nothing which would suggest the victim would not make a full recovery: at [48]-[50]. Garling J at [71] stated that the following principles apply with respect to the phrase "*grievous bodily harm*":

1. It is to be interpreted according to its natural and ordinary meaning;
2. On its natural and ordinary meaning, the phrase means not just serious bodily injury, but *really* serious bodily injury;
3. there is no bright-line by which an injury can be classified as really serious bodily injury; it is always a question of fact and degree;
4. not every injury is capable of amounting to grievous bodily harm;
5. only the injury itself and its direct physical effects, not its personal, social and economic consequences, can be taken into account in deciding whether an injury amounts to really serious bodily injury: *AM* [2012] NSWCCA 203; *Haoui* [2008] NSWCCA 209; *Overall* (1993) 71 A Crim R 170.

A fracture to a bone part of a lumbar vertebra can amount to grievous bodily harm. However, features of this case against this conclusion include: there was no displacement, no operative or other treatment required, no permanent injury, a short period in hospital and released without plan for further treatment, and doctor described injury as minor: at [74].

The injury fails to amount to "*serious bodily injury*", let alone "*really serious bodily injury*". Whilst the question of whether an injury amounts to "*really serious bodily injury*" is one of fact and degree, and for the jury's assessment, that does not mean that all injuries will properly be assessed as really serious, or that this Court has no role to play in determining whether the jury's verdict is unreasonable: at [76].

***Appeal against directed verdicts of acquittal for constructive murder and manslaughter allowed – whether act causing death was "malicious" within s 18(2)(a) Crimes Act***

In *IL* [2016] NSWCCA 51 the respondent was charged with constructive murder and, alternatively, manslaughter. The CCA allowed the Crown appeal against directed verdicts of acquittal for both offences.

The victim died in a house fire allegedly caused by the ignition of a ring burner used for drug manufacture. The Crown case was that the respondent engaged in a joint criminal enterprise with the victim to manufacture a large commercial quantity of methylamphetamine and was equally responsible for the act of ignition. (Manufacture of a large commercial quantity of prohibited drug is punishable by life imprisonment and therefore a foundational crime for constructive murder). In relation to manslaughter, the Crown relied also on joint criminal enterprise in that the act causing death (ignition of the burner) was unlawful and dangerous. The Crown relied on joint criminal enterprise as it could not point to any specific act or event which caused the ignition of the burner. At the close of the Crown case, the trial judge directed the jury to return verdicts of not guilty for both murder and manslaughter.

Simpson JA (RA Hulme J and Bellew J agreeing) allowed the appeal and quashed the verdicts of acquittal on both charges. A new trial was ordered.

In relation to murder, it was not necessary to show the respondent contemplated injury or death of the victim. Joint criminal enterprise principles applied to the foundational crime of drug manufacture, thus the question was therefore whether the ignition of the ring burner was within the scope of that enterprise or contemplated by the participants: [60] - [64]. As to manslaughter, it was only necessary to show the ignition of the burner was an incident within the contemplation of the respondent in her participation of the drug manufacture. It was not necessary to show the respondent and the victim acted together in lighting the burner: at [70].

Thus the principle of joint criminal enterprise applied to the foundational offence, not the murder or manslaughter offences. The respondent and the victim each bore criminal liability for the acts of the other within the joint criminal enterprise to manufacture methylamphetamine: at [39]-[40]. The ignition of the gas burner (not the victim's death) was within the scope of the enterprise and the ignition of the burner caused the fire that then caused the victim's death, then the respondent could be convicted of murder: at [40].

The respondent also submitted that on no view of the meaning of "malicious" in s 18(2)(a) *Crimes Act* could it be said that the act that caused the victim's death was "malicious"; and therefore it would be futile for this Court to order a new trial: at [75]. The CCA found the definition of "maliciously" in s 5 - which was repealed in 2008 - is preserved in relation to charges of murder. The CCA held that in this case, it would be open to a jury to conclude the ignition of the ring burner was done recklessly - an act done recklessly is expressly within s 5: at [95]. Whether "malicious" in s 18(2)(a) is to be interpreted in the light of s 5 or not, the respondent's submission must fail: at [103].

NOTE: The respondent was granted Special Leave to appeal to the High Court. The High Court has reserved Judgment in this matter: [2017] HCATrans 65.

***"Manufacture" drugs – extraction of cocaine from sheets of paper - s 24 Drug Misuse and Trafficking Act 1985 (DMTA)***

In *Bucic* [2016] NSWCCA 297 the process of extracting cocaine from sheets of paper via evaporation and dissolution was said to constitute an offence of "manufacture" drugs within s 24 *DMTA*. This was despite the process would extract the cocaine and there was no difference in the form of the cocaine which was ultimately extracted.

The CCA said that reading the relevant definitions of 'manufacture' in s 3 and s 6 into the operative part of s 24, the section reads:- "a person... who knowingly takes any step in the process of extracting... a prohibited drug is guilty of an offence". Adapting the words of the substantive provision as amplified in this way, the evidence was capable of proving beyond reasonable doubt the offender had knowingly taken a step in the process of extracting cocaine from the paper: at [24]; *Kelly v The Queen* (2004) 218 CLR 216 at [103]. To be guilty of an offence under s 24, it is not necessary the person charged is responsible for all necessary steps in the manufacture of the drug from acquisition



of raw materials to realisation of the drug as a “marketable commodity”. Participation in *any* one of the various steps along the continuum of a process of manufacture is sufficient: at [42].

**“Manufacture” drugs – knowledge of precursor not sufficient to satisfy mental element for manufacture prohibited drug - s 24 Drug Misuse and Trafficking Act 1985 (DMTA)**

In *Siafakis* [2016] NSWCCA 100 the applicant was convicted of various drug offences including one count of knowingly taking part in the manufacture of a prohibited drug, namely, 3,4-Methylenedioxy-phenyl-2-propanone - also known as ‘MDP2P’ (s 24 DMTA). MDP2P is both a precursor and a prohibited drug under the DMTA. The CCA (by majority) allowed the appeal and quashed the conviction on the MDP2P count. The judge erred in accepting that the mental element in s 24(2) could be satisfied by the applicant’s knowledge that a precursor was being manufactured.

There were 2 possible ways for the Crown to prove the mental element created by s 24(2):

1. by proving that the person knew s/ he was manufacturing a prohibited drug (although without necessarily knowing precisely which prohibited drug was being manufactured); or
2. by proving that the person knew s/he was manufacturing MDP2P specifically: at [27]-[28].

As to 1. the judge applied an erroneous test: at [52]. The intention which must be proved is an intention of doing an act of the defined kind which constitutes the offence. The mental element in s 24(2) is an intention of manufacturing a substance which was a prohibited drug (as opposed to an intention to manufacture *some* substance, which happened as it turned out to be a prohibited drug: at [38]. This reasoning and degree of specificity in the mental element of the offence has been confirmed in relation to s 23(2) DMTA (*CWW* (1993) 32 NSWLR 348) and s 25(2) DMTA (*Yousef Jidah* [2014] NSWCCA 270): see discussed at [37]-[43].

As to 2. the Crown did not prove beyond reasonable doubt the appellant knew it was MDP2P which was being manufactured. While the primary judge found that the appellant was aware of the “fundamental steps” in manufacturing the ‘ketone’ (the precursor), there is no reasoning linking that finding with the finding that the appellant was aware of the particular ketone being manufactured. The CCA noted the lack of direct evidence the appellant knew the substance was MDP2P specifically, his lack of knowledge of chemistry, and the way in which the term “ketone” was used by the participants: at [69]-[72].

**Aggravated detain for advantage s 86(2)(a) Crimes Act – “Recklessness” as to lack of consent to being detained**

For ‘Aggravated detain for advantage’ under s 86(2)(a) *Crimes Act* the Crown is required to prove, *inter alia*, that the complainant did not consent to being detained; and the accused knew the complainant did not consent to the detention.

In *Castle* [2016] NSWCCA 148 the CCA held that the element of knowledge of lack of consent under s 86(2)(a) can be satisfied by recklessness: at [32], [63], [130]; *DMC* (2002) 137 A Crim R 246. The CCA (Bathurst CJ, Hall J agreeing) stated:

- . Recklessness under s 86 can be satisfied by a knowing disregard of an appreciated risk that the person was not consenting to being detained: at [55]; [63]; [130].
- . Recklessness under s 86 can be satisfied where the accused has an “intention to commit the act willy-nilly not caring whether the victim consents or not”: at [48]-[50]; [60]; [130]; *Banditt v The Queen* (2005) 224 CLR 262 following *Morgan* [1976] AC 182.
- . The proper test under s 86 is “advertent recklessness” as to lack of consent (as where the accused person realised there was a possibility that the complainant was not consenting but went ahead anyway whether or not he was consenting): at [47], [97]. It is not the reaction of some notional reasonable man but the state of mind of the accused which the jury is obliged to consider. Recklessness under s 86(1) is to be taken as meaning subjective recklessness: at [63]; *Banditt* (2005) 224 CLR 262.

Recklessness under s 86 will not be satisfied where the accused did not turn his mind to the question in circumstances where lack of consent would be obvious if the accused had considered it: at [38]-[39], [97]. It is the state of mind of the accused, not an objective standard (or “inadvertent recklessness”) that must be considered: at [39]; [63], [96]; *Banditt v The Queen* (2005) 224 CLR 262; *Tolmie* (1995) 37 NSWLR 660 distinguished.

In the present case the trial judge erred in importing an objective test in her directions to the jury. However, taking the directions as a whole in the circumstances of this case the appeal was dismissed: at [54]-[55].

### ***Affray – elements – conviction quashed***

In *Mann* [2016] NSWCCA 10 the appellant was convicted of affray. The CCA quashed his conviction and entered an acquittal.

The Crown case was that the appellant was present during a fight between two men at a park and that he had shot the victim; in the alternative, that he was a participant in a joint criminal enterprise to engage in an affray.

The CCA held the verdict was unreasonable and cannot be supported by the evidence. The evidence fell well short of proving encouragement of the participants in the fight, or the readiness to assist, necessary to establish the appellant’s involvement in the offence, whether through pre-concert or as principal in the second degree. It could establish no more than that he was a spectator. Even accepting the appellant attended the park with the others, absent the evidence that the appellant shot the victim, the evidence is silent as to where he was or what he did at the time of the fight: at [28]; *Phan* (2001) 53 NSWLR 480; *Chishimba & Ors* [2010] NSWCCA 228; *Donnelly* [2001] NSWCCA 394.

### ***Common law conspiracy to defraud – credit card skimming – offence made out whether conspiracy was to on-sell the customers’ data once harvested or to use data personally***

In *Thangavelautham* [2016] NSWCCA 141 the CCA dismissed the applicant’s appeal against his conviction for conspiracy to defraud where he was the ringleader of a plan with his co-offenders to “skim” approximately 1000 credit cards. The police intervened after only four cards were skimmed. The Crown particulars were that the applicant “by deception, dishonestly obtaining the property belonging to another person/persons, namely the credit card particulars and PIN’s and/or obtaining a financial advantage or causing a financial disadvantage”.

The CCA, referring to the authorities, held that the offence was made out regardless of whether the conspiracy was to on-sell the customers’ data once harvested or to use the data personally:

- . Conspiracy to defraud is made out where the conspirators have an intention to defraud; an expectation that the offence of fraud will be committed is not enough: at [18].
- . It involves an agreement to bring on a situation which will prejudice or imperil the legal rights or interests of others. It is sufficient that the conspirators intend to take some advantage to themselves by putting another’s property at risk or depriving a person of a lawful opportunity to obtain or protect property: at [23].
- . Taking credit card information puts at risk the accounts to which the cards relate to by providing means for unauthorised access to those accounts. Where this risk was produced either by selling the data or using it personally, and by means that were admittedly deceptive and dishonest, the offence of conspiracy to defraud was made out: at [22], [24].

### ***Dishonestly obtain financial advantage by deception – s 192B(1)(b) Crimes Act***

In *Moore* [2016] NSWCCA 260 the CCA quashed the appellant’s conviction for obtain financial advantage by deception. The appellant opened a bank savings account which he overdraw by over \$2.1 million over many months. The appellant had made no representations to the bank that had any causative role in the funds being made available to him: at [24], [59].

As there was no deception in the appellant’s conduct, the Crown relied on the expanded statutory notion of “deception” in s 192B(1)(b), which states that deception includes “conduct by a person that causes a computer, a machine or any electronic device to make a response that the person is not

authorised to cause it to make”: at [44]. However, the CCA held that the bank account’s terms and conditions “authorised” the appellant to request funds to be lent to him in excess of his account balance. Thus the appellant’s conduct did not come within s 192B(1)(b): at [36]-[46].

There was some consideration of whether s 192B(1)(b) deems there to be a deception, or whether some form of deception as otherwise understood in the law of criminal fraud is also required: see at [51]-[53] (Fagan J); [59]-[62] (N Adams J).

### ***Child prostitution – ss 91D(1)(a), 91F Crimes Act***

In **Glover** [2016] NSWCCA 316 the appellant had clients to his home or a motel room to see two girls aged 14-15. The CCA held there was no duplicity or double jeopardy where the appellant had been convicted of offences under s 91D(1)(a) and 91F *Crimes Act*. Section 91D(1)(a) states it is an offence for “any person who by any means, causes or induces a child to participate in an act of child prostitution”. Section 91F states any person “who is capable of exercising lawful control over premises at which a child participates in an act of child prostitution” commits an offence.

There was no duplicity. Duplicity arises where one count on an indictment charges two or more separate offences. Both charges were substantiated by proof of a course of conduct (count 1) or a continuing situation and relationship (count 2) which endured over more than a year. Each provision was capable of being infringed, in a single offence, by such a course of conduct or continuing situation. Neither the Crown case on count 1 or count 2 constituted an attempt to prove any more than one infringement of each of the sections respectively: at [35]-[36].

There is no double jeopardy. The appellant has been convicted of two offences in which a common circumstance is the use of his home for child prostitution, in one case as a particular of actively causing the prostitution and in the other case as an offence in itself. It is not a matter which has given rise to double jeopardy which would have justified a stay of prosecution on one of the charges as an abuse of process or which affects the validity of the convictions on both counts. It is a matter to be taken into account on sentence by way of careful regard for the totality of criminality involved: at [54].

## **6. OTHER CASES**

### ***Onus and standard of proof – written directions in form of question trail as to whether there is a ‘reasonable possibility’ – written directions overriding oral directions***

In **Hadchiti** [2016] NSWCCA 63, a murder trial, the trial judge gave the jury written directions asking eight questions (referred to as a “question trail”) repeatedly asking: “Is there a “reasonable possibility...?” in relation to issues of intention, provocation and self-defence. The issues were framed in terms of whether the Crown had established a matter beyond reasonable doubt, however, the questions largely did not refer to ‘beyond reasonable doubt’ at all: at [31].

The CCA allowed the appellant’s appeal. The written directions reversed the onus of proof. The ‘reasonable possibility’ established by the evidence was one that the Crown had to eliminate or remove beyond reasonable doubt: at [106]. That possibility was not linked to a statement that it was for the Crown to remove or eliminate it, amounting to a material departure from the established formulation of the standard of proof: at [107]. The effect of the written directions was to deny the appellant the right to assess whether the Crown had established the issues beyond reasonable doubt: at [152]. (The Judicial Commission has noted the Criminal Trials Bench Book accordingly.<sup>1</sup>)

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<sup>1</sup> Judicial Commission NSW, *Criminal Trials Bench Book*. The Bench Book states at “[3-600] Suggested direction — where the defence has no onus [Where the Crown must negative a defence/issue to the criminal standard a long accepted direction which can be given (after making clear that the Crown must prove all ingredients of the charge beyond reasonable doubt) is as follows: “Has the Crown eliminated any reasonable possibility that the accused acted in self-defence/ was extremely provoked/ acted under duress, etc?”]. At “[3-603] Notes - 3. If a judge gives the jury written directions it is essential that the directions make clear where the legal onus is on the Crown to eliminate any reasonable possibility: *Hadchiti* [2016] NSWCCA 63 at [106], [112].”

**Moore** [2016] NSWCCA 185 (murder) was a similar case. However, the use of "is there a reasonable possibility" did not reverse the onus of proof. The trial judge gave written directions containing the question "Is there a reasonable possibility ..." the appellant held the necessary belief for self-defence. The CCA (by majority) dismissed the appeal. Posing a question in terms of "is there a reasonable possibility" is not by itself wrong. **Hadchiti** can be understood in the context of it being "the repetition of the ... terminology throughout a written direction" - not evident in the present case: at [114]. The jury were constantly reminded of the Crown bearing the onus of proof beyond reasonable doubt: at [49], [127]. Asking whether there is a reasonable possibility that the accused *did* hold an exculpatory belief does not distract attention from either the burden or standard of proof; it is consistent with both: at [43]. The CCA in **Moore** also found that the question "is there a reasonable possibility" can be answered only "Yes" or "No". There is no middle-ground answer of "Not sure": at [36], [129].

*Written directions.* Regardless of whether a question trail is erroneous, the force of the written directions which the jury has in the jury room will be likely to override the jury's recollection of oral directions: **Hadchiti** at [52], [70]; **Justins** (2010) 79 NSWLR 544 at [242]. Whether an error causes a trial to miscarry will depend on circumstances such as the nature of the error, the jury given the written directions at the end of the oral directions and a transcript and exhibits being in the jury room: **Moore** at [53]-[60].

**Prior sexual history – "fear" and "anxiety" do not come within s 293(4)(c) Criminal Procedure Act 1986**

Evidence of a sexual assault complainant's prior sexual history is inadmissible, however, an exception is where:

- " (i) ... the accused person does not concede the sexual intercourse so alleged, and
- (ii) the evidence is relevant to whether the presence of ..... injury is attributable to the sexual intercourse alleged to have been had by the accused person,  
... and if the probative value of the evidence outweighs any distress, humiliation or embarrassment that the complainant might suffer as a result of its admission." (s 293(4)(c) *Criminal Procedure Act 1986*).

In **GP** [2016] NSWCCA 150 the CCA held that there is no principle that evidence of a complainant crying or exhibiting anxiety when describing an alleged sexual assault years after the event is a relevant "injury" which was "attributable to the sexual intercourse alleged to have been had by the accused person": at [34]. The complainant MP was sexually assaulted aged 3-4. MP reported the offences at 10 years old and at that time also alleged the applicant's cousin NP had committed sexual offences against her. The appellant applied to cross-examine the complainant about her prior sexual history involving NP under s 293(4)(c) submitting her fear and anxiety when telling her family of the offences was "injury". The application was correctly refused by the trial judge.

Other cases could not be relied upon:- **JAD** [2012] NSWCCA 73 where the complainant's psychological condition (voices, suffering symptoms of depression and suicidal ideation) was a "disease or injury" under s 293(4)(c)(ii) bears no relationship to the limited evidence of MP's distress when she disclosed the assault to her family.

**STATISTICS.** The Judicial Commission Statistics for the Court of Criminal Appeal sentencing and Crown appeals are as follows.

**Table 1 — Severity Appeals (2000–2015)**

Year	Severity Appeals	Allowed	
	N	n	%
2000	313	127	40.6
2001	343	138	40.2
2002	331	148	44.7
2003	272	109	40.1
2004	285	131	46.0
2005	318	141	44.3
2006	259	106	40.9
2007	242	94	38.8
2008	216	83	38.4
2009	230	78	34.3
2010	216	84	38.9
2011	188	93	49.5
2012	168	65	38.7
2013	224	57	25.4
2014	191	61	31.9
2015	208	74	35.6
	<b>4004</b>	<b>1589</b>	<b>39.7</b>
Source: Judicial Commission NSW Court of Criminal Appeal			

**Table 2 — Crown Appeals (2000–2015)**

Year	Crown Appeals	Allowed	
	N	n	%
2000	84	42	50.0
2001	55	34	61.8
2002	80	49	61.3
2003	65	32	49.2
2004	101	52	51.5
2005	58	34	58.6
2006	76	47	61.8
2007	59	35	59.3
2008	62	32	51.6
2009	48	31	64.6
2010	69	49	71.0
2011	34	15	44.1
2012	32	12	37.5
2013	33	19	57.6
2014	55	36	65.5
2015	26	11	42.3
	<b>937</b>	<b>530</b>	<b>56.6</b>

\* We have confirmed with the Judicial Commission that 2016 final statistics are not available.

## **ANNEXURE A - HIGH COURT CASES 2016-2017**

### **1. *GW v The Queen* [2016] HCA 6.** Appeal from ACT.

s 13 *Evidence Act* – *Evidence Act is neutral in its treatment of the weight that may be accorded to evidence whether it is sworn or unsworn.* Held: Appeal allowed.

The High Court held that the *Evidence Act* is neutral in its treatment of the weight that may be accorded to evidence whether it is sworn or unsworn: at [46], [56].

Under the Act, a person is not competent to give sworn evidence if the person does not have the capacity to understand that, in giving evidence, the person is under an obligation to give truthful evidence: s 13(3). A person who is competent to give evidence, but not sworn evidence, may give unsworn evidence provided the court tells the person of the importance of telling the truth and certain other matters: ss 13(4), (5).

GW was convicted of committing an act of indecency in the presence of his daughter, R, aged six years at the pre-trial hearing before the pre-trial judge. There was no issue as to R's competence to give evidence. There was an issue as to R's competence to give sworn evidence.

An appeal by the DPP to the High Court was allowed. The High Court held:

(i) It was open to the pre-trial judge to rule he was not satisfied R had the capacity to give sworn evidence and that R's evidence be taken unsworn (s 13(3)). It was necessary for the pre-trial judge to be affirmatively satisfied R did not have the requisite capacity before instructing her pursuant to s 13(5) and admitting her evidence unsworn: at [28]. The pre-trial judge's failure to express the conclusion in the terms of the statute did not support a finding he was not satisfied on the balance of probabilities R lacked the requisite capacity: at [31]. Whether the pre-trial judge was satisfied R lacked the capacity to give sworn evidence took into consideration all of the circumstances, including that R was a six-year-old child: at [31].

(ii) Directions concerning the unsworn evidence were not required under the *Evidence Act* or the common law. That R did not take an oath or make an affirmation before giving her evidence is not material to the assessment of whether R's evidence was truthful and reliable: at [54]. The Act does not treat unsworn evidence as of a kind that may be unreliable. There was no requirement under common law to take into account the differences between sworn and unsworn evidence in assessing the reliability of R's evidence: at [56].

### **2. *R v Independent Broad-based Anti-Corruption Commissioner* [2016] HCA 8.** Appeal from Victoria.

Held: Appeal dismissed.

The appellants, both police officers, challenged the summons issued by the Independent Broad-based Anti-corruption Commission (IBAC) on the basis that the Act did not permit the compulsory examination of a person reasonably suspected of crime because the appellants had not been charged with an offence: *Broad-based Anti-corruption Commission Act 2011* (Vic) (ss 120, 144). The High Court held the Act clearly intends that persons who may later be charged with an offence can be compulsorily examined and that the Act should not be construed in a way that would fetter the discharge of the functions of IBAC.

### **3. *IMM v The Queen* [2016] HCA 14.** Appeal from NT.

ss 97(1)(b), 101 and 137 *Evidence Act* – *Shamouil* (2006) 66 NSWLR 228 approved - *Dupas* [2012] VSCA 328 disapproved. Held: Appeal allowed. Convictions quashed. New trial ordered.

The Court approved the NSW CCA in *Shamouil* (2006) 66 NSWLR 228: that in determining the probative value of evidence for the purposes of ss 97(1)(b) and 137, a trial judge should assume the jury will accept the evidence and thus should not have regard to the credibility or reliability of the evidence: at [51]-[58]. The Court disapproved *Dupas* [2012] VSCA 328 which requires a judge to make a determination concerning reliability: at [52]-[54].

The appellant was convicted of indecent dealing with a child and sexual intercourse with a child under 16. At trial, the prosecution adduced "tendency evidence" that while the complainant and another girl gave the appellant a back massage, the appellant ran his hand up the complainant's leg.

Allowing the appeal, the Court held that the tendency evidence did not have significant probative value and was not admissible under s 97(1)(b): at [65], [75], [107]-[108]. In cases such as this, the probative value of tendency evidence lies in its capacity to support the credibility of a complainant's account. Evidence from a complainant to show an accused's sexual interest will generally have limited, if any, probative value. In cases where there is



evidence from another source independent of the complainant, the requisite degree of probative value is more likely to be met. This does not mean that a complainant's unsupported evidence can never meet that test as there may be special features of the complainant's account of an uncharged incident which gives it significant probative value: at [62].

Complaint evidence by the complainant to others of the appellant's conduct was admissible. The complaint evidence was tendered to prove the acts charged and its probative value was not low. There is no reason to think the jury would apply it as tendency evidence, when they were directed otherwise: at [73]-[75].

#### **4. Mok v The Queen [2016] HCA 13.** Appeal from NSW CA.

*s 89(4) Service and Execution of Process Act 1992 - creates federal offence of escape lawful custody – did not require proof appellant was an "inmate". Held: Appeal dismissed.*

The High Court held that under s 89(4) *Service and Execution of Process Act 1992* (Cth) (SEPA) the appellant could be found guilty of the offence of attempting to escape lawful custody under s 310D *Crimes Act 1900* (NSW). SEPA provides for the execution of warrants throughout Australia authorising the apprehension of persons under State laws. Section 89(4) provides:

"The law in force in the place of issue of a warrant, being the law relating to the liability of a person who escapes from lawful custody, applies to a person being taken to the place of issue in compliance with an order ....."

After the appellant was sentenced for a matter in Victoria, an order was made under SEPA requiring the appellant be taken in custody to NSW for outstanding NSW offences. The appellant escaped while in custody at Tullamarine Airport but was re-arrested. Upon arrival in NSW, the appellant was charged under s 310D *Crimes Act* which is an offence for an "inmate" to escape or attempt to escape from lawful custody.

The High Court upheld the decision by the NSW Court of Appeal (*Mok v DPP (NSW)* (2015) 320 ALR 584) that, by s 89(4), a person may be guilty of the offence of escape contrary to s 310D even if that person is not an "inmate": at [42], [51], [57]-[59]. A State law made applicable by a federal law operates as federal law. Section 89(4) applied s 310D to the appellant as a federal law, s 310D being the law in force in NSW (the place of issue of the warrant) and being the law relating to the liability of a person who escapes from lawful custody: at [33], [51].

#### **5. Zaburoni v The Queen [2016] HCA 12.** Appeal from Qld.

*s 317 Criminal Code (Qld) – unlawfully transmit disease with intent – proof of actual intention required. Held: Appeal allowed.*

The appellant was convicted of unlawfully transmit disease with intent under s 317 *Criminal Code* (Qld). The appellant had unprotected sex with his girlfriend over a 21 month period knowing he was HIV positive.

Allowing the appeal, the High Court held the evidence was not capable of establishing the appellant intended to transmit HIV. Section 317(b) requires proof of actual intent and intention requires there be a "directing of the mind, having a purpose or design": at [7]-[8]. The prosecution was required to prove beyond reasonable doubt that when the appellant had unprotected sexual intercourse his object or purpose was to transmit HIV: at [19]. Awareness of the risk of conduct resulting in harm, without more, does not support an inference the person intended to produce the harm. Apart from this conduct there was no evidence supporting the inference the appellant had that intention: at [42]-[44].

#### **6. Nguyen v The Queen [2016] HCA 17.** Appeal from NSW CCA.

*Irrelevant when assessing the objective gravity of an offence of manslaughter to contrast it with what would be an offence of murder – De Simoni (1981) 147 CLR 383 principle not applicable. Held: Appeal dismissed.*

The High Court dismissed the appellant's appeal. The NSW CCA was correct to hold that the sentencing judge erred in her assessment of the objective gravity of the offence of manslaughter. It is irrelevant in assessing the objective gravity of an offence of manslaughter to contrast it with what would be an offence of murder. It is likely to result in an assessment of the relative gravity of the subject offence which ill-accords with its objective gravity relative to other cases of that kind. The comparison resulted in the judge concluding the objective gravity of the manslaughter ranked lower in the range of gravity of offences of manslaughter than in fact it did: at [43], [59]-[60].

The High Court held it was not correct for the NSW CCA to find that the sentencing judge breached the *De Simoni* principle when, in assessing the objective gravity of manslaughter, she contrasted it with what would have

been the gravity of the offence if the appellant had committed murder. *De Simoni* prohibits a judge taking into account, as an aggravating circumstance, a circumstance which would render the offence a different more serious offence. It says nothing about taking into account the absence of a circumstance which, if present, would render the offence a different offence. This is irrelevant to, and likely to distort, the assessment of objective gravity: at [28]-[29], [60].

#### **7. *Alqudsi v The Queen* [2016] HCA 24.** Appeal from NSW.

*Section 80 Constitution does prevent a trial by judge alone for Commonwealth trials.* Held: Motion dismissed.

The High Court considered whether provisions for trial by judge alone under s.132 *Criminal Procedure Act 1986* (NSW) are inconsistent with s 80 *Constitution* and therefore unavailable for trials for Commonwealth offences. The Court held that s 80 does prevent a trial by judge alone for Commonwealth trials, upholding *Brown* (1986) 160 CLR 171.

#### **8. *Betts v The Queen* [2016] HCA 25.** Appeal from NSW.

*Principles governing admission of new evidence on appeal apply to the re-sentencing discretion.* Held: Appeal dismissed.

In re-exercising its sentencing discretion under s 6(3) *Criminal Appeal Act*, the NSW CCA declined to take into account new material (psychiatric and a psychotherapist report) presented by the applicant.

The High Court dismissed the applicant's appeal. As a general rule, the appellate court's assessment of whether some other sentence is warranted in law is made on the material before the sentencing court and any relevant evidence of the offender's progress towards rehabilitation since the sentence hearing. An offender is not permitted to run a new and different case. An appellate court has the flexibility to receive new evidence where necessary to avoid a miscarriage of justice: at [2], [11]; *Kentwell v The Queen* (2014) 252 CLR 601.

The principles governing the admission of new evidence on the appeal apply to the re-sentencing discretion: at [8], [13]-[14]; *Deng* (2007) 176 A Crim R 1 at [45] approved.

Forensic choices are made at the sentence hearing, including material relied upon in mitigation and whether facts are to be contested. Exceptional cases apart, the question of whether some other sentence is warranted in law is answered by consideration of material before the sentencing court and relevant post-sentence conduct: at [14].

The appellant's forensic choice at sentence was to accept responsibility for the offences: at [59]. The general rule applied because the new evidence was inconsistent with the case run in the sentencing court and its rejection did not cause justice to miscarry: at [2], [59].

#### **9. *Graham v The Queen* [2016] HCA 27.** Appeal from QLD.

*'Consensual confrontation'.* Held: Appeal dismissed.

The appellant was convicted of attempted murder and unlawful wounding following a confrontation between the appellant and victim, members of rival bkie gangs. During address to the jury the Crown referred to the idea of a 'consensual confrontation' – suggesting the jury would be satisfied that everything preceding the firing of the gun, including the brandishing of the knife, was part of a 'consensual posturing' and therefore there was no assault that could form the basis for self-defence.

Under the *Criminal Code (QLD)* all forms of self-defence require an assault. An assault may include a threat and must be non-consensual. The Crown sought to negate the idea of an assault by suggesting that the actions of the victim were all part of a 'consensual confrontation.'

The High Court dismissed the appeal. It was surprising that the Crown raised such an idea but it was clearly not considered an issue by either defence counsel or the trial judge: at [34].

#### **10. *Miller; Smith; Presley v The Queen* [2016] HCA 30.** Appeal from SA.

*High Court declined to reconsider principle of liability under extended joint criminal enterprise as stated in McAuliffe* (1995) 183 CLR 108. Held: Appeal dismissed.

The primary issue was whether Australia should follow the English case of *Jogee* in relation to criminal liability for murder under principles of extended joint criminal enterprise (JCE). This would involve reconsidering the

principle stated in *McAuliffe* (1995) 183 CLR 108 that a person is guilty of murder if they are a party to an agreement to commit an offence and foresee the possibility that death or GBH might be occasioned by a co-offender acting with murderous intent.

*Jogee* [2016] UKSC 8; [2016] 2 All ER 1 held that the doctrine of extended JCE should no longer be a basis for criminal liability. The English courts were wrong to hold that foresight of the possibility of the offence was a lower test for a secondary party than a perpetrator. This departed from the well-established rule that the mental element required of a secondary party is an intention to assist or encourage the principal to commit the crime. The correct rule is intention to encourage or assist - foresight as to possibility is simply evidence of that intention.

The High Court declined to reconsider and overturn principle of liability under extended JCE as stated in *McAuliffe*: at [39]-[43].

However, the Court allowed the appeal and remitted the matter to the CCA to reconsider whether the convictions were unreasonable in view of the evidence. The NSW CCA failed to properly consider the effect of intoxication of offenders on the question of agreement and their foresight as to the possibility of murder: at [78]-[82].

Of particular note is the dissenting judgment of Gageler J in which His Honour held the doctrine of extended joint criminal enterprise to be anomalous and unjust and has created a problem of over-criminalisation. His Honour would reopen and overrule *McAuliffe*. His Honour stated: "Where personal liberty is at stake, no less than where constitutional issues are in play, I have no doubt that it is better that this Court be "ultimately right" than that it be "persistently wrong" (*Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 350 [65]): at [128]-[129].

### **11. *NH, Jakaj; Zefi & Stakaj v DPP (SA)* [2016] HCA 33.** Appeal from SA.

*No power to look behind the verdicts delivered by the foreperson of the jury.* Held: Appeal allowed.

The High Court allowed the appellants' appeals from the SASCFC. The Appellants were jointly charged with murder. The jury foreperson announced that the jury found the appellants not guilty of murder and guilty of manslaughter. It transpired that the foreperson mistakenly answered "yes" to the question whether at least 10 members of jury had agreed on verdict of not guilty murder, when this was not the case. Section 57 *Juries Act* 1927 (SA) states a jury who have found a person not guilty of an offence may find the person guilty of an alternative uncharged offence. It also provides that a verdict of not guilty requires a majority of at least 10 jurors.

The High Court held that the Full Court did not have power to look behind the verdicts delivered by the foreperson of the jury, in open court in the sight and hearing of the other jurors without any dissent or action by them, to quash the appellants' acquittals of murder and convictions of manslaughter: at [4]-[5], [75].

The High Court further held there was no power to receive affidavits from a jury to impeach a verdict: at [5], [82]. However, where a verdict is not delivered in sight and hearing of one or more jurors, evidence may be adduced that they did not agree with it. The Court has power to correct a verdict in such a case, as well as in cases of fraud, intimidation, or where a juror lacks capacity to understand proceedings: at [82].

### **12. *Sio v The Queen* [2016] HCA 32.** Appeal from NSW.

*Hearsay evidence – error in taking compendious approach to s 65 Evidence Act – “likely” to be reliable.* Held: Appeal allowed.

The High Court allowed the appellant's appeal and quashed his conviction for armed robbery with wounding. The trial judge erred in admitting hearsay evidence by F, who stabbed the victim, that the appellant had given F the knife. F refused to give evidence at the appellant's trial. The prosecution tendered two electronically recorded interviews and statements by F in which he named the appellant as the person who had given him the knife, which the trial judge admitted under s 65 *Evidence Act* 1995.

The High Court held:

- . The trial judge and CCA erred in taking a compendious approach to s 65(2) whereby an overall impression was formed of the general reliability of F's statements and then holding all of them were admissible: at [58]-[61], [72].
- . Section 65(2) proceeds upon the assumption that a party is seeking to prove a particular fact relevant to an issue. It then requires the identification of the particular representation to be adduced in evidence as proof of that fact. The circumstances in which that representation was made may then be considered in order to determine whether the conditions of admissibility are met. This process must be observed in relation to each relevant fact sought to be proved by tendering evidence under s 65: at [57].
- . Section 65(2)(d)(ii) requires a trial judge to be positively satisfied that the representation which is tendered was made in circumstances that make it likely to be reliable notwithstanding its hearsay

character: at [64]. The evaluation of the likely reliability of F's assertions must be made having regard to the circumstance that F was an accomplice. Accomplice evidence has long been recognised as less than inherently reliable: at [65]. F's statements that the appellant gave him the knife was to minimise his culpability by maximising the appellant's: at [68]. While it was a statement against F's interests, it did not follow the statement was "likely" to be reliable under s 65(2)(d)(ii): at [68]. It was not open to the trial judge to be satisfied positively of the likely reliability of F's assertion: at [73].

### **13. *The Queen v Baden Clay* [2016] HCA 35. Crown appeal from QCA.**

*Appellant convicted of Murder - Court of Appeal substituted verdict of Manslaughter – High Court restored verdict of guilty for Murder. Held:* Crown appeal allowed.

The appellant was convicted by jury of the murder of his wife. At trial, the respondent gave evidence denying he had fought with his wife, killed her and disposed of her body. On appeal to the QCA, the respondent submitted for the first time that the prosecution had not excluded the hypothesis that he had struck his wife during a struggle and she had died in some way that did not involve intent to kill or cause grievous bodily harm: at [3]. Accepting the submission, the QCA substituted manslaughter for the murder conviction on the bases that the evidence did not allow the jury to be satisfied beyond reasonable doubt the respondent intended either to kill her, or to cause her grievous bodily harm.

The High Court allowed the Crown's appeal and restored the verdict of guilty of Murder. The respondent's evidence did not support the hypothesis held by the QCA. The hypothesis on which the QCA acted was not available on the evidence: at [5]. The QCA's conclusion was mere speculation or conjecture: at [55]. The QCA was wrong to conclude that it was unreasonable for the jury to find on the whole of the evidence that the deceased's death at the respondent's hands was intentional: at [5].

It is wrong, as occurred before the QCA and again to this Court, "to contend for a hypothesis which was not put to the jury for tactical reasons, which is directly contrary to evidence of the respondent at trial, which is directly contrary to the way in which the respondent's counsel conducted the defence and which, in response to direct questions from the trial judge, was expressly rejected by the respondent's counsel": at [63]. The hypothesis identified by the QCA was not open. Once that hypothesis is rejected, no other hypothesis consistent with guilt of manslaughter, but innocence of murder, has ever been identified at trial, before the QCA or in this Court: at [63].

A court of criminal appeal is not to substitute trial by an appeal court for trial by jury. Where there is an appeal against conviction on the ground that the verdict was unreasonable, the ultimate question for the appeal court "must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty: at [66]; *M v The Queen* [1994] HCA 63; (1994) 181 CLR 487. The Court explained why the jury were entitled reasonably to regard the whole of the evidence as satisfying them beyond reasonable doubt that the respondent acted with intent to kill or cause grievous bodily harm when he killed his wife and so reject the alternative verdict of manslaughter: at [64]. The Court discussed the evidence before the jury including motive and post-offence conduct: at [71]-[76].

### **14. *Lyons v The Queen* [2016] HCA 38. Appeal from QCA.**

*Appellant, who was deaf, summonsed for jury service – Appellant required assistance of Auslan interpreters to participate as juror – Appellant excluded from jury panel – Exclusion was not unlawful discrimination. Held:* Appeal dismissed.

The High Court held it was not unlawful discrimination to exclude the Appellant, who was profoundly deaf, from a jury panel. The appellant would have required two Auslan interpreters. The Deputy Registrar properly excluded the appellant from jury service under s 4(3)(1) *Jury Act* 1995 (Qld): "a person who has a physical or mental disability that makes the person incapable of effectively performing the functions of a juror" is not eligible for jury service; correctly found there was no provision under Act to administer an oath to an interpreter for a juror and that an interpreter was not permitted to be present in the jury room during deliberations: at [38].

The common law has long required the jury be kept separate. The presence of a person other than a juror in the jury room during deliberations is an incurable irregularity regardless of whether the person takes any part in the deliberations: at [33].

Note s 14A(b) *Jury Act* 1977 (NSW) states a person has good cause to be exempted or excused from jury service if "some disability associated with that person would render him or her, without reasonable accommodation, unsuitable for or incapable of effectively serving as a juror".

**15. Castle; Bucca v The Queen [2016] HCA 46.** Appeal from SA CCA.

*Fairness of summing-up – judicial comment. Held: Appeal allowed.*

The appellant C submitted her case was not fairly left for the jury's consideration. Further, that the trial judge in summing-up made favourable comments with respect to the reliability of a critical Crown witness M, by commenting M was a "fairly decent woman."

The High Court held that the SA CCA did not err in holding C's defence was fairly left for the jury's consideration. The submission the jury would have taken from the tenor of the summing-up that C's evidence should be summarily rejected is to be assessed taking into account the summing-up as a whole and the conduct of the parties: at [63]. How the judge structures the summing-up and the extent to which the judge reminds the jury of the evidence is a matter for individual judgment and will reflect the complexity of the issues, and the length and conduct of the case. The essential requirements of the summing-up include that the judge must fairly put the accused's case, an obligation which extends to explaining any basis upon which the jury might properly return a verdict in the accused's favour: at [59]; *Pemble v The Queen* (1971) 124 CLR 107. C was competently represented by counsel. The trial judge reminded the jury of C's case by reference to the submissions put by counsel: at [63].

It would have been preferable for the judge not to have expressed the view that M was a "fairly decent woman": at [62]. A trial judge may comment on the evidence provided s/he makes clear the determination of the facts is entirely within the jury's province. Unless there is a need for comment the wise course will often be not to do so. Where the judge chooses to comment, the comment must exhibit a judicial balance so that the jury is not deprived 'of an adequate opportunity of understanding and giving effect to the defence and the matters relied upon in support of the defence': at [61]; *B v The Queen* (1992) 175 CLR 599 at 605.

The appeal was allowed on the basis that the CCA erred in its approach to the proviso: at [63], [68].

**16. Kilic The Queen [2016] HCA 48.** Appeal from Vic CA.

*Sentence - expression of "worst category" of offence should be avoided – current sentencing practices – comparable cases – sentencing domestic violence. Held: Crown appeal allowed.*

The respondent had been sentenced for intentionally causing serious injury to his female partner who was pregnant by dousing her with petrol and setting her alight. The High Court allowed the Crown appeal against the Victorian Court of Appeal's reduction of original sentence.

The High Court held the Court of Appeal erred in using the expression "worst category" of offence: at [42]. An offence falling within the "worst category" is one so grave it warrants imposition of the maximum prescribed penalty: at [18]. Where, however, an offence is not so grave as to warrant imposition of the maximum penalty – such as in this case – a sentencing judge is bound to consider where the facts of the offence and offender lie on the "spectrum" from the least serious to the worst category. It is confusing and likely to lead to error to describe an offence which does not warrant the maximum penalty as being "within the worst category". It is a practice which should be avoided: at [19]. Instead, in cases where relevant to do so, judges should state in full whether the offence is or is not so grave as to warrant the maximum penalty: at [20].

In its consideration of "current sentencing practices", the Court of Appeal impermissibly treated sentences imposed in a few comparable cases as defining the sentencing range. Cases of intentionally causing serious injury by fire are not common. The few cases mentioned by the parties could not properly be regarded as providing a sentencing pattern: at [24]-[25].

The High Court observed that current sentencing practices for offences involving domestic violence depart from past sentencing practices for this category of offence because of changes in societal attitudes to domestic relations: at [21].

**17. RP v The Queen [2016] HCA 53.** Appeal from NSW CCA.

*Doli incapax – appellant's intellectual limitations – clear evidence needed to demonstrate offender had requisite understanding. Held: Appeal allowed. Verdicts of acquittal entered.*

The appellant (then aged 11-12) was convicted by a judge alone of two counts of 'sexual intercourse with a child under 10' (counts 2 and 3) and one count of 'aggravated indecent assault' (count 4) committed against his younger brother. The trial judge had accepted counsel's concession that if count 2 was proved beyond reasonable doubt then counts 3 and 4 were also made out. On appeal, the NSW CCA upheld the convictions on counts 2 and 3; and quashed the conviction on Count 4: *RP* [2015] NSWCCA 215.

The High Court allowed the appellant's appeal and quashed the convictions on counts 2 and 3.

The presumption of *doli incapax* (that a child under 14 lacks the capacity to be criminally responsible for his or her acts - discussed at [8]-[12]) may be rebutted by evidence the child knew it was morally wrong to engage in the conduct. The prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that s/he knew it was morally wrong. This directs attention to the child's education and the environment in which the child has been raised: at [9]; *C (A Minor) v DPP* [1996] AC 1; *BP* [2006] NSWCCA 172. Rebutting the presumption directs attention to the intellectual and moral development of the particular child. Some 10-year-old children will possess the capacity to understand the serious wrongness of their acts while other children nearly 14 years old will not: at [12].

The presumption was not rebutted. The conclusion of the CCA that the appellant knew his conduct was seriously wrong was based on inferences he knew his brother was not consenting and he must have observed his brother's distress. It cannot be assumed a child of 11 understands the infliction of hurt and distress on a younger sibling involves serious wrongdoing. While the evidence of the appellant's intellectual limitations does not preclude a finding the presumption had been rebutted, it does point to the need for clear evidence that, despite those limitations, he possessed the requisite understanding: at [32]-[35]. There was no evidence about the environment in which the appellant had been raised or as to his moral development. It was not open to conclude the appellant, with his intellectual limitations, was proved beyond reasonable doubt to have understood his conduct was seriously wrong in a moral sense: at [36].

### **18. *Perara-Cathcart v The Queen* [2017] HCA 9. Appeal from SA.**

*Proviso – conviction appeal. Held: Appeal dismissed.*

The High Court held that the proviso to dismiss a conviction appeal is not to be applied unless a *majority* of the appellate court concludes that no substantial miscarriage of justice has occurred. The Court considered the SA provisions which are in similar terms to the NSW provisions in ss 6(1) and 21A(1) *Criminal Appeal Act 1912*.

Section 353(1) *Criminal Law Consolidation Act (SA)* states:

*“...the Full Court may, notwithstanding that it is of the opinion that the point raised in 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.”*

Section 349 states:

*“The determination of any question before the Full Court...shall be according to the opinion of the majority of the members of the Court hearing the case.”*

The language of s 353(1), understood in the light of s 349, authorises the application of the proviso if “it”, meaning the Full Court, “considers that no substantial miscarriage of justice has actually occurred”: at [38]-[39], [48]. Under s 353(1), two questions arise for determination: (1) whether the Full Court “thinks that the verdict of the jury should be set aside” on any one or more of the three grounds there stated; and (2) whether the Full Court “considers that no substantial miscarriage of justice has actually occurred.” By virtue of s 349, each of these questions is determined according to the opinion(s) of the majority of the Court: at [38].

### **19. *Prior v Mole* [2017] HCA 10 Appeal from NT**

*Arrest – intoxication in public place and likely to commit offence - “reasonable grounds” for belief – police officer’s experience relevant to forming belief. Held: Appeal dismissed.*

The appellant was apprehended under s 128(1) *Police Administration Act* (NT). Section 128 provides, inter alia, that a police officer may apprehend without warrant a person who the member has reasonable grounds for believing is intoxicated in a public place and is likely to commit an offence.

The appellant submitted the NT Court of Appeal erred in holding that the police officer had reasonable grounds for his belief that, because of his intoxication, the applicant was likely to commit an offence in circumstances in which the officer knew nothing of the applicant’s background and based his belief at least in part on his policing experience.

The High Court dismissed the applicant’s appeal. When a statute prescribes that there must be “reasonable grounds” for a state of mind, it requires the existence of facts sufficient to induce that state of mind in a reasonable person. It is an objective test. The question is not whether the relevant person thinks they have reasonable grounds: at [73], [98]-[100]; *George v Rockett* (1990) 170 CLR 104; *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423. The officer was entitled to rely upon experience of more than 12 years and dealings with people displaying similar behaviour. It was fair for the court to infer the experience of which the officer spoke was of dealing with intoxicated people behaving in the aggressive, abusive way as the appellant: per Kiefel and Bell JJ at [14]-[19]. A police officer is ordinarily expected to bring previous experience as an aid. Where past experience has taught that identified circumstances coincide with particular kinds of



offending, it is reasonable to infer similar circumstances entails a possibility of similar offending. It was sufficient for the officer to outline past experience and observations of the appellant and surrounding circumstances: per Nettle J at [69]-[72]. The officer's policing experience was *a*, not *the*, basis for his belief. His experience was not relied upon in a vacuum, but in the context of the appellant's demeanour, behaviour and the circumstances: per Gordon J at [108]-[110].

## **20. *Aubrey v The Queen* [2017] HCA 18 appeal from NSW**

*Infliction of grievous bodily harm – Meaning of "inflicts" – Appellant caused complainant to contract human immunodeficiency virus (HIV) – R v Clarence (1888) 22 QBD 23 not followed. Held: Appeal dismissed.*

The applicant was convicted of one count of maliciously inflicting grievous bodily harm upon the complainant, contrary to s 35(1)(b) *Crimes Act* (as it stood in 2004). The Crown case was that the appellant had unprotected sexual intercourse with the complainant where the appellant knew he was HIV positive. The High Court answered in the affirmative on two questions of principle:

- (1) Is an act of having sexual intercourse and thereby causing the other person to contract a grievous bodily disease capable of amounting to the "infliction" within s 35(1)(b)?
- (2) Is it sufficient to establish that an accused acted *recklessly* within the meaning of s 5 (repealed), and thus maliciously within the meaning of that section and s 35, for the Crown to establish that the accused foresaw the *possibility* (as opposed to the *probability*) that the act of sexual intercourse with the other person would result in the other person contracting the grievous bodily disease?

The High Court held that *R v Clarence* (1888) 22 QBD 23 should no longer be followed: see at [11], [16]-[18], [35]-[36]. *Clarence* held that the transmission of a disease by sexual intercourse was not "infliction" of harm: at [10]. In light of contemporary conceptions of bodily injury and disease, it is no longer possible to discern the critical difference identified in *Clarence* between an immediate and necessary connection between a blow and physical harm, and the delayed effect of an act of sexual intercourse leading to the development of infection: at [16]; *Dica* [2004] QB 1257. The NSW common law - that the degree of recklessness required to establish malice for the purpose of statutory offences other than murder was foresight of possibility (not probability) of harm (Coleman (1990) 19 NSWLR 467) - was correctly applied to s 35: at [46]-[47].

## **21. *Smith v The Queen; The Queen v Afford* [2017] HCA 19 Appeal from NSW and Vic**

*Import border controlled drug – ss 5.2, 307.1 Criminal Code (Cth). Held: Crown appeal from VSCA allowed - Appeal from NSW CCA dismissed.*

The appellants, A and S were convicted (in Victoria and NSW respectively) of import commercial quantity of border controlled drug (s. 307.1(1)(a) *Criminal Code* (Cth)). The drugs were hidden in the appellants' luggage brought into Australia. The case of both appellants was that they had no intention to import the drugs. For the offence of import commercial quantity of border controlled drug, the fault element is intention (a person has intention with respect to conduct if s/he means to engage in that conduct: s 5.2(1)).

In *Kural v The Queen* (1987) 162 CLR 502 the High Court had held that under the earlier *Customs Act* provision (s 233B(1)(b) - repealed) it was open to infer intent to import a narcotic drug where it was established the accused knew or believed or was aware of the likelihood, in the sense of there being a significant or real chance, that what was being imported was a narcotic drug.

The High Court held that the process of inferential reasoning in *Kural* does apply to proof of an intention to import a commercial quantity of border controlled drug under s. 307.1(1): at [64]. The High Court allowed the Crown appeal from the VSCA, and dismissed the appeal from the NSW CCA.

In cases like this, it is entirely appropriate for a trial judge to tell the jury that, if they consider it to be established beyond reasonable doubt the accused perceived there to be a real or significant chance of the presence of a substance in an object which the accused brought into Australia, it is open to infer the accused intended to import the substance: at [60]-[61]; *Saengsai-Or* (2004) 61 NSWLR 135; *Cao* (2006) 65 NSWLR 552.

It does not follow the accused must be shown to have known or believed what the substance was or what it looked like, or how it was wrapped or otherwise contained, or where it was located or concealed in the suitcase: at [63].

The High Court at [69] set out directions, where it is not disputed the accused brought a substance into Australia and not disputed that it was a border controlled drug.

## **22. Hughes v The Queen [2017] HCA 20 Appeal from NSW**

*Tendency evidence – s 97(1)(b) Evidence Act 1995 (NSW). Held: Appeal dismissed.*

The appellant was convicted of child sexual offences against four complainants. Evidence by the complainants and other witnesses was admitted at trial to prove the appellant's tendencies for sexual interest in female children under 16 and to act on that interest through opportunistic sexual activity with underage girls. The NSW CCA declined to follow *Velkoski* (2014) 45 VR 680, thus rejecting the appellant's submission the evidence was inadmissible because it lacked an 'underlying unity' or 'pattern of conduct' inherent in the expression 'significant probative value'.

Dismissing the appeal, the High Court held the NSW CCA did not err in declining to follow *Velkoski* nor in determining the tendency evidence had significant probative value: at [12]. The test posed by s 97(1)(b) *Evidence Act* 1995 is that "the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged" (*Ford* [2009] NSWCCA 306; (2009) 201 A Crim R 451 at 485). It is not necessary the disputed evidence has this effect *by itself*. It is sufficient if the disputed evidence together with other evidence makes significantly more likely any facts making up the elements of the offence charged. Where there are multiple counts, it is necessary to consider each count separately to assess whether the tendency evidence which is sought to be adduced in relation to that count is admissible: at [40].

The assessment of whether evidence has significant probative value in relation to each count involves consideration of two interrelated but separate matters: (1) The first matter is the extent to which the evidence supports the tendency; (2) The second matter is the extent to which the tendency makes more likely the facts making up the charged offence: at [41].

Where the question is not one of the identity of a known offender but a question concerning whether the offence was committed, it is important to consider both matters. In summary, there is likely to be a high degree of probative value where (i) the evidence, by itself or together with other evidence, strongly supports proof of a tendency, and (ii) the tendency strongly supports the proof of a fact that makes up the offence charged: at [41]. Unlike the common law which preceded s 97(1)(b), the statutory words do not permit a restrictive approach to whether probative value is significant. However, the open-textured nature of an enquiry into whether "the court thinks" that the probative value of the evidence is "significant" means that it is inevitable that reasonable minds might reach different conclusions: at [42].

## **23. R v Dickman [2017] HCA 24 Appeal from Vic**

*evidence – s 116, s 137 – no error in finding unfair prejudice minimal – Court of Appeal erred in concluding there was a miscarriage of justice without reference to the evidence or conduct of trial. Held: Crown appeal allowed. Conviction restored.*

The respondent was convicted of intentionally cause serious injury and making threat to kill. In 2009 the victim identified an "old man" from a police photoboard, however, that man had an alibi. In 2011 the victim identified the respondent from another photoboard. The VCA held the trial judge erred in failing to exclude the 2011 identification evidence and set aside the convictions. The prosecution appealed. The High Court allowed the appeal and restored the convictions.

The admission of the August 2011 identification was not in error. The trial judge was justified in finding exclusion under s 137 was not required because the danger of unfair prejudice was minimal and could be adequately addressed by directions: at [57].

There was no dispute regarding the trial judge's assessment of the probative value of the evidence as low: at [43]. Standing alone, the low probative value of the evidence did not require its exclusion unless that value was outweighed by the danger of unfair prejudice: at [44]; *Festa* (2001) 208 CLR 593. Yet the reasons by the VCA as to why exclusion was required were concerned with the evidence's low probative value: at [44].

The unfair prejudice was the risk the jury would infer that the police officer's suspicion of the respondent as the suspect was based on matters known to the officer but not in evidence. However that risk does not appear to have been a real one as the reasons why the investigation came to focus on the respondent were explained in evidence: at [56].

The VCA erred by proceeding to the conclusion there had been a substantial miscarriage of justice without reference to the evidence or the conduct of trial: at [58]. The possibility that a person other than the respondent was the "old man" was excluded beyond reasonable doubt and other evidence meant the respondent's conviction was inevitable: at [63].

## **24. *Gax v The Queen* [2017] HCA 25 Appeal from QCA**

*Unreasonable verdict – sufficiency of reasons. Held: Appeal allowed. Verdict of acquittal entered.*

The appellant was charged with three counts of aggravated indecent dealing with a child (his daughter, aged 13). He was acquitted of the first two counts and convicted of the third. The complainant made her first complaint around a decade after the offence was committed. The complainant's evidence-in-chief on the third count was her mother entered her bedroom as the appellant was getting out of the complainant's bed. The complainant said her underwear was around her ankles, but was unable to say why, and that "I was asleep before and ended up finding out what happened".

The QCA dismissed the appellant's appeal (by majority). In dissent, McMurdo P found that the possibility that the complainant's evidence was a reconstruction rather than an actual memory had not been excluded beyond reasonable doubt. The High Court allowed the appeal, quashed the conviction and entered a verdict of acquittal.

The complainant's assertion that "his fingers were near my vagina" was in law evidence of an indecent dealing within the relevant particulars. Determination of whether the verdict was unreasonable was thus an issue of fact, turning on the QCA's own assessment of whether it was open to the jury to be satisfied of the appellant's guilt to the criminal standard: at [25]; *M* (1994) 181 CLR 487; *SKA* (2011) 243 CLR 400.

McMurdo P in dissent was right to conclude that the possibility of reconstruction had not been excluded: at [31], [40]. This was not a case in which the jury's advantage in seeing and hearing the evidence can provide an answer to the sufficiency of the evidence to support the verdict: at [31], [40]. The complainant's answers pointed to her further answers on the topic as a reconstruction. Her inability to give any details of the touching is consistent with that possibility: [29]; [40]. There was also marked inconsistencies between her sister's account and the complainant and her mother's accounts: [30]. Given the insufficiency of the evidence, it is not necessary to decide upon the adequacy of the QCA's reasons. However, there is force to the argument the reasons do not disclose assessment of the sufficiency and quality of the evidence of the particularised touching. It is not clear there was an independently formed conclusion about the capacity of the evidence to exclude the possibility of reconstruction: at [25].

## **24. *Rizeq v The Queen* [2017] HCA 23 Appeal from WACA**

*Majority verdict – state offences – appellant from different state – federal jurisdiction. Held: Appeal dismissed.*

The appellant was convicted of state drug offences under (WA) *Misuse of Drugs Act* s.6(1)(a) by majority verdict. The appellant was a resident of NSW which meant the case involved federal jurisdiction under the Cth *Constitution* s.75(iv) (matters between a State and the resident of another State). Section 80 of the *Constitution* requires a unanimous verdict for trials involving a law against the Commonwealth (*Cheatle* (1993) 177 CLR 541). The issue in this case was whether the offences under the (WA) *Misuse of Drugs Act* s.6(1)(a) had become Commonwealth offences and therefore required unanimous verdicts.

In dismissing the appeal, and after considering the application of (CTH) *Judiciary Act* s.79, the Court concluded the appellant's trial had been for offences against the law of a State and a majority verdict was available under the (WA) *Criminal Procedure Act* s.114.

### **High Court Reserved cases**

***IL v The Queen*** [2017] HCATrans 65; Appealed from [2016] NSWCCA 51

Constructive murder – Joint criminal enterprise – *Crimes Act 1900* (NSW) s 18 – Where deceased's death caused by ignition of ring burner – evidence insufficient to establish that appellant ignited burner – whether ignition of ring burner within scope of joint criminal enterprise to manufacture methylamphetamine – whether subjective foresight of risk of death required for charge of constructive murder – “malice” in s 18(2)(a) satisfied by proof of intention to commit foundational offence – “malice” established by recklessness.

***Chiro v The Queen*** [2017] HCATrans 133; [2017] HCATrans 134; Appeal from SA CCA [2015] SASCFC 142; (2015) 123 SASR 583

Sentencing – “persistent sexual exploitation of a child” *Criminal Law Consolidation Act 1935* (SA) s 50 Whether Court of Criminal Appeal erred in failing to hold trial judge erred in failing to ask jury which two or more sexual offences were subject of guilty verdict for purposes of sentencing – Whether in absence of such answer it was open to trial judge to sentence on basis appellant guilty of all alleged sexual offending.

***Director of Public Prosecutions v Dalgiesh (A Pseudonym)*** [2016] HCATrans 122; Appeal from Vic CA [2016] VSCA 148

*Sentencing Act 1991* (Vic) s 5(2)(b) – respondent pleaded guilty to four sexual acts on two children under 16 – Court informed parties that Court would consider adequacy of “current sentencing practices” for incest – Court of Appeal dismissed appeal but stated current sentencing practices for incest inadequate – Whether s 5(2)(b) alters common law principle of “instinctive synthesis” in sentencing.

***Hamra v The Queen*** [2017] HCATrans 133; [2017] HCATrans 134; Appeal from SA CCA [2016] SASCFC 130; (2016) 126 SASR 374

Persistent sexual exploitation of child *Criminal Law Consolidation Act 1935* (SA) s 50 – Whether s 50 requires proof of commission of two or more prescribed sexual offences on particular occasions – Whether Court of Criminal Appeal failed to address appellant's submission that respondent's appeal should not be granted having regard to considerations relating to double jeopardy.

***The Queen v Dookheea*** [2016] HCATrans 132; Appealed from VSCA [2016] VSCA 67

Jury directions – Where trial judge directed jury that prosecution must prove element of crime “not beyond any doubt, but beyond reasonable doubt” – Whether Court of Appeal erred in finding trial judge impermissibly explained meaning of “beyond reasonable doubt” – Whether Court of Appeal erred in concluding jury direction occasioned substantial miscarriage of justice.

***The Queen v Holliday*** [2017] HCATrans 123; Appeal from ACT CA [2016] ACTCA 42; (2016) 312 FLR 77

Whether offence of incitement under *Criminal Code 2002* (ACT) s 47 can be committed by inciting another person to procure a third person to commit an offence – Whether offence of incitement complete at the point of the urging

***Van Beelen v The Queen*** [2017] HCATrans 135; [2017] HCATrans 137; Appeal from SA CCA [2016] SASCFC 71; (2016) 125 SASR 253

*Criminal Law Consolidation Act 1935* (SA) s 353A – Second or subsequent appeal – Where appellant seeks to appeal against murder conviction on basis that new evidence shows expert evidence as to time of victim's death flawed – Whether new evidence is “compelling” – Whether majority of Court of Criminal Appeal erred in holding further attack on expert evidence precluded because expert evidence contested at trial – Whether evidence could have been adduced at original trial – Whether majority of Court of Criminal Appeal erred in finding principle of finality relevant to s 353A appeal – Whether in “interests of justice” to allow appeal.

## **ANNEXURE B - LEGISLATION 2016-2017**

### **1. Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015**

This Pilot Scheme commenced operation on 31 March 2016 for a period of 3 years. (The legislation commenced on 5.11.2015).

*Criminal Procedure Act 1986* - New Part 29 (clauses 81-94) inserted into Schedule 2 to:

- (i) allow evidence of children in "prescribed sexual offences" cases in the District Court to be pre-recorded in the absence of a jury
- (ii) provide for such evidence to be given with the assistance of a "Children's Champion" (or "witness intermediary").

### **2. Limitation Amendment (Child Abuse) Act 2016**

Commenced 17.3.2016

Amends *Limitation Act 1969* to remove limitation periods applicable to civil damages actions for child abuse victims. Section 6A removes the previous limitation periods (of between 3 and 12 years) for commencing an action for damages relating to death or personal injury resulting from "child abuse". Section 6A has retrospective operation.

### **3. Terrorism (Police Powers) Amendment (Investigative Detention) Act 2016**

Commenced 16.5.2016

*New Pt 2AA Terrorism (Police Powers) Act 2002 (NSW)* authorises arrest, detention and questioning of person suspected of being involved in a recent or imminent terrorist act: s 25A. Maximum period of detention 14 days: s 25H(1). An 'eligible Judge' may extend detention period beyond initial 4 day period in increments of up to 7 days: ss 25D, 25I.

### **4. Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016**

*Inclosed Lands Protection Act 1901* - amendment commenced on 1.6.2016

New s 4B: aggravated offence of unlawful entry on inclosed lands. Maximum penalty: 50 penalty units.

*Law Enforcement (Powers and Responsibilities) Act 2002 Act 1900* - amendment commenced 1.11.2016

New ss 45A-C give police additional search and seizure powers without warrant where person has (or a vehicle, vessel or aircraft contains) anything intended to be used to lock-on or secure a person to any plant, equipment or structure for purpose of interfering with business or undertaking and that give rise to serious risk to safety of any person.

### **5. Crimes (High Risk Offenders) Amendment Act 2016**

Commenced 7.6.2016

The *Crimes (High Risk Offenders) Act 2006* enables State government to apply to Supreme Court for continuing detention or extended supervision orders after the expiry of a sentence of imprisonment in respect of high risk sex offenders and high risk violent offenders. New s5A(2A) expands the definition of "serious violence offence" (s 5A(1)(a)) to include: (a) Murder by an act done (by a person or an accomplice) in an attempt to commit, or during or immediately after the commission of, another serious crime (i.e. constructive murder) (b) Manslaughter by unlawful and dangerous act (c) Wounding with intent to cause death or gbh.

### **6. Justice Portfolio Legislation (Miscellaneous Amendments) Act 2016**

*Crimes (Sentencing Procedure) Act 1999*

- . Fixed terms now permitted for SNPP offences: s 45(1).
- . New s 45(1A): a court may decline to set a NPP (i.e. impose a fixed term) for an offence to which a SNPP applies "... only if the term of the sentence is at least as long as the term of the non-parole period that the court would have set for the sentence if a non-parole period had been set in accordance with that Division."
- . NPPs for terms of sentence 6 months or less: New sub-section 46(2) - if a court imposes an aggregate sentence of more than six months for multiple offences, it would not need to be a fixed term, even if individual sentences the court would have imposed would have been less than six months.
- . New s 53B: Local Court may impose an aggregate sentence of imprisonment of up to five years.
- . s 71 (Commencement of ICOs): ICO's may be ordered to commence on a date other than day on which made if it is to be served consecutively / partly consecutively with another sentence the subject of an ICO.

*Criminal Procedure Act 1986* - 164A(1) 'Judge unable to continue in trial by jury' - if presiding judge in a criminal jury trial in District or Supreme Court dies, becomes ill, or is otherwise unable to continue the proceedings, then

the senior judicial officer of the court after hearing submissions from the parties may (a) nominate another judge of the court to take over the proceedings, or (b) discharge the jury and order a new trial.

*Children (Criminal Proceedings) Act 1987* - s 29 ('Jurisdiction in respect of 2 or more co-defendants who are not all children') is amended to allow for committal proceedings for a child co-accused in Children's Court and an adult co-accused in the Local Court to be joined in the Children's Court at discretion of the Children's Court - regardless of the age of the adult co-accused. Previously such a course was only available where the adult co-accused was less than 3 years older than the child.

## **7. Law Enforcement (Powers and Responsibilities) Amendment Act 2014**

The uncommenced provisions (Schedules 1 and 3) commenced on 1.9.2016

*Law Enforcement (Powers and Responsibilities) Act 2002*

Part 9 - Investigation and questioning - ss 109-111: To provide separate safeguards for *detained persons* and *protected suspects*, and to remove references to persons deemed to be under arrest.

Searches: A consensual search may only be carried out if the police officer has sought the person's consent before carrying out the search and provides evidence s/he is a police officer and with the officer's name and place of duty: s 34A.

Crime scene warrants / domestic violence offences: Enables occupier of private premises to apply to an authorised officer for a review of the grounds on which a crime scene warrant is issued: s 94A. A police officer may remain in a dwelling on which a domestic violence offence is / may have been committed to exercise functions in relation to a crime scene (such as directing a person to leave / not to enter) so that evidence can be preserved: ss 82(3A)-(3C)

## **8. Courts Legislation Amendment (Disrespectful Behaviour) Act 2016**

Commenced 1.9.2016

The Act creates a summary offence for a person to engage in behaviour that is disrespectful (according to practice and convention) in the Supreme Court, Land and Environment Court, District Court or Local Court or in coronial proceedings. Maximum penalty: 14 days imprisonment or 10 penalty units, or both. The offence is contained in: *Supreme Court Act 1970* s 131 'Disrespectful behaviour in Court'; *Land and Environment Court Act 1979* s 67A; *District Court Act 1973* s 200A; *Local Court Act 2007* s 24A; *Coroners Act 2009* s 103A.

## **9. Criminal Legislation Amendment (Organised Crime and Public Safety) Act 2016**

Commenced 8.9.2016

*Crimes Act 1900* - s 193C 'Dealing with property suspected of being proceeds of crime' is amended to create a scale of offending. Property less than \$100,000 attracts maximum penalty of 3 years imprisonment; property greater than \$100,000 attracts maximum penalty 5 years imprisonment (ss 193C(1),(2)).

*Confiscation of Proceeds of Crime Act 1989* - Supreme Court may make a "substituted tainted property declaration" in respect of property of a person convicted of a serious criminal offence in cases where other property was used by the offender in the offence and that other property is not available for forfeiture: s 33.

*Criminal Assets Recovery Act 1990* - commenced 29.7.2016 - Expands circumstances in which Supreme Court can make an "asset forfeiture order" following application by the NSW Crime Commission. An order is made in respect of "serious crime use property" used in serious crime related activity: s 22(1A). Court can also make a "substituted serious crime use property declaration" in respect of other property of an offender where the "serious crime use property" is unavailable for forfeiture: s22(1A), s 22AA.

## **10. Statute Update Act 2016 (Cth)**

Commenced on 21.10.2016

References to penalties expressed as a "dollar amount (\$)" are now expressed as "penalty units". References to "maximum penalty" are replaced by "penalty: s 4D(1) *Crimes Act 1914*.

## **11. Crimes (Serious Crime Prevention Orders) Act 2016**

Commenced on 25.11.2016

New stand-alone Act provides for making of Serious Crime Prevention Orders (SCPO) to restrict activities of persons or businesses involved in serious crime. A SCPO can be issued by District or Supreme Court on application by NSW Crime Commission (NSWCC), DPP or Commissioner of Police; where Court is satisfied on balance of probabilities a person/business is involved in serious crime related activity, or following a conviction for a serious offence. 'Serious offence' and 'serious crime related activity' is defined in *Criminal Assets Recovery Act 1990*. A SCPO can last for a maximum of five years. Punishment for breach of an SCPO is maximum penalty five years' imprisonment and/or a fine of 300 penalty units (\$33,000) for individual and 1,500 penalty units (\$165,000) for corporation.



## **12. Criminal Procedure Amendment (Summary Proceedings for Indictable Offences) Act 2016**

Commenced 11.11.2016

Inserts Clause 8A into Table 1, Schedule 1 of the *Criminal Procedure Act 1986* to allow four strictly indictable break and enter offences to be dealt with summarily in the Local Court unless prosecutor or person charged elects otherwise. Subject to certain criteria, the offences in the *Crimes Act 1900* are: s 109(2), s 111(2); s 112(2); s 113(2). The Local Court jurisdictional maximum penalty of two years' imprisonment applies.

## **13. Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016**

Commenced on 3.12.2016

Follows recommendations by the 'Statutory Review of the *Crimes (Domestic and Personal Violence) Act 2007*' and the 'Statutory Review of Chapter 9A of the *Coroners Act 2009*: the Domestic Violence Death Review Team' by Department of Justice.

*Crimes (Domestic and Personal Violence) Act 2007*

Definitions

'Domestic relationship' in s 5 extended to include relationship between a current partner and former partner.

'Personal violence offence' in s 4 amended to include female genital mutilation, failing to provide child with the necessities of life, sexual intercourse with a person under special care aged between 16 and 18, incest and offences relating to abandoning a child.

'Domestic violence offence' in s 11 extended to include offences other than personal violence offences if committed by a person against a person with whom person has or has had a domestic relationship and offence arises from substantially the same circumstances as a personal violence offence is committed against the person in order to coerce or control or cause person to be intimidated or fearful. Thus the previous list of 55 offences is expanded to include any NSW criminal offence or offence under Commonwealth Criminal Code.

Apprehended Domestic Violence Order (ADVO) - court can make ADVO without being satisfied person in need of protection fears intimidation, stalking the commission of a personal violence offence, if satisfied on balance of probabilities person has *reasonable grounds* to fear commission of a domestic violence offence: s 16(2)(d).

## **14. Bail Amendment Act 2015**

Commenced on 6.12.2016

Amendments made to the *Bail Act 2013* in response to the Hatzistergos Review and Sentencing Council reports; and the Martin Place Siege Review. Main amendments include: New "show cause" offence - s 16B (1)(l); New s.16B (3) - Definition of "serious personal violence offence"; Section 18 Additional factors when assessing bail concerns; Section 18 Matters to be considered as part of assessment – Links to terrorist organisations and extremism; New section 22A 'Limitation on power to release in relation to terrorism related offences'

## **15. Drug Misuse and Trafficking Amendment (Drug Exhibits) Act 2016**

Commenced on 1.1.2017

Amends Part 3A DMTA and DMTA Regulations to update and streamline the system for the retention, analysis and destruction of prohibited drugs. A helpful [Flow Chart](#) has been prepared by the Judicial Commission of NSW and is available on their website.

Previously, the whole of a substance was to be given to an analyst by Police as soon as practicable, though not later than 14 days: previous cl 10 DMTA Regulation.

New procedures include:

- . Police member to record quantity of substance or provide it to an analyst for that purpose: cl 11(1)
- . Certificate recording initial quantity to be served on accused: cl 11(2)
- . Certificate is prima facie evidence in legal proceedings of quantity: cl 11(3)
- . Police must retain an amount of the substance sufficient to allow for 3 times the amount required for 2 samples for analysis: cl 13

Substances (not plants):

- . Less than traffickable quantity: to be provided to an analyst of identity of substance will be in dispute in any proceedings: cl 15
- . Not less than traffickable quantity: amount must be provided to analyst: cl 14(2). Accused may request analysis of further sample by nominated person or analyst: cl 16. Police may order bulk of substance be destroyed where evidence of the substance is recorded by photographing etc and after 28 days from accused being served with notice of destruction: s 39I DMTA.

- . Greater than commercial quantity: purity of drug to be analysed where capable of being tested: cl 16A(1)(c).
- Plants:
  - . Analyst must be given access sufficient to allow identification: cl 12(1)
  - . Police may order plants be destroyed where evidence of the substance is recorded by photographing etc: s 39H DMTA
- Presumptions:
  - . All substances to be placed in sealed and labelled drug exhibit bags and entered into the NSW Police Force exhibits management system as soon as practicable: cl 16F, cl 16G
  - . There are two new evidentiary presumptions:
    - . A certified copy of a report from the NSW Police Force exhibits management system is prima facie evidence of dealings with that exhibit as listed: cl 16L
    - . Certificates issued by the police officer sealing the bag and the analyst opening the sealed bag for testing are prima facie evidence that the substance analysed was the same substance seized: cl 16M (applies to substances other than a prohibited drug of less than traffickable quantity).
  - . Certificates issued under the Regulations are prima facie evidence of the matters stated in them without proof of the signature, appointment or approval of the person purporting to sign the certificate: cl 16N (this presumption mirrors the previous ss 43(2), 43(4) DMTA).
  - . Where person who pleads guilty in Local Court appeals against the Local Court's determination, and substance has been destroyed, any particular in the Court Attendance Notice as to quantity or nature of substance is presumed to be true for appeal purposes: s 39N DMTA
- Review by Local Court :
  - . Accused may apply for review in Local Court (within 60 days of being served with certificate) of the initial quantity recorded on a certificate issued under cl 11. A review can only be ordered where Local Court satisfied there has been substantial failure to comply with Act or Regulation, or there is a real doubt as to accuracy of certificate: s 39M DMTA.

## LEGISLATION 2017

### **1. Fines Amendment Act 2017**

Commenced 21 March 2017

Amends *Fines Act 1996*:

Office of State Revenue now has discretion to take civil enforcement action against fine defaulter without first suspending or cancelling driver's licence. If fine defaulter is an individual and Commissioner of Fines Administration is satisfied civil enforcement action is preferable because enforcement action under Pt 4 Div 3: (a) is unlikely to be successful in satisfying fine, or (b) would have excessively detrimental impact on fine defaulter: s 71(1A)

Amends *Victims Rights and Support Act 2013 (VRSA)*:

Commissioner of Fines Administration can enforce confirmed restitution orders made under *Victims Rights and Support Act 2013* against an offender. Previously, such orders could be enforced only as judgment debt requiring application to court. Enforcement action may be taken under *Fines Act* and additional enforcement costs may become payable: s 70B(4). Restitution amounts are taken to be a fine imposed by court and the Act then applies in same way as to court imposed fines: ss 112C(1), 112D.

### **2. Criminal Legislation Amendment (Organised Crime and Public Safety) Act 2016**

Schedule 5 commenced 31 March 2017

Schedule 5 amends *Law Enforcement (Powers and Responsibilities) Act 2002*:

A new police power to make "Public Safety Orders" is set out in ss 87Q-87R. A public safety order is an order made by a senior police officer that prohibits a specified person (or persons belonging to a specified class of persons) from: (a) attending a specified public event (including entering, or being present at, premises being used in connection with the public event), or (b) entering, or being present at, specified premises or other specified area at any time during a specified period: s87Q.

An order may only be made if the officer is satisfied that: (a) the presence of the person (or class of persons) concerned at the public event or premises or other area concerned poses a serious risk to public safety or security, and (b) the making of the order is reasonably necessary in the circumstances: s 87R(1).

In determining whether an order is reasonably necessary, the officer must take into account matters listed in s 87R(2) which include whether the person/s:

- . previously behaved in a way that posed a serious risk to public safety or security/ have a history of engaging in serious crime related activity within the meaning of the *Criminal Assets Recovery Act 1990*
- . are, or have been, members of a declared organisation
- . associate, or have associated, with members of a declared organisation

An officer must not make an order that if the primary purpose of the person/s is non-violent advocacy, protest, dissent or industrial action: s 87R(3).

The provisions set out further criteria upon which a public safety order is to be made, the content and duration of the order, service of the order, urgent orders, variation and revocation of orders, appeals against orders, contravention of orders and police powers to stop and search in relation to the orders.

### **3. Parliamentary Contributory Superannuation Amendment (Criminal Charges and Convictions) Act 2017 (NSW)**

Commenced 1 June 2017

Amends *Parliamentary Contributory Superannuation Act 1971* to disqualify all former members of parliament from entitlement to pension if convicted of a serious offence for conduct during time in office.

Inserts s 24C *Crimes (Sentencing Procedure) Act 1999* to provide that when sentencing an offender who is / was a member of Parliament the court must not take into account, as a mitigating factor, the offender's loss of entitlement to parliamentary pension because of their conviction.

The amendments have a retrospective effect. The amendments extend to MPs convicted of:

- . any serious offence committed before the commencement of those amendments; and
- . any conviction before the commencement of those amendments; and
- . a person who ceased to be a member before the commencement of those amendments (and to any entitlement of the person to a pension or lump sum that accrued or was paid before that commencement): Sch 1 cl 11A

The new s.24C *Crimes (Sentencing Procedure) Act 1999* was applied in *Macdonald; Maitland* [2017] NSWSC 638 at [262].

### **4. Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016 (Cth)**

Commenced on 7 June 2017

Act inserts Division 105A into the *Criminal Code* (Cth) to create a scheme for continuing detention orders for terrorist offenders.

A continuing detention order commits the offender to detention in a prison for the period the order is in force: s 105A.3(2).

The Attorney-General may apply to a Supreme Court of a State / Territory for a continuing detention order in relation to a terrorist offender: s 105A.5(1).

A "terrorist offender" is defined (s 105A.3) as a person:

- . convicted of a serious offence under Part 5.3 (terrorism) *Criminal Code* (or certain other offences under 105A.3(1)(a)); and
- . either serving a sentence of imprisonment for that offence, or subject to a continuing detention order or interim detention order.

The application cannot be made more than 12 months before the end of a sentence of imprisonment the offender is serving, or, if the offender is subject to an existing continuing detention order, the period for which order is in force: s 105A.5(2).

Provision is made for interim detention orders for a period of no more than 28 days: s 105A.9

Under s 105A.7(1) a Supreme Court may make a continuing detention order if:

- . after having regard to the matters specified under s 105A.8, the Court is satisfied to *a high degree of probability* the offender poses an unacceptable risk of committing a serious Part 5.3 offence if released into the community, and
- . the Court is satisfied there is no other less restrictive measures that would be effective in preventing the unacceptable risk.

A continuing detention order may not exceed a period of 3 years and must be limited to the period reasonably necessary to prevent the unacceptable risk: s 105A.7(5).

Successive orders may be made: s 105A.7(6).

A continuing detention order must be reviewed annually, or sooner where offender makes application for review: ss 105A.10-11.

Provision is made for right of appeal: s 105A.17.

A court sentencing a person convicted of a "terrorist offence" must warn the person that, after the end of the person's sentence, an application may be made for a continuing detention order: s 105A.23(1). Failure to give warning does not invalidate sentence or prevent an application under Division 105A: s 105A.23(2).

## **5. Terrorism Legislation Amendment (Police Powers and Parole) Act 2017 (NSW)**

Commenced 22 June 2017

The Act responds to recommendations by the State Coroner on the Lindt Cafe siege.

Amends *Terrorism (Police Powers) Act 2002*:

New Part 2AAA authorises reasonably necessary police force in response to incident declared to be terrorist acts.

Police Commissioner may declare an act a terrorist act if satisfied: (a) an incident to which police are responding is / is likely to be a terrorist act; and (b) planned and coordinated police action is required to defend any persons threatened by the terrorist act or to prevent/terminate their unlawful deprivation of liberty: s 24A

If a declaration is made under s 24A, the police action authorised in responding to the incident includes authorising, directing or using force (including lethal force) that is reasonably necessary, in the circumstances as they perceive them, to defend any persons threatened by the terrorist act or to prevent/terminate their unlawful deprivation of liberty: s 24B(1)

Amends *Crimes (Administration of Sentences) 1999*:

Provision is made for restrictions on the grant of parole for terrorism related offenders: Division 3A, Part 6.

"Terrorism related offender" includes an offender (ss 159A and 159B):

- . serving a sentence for, has been convicted of, or charged with, a terrorism offence;
- . subject to a control order under the *Criminal Code* (Cth), Pt 5.3;
- . has associations with a terrorist organisation;
- . Has made statements or carried out activities advocating support for terrorist acts or violent extremism; or
- . Has associations or affiliation with persons / groups advocating support for terrorist acts or violent extremism.

A terrorism related offender who is otherwise eligible for parole is not to be released unless the Parole Authority is satisfied that the offender will not engage in, or incite or assist others to engage in, terrorist acts or violent extremism: s 159C(1).

A terrorism related offender's parole may be revoked or suspended if the Authority becomes aware the offender may engage in, or incite or assist others to engage in, terrorist acts or violent extremism: ss 159C(2), (3)

If an offender is known to the court to be a terrorism related offender, a court may also decline to make a parole order under s 50 *Crimes (Sentencing Procedure) Act 1999* (which requires a court, when imposing a sentence of imprisonment of 3 years or less, with a NPP, to make an order directing the offender's release on parole at the end of the NPP): s 159C(4)

The amendments under Div 3A extend to applications for parole orders which are pending on, or which were made before, the commencement of the amendments on 22.6.2016: s 159D(5).

## **6. Firearms and Weapons Legislation Amendment Act 2017**

Commenced 1 July 2017 (further provisions are to commence on 1.11.2017)

The Act inserts Part 12A into the *Firearms Regulation 2006* for a temporary amnesty from 1 July 2017 to 30 September 2017 for the surrender of firearms and prohibited weapons. During this period a person is exempt from the possession restrictions of the *Firearms Act* while in possession of a firearm or related article at a police station or participating dealer, or while proceeding to same, for purposes of surrendering that firearm. A temporary amnesty also applies to supplying a firearm to a participating dealer, or attending a participating dealer for purposes of registering a firearm.

Clause 35B is inserted into the *Prohibited Weapons Regulation 2009* to provide that same amnesty in relation to possession of prohibited weapons.

## **7. Crimes Amendment (Penalty Unit) Act 2017 (Cth)**

Commenced 1 July 2017

The value of a penalty unit for Commonwealth offences increased from \$180 to \$210: s 4AA(1) *Crimes Act 1914* (Cth). Applies to an offence committed on or after the Act's commencement date.

## **ANNEXURE C - SUPREME COURT CASES 2016-2017**

### ***Wilson v DPP (NSW) [2016] NSWSC 1458 (Schmidt J)***

*Conceal serious indictable offence s 316 Crimes Act – applies to historical sexual offence that was repealed prior to introduction of s 316 – requisite belief*

The appellant, an Archbishop, was charged under s 316 *Crimes Act* 'Conceal serious indictable offence'. The victim had told the appellant in 1976 that in 1971 when he was 10 he had been sexually assaulted by a fellow priest. The Crown case was the appellant formed the requisite belief under s 316 much later in 2004 when he became aware of other allegations against the priest. The priest, who was deceased, would have been charged under the historical s 81 'Indecent assault on male.'

Schmidt J found a charge under s 316 was valid despite s 81 having been repealed in 1984 prior to the enactment of s 316 in 1990: see at [17]-[37]. Section 81 is a 'serious indictable offence' within s 316. Section 4 *Crimes Act* defines 'serious indictable offence' to mean "an indictable offence that is punishable by imprisonment ...". Section s 81 was punishable by "penal servitude", but relevant legislative provisions mean that if a person is now convicted under s 81, the sentence a court must impose is not one of penal servitude, but of imprisonment. A conviction of a historical s 81 offence "is, for all purposes, taken to be a conviction for a serious indictable offence": at [57]-[62]. Further, the inferences to be drawn from all of the evidence was that the appellant had the requisite belief under s 316: at [88]. Under s 316, the prosecution must establish that the offender actually came to hold the alleged belief that an offence has been committed: at [36]. The capacity of the evidence to establish the existence of a memory in 2004 - 2006 of what the appellant was told by the alleged victim in 1976 about the 1971 offending and the appellant's formation then of a belief about that offending, has to be considered in the light of all the evidence: at [80]; [82]-[83].

Affirmed on appeal ***Wilson v DPP [2017] NSWCA 128***. On appeal the court further stated that s.316 may apply to offences committed but not dealt with prior to the commencement of s.316, the concealed offence must be a serious indictable offence at the time of the concealing, although the offender may not be aware it is a serious indictable offence and the repeal of s.81 does not mean it ceased to be committed and therefore could still be concealed.

### ***Salisbury v Local Court of NSW [2016] NSWSC 1082 (Bellew J)***

*Magistrate acted beyond power in ordering defence expert report be served on prosecution before hearing – s 28 Local Court Act 2007*

The Magistrate adjourned the hearing directing that both parties serve expert reports. Bellew J allowed the appeal. The Magistrate did not have power to make an order requiring the plaintiff to serve expert evidence in advance. Any implied power of the Local Court does not extend to the power to make an order that abrogates fundamental common law principles governing the rights of an accused. It is for the prosecution to put its case fully and fairly, before the accused is called upon to announce his/her course (*Soma* (2003) 212 CLR 299): at [30].

### ***DPP v Lazzam [2016] NSWSC 145 (Adamson J)***

*Brief of evidence served outside time set by direction made by Magistrate - Magistrate erred in not admitting evidence and dismissing charges - s 188(1) Criminal Procedure Act 1986*

A Magistrate dismissed charges on the basis that the brief of evidence was served outside the time set by her own direction. Adamson J allowed the DPP's appeal. The Magistrate erred in law by considering herself bound to reject evidence by s 188 *Criminal Procedure Act 1986* which did not apply. The Magistrate's orders were set aside and the matter remitted for determination.

Adamson J set out how s 188 operates. In particular:

s 188(1) requires the court to refuse to admit evidence if, in relation to the evidence, "this Division or any rules made under this Division have not been complied with by the prosecutor".

s 188 is only concerned with non-compliance by a prosecutor with a provision of Division 2. There is a significant difference between a statutory provision, a rule, a Practice Note and a direction. No other non-compliance engages s 188.

If any relevant non-compliance can be identified, the Magistrate is obliged under s 188(2), to ask whether the accused consents to dispensation with the requirements of s 188(1); and, if so, the Magistrate is obliged to do so "on such terms and conditions as appear just and reasonable". If the accused does not consent, the Magistrate is obliged to consider whether the requirements ought be dispensed with and grant such dispensation "on such terms and conditions as appear just and reasonable".

The discretion conferred by s 188(2) is broad and must be exercised judicially. The requirement to serve the police brief is a fundamental aspect of the administration of criminal justice. It is important that a prosecution not be required to be conducted on incomplete evidence (as in the present case).

Factors relevant to the exercise of the discretion in s 188(2) had there been any relevant non-compliance (to engage s 188(1)) include: whether there was any prejudice to the defendants; whether it could be cured or ameliorated; the reason for any non-compliance; probative value of the evidence; the public interest in determination of criminal proceedings.

### ***DPP (NSW) v Tilley [2016] NSWSC 984 (Bellew J)***

*Magistrate's duty to give reasons*

Bellew J helpfully gathers the authorities discussing the obligation imposed upon a judicial officer to provide adequate reasons for his or her decision, citing from *DPP v Sadler* [2013] NSWSC 718, *DPP v Illawarra Cashmart Pty Limited* [2006] NSWSC 343; (2006) 67 NSWLR 402, *DPP (NSW) v Wililo* [2012] NSWSC 713.

Bellew J upheld the DPP's appeal. The Magistrate's reasons for dismissing the charges were inadequate. The Magistrate's conclusion he was not satisfied beyond reasonable doubt that "each and every element of the charges had been established" was reached in the absence of identifying those elements; making any findings of fact; applying relevant legal principles to the facts; specifying the particular element(s) about which he was not satisfied beyond reasonable doubt; and exposing his reasoning process, explaining why he was not so satisfied. He made no reference to submissions of either party. This reflected a failure to engage with, and properly determine, the issues: at [48]-[50].

### ***Wran [2016] NSWSC 1015 (Harrison J)***

*Extra-curial punishment – damaging newspaper articles – short periods in protective custody taken into account on sentence*

The offender (accessory after the fact to murder; robbery in company) had a high public profile. Harrison J found the offender was subjected to a "sustained and unpleasant campaign" by the media and accepted that the adverse media publicity amounted to extra curial punishment: at [72]-[79].

The offender was placed in a harsh custodial environment due to her public profile, spending almost twelve months in maximum security and confinement in solitary for up to 23 hours a day in lockdown. The principle that time in protective custody is the equivalent of a longer loss of liberty under ordinary conditions of imprisonment (AB (1999) 198 CLR 111) apply with particular relevance to cases where periods in custody have been, or might be, long. In this case, where those periods have been relatively short, Harrison J accepted the offender was entitled to have these matters taken into account: at [80]-[82].

### ***Turnbull (No.25) [2016] NSWSC 831 (Johnson J)***

*Manslaughter by extreme provocation – evidentiary onus on Accused - s 23(2) Crimes Act 1900*

Johnson J explained that in an application for a trial judge to leave extreme provocation to the jury, the accused bears an evidentiary onus to point to evidence from which it could be inferred that there is at least a reasonable possibility that the homicidal act of the accused was provoked in accordance with the four elements contained in s 23(2) *Crimes Act* (Youssef (1990) 50 A Crim R 1). Caution must be exercised before declining to leave extreme provocation to the jury at [58]; *Lindsay v The Queen* (2015) 255 CLR 272 at 284. Where the Accused has failed with respect to one of the four elements, that is fatal to the application to have extreme provocation left to the jury: at [81].

Johnson J held the accused failed to discharge the evidentiary onus in relation to s 23(2)(b); and went on to discuss in obiter remarks that the evidentiary onus was also not discharged in relation to the remaining elements in s 23(2)(a),(c),(d): at [84]-[91].

### ***W4 v Detective Senior Constable Ayscough [2016] NSWSC 1106 (Harrison AJ)***

*Crimes (Forensic Procedures) Act 2000 – ss 75ZC – application to allow DNA profile on DNA database system – magistrate failed to determine whether procedure "justified in all the circumstances"*

When aged 14 the plaintiff committed a sexual assault upon a 12 year old girl and was entered on the Child Protection Register. A first application to have his DNA placed on the system was refused when he was still under 18. A second application under s 75ZC(1) *Crimes (Forensic Procedures) Act 2000* was made when the plaintiff was 19 was granted. The Magistrate found it was unnecessary for the defendant to prove anything other than the plaintiff was a registrable person and his DNA profile was not on the DNA database system.

Harrison J set aside the Magistrate's decision and remitted the matter to the Local Court. In exercising its discretion to order a forensic procedure under s 75ZC(1) the court must be "satisfied that the carrying out of the



forensic procedure is justified in all the circumstances". The Magistrate was required to address the balance between the rights of the citizen and the interests of the community - delay between acquittal, or in this case conviction, would be a relevant factor in determining whether the making of an order was justified (*Daley* [2014] NSWSC 144). Failure to address that the carrying out of the forensic procedure was "justified in all the circumstances" was an error in law: at [44].

***Quami (No 56) [2016] NSWSC 1130 (Hamill J)***

*Discharge of juror – apprehension of bias – juror's ability to perform functions affected – s 53B Jury Act 1977*

A juror was discharged on the basis that evidence (persistent smiling at accused, not attentive at all times, inappropriate responses to evidence and directions) suggested her level of distraction may compromise her ability to perform the task of a juror: s 53B(d). A reasonable apprehension of bias arose where a co-accused ran a defence linked to threats made by the other accused and the juror's smiling and staring appeared to be solely directed at those other accused. This conclusion was reached by observations by the trial judge ("evidence before the Court" s 53B(b) who must be careful not to draw inferences unless they are clear and rational, as well as other material: at [27].

***BNS [2016] NSWSC 350***

*Multiple bail applications – s 74 Bail Act 2013*

Section 74 *Bail Act 2013* states that a court that refuses bail is to refuse to hear subsequent applications in respect of the same offence unless there are grounds for a further release application. Grounds for a further release application include: relevant material information that was not presented in the previous application (s 74(3)(b)) or circumstances have changed since the previous application (s 74(3)(c)).

In *BNS* [2016] NSWSC 350 the applicant was bail refused for drug offences. His fiancée had offered a surety of \$50,000. In this second bail application, the applicant said that his mother was offering surety of \$1M and submitted this satisfied s 74.

Garling J allowed the hearing of further release application under s 74 finding that the change in the identity of surety and the sum offered was "material" information: at [46]. However, the application for bail was dismissed: at [64].

Making of submissions by a legal representative different in quality or quantity from an earlier application by another legal representative, does not fall within s 74. Submissions are not information, nor a change of circumstances. The purpose of s 74 is not to give an applicant the right to a second hearing simply because a lawyer thinks they have a more persuasive argument than on an earlier occasion: at [42]-[44]. Under s 74 a court is first required to refuse to hear a further release application unless particular grounds are established. Change in surety and the amount are not always regarded as a change of circumstances or as material information. A court needs to assess, in the context of the seriousness of the charge and all other circumstances relevant to a bail application, whether such matters are "material": at [45]-[46].

***Johnson (No 4) [2017] NSWSC 609 (Button J)***

*Assault causing death whilst intoxicated - s 25A Crimes Act - meaning of "intoxicated"*

The accused was on trial for murder. In the alternative, the accused was charged with assault causing death, whilst intoxicated, under s 25A(2) *Crimes Act 1900* (which commenced on 31.1.2014).

The issue arose as to the meaning of being intoxicated - not yet the subject of judicial consideration. Button J directed the jury that "intoxicated" is an ordinary English word, more plainly expressed as being "drunk". Intoxicated involves something more than a person having a small amount of alcohol in the body, without it affecting that person or only affecting the person to a very small degree. A person who is merely tipsy or "happy" would not be thought of as intoxicated: at [8]-[11].

***DPP v Hughes [2017] NSWSC 492 (Bellew J)***

*Possession, production, dissemination child abuse material – s 91H(2) Crimes Act – mental element of production or dissemination*

Bellew J held that the magistrate erred in finding that malice was an element under s 91H(2): at [88]. For a charge of possession, the mental element is that the possession must be intentional: at [82]; *Clark* (2008) 185 A Crim R 1. For a charge of production or dissemination, the mental element has not been authoritatively determined. However in the absence of some specificity in the terms of s 91H(2), there is no warrant to conclude that proof of any specific intent, including malice, is required (*He Kaw Teh* (1985) 157 CLR 323). Accepting there is nothing in the language of s.91H(2) which suggests that the offences created are offences of specific intent, and consistent with the decision in *He Kaw Teh*, for the purposes of an offence contrary to s. 91H(2) the prosecution must prove beyond reasonable doubt that a defendant voluntarily and intentionally performed the particular physical act in question: at [83]-[84].

## **ANNEXURE D - STOP PRESS: NSW CCA 2017 UPDATE**

### **NSW CCA SENTENCE APPEAL CASES 2017**

#### **GENERAL SENTENCING**

##### ***Erroneous reference to standard non-parole period (SNPP) for offence – mere reference does not always result in material error***

In **Nguyen** [2017] NSWCCA 39 the CCA said that a mere reference by the sentencing judge to a SNPP, when no SNPP applied, does not always carry with it a finding of material error leading to re-sentencing.

It is necessary for the Court to be persuaded the judge directly, indirectly or obliquely had regard to the erroneous factor of the SNPP: at [103]-[104]; **Potts** [2017] NSWCCA 10 (error established); **HJ** [2014] NSWCCA 21 (no error). The Court is to enquire into all of the facts and circumstances, terms in which the SNPP has been mentioned, and whether the erroneous reference had any effect upon sentence. That effect does not have to be, but may be, a direct effect. The references may indicate it has been a significant guideline in determination of sentence. A less than direct effect would also be sufficient, as an indirect or oblique effect on the sentence would demonstrate material error: at [117].

In this case, the error did not have any effect on sentence: at [120]. The judge's reference was in passing, did not form part of the judge's reasoning when considering the facts, circumstances and matters, and he did not have any regard to it when reciting the basis upon which he was sentencing the appellant: at [118].

##### ***Standard non-parole periods do not apply to 'Attempts' – SNPP erroneously referred to***

**Potts** [2017] NSWCCA 10: The appellant was sentenced for attempting to commit an aggravated break, enter and steal. The CCA found the sentencing judge incorrectly held that a SNPP of 5 years applied when SNPPs do not apply to offences of attempt: at [36]. The Crown argued the error did not have any effect on the sentence ultimately imposed. In cases in which a sentencing judge has erroneously referred to a SNPP that did not apply, this Court has adopted a cautious approach by accepting that error has been established, and moving to re-sentence. Analysis of the judge's remarks and the stern sentence imposed suggests the SNPP may have played a role in the judge's instinctive synthesis leading to the ultimate sentence. The CCA allowed the appellant's sentence appeal. at [38]-[41].

##### ***Failure to properly assess objective seriousness – aggregate sentence - whether such assessment can be gleaned from remarks on sentence***

In **Kearslay** [2017] NSWCCA 28 the CCA allowed the appellant's appeal against his aggregate sentence. The judge failed to properly assess the objective seriousness of the offences. Neither offence attracted a SNPP so it was unnecessary to make a finding as to precisely where they lay on the spectrum of offending. However, a judge is still required to assess the objective gravity of each offence as an essential element of sentencing: *Dodd* (1991) 57 A Crim R 349; *Van Ryn* [2016] NSWCCA 1 at 129. The obligation applies when imposing an aggregate sentence. An erroneous approach in an indicated sentence for an individual offence may reveal error in the aggregate sentence: at [60]-[61]; *Brown* [2012] NSWCCA 199; s 53A(2)(b) *Crimes (Sentencing Procedure) Act 1999*. The CCA found no such assessment can be gleaned from the remarks on sentence. It remains critical that upon a fair reading of the remarks the relevant assessment is clear: at [63]; *Delaney* [2013] NSWCCA 150.

##### ***No requirement for sentencing judge rank objective seriousness on a scale***

In **Sharma** [2017] NSWCCA 58 the sentencing judge, in sentencing the applicant for sexual assault offences, found that the offences were "serious offences of their type." The CCA rejected the applicant's submission that the judge failed to properly assess objective seriousness of the offences.

There is no requirement to rank the objective seriousness of the offences on a scale; rather, the requirement is that a judge "identify fully the facts, matters and circumstances which the judge concludes bear upon the judgment that is reached about the appropriate sentence to be imposed" (*Muldrock* (2011) 244 CLR 120 at [29]). The High Court merely requires that there be such an assessment of objective seriousness and this is what the judge did: at [63]. The CCA said that whilst the judge's broad expression is not erroneous, the term "serious offences of their type" is open to the criticism that it is vague or imprecise. It is not inappropriate for judges to make an assessment of objective offending according to a scale of seriousness (*Aldous* (2012) 227 A Crim R 184 at [33]; *Koloamatangi* [2011] NSWCCA 288 at [18]-[19]). Whilst greater precision may be desirable, it is not essential: at [64].

### **Stated case – Good behaviour bonds**

In *DPP (NSW) v Jones* [2017] NSWCCA 164 the respondent appealed to the District Court against sentences imposed in the Local Court. The District Court judge allowed his sentence appeal and granted good behaviour bonds (s 9 *Crimes (Sentencing Procedure) Act* 1999 (CSPA)). The District Court judge imposed a bond condition stating: "... any breach of bond be reported to [the Judge] for further action". The respondent failed to comply with his bond. He was called upon by the Local Court where his bond was revoked and he was resentenced to imprisonment.

On a stated case by the District Court judge, the CCA answered:

- . The District Court has jurisdiction to determine that a sentence imposed in the Local Court was invalid and, if so held, to set it aside: s 17 *Crimes (Appeal and Review) Act* (CARA)
- . The direction given by the District Court judge - that any breach of bond be reported to him for further action - was not a condition of the bond. It did not deprive any other court or judicial officer of its statutory power to deal with the offender for failure to comply with bond conditions: at [9]-[10], [28].
- . The District Court does not have jurisdiction to impose a condition on a bond that any breach of the bond be reported to a particular judge: at [10], [28].
- . Where a bond is imposed by the District Court (sitting in appellate capacity on appeal from the Local Court), a Local Court has jurisdiction to call on an offender to appear before it. The Local Court may determine whether there has been a failure to comply with any condition of the bond: s 71 CARA; s 98(1)(b) CSPA. If so satisfied, the Local Court may revoke the bond (s 98(2)(c) CSPA) and resentence (s 99(1)(a)) or take such other steps as may be appropriate under s 98(2): at [28].
- . Where there is failure to comply with a bond condition due to committing further offences, the Local Court in sentencing for those further offences can deal with the failure to comply with the bond, despite the bond having been imposed in the District Court on a sentence severity appeal: at [26].

### **Motive – no evidence of motive – no error in considering applicant's dangerousness increased by inability to identify motive - whether inability to identify motive aggravated sentence imposed**

In *Cramp* [2017] NSWCCA 305 (murder) the applicant submitted the judge erred in considering dangerousness to be increased because motive could not be determined. The judge stated in his remarks: the "very inability to identify a motive ... increases rather than reduces .. dangerousness." The CCA held there was no error.

The applicant relied on *Louizos* (2009) 194 A Crim R 223 at [102] where the Court there said that, "If the Crown wishes to rely upon motive as an aggravating feature, the Crown must prove it beyond reasonable doubt. If the accused contends that the motive is a mitigating factor, the accused is required to prove it on the balance of probabilities. *If the court cannot determine what motivated the offender, it follows that it is not a factor that can be taken into account in determining the objective seriousness of the offence or in any other way relevant to sentencing.*" The CCA said that the final sentence of the passage from *Louizos* was not intended to be a general statement, for all cases, where no specific motive can be proved: at [25]-[27]. In *Louizos* the judge erred in converting the absence of "an aggravating factor into a mitigating factor": at [32].

Here, the judge was not able to determine whether objective gravity was aggravated or mitigated by motive. Where no motive could be positively established this void in the evidence nevertheless had an indirect relevance to sentencing. The judge's remark is no more than that the need to sentence on the basis of danger posed to the community was confirmed and the degree of risk against which the community was to be protected was heightened by the circumstance of no apparent motive: at [32].

### ***Principles in considering Life Sentence***

In considering a life sentence for murder, manslaughter and other related offences in **Qaumi** [2017] NSWSC 774 at [181]-[198] Hamill J rejected the established two stage approach to the application of s.61(1) *Crimes (Sentencing Procedure) Act* of first assessing the objective culpability of the offence, then considering the relevance and impact of subjective features applicable to the offender. 'The correct approach to s 61 is for the sentencing judge to consider all of the evidence relevant to the sentencing discretion, apply the relevant sentencing principles (common law and statute) and make an assessment of the extremity of the offender's culpability and the "community interest in retribution, punishment, community protection and deterrence." The sentencing Judge must consider whether the only way that the community interest so identified can be met is by the imposition of a life sentence. This is not a multi-stage process. Rather, it is an intuitive evaluation of the all of the material and principles and an application of the legislation providing for mandatory life sentences.' [194]

Hamill J also accepted that the criminal record of the offender and earlier offences cannot be used to determine the objective gravity of the offence but are relevant to assessing the "community interest" for the purpose of s 61 ... in particular (but not only) in terms of the community interest in "community protection". [197]

In this case the offenders were given a head sentence for murder of 45 and 38 years with total head sentences of 60 and 50 years.

## **PLEA OF GUILTY**

### ***Plea entered based on incorrect advice as to child's age***

**Jiminez [2017] NSWCCA 1:** The CCA allowed the appellant's appeal under s 79(1)(b) *Crimes (Appeal and Review) Act* 2001 and entered a verdict of acquittal. The appellant pleaded guilty to possess child abuse material under s 91H(2) *Crimes Act* NSW after being mistakenly advised the offence was committed if the images were of a child less than 18. An appeal against conviction to withdraw his appeal was dismissed in the District Court. The parties and the judicial officers in both Local and District Courts were under the mistaken belief that a "child" was a person under 18, when in fact for the purposes of s 91H(2) a "child" is a person under 16 (s 91FA). The *Criminal Code (Cth)* s 473.1 defines 'child' as a person under 18. The CCA held that the plea could be regarded an admission the child was under 16 (an essential ingredient of the offence) and cannot be attributable to a genuine consciousness of guilt: at [14].

## **DISCOUNTS**

***Assistance to authorities - s 23(1) Crimes (Sentencing Procedure) Act 1999 - "any other offence" – connection with subject offence required - s 23 confers a discretion, not an obligation, to grant discount***

Section 23(1) *Crimes (Sentencing Procedure) Act* 1999 states a discount can be granted for assistance for "... the offence concerned or any other offence." [Emphasis added].

In **XX** [2017] NSWCCA 90 the respondent was sentenced for sexual assault offences committed in 2013-2014. The judge allowed a 15% discount under s 23 for the applicant's assistance to authorities in 2006 in relation to a charge of conspiracy to murder, where the respondent gave evidence at the trial of the conspirators and received payment of \$17k.

The CCA found “any other offence” in s 23(1) clearly contemplates assistance in relation to an offence other than the offence for which the offender is to be sentenced: at [34]. Past assistance provided prior to the subject offence falls within the s 23(1): at [35]. However, the CCA held it was an error to allow the respondent the discount: at [63]. Section 23(1) confers a discretion, not an obligation, on a sentencing judge to grant a discount for assistance: [31]; *Williamson* [2015] NSWCCA 250 at [68]. Section 23(2) lists those factors which are relevant to an assessment of the level of discount but also to an assessment of whether any discount should be provided: at [61]. In this case, the sentencing judge failed to consider that the subject offences and the offence for which the respondent provided assistance were unrelated: at [48]-[49], [61]; s 23(2)(i); *Kelly* (1993) 30 NSWLR 64. The lack of any connection between the conspiracy to murder and the subject offences was significant to any consideration of whether to exercise the discretion in s 23(1): at [36].

### ***Plea of guilty - caution against using a range of percentages for discount***

In *Linggo* [2017] NSWCCA 67 the applicant pleaded guilty to Commonwealth offences. For the guilty plea, the sentencing judge allowed a discount in sentence of “between 4 per cent and 10 per cent”. The CCA strongly cautioned against using a range of percentages when determining the discount given for a plea of guilty. It is difficult to know how the discount of between 4 per cent and 10 per cent was actually applied and introduced an unsatisfactory degree of uncertainty into the sentencing process: at [51].

## **OFFENCES COMMITTED AS JUVENILE / CHILD**

### ***SNPP provisions – correctly applied to juvenile at original sentence – SNPP no longer applies to juveniles – SNPP does not apply on re-sentencing on appeal***

*DL (No 2)* [2017] NSWCCA 58: In 2008 the applicant, aged 16, was sentenced for murder. The sentencing judge correctly took into account the SNPP of 25 years that then applied. Legislative amendments subsequently removed the SNPP from applying to juveniles: s 54D(3) *Crimes (Sentencing Procedure) Act* 1999. The CCA said that on re-sentencing the SNPP has no application in determining the sentence to be imposed, because of the operation of s 54D(3), and the SNPP is to be disregarded completely (*MB* [2013] NSWCCA 254): at [5], [136].

### ***Sentencing adult offender for offences committed as a juvenile – children’s sentencing options can be taken into account***

A sentencing court, in dealing with an adult offender for an offence committed while they were a juvenile, can have regard to the sentencing regime available for juveniles had they been prosecuted earlier: *AA* [2017] NSWCCA 84. In *AA*, the respondent, aged 23, was sentenced for child sexual assault offences he had committed when he was 15 to 19 years old. The CCA rejected the Crown submission that the sentencing judge erred by having regard to the sentencing options under the *Children (Criminal Proceedings) Act* had the respondent been prosecuted as a juvenile: at [60]. It can be an error to fail to specifically address the statutory regime for the sentencing of children prevailing at the time the offence was committed: at [65]; citing *TC* [2016] NSWCCA 3 at [42]-[48]; *SHR v R* [2014] NSWCCA 94. The judge properly had regard to the children’s sentencing legislation as a matter in mitigation of sentence: at [66].

## **AGGRAVATING FACTORS**

### ***Abuse of position of trust - Indecent assault by registered health practitioner - s 21A(2)(k) Crimes (Sentencing Procedure) Act 1999***

In *Jung* [2017] NSWCCA 24 the applicant, a physiotherapist, was convicted of indecent assault offences (s 61L *Crimes Act*) committed against six female patients. The CCA found that the abuse of the trust of his patients was a significant aggravating factor under s 21A(2)(k): at [52]. Offences committed by a masseur against clients are also aggravated by the breach of trust inherent in that relationship (see *Qin* [2008] NSWCCA 189 at [36]). However, additional considerations apply where

the offender is a registered health practitioner who is authorised by the State to provide professional health services to the public. The clear distinction between a masseur and a registered physiotherapist must be kept in mind: at [60]-[62]. The gravity of offences is magnified by the breach of trust which the patient reposed in a medical practitioner. The extreme vulnerability of patients and taking advantage of that situation for self-gratification attracts general and personal deterrent elements: at [63]-[65]; *Arvind* (NSWCCA, 8 March 1996, unreported); *Reeves* [2013] NSWCCA 34 at [205].

### ***Abuse of position of trust - “special or peculiar relationship” of trust - s 21A(2)(k) Crimes (Sentencing Procedure) Act 1999***

In *Mol* [2017] NSWCCA 76 the applicant was convicted of sexual assault offences against three victims whom he recruited to work for him as artist’s models. The CCA held that the judge properly found the offences aggravated under s 21A(2)(k). The judge properly regarded the relationship between the applicant, who represented himself as a professional artist, and the complainants, who agreed to pose nude as models, as constituting a “special or peculiar relationship” of trust which the applicant breached: at [108]-[109]. Section 21A(2)(k) was not intended to extend the categories of what might constitute a breach of trust or authority in the commission of an offence at common law where the special relationship between an offender and a victim imposes mutual obligations not to act to the detriment of the other (see *Johnson* [2005] NSWCCA 186 at [21]). However, in a given case, the particular nature of the relationship may be such that the relationship transcends the duty of care that arises between people engaged in business or social communion, thereby imposing on them a particular responsibility not to act to the detriment of the other and an obligation the breach of which will operate as a statutory feature of aggravation (*Suleman* [2009] NSWCCA 70 at [22]): at [107].

### ***s 21A(2)(l) – security guard a vulnerable victim***

In *Longworth* [2017] NSWCCA 119 a security guard, who was physically assaulted by the applicant after refusing the applicant entry to licensed premises, was found to be “vulnerable” within s 21A(2)(l) based on occupation. The occupation examples in s 21A(2)(l) are not exhaustive. The examples are occupations where the worker is often isolated from others and sometimes in possession of significant amounts of money: at [17]. A security guard is often isolated, outnumbered or may encounter persons in groups, in a highly intoxicated and aggressive state. The risk of a security guard being subjected to aggression is significant and renders security personnel “vulnerable” in the relevant sense. It is not to the point that security guards may often be physically strong or trained in self-defence: at [17]-[20].

## **MITIGATING FACTORS**

### ***Duress***

In *Giang* [2017] NSWCCA 25 the CCA held that duress is not a purely subjective factor. There was no error in the judge factoring duress into the sentencing exercise at both the objective and subjective stages. The distinction between factors that are relevant to “the nature of the offending” (*Muldrock* (2011) 244 CLR 120) (objective factors) and those that are purely subjective to the offender is not always easy to draw. However, nothing in *Muldrock* confines duress as a purely subjective factor (*Tiknius* [2011] NSWCCA 215; (2011) 221 A Crim R 365 relating to the application of non-exculpatory duress to sentence continues to apply): at [33]-[34].

### ***Gambling addiction – fraud offences***

In *Johnston* [2017] NSWCCA 53 the CCA said that the principles set out in *Henry* (1999) 46 NSWLR 346 at [273] – regarding that an addiction to drugs or gambling is not of itself a mitigating circumstance - apply equally to cases of fraud to feed a gambling addiction: at [40]-[41]. The Court has consistently held that the fact that offences were committed to feed a gambling addiction will not generally be a mitigating factor. Although the gambling habit may explain the fall into serious criminal conduct, it is a rare case where the offender can seek mitigation of penalty based on an addiction to gambling even when pathological: at [36]. Gambling addiction will generally not reduce moral culpability where the offence is committed over an extended period, as the offender had a degree of

choice as to how they would finance their addiction. Where general deterrence is an important factor, it would be inappropriate to treat an underlying explanation that the motive was gambling as a mitigating circumstance or reducing moral culpability particularly where the frauds were perpetrated and skilfully executed over an extended period: at [37]-[38]; *Grossi* (2008) 183 A Crim R 15; [2008] VSCA 51.

### ***Ice Psychosis and Drug Addiction***

In ***Fang (No.4)*** [2017] NSWSC 323 Johnson J sentenced the offender for a murder committed during an ice induced psychosis. Johnson J applied s.21A(5AA) *Crimes (Sentencing Procedure) Act*, ignoring the self-induced intoxication as a mitigating factor but did accept that the fact the addiction was caused by family tragedy assisted the offender's subjective case. He also found the fact that the accused did not have prior knowledge that the ice would lead to an act of violence on his part was not a mitigating factor but the absence of a seriously aggravating factor

### **STATISTICS AND COMPARATIVE CASES**

***Statistics – no guidance regarding aggregate sentences – counsel to ensure limits of utility of statistics is understood - statistics can be very valuable tool - “Explaining the Statistics” document by the Judicial Commission***

***Why*** [2017] NSWCCA 101: A number of cases have found Judicial Commission statistics offer no guidance about the propriety of an aggregate sentence. The statistics only record the sentence imposed for one offence in a multi-offence sentencing exercise; that is, the “principal offence” – and no statistics are maintained of the overall or aggregate sentence imposed in such cases: at [33]-[34]; *Tweedie* [2015] NSWCCA 71 at [47]; *AG* [2016] NSWCCA 102. RA Hulme J made the following observations at [59]-[64]:

- . The statistics can be a very valuable tool if properly understood and used appropriately. If they are to be relied upon, counsel should ensure the limits of their utility are properly understood (*Knight* [2015] NSWCCA 222).
- . Practitioners should read the “Explaining the Statistics” document available on the Judicial Commission website before relying upon statistics in court.
- . The statistics provide an enhancement provided of published judgments available via hyperlink which give further information about individual cases making up the database. Another enhancement is the provision of statistics for “Aggregate/Effective” terms of sentence and non-parole periods, though there are limitations on the utility of these.

***NOTE:*** Following R A Hulme J's comments, the Judicial Commission's *Sentencing Bench Book* now states: “[10-025] *Necessity to refer to “Explaining the statistics” document* - Where JIRS statistics are used by either party it is essential that reference is also made to the “Explaining the statistics” document (found at the top of the Statistics page on JIRS). This document explains how JIRS statistics are compiled. RA Hulme J in *Why* [2017] NSWCCA 101 at [60]-[61], [64] emphasised the need for the parties to refer to the “Explaining the statistics” document on JIRS.”

***Statistics - “multiple offences” variable – mid-range point variable – both variables now removed from Judicial Commission statistics***

***NOTE:*** Following these two cases, the Judicial Commission has now removed the variables “Multiple offences”, the median and 80% range from the statistics viewer for the Higher Courts.

In ***Wright*** [2017] NSWCCA 102 the sentencing judge was left under the misapprehension that the “multiple offences” variable within the Judicial Commission statistics encompassed multiple offences of the *same* offence. In fact the “multiple offences” variable referred to “*any* additional offence” committed by the offender. This resulted in sentence that was manifestly inadequate, however, as his Honour's misapprehension was not corrected by the Crown, the CCA dismissed the Crown appeal: at [50]-[55].

In ***Harper*** [2017] NSWCCA 159 the applicant's counsel relied on the statistics to show the sentence imposed reflected a “middle of the road” result inconsistent with the sentencing judge's finding that the



objective seriousness of the offence was just below the middle of the range. Dismissing the appeal, the CCA said the problem with the applicant's submission is the premise the median in the statistics represents sentences imposed for middle of the range offences, or offences less serious where the subjective case is not as positive as the applicant's. Without knowing anything about the facts of the cases falling at or close to the median, the premise is not established: at [34]. Further, little can be discerned from statistics as to subjective cases: at [35].

### **Comparative cases**

In **To** [2017] NSWCCA 12 the CCA said that the Court has a specific duty to examine sentences in like cases in determining whether a lesser sentence is warranted in law. While caution is to be exercised, the Court is bound to have regard to the sentences passed in like cases, provided that true comparability can be shown, in order to achieve consistency (*Wong* at [6]), "equal justice" (*Green & Quinn* (2011) 244 CLR 462), and 'systematic fairness' and 'reasonable consistency' in sentencing (*Hili*): at [256]-[258].

That kind of general consistency is maintained by the decisions of intermediate courts of appeal: at [257]. There is also the positive purpose of the sentencing judge or intermediate Court of Appeal drawing upon the collective wisdom of other judges (*Hili* at [54]): at [260]. The purpose of comparison is to consider whether the sentence reflects "consistency in the application of the relevant legal principles". This does not merely involve checking the principles have been articulated. The level of penalty imposed must be explicable by reference to the principles applied to the specific facts of the case and must bear a reasonable proportion to levels of penalty in like cases where the same principles have been applied to materially comparable facts: at [259]. A conclusion as to whether the sentence is appropriate is not arrived at merely on the simplistic basis that other sentences passed under the same section have been lower: at [261].

## **PARTICULAR OFFENCES**

### ***Sexual assault – failure to make findings and give reasons in relation to consent***

In **Alcazar** [2017] NSWCCA 51 (Crown appeal) the respondent pleaded guilty to three offences of aggravated sexual intercourse without consent (s 61J(1) *Crimes Act*). The CCA found that the question of consent was in issue having been raised on sentence by the respondent. However, the judge erred in failing to explain not only how he resolved the question of consent but also to give reasons for the conclusions reached: at [45]-[46].

Evidence showed the respondent and two co-offenders assaulted the victim who was incapable of consent because of her intoxicated state, allowing them to take advantage without threats or significant violence: at [42], [55]; *Ali* [2010] NSWCCA 35. The victim tried to resist the assaults, consistent with her clothes being torn, and was drunk to the point of vomiting. The evidence established she did not "freely and voluntarily" agree to the assaults, then obviously not having the capacity to give such consent: *Crimes Act*, ss 61HA(2), (4)(a). The respondent's evidence on sentence was consistent with knowledge of the absence of consent. The judge should have found as such and would inevitably have concluded the offences were more serious and the respondent's moral culpability was greater: at [58]-[70].

### ***Sexual assault – young age of offender – relevance in assessing objective seriousness***

In **AA** [2017] NSWCCA 84 the respondent (aged 23) was sentenced for child sexual assault offences committed when he was aged 15 - 19 years old. On appeal by the Crown, the Crown submitted the judge incorrectly took into account the respondent's youth in assessing objective seriousness, when it was relevant to the assessment of the offender's "moral culpability": at [53]; *Muldock* (2011) 244 CLR 120; *KT* [2008] NSWCCA 51 at [22]-[25]. The CCA rejected the Crown's submission. In the context of a sexual offence some aspects of an offender's personal circumstances may bear upon the "nature of the offending" (*Muldock* at [27]). For example, the age difference between a victim and perpetrator can affect assessment of the objective seriousness. Additionally, the age of the perpetrator can be relevant to an explanation of the context in which the offending occurred. In this case, the respondent

was in his late teens. He had not assumed responsibility for the care of the two child victims. It is likely the victims could distinguish between him and an adult. This does not deny or mitigate the seriousness of the offence. However, at least in the present case, the judge did not err by referring to the age of the respondent and his victims in assessing objective seriousness: at [55].

### ***Sexual assault – short duration of offence***

In **AA** [2017] NSWCCA 84 the offender committed sexual offences against the child victims when other people, including the respondent's mother, were in the home. On the Crown appeal, the Crown submitted the judge erred in referring to the "relatively short duration" of the offending as the agreed facts did not "suggest any particular time period". The CCA rejected the Crown's submission. While the short duration of a sexual assault "would not ordinarily be considered as a factor which reduces the objective seriousness" of such an offence (*Daley* [2010] NSWCCA 223 at [48]; *Cowling* [2015] NSWCCA 213) it was open to the judge to have some regard to it (see *Russell* [2010] NSWCCA 248 at [61]): at [56]. The description of the events and the context in which they occurred, namely while the children were in the care of the respondent's mother, enabled the judge to make the finding he did: at [56].

## **2. NSW CCA CONVICTION APPEAL AND OTHER CASES 2017**

### ***s. 18 Evidence Act 1995 – compellability of parent to give evidence – compliance with s 18(4)***

Section 18(4) states: "If it appears to the court that a person may have a right to make an objection under this section, the court is to satisfy itself that the person is aware of the effect of this section as it may apply to the person."

In **Decision Restricted** [2017] NSWCCA 93 witness T was subpoenaed by the Crown to give evidence against his daughter, the applicant, being tried for drug offences. T objected to giving evidence under s 18(2) *Evidence Act*. Both the applicant and T appealed against the trial judge's ruling that T was required to give evidence. The CCA allowed (by majority) the appeals and remitted the matter to the District Court. The judge failed to comply with the requirements under s 18(4). The trial judge had to be satisfied T was "aware of the effect of [the] section" as it applied to T. To be "aware of the effect" of the section the prospective witness needs to be aware not only of his/her right to object but also that:

- (1) the court will decide whether or not the objection should be overruled and the person required to give evidence;
- (2) the decision will be based upon the court's findings as to matters under s 18(6), of which the judge should apprise the witness.
- (3) in making its decision the court will take into account the five matters referred to s 18(7), of which the judge should apprise the witness: at [26]-[27].

The witness will thus know to what issues his/her evidence and submissions should be directed in persuading the court of the force of the objection to giving evidence: at [28].

In this case, s 18(4) was not complied with. The judge simply asked T (not counsel) whether T had spoken to the lawyers (the representatives of the Crown and the accused). The judge did not ask T what explanation, if any, T had been given about the effect of the section. This course was not capable of satisfying the judge that T was "aware of the effect" of the section: at [29]-[30].

A s 18 determination is "interlocutory" in nature and thus can be appealed from pursuant to s 5F *Criminal Appeal Act*: ss 5F(2), (3): at [12]-[14]. T also had standing to appeal. A person who participates in a hearing, in a manner analogous to that of a formally recorded party (for example, by leading evidence or making submissions) is a "party" for the purposes of an appeal provision such as s 5F(3) if the person is directly affected by orders made. This conclusion is appropriate even if the person is not formally recorded as a party: at [20].

### **s 79 Evidence Act 1995 – Voice identification by police officer of telephone intercepts**

In **Nguyen** [2017] NSWCCA 4 (drug supply) a police officer gave evidence at trial that the female voice on police telephone intercepts was the applicant. The officer had listened repeatedly to a large number of intercepts as well as the applicant's record of interview. The applicant submitted the officer's evidence was not admissible under s 79 *Evidence Act 1995*.

Refusing leave to appeal, the CCA (by majority) held the evidence was admissible under s 79: at [105]-[106]. There was a total of 44,523 "mobile products" (voice calls, text messages and mobile internet data). The officer estimated he monitored 70 per cent of all intercepted products, listening to calls a number of times; stopping, starting and restarting to listen again: at [85]-[86]. The officer identified the applicant's voice by reference to three matters: the way in which the person spoke; voice characteristics; and common references (or phrases): at [90]. Two of the three bases upon which the officer made his identification of the applicant's voice were readily capable of being drawn to the jury's attention and for them to make their own assessment. But the officer relied upon the overall sound of the voice as well as the attributes he was able to articulate. The amount of time he invested in repeatedly listening to the calls and the applicant's police interview is something that would have been impractical for the jury to replicate. The evidence was relevant for this reason: at [91].

The concept of an ad hoc expert, who can be called to give opinion evidence such as that sought to be called from the officer, has long been recognised: at [103]; *Butera* (1987) 164 CLR 180; *Leung & Wong* (1999) 47 NSWLR 405 at [40].

### **Relationship Between s.110 and s.97 / 101(2) provisions of the Evidence Act**

In **Clegg** [2017] NSWCCA 125 the appellant was charged with child sexual assault offences against two complainants. The appellant sought to lead evidence of good character from five witnesses. The trial judge ruled if such evidence led Crown would be permitted to lead evidence from third complainant. Trial judge had earlier ruled under tendency provisions trial for third complainant should be held separately as contained allegations of violence and brutality not present in allegations of other two complainants. Issue on appeal was whether it was unfair to permit the Crown to lead evidence from third complainant where separate trials had been ordered.

Court help the decision to allow evidence in rebuttal of good character evidence is different to the decision to permit or exclude evidence under tendency provisions. Evidence excluded under ss.97 and 101 may re-enter under character provisions. In this case there was no error in ruling evidence of third complainant could have been led in rebuttal.

### **s 165B Evidence Act 1995 - delay - forensic disadvantage direction - trial judge may give forensic disadvantage direction on own volition**

Section 165B *Evidence Act 1995* states, inter alia:

#### **"Delay in prosecution**

.....

(2) If the court, on application by a party, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence. ..."

In **TO** [2017] NSWCCA 12 at [167] the CCA summarised the effect of s 165B *Evidence Act* as follows:

1. The duty on the judge to give a direction in accordance with subsection (2) arises only on application by a party and what is said to be the particular significant forensic disadvantage must form part of the application: *Groundstroem v R* [2013] NSWCCA 237 at [56].
2. Subsection (5) prohibits the judge from directing the jury "about any forensic disadvantage the defendant may have suffered because of delay" otherwise than in accordance with the section: *Jarrett v R* (2014) 86 NSWLR 623; [2014] NSWCCA 140 at [53] ("*Jarrett*").

3. There is a duty to inform the jury of the nature of the disadvantage and the need to take that disadvantage into account when considering the evidence, only when the judge is satisfied that the defendant has “suffered a significant forensic disadvantage because of the consequences of delay”: *Jarrett* at [53].
4. Subsection (3) provides a rider to the obligation to inform where the judge is satisfied there are “good reasons” for not taking that step: *Jarrett* at [53].
5. Subsection (4) prohibits the judge from suggesting that it would be dangerous or unsafe to convict the defendant “solely because of” the delay or the disadvantage. Otherwise, no particular form of words need be used: *Jarrett* at [53].
6. Whether there has been a significant forensic disadvantage depends on the nature of the complaint and the extent of the delay in the circumstances of the case. The extent of delay is not the test. It is the consequence of delay which is decisive: *Groundstroem* at [61]. The proper focus of s 165B is on the disadvantage to the accused: *Jarrett* at [60].
7. The concept of delay is relative and judgmental. Although various factors may contribute to a delay, where a significant element is misconduct on the part of the accused, any resultant forensic disadvantage may not be characterised as a consequence of delay or, in the alternative, may provide a good reason for a judge not to give a direction, pursuant to the exception in s 165B(3): *Jarrett* at [61]–[62].
8. If the accused is put on notice of the complaint, any failure to make inquiry thereafter will not normally constitute a consequence of the delay, but a consequence of the accused’s own inaction: *Jarrett* at [63].

A trial judge may, even absent an application from the defendant, give a forensic disadvantage direction, although, if given, the direction must comply with s 165B(4). The duty of a trial judge to give any warning to avoid a perceptible risk of a miscarriage of justice is unfettered: at [176]–[178]; *Greensill* (2012) 37 VR 257; [2012] VSCA 306.

In this case, the CCA dismissed the applicant’s appeal. The trial judge was not prevented from giving a forensic disadvantage direction even though defence counsel did not ask the judge for such a direction. However, in the circumstances of the case such a direction was not necessary to avoid a perceptible risk of a miscarriage of justice: at [183].

The appellant, convicted of child sexual assault, had submitted forensic disadvantage arose from there being no statement being taken for one and half years from his son OJ who was present when the offences were committed. However, defence counsel had relied on OJ’s evidence and the complainant had not complained due to being scared by threats made by the appellant. Any forensic disadvantage was thus not due to delay in complaint: at [183].

***Directions - child sexual assault – warnings – s 165 Evidence Act – Murray direction – discretion to decline to give warning***

In *AL* [2017] NSWCCA 34 the applicant was convicted of child sexual assault offences. The applicant submitted the judge failed to give a “*Murray* direction” (where there is only one witness asserting the commission of a crime, the evidence of that witness must be “scrutinised with great care” before it is accepted a verdict of guilty could be returned: *Murray* (1987) 11 NSWLR 12). Further, the judge failed to give a direction pursuant to s 165 *Evidence Act* 1995 (NSW): at [48]–[49].

The CCA dismissed the appeal. The judge did not err in not giving a *Murray* direction or s 165 warning: at [90]. The CCA noted the various provisions that operate to restrict the scope of the common law warnings formerly given with respect to the evidence of a complainant in a sexual assault case:-

- s 164 *Evidence Act* 1995 (removed the requirement for a trial judge to warn a jury that it was “dangerous to act on uncorroborated evidence”);
- s 165 (a power to warn a jury about “evidence of a kind that may be unreliable”);
- s 165(6) (prohibits a warning being given to a jury as to the unreliability of a child’s evidence based upon the age of the child);
- s 165A (Warnings in relation to children’s evidence);

s 294AA *Criminal Procedure Act 1986* (judge must not warn or make suggestion that complainants as a class are unreliable witnesses; prohibits a warning of danger of convicting on uncorroborated evidence of complainant): at [67]-[75].

The CCA stated that a direction, cautioning the jury about the possible unreliability of the evidence of a child complainant, can only focus on matters relevant to the particular child in the particular circumstances of the case – and not upon the mere fact the witness is a child, or an inherent feature of children. This approach contravenes s 165A *Evidence Act* and s 294AA *Criminal Procedure Act*: at [77]-[78]; *Ewen* [2015] NSWCCA 117; (2015) 250 A Crim R 544.

Section 165 refers to “evidence of a kind that may be unreliable”. Arguably, much of the evidence given by lay witnesses could be challenged as unreliable. However, where statutory amendment suggests a desire to limit rather than enlarge jury warnings, it cannot have been the intent of the legislature to engage s 165 in every case where an assertion of unreliability is made: at [79]. Section 165(3) *Evidence Act* and s 294AA *Criminal Procedure Act* provide statutory limits upon s 165 warnings: at [80].

It is within the judge’s discretion to decline to give a warning for matters evident to jury which the jury can assess without assistance: at [81]. There is also the principle that warnings are required where there is some danger which would not be appreciable to a jury, but which would be perceived by the court of which the trial judge was conscious: at [80]-[82]; *GW* [2016] HCA 6; *Tully* (2006) 230 CLR 234 at [178]. The judge’s decision to decline to give a s 165 warning or *Murray* direction were made in the exercise of his discretion. Section 165(3) retains a discretion as to whether or not to give the statutory warning; whether a *Murray* direction is given is a matter for the discretion of the trial judge: at [85]-[86]; *SKA* [2012] NSWCCA 205 at [254].

#### ***Jury - jury permitted by judge to formulate questions for witnesses – miscarriage of justice***

In *Tootle* [2017] NSWCCA 103 the CCA held there was a miscarriage of justice resulting from the trial judge advising the jury they were entitled to formulate questions to be asked of witnesses.

The process involved the jury submitting questions in writing to the judge who discussed the questions with counsel; evidence of the witness taken on the voir dire; trial judge ruling as to admissibility; and permitted questions then asked of the witness by the Crown prosecutor.

Any practice of a trial judge allowing a juror directly to question witnesses has long been frowned upon by this Court (*Pathare* [1981] 1 NSWLR 124). The question is whether the indirect process by the judge avoided that which renders direct questioning of witnesses impermissible: at [47]-[52].

The role of the jury is that of impartial arbiter as to the facts and final determination of guilt; the jury does not have any investigative or inquisitorial role: at [42]. Only the parties and their legal representatives have a complete overview of the evidence to be called. Neither judge nor jury is privy to the case as a whole. The structure of the trial is undermined if the jury is permitted to take on an inquisitorial role, and steer the trial in a direction different from that laid out by the prosecution, and known to the defence: at [44].

The process crossed the boundary to the point that the very nature of the trial was altered in a fundamental respect (*Lee* (2014) 253 CLR 455). It was not a trial according to law, constituting a miscarriage of justice: at [62].

The CCA noted that at the commencement of a trial, and usually after the jury is empanelled, it is customary for the trial judge to give general directions concerning procedure, evidence, and role of the various participants. Some judges include a caution to the effect that the jury can expect evidence to unfold gradually and to withhold judgment until the evidence is complete. Such a direction is a wise and fair precaution. It is often reinforced at the close of the Crown case, especially if known the accused will go into evidence. It may be given again at the end of the Crown’s address, if there is to be a break before defence address commences: at [58]. The CCA quashed the appellant’s convictions and ordered a new trial.

***Manslaughter – Crown relied on two separate acts as constituting voluntary act causing death - jury must be unanimous as to the voluntary act or acts***

In **Lane** [2017] NSWCCA 46 the appellant was found not guilty of murder but guilty of manslaughter. Evidence showed the deceased fell striking his head on the ground on two occasions, and that the head injuries in each fall were separately sufficient to cause death which occurred nine days later. The Crown alleged the first fall was caused by contact between the appellant and the deceased, and the second fall was the result of the appellant punching the deceased. The appellant's case was that the jury could not be satisfied that either fall was caused by a voluntary act on his part.

The CCA held that the judge erred in failing to direct the jury that they could not convict unless unanimous as to the voluntary act or acts. The Crown relied on two discrete acts said to have been deliberate and to have caused death. Each may have been sufficient to establish murder or manslaughter and thus was an alternative factual basis of liability. In such circumstances the jury could not convict of murder or manslaughter unless they were agreed as to whether one or both of those acts was a criminal act of the appellant. In the absence of any direction to that effect it remained possible some jurors might reason to a verdict of guilty of murder or manslaughter by being satisfied the appellant's voluntary act caused the first fall, while others might reason to the same conclusion by reference to his voluntary act having caused the second fall. That possibility was not excluded by the trial judge's general direction as to unanimity which accommodates only the circumstance that the same facts may support alternative legal bases of guilt: at [42]-[44]. However, the CCA applied the proviso and dismissed the appeal: at [61].

***Juror alleged bullying and did not return to court – remaining jurors asked to self-assess whether they could properly perform duty – whether judge should have made full investigation of juror allegation - no miscarriage***

In **Bahrami** [2017] NSWCCA 8, a juror, towards the end of the trial, sent a note to the judge stating: "Am unwell/stressed extreme –... Being mistreated by another juror (bullying)". The juror did not return for service the following day. The judge discharged the juror, asked the other jurors whether they could continue to discharge their duties and continued the trial. The CCA dismissed the appellant's appeal.

The judge had asked each juror if they could continue to discharge their duty: at [41]. This Court has implicitly endorsed the approach taken by the trial judge of seeking a self-assessment by jurors of their ability to discharge their duty in accordance with their oath or affirmation: at [77]-[78]; *Elomar* [2014] NSWCCA 303; *Spiliotis* [2016] SASCFC 6 referred to.

The appellant submitted the juror's note created reasonable grounds for suspecting a juror had exercised unlawful intimidation - "a serious breach of the presuppositions of the trial" (*Smith v State of Western Australia* at [54]). The CCA said the note did not positively assert bullying in the sense of an attempt to intimidate or coerce the juror in relation to an issue concerning the trial: at [59]-[62].

The appellant submitted the judge should have sought an investigation by the Sheriff as to whether improper pressure had been applied to the juror. The CCA said a request to the Sheriff pursuant to s 73A *Jury Act* 1977 to carry out an investigation could have been made if there was "reason ... to suspect that the verdict of ... may be ... affected because of improper conduct by a member or members of the jury". However, trial counsel retreated from such a suggestion. The judge took the more expeditious action available. Efforts were made to contact the juror and the option of further delaying the trial while such attempts continued had to be balanced against other considerations (*Wu* (1999) 199 CLR 99 at [18]): at [67]-[71].

***Plea of guilty to deemed supply prohibited drug - imprudent legal advice given to applicant - real question concerning Applicant's guilt – retrial ordered***

In **Ritchie** [2017] NSWCCA 21 the applicant, on the advice of his solicitor, pleaded guilty to deemed supply of prohibited drug (s 29 *Drug Misuse and Trafficking Act* 1985). The applicant had informed his solicitor he possessed the drugs for his own use, not for the purpose of supply. There was evidence of drug addiction: at [18]; [30]-[31]. The CCA (with concurrence by the Crown) found a

miscarriage of justice will occur if the applicant is not permitted to withdraw his plea: at [30]-[32]. There is ample evidence to support the applicant: (1) the advice given to the applicant was imprudent and inappropriate; (2) the applicant's plea was not attributable to a consciousness of guilt; and (3) the material shows there is a real question concerning the applicant's guilt: at [33]; applying *Wilkes* [2001] NSWCCA 97; 122 A Crim R 310.

### ***Costs in Criminal trials – child sexual offences***

**Cox (No.2)** [2017] NSWCCA 129 where costs sought in child sexual assault offence - decision that it would have been unreasonable to prosecute if in possession of all the facts based on weaknesses in complainant's evidence – do not have to conclude complainant being deliberately untruthful – sufficient to be 'very substantially lacking in credit'

### ***Ice Psychosis and Drug Addiction***

In **Fang (No.3)** [2017] NSWSC 28 Johnson J considered the authorities and declined to leave psychosis from ice use as mental illness

## **PARTICULAR OFFENCES**

### ***Drugs – “prohibited drug” – “substance”***

In **Woods** [2017] NSWCCA 5 the CCA quashed the applicant's conviction for supply prohibited drug, namely, dextromethorphan. The CCA held that dextromethorphan was not a “prohibited drug”.

Section 3 of the *Drug Misuse and Trafficking Act 1985* defines “prohibited drug” as “any substance... specified in Schedule 1”. “Substance” is defined as including “preparation and admixture and all salts, isomers, esters or ethers of any substance and all salts of those isomers, esters and ethers”. Dextromethorphan is an isomer of two other drugs but not a structural isomer of either: at [18]-[20], [25]. The CCA found that dextromethorphan is not a prohibited drug for the purposes of the *DMT Act* for the following reasons (at [21]):

- . A prohibited drug is defined in s 3 as any *substance* specified in Schedule 1.
- . Schedule 1 is augmented by the so-called ‘analogue provisions’ at the end of the schedule which deem analogues, structural isomers (as opposed to isomers- simpliciter) and structurally modified substances to be included in the schedule and hence to fit the description of ‘prohibited drug’ in s 3.
- . The s 3 definition of ‘prohibited drug’ commences with the words “prohibited drug *means*...”
- . The s 3 definition of ‘substance’ commences with the words “substance *includes*...” The matters included in a “substance” are ‘preparation and ‘admixture’ AND all salts, isomers, esters or ethers of any substance AND all salts of those isomers, esters and ethers.
- . The definition of ‘prohibited drug’ refers to ‘any substance.’ Accordingly, the definition of ‘prohibited drug’ should be read together with the definition of ‘substance.’
- . On this construction, the definition of ‘substance’ does no more than expand upon and explain the use of the word ‘substance’ in the definition of ‘prohibited drug’.

The s 3 definition of “substance” is not intended as a “catch all” for those substances which do not appear in either the Schedule or in the analogue provisions, given the words “specified in Schedule 1” appearing in the definition of “prohibited drug”: at [22].

### ***Intimidation – offence of specific intent***

**McIlwraith** [2017] NSWCCA 17 held the offence of intimidation is one of “specific intent” under s 428B *Crimes Act 1900*. Thus an offender's intoxication is relevant to criminal liability for the offence of intimidation. The applicant had been convicted under s 112(2) *Crimes Act 1900* of an offence of aggravated break, enter and commit serious indictable offence (s 112(2) *Crimes Act*). The serious indictable offence was intimidation under s 13(1) *Crimes (Domestic and Personal Violence) Act*. The judge erred in finding the s 112(2) offence was not an offence of specific intent: at [28].