APPELLATE CASES

A selection of recent cases from the High Court and Court of Criminal Appeal

REASONABLE CAUSE CONFERENCE – 30 MARCH 2019

ANDREW WONG – Barrister (Forbes Chambers)

1) **Admissions**
   Flood-Smith v R [2018] NSWCCA 103

2) **Bail**
   Moukhallaletti v DPP (NSW) [2016] NSWCCA 314 (recently published)
   Barr (A Pseudonym) v DPP(NSW) [2018] NSWCA 47
   Noufl v DPP(NSW) [2018] NSWSC 1238
   Anae v R [2018] NSWCCA 73

3) **Child Pornography**
   Innes v R [2018] NSWCCA

4) **Context Evidence**
   CA v R [2017] NSWCCA 324

5) **Directions**
   Llewellyn v R [2011] NSWCCA 66 (recently published)

6) **Discretionary Exclusion**
   DPP (NSW) v GW [2018] NSWSC 50
   DPP (NSW) v Owen [2017] NSWSC 155

7) **Drugs**
   Nguyen v R [2018] NSWCCA 176
   R v Busby [2018] NSWCCA 136

8) **Evidence (DVEC)**
   DPP (NSW) v Al-Zuhairi [2018] NSWCCA 151

9) **Expert Evidence**
   Chen v R [2018] NSWCCA 106

10) **Firearms**
    Baxter v R [2018] NSWCCA 281

11) **Guilty Pleas**
    Gordon v R [2018] NSWCCA 54
    Jinde Huang aka Wei Liu v R [2018] NSWCCA 70

12) Legal Representation
Mendoza v R [2018] NSWCCA 257

13) Procedure
Elzahed v State of NSW [2018] NSWCA 103
Commissioner of Corrective Services v Liristis [2018] NSWCA 143

14) Unfavourable witnesses
Odisho v R [2018] NSWCCA 19

15) Tendency Evidence
The Queen v Bauer (a pseudonym) [2018] HCA 40
McPhillamy v The Queen [2018] HCA 52
R v AC [2018] NSWCCA 130
R v Chase (a pseudonym) [2018] NSWCCA 71

Admissions

Flood-Smith v R [2018] NSWCCA 103

The applicant was found guilty of an offence of recklessly causing grievous bodily harm to her young daughter.

The Crown case was circumstantial in nature and relied on:

a) medical evidence excluding the reasonable possibility of an accidental fall having caused the injuries, namely, jaw fractures, bruising on both sides of the face, a pelvic fracture and trauma to the liver and pancreas.

b) The opportunity for the applicant to have caused the injuries undetected.

c) The implausibility of another person having assaulted the child.

d) The applicant's conduct after the injuries were sustained including admissions she made to other members of the household.

The applicant's case was that the Crown could not exclude the reasonable possibility the injuries were sustained by way of an accidental fall from a bunk bed or that another unknown person had assaulted the child.

The applicant on appeal argued that

a) the trial judge erred by failing to exclude admissions which were ambiguous or equivocal in nature,

   or in the alternative

b) the trial judge failed to direct the jury that they could not act on any admission unless they were satisfied that the words were intended to be an admission of guilt and had no innocent meaning.

The admissions relied on by the Crown included the applicant telling others after the child was injured:

a) "I didn't mean for none of this to happen".
b) "I don't know what happened, I don't know what I've done".
c) "I don't know what I've done".

The admissions were not objected to at trial and the fact they were made was not disputed.

The applicant referred to the cases of *Burns v R* [1975] HCA 21 and *R v Buckley* [2004] 10 VR 215 as authority that before a jury could use an admissions they had to be satisfied the statement constituted a truthful representation of involvement in the crime and were intended as an admission of guilt. In the present case it was argued the admissions were ambiguous and should have been excluded.

Hoeben CJ at CL (Walton and Button JJ agreeing) dismissed the appeal:

a) Defence counsel at trial made no objection to the admissions, nor were further directions sought. This suggested counsel did not consider any unfairness was occasioned by the use of the admissions [108] – [109].

b) The absence of any objection being taken to the admissions meant r 4 of the Criminal Appeal Rules applied and no proper basis had been identified as to why r 4 would not apply [116] and [123].

c) As far as admissibility is concerned, the *Evidence Act* provides a Code that one must look to when considering issues of admissibility and the common law before the Act's enactment is of little value except insofar as it assists in interpreting the words of the statute [110].

d) The admissions were not made in circumstances that made it unfair to use them in evidence and there was no evidence adduced to show the admissions should have been excluded under s 90 [112].

e) The fact that the evidence is capable of bearing another interpretation does not amount to unfair prejudice under s 137 [114]. Reference was made to the case of *R v SJRC* [2007] NSWCCA 142 where James J (Rothman and Harrison JJ agreeing) said:
"[38] "It not infrequently happens that evidence sought to be relied on by the Crown in a criminal trial is open to more than one interpretation or is capable of giving rise to more than one inference. However, provided that the evidence is capable of bearing the interpretation or of giving rise to the inference contended for by the Crown, the fact that defence can suggest some other interpretation or inference which would be consistent with innocence of the accused does not, of itself, show that any probative value the evidence has is outweighed by the danger of unfair prejudice."

Bail

Moukhallaletti v DPP (NSW) [2016] NSWCCA 314

The applicant was refused bail in the Supreme Court by a single judge and made a further release application to the NSWCCA.

There was no dispute the application was to be determined *de novo*.

The applicant faced two sets of public justice offences involving amongst others, an allegation of intentionally fabricating false evidence with intent to mislead a judicial tribunal in a judicial proceeding and falsifying the statement of a witness knowing it was or may be required as evidence in a judicial proceeding.

The second set of offences allegedly occurred while on bail for the first set of offences.

The applicant was required to show cause as to why her detention was not justified. Reliance was placed on the following factors to show cause:

a) The applicant had 3 children aged 4 to 14 who were disadvantaged by her incarceration as her husband was also in custody. The 14 year old had serious behavioural issues and was medicated and seeing a psychologist and the present carer of the children had serious health problems including Parkinson's disease.

b) The applicant if not released would lose her job where she had been employed since 1999.

c) The applicant was 36 years old and had no criminal record and very strong community ties.

d) There would be a delay in the resolution of the matters given the second set of matters would proceed in the District Court

Button J (Gleeson JA and Rothman J agreeing) at [50] – [56] considered that the following basic principles applied to a determination of whether cause has been shown:

a) The question of show cause is separate from the question of whether there would be an unacceptable risk (see *DPP (NSW) v Tikomaimaleya* [2015] NSWCCA 83 at [25).

b) Parliament has not enumerated the facts that any show cause

c) There will often be a substantial overlap between the factors that may go to whether cause has been shown and the factors that inform whether an unacceptable risk exists.

d) Cause may be shown by a single powerful factor or a powerful combination of factors (see *R v S* [2017] NSWCCA 189 at [63]).

e) It is not incumbent upon an applicant to show special or exceptional circumstances.

f) There are countless examples of single judges of the Supreme Court finding an applicant has shown cause or failed to do so. Unless those cases contain a discussion of legal principles they will have little or no precedential value (see *DPP (NSW) v Zaiter* [2016] NSWCCA 247 at [30] to [33]).

Button J (Gleeson JA and Rothman J agreeing) found that cause had not been shown:

a) There was a strong Crown case that while on bail for public justice offences the applicant committed the same kind of offence [58].

b) There were significant assets and vast sums of cash available to the applicant's husband [60].

c) While the children were suffering, this is regrettably the case whenever a parent is incarcerated and the children were not left bereft, having the benefit of the care of two adults [63].

d) There was no evidence to confirm the applicant would lose her job [64].

e) The delay was not of such a nature to conclude that the applicant had shown cause [66].

Barr (A Pseudonym) v DPP(NSW) [2018] NSWCA 47

The applicant was charged with historical sexual offences against a young boy. On the day of his trial in the District Court, he pleaded guilty to six "show cause" offences.

The Crown then made an oral detention application under s 50 of the *Bail Act 2013*. The primary judge heard the application about one hour later.

The applicant sought judicial review on the basis that there was a failure on the part of the trial judge to comply with s 50(5) of the *Bail Act 2013*:

50(5) A court or authorised justice is not to hear a detention application unless satisfied that the accused person has been given reasonable notice of the application by the prosecutor, subject to the regulations.

Leeming JA (N Adams J agreeing; McCallum J dissenting) dismissed the summons and held:

a) The court would not exercise the discretionary power to grant relief for jurisdictional error where a more efficient and convenient remedy existed. In the present case a more efficient and convenient remedy existed in the form of a de novo bail application made in the Supreme Court [66] – [67].

b) The question posed by s 50(5) of the *Bail Act 2013* is not whether the accused person has been given reasonable notice, but whether the court is satisfied that such notice has been given. The applicant failed to identify a basis upon which the court could infer that the primary judge was not satisfied that the accused had been given reasonable notice. The applicant faced a heavy burden in circumstances where the applicant was represented by experienced counsel briefed in the trial that was due to commence that day.

McCallum J dissented and was of the view that the primary judge could not have been satisfied that reasonable notice had been given:

a) The detention application was made orally following a lengthy period where bail on lenient conditions had not been opposed [118].

b) The detention application took the applicant by surprise and he was caught without medical evidence to support the medical grounds relied upon to show cause [118].

Noufl v DPP(NSW) [2018] NSWSC 1238

The applicant was sentenced in the District Court for two offences of drug supply. The applicant filed a notice of intention to appeal in the NSWCCA against the sentence imposed and then filed a release application in the Supreme Court pursuant to s 22 of the *Bail Act 2013*.

Hamill J held that the Supreme Court did not have jurisdiction to hear the release application and found that the inherent jurisdiction of the court recognised by s 23 of the *Supreme Court Act* could not overcome the clear terms of the *Bail Act 2013* [55].

Hamill J concluded that an unintended consequence of the Bail Act 2013 is that a single judge of the Supreme Court is not empowered to hear a bail application while an appeal is pending in the NSWCCA unless:

a) The proceedings for the offence were dealt with in the Supreme Court and the applicant is yet to make their first appearance before the NSWCCA (s62); or

b) A release application has been refused by another court, police or authorised officer (s66).

Anae v R [2018] NSWCCA 73

The applicant pleaded guilty to an offence of recklessly causing grievous bodily harm (s35(2) *Crimes Act 1900*).

During the sentence proceedings after defence had tendered material relied upon, the sentencing judge made a decision to revoke bail immediately without hearing from the parties and stated that there was no appropriate sentence other than full-time custody.

Price J (Hoeben CJ at CL and Johnson J agreeing) stated that a judge is not prevented from forming a preliminary view of the appropriate sentence to be imposed and while efficiency is a laudable object, "*the principles of impartiality and procedural fairness require a judge to give some time to an offender's arguments which are to be listened to with an unfixed mind*" [51].

Price J concluded that the revocation of bail without hearing from the parties was such that a fair minded lay observer might reasonably apprehend that the judge, who had determined that full-time imprisonment was appropriate and

bail was to be revoked without hearing from the applicant's solicitor, might not bring an impartial and unprejudiced mind to the sentencing task [53].

While Price J upheld the ground of appeal relying upon an apprehension of bias, the appeal was ultimately dismissed on the basis that no lesser sentence was warranted in law.

Child Pornography

Innes v R [2018] NSWCCA

The appellant was convicted of three offences of using a carriage service to transmit child pornography (s 474.19(1) of the *Criminal Code (Cth)*).

The appellant accepted that he was guilty of three alternative offences of using a carriage service in such a way that a reasonable person would regard that use as being menacing, harassing or offensive (s 474. 17(1) of the *Criminal Code (Cth)*).

The appeal against conviction was that the material transmitted could not constitute child pornography.

The facts involved the appellant making contact with a person he believed was a single mother named "CEIU 16". CEIU16 was in fact a police officer. CEU16 revealed to the appellant that she had an 11 year old daughter.

Through online chats between the appellant and CEIU16 the appellant expressed a desire to have an intimate sexual relationship with both mother and daughter. In several of the online chats the appellant described the sexual activities he wanted to engage in with both mother and daughter when they finally met.

The chats constituting the charges included the appellant stating to CEIU16:

a) "as she is 11 I would like to start playing with her as soon as I could…leading to full penetrative sex…from then on it would be about pushing her boundaries…with sex acts and other kinks".

b) that he wished to engage in sexual acts with CEIU16 while her daughter watched.

c) "I think about being with her and you as a threesome…I'd love her and you kissing and touching…and I join you…Mum teaching her and showing her how".

The Crown at trial submitted that the online chats constituted child pornography which included under s 473.1(c) of the *Criminal Code (Cth)*:

(c) material that describes a person who is, or is implied to be, under 18 years of age and who is either:

i. engaged in or is implied to be engaged in a sexual pose or sexual activity; or
ii. is in the presence of a person who is engaged on or is implied to be engaged in a sexual pose or sexual activity.

The appellant submitted that the proper construction of the definition in s 473.1(c) should be confined to its plain and ordinary meaning which concerned current activity only as opposed to prospective activity.

The appeal was dismissed and Johnson J (Davies and Lonergan JJ agreeing):

a) accepted the Crown submission that the legislation is intended to be of wide ambit and covered a wide range of conduct including offending where no real child victim exists and where fictional or fantasy characters may be involved [71].

b) The legislative purpose or objects of the provisions in s 474.19 and the definition of child pornography material would not be promoted by the narrow construction advanced by the applicant [73].

c) Reference was made to the case of *McEwen v Simmons* [2008] NSWSC 1292 at [12] where Adams J stated that although the primary purpose of the legislation is to combat direct sexual exploitation it is also calculated to deter production of other material such as cartoons that can fuel the demand for material that does involve the abuse of children.

Context Evidence

CA v R [2017] NSWCCA 324
The appellant was convicted of five counts of aggravated indecent assault against the complainant.

The offences occurred within two separate time frames - Counts 1 to 3 occurring between 2006 and 2007 and Counts 4 to 5 occurring between 2011 and 2012.

The trial judge admitted evidence of an uncharged act referred to as “the lookout incident” that allegedly occurred in 2009 outside of NSW, where the appellant grabbed the complainant’s penis causing the complainant to hit the appellant in anger.

The sole ground of appeal was that the trial judge erred in admitting the evidence as context evidence.

N Adams J (Beazley ACJ and Walton J agreeing) stated:

a) Evidence of uncharged acts is potentially admissible to place the specific allegations on indictment into context. But the evidence must

go to an issue at trial and be capable of rationally affecting the probability of the existence of a fact in issue. It is not sufficient for the Crown to simply rely on allegations not included in the indictment [65].

b) The trial judge properly identified how the evidence was relevant, noting that "the lookout incident" occurred in terms of timing, mid-way between the dates of the charges on indictment. The trial judge observed that if the evidence were not led, it would have left the jury with an unrealistic or misleading picture of two series of apparently unconnected events [75].

c) The "lookout incident" evidence was relevant as it was followed by an act of physical assault by the child towards the appellant. The appellant did not dispute that the complainant assaulted him but his case was that the complainant was misbehaving, whereas on the Crown case the assault was consistent with animus on the part of the complainant towards the appellant. A jury may have considered it to be unusual that a child would assault an adult family friend for no reason, if the evidence of the touching was not led [79] – [80].

d) In considering whether the evidence should have been excluded pursuant to s 137 of the *Evidence Act*, N Adams J found the evidence had significant probative value and the only risk of unfair prejudice was the risk the jury would use impermissible tendency reasoning. Such a risk was addressed by the trial judge, through detailed directions warning against such a process of reasoning [104].

Directions

Llewellyn v R [2011] NSWCCA 66 (recently published)

The appellant was convicted of a single charge of sexual intercourse without consent.

At trial, defence counsel put to the complainant that prior to sexual intercourse she assisted the appellant by unbuttoning his jeans and pulling down his zip. Defence counsel then put to the complainant that she "*helped push down his pants*".

When the appellant gave evidence, he said the complainant undid the button of his jeans, undid his fly and then pulled his jeans down using the soles of her feet to slide his jeans down.

When the appellant was cross-examined, the Crown put to him that in cross-examination of the complainant, it was never put to her that she actually pulled the appellant's pants down using her feet in the manner he just described. The cross-examination implied but did not explicitly assert recent invention on the part of the appellant.

In re-examination, the appellant gave evidence that he had previously provided written instructions to his counsel that the complainant had pulled down his pants with the soles of her feet.

The jury asked a question, namely:

"*If [defence counsel] knows some evidence to be untrue, for example, [the complainant] pulling down [the appellant's] pants, is he restricted by ethics to suggest it is true?*"

In answer to the question, the trial judge directed the jury that while it was not put to the complainant that she had used her feet, in re-examination the appellant agreed that he told defence counsel this a long time ago. The direction continued:

"Now the situation is, members of the jury, counsel are human and sometimes they just forget things. It's up to you if you think that's what has happened here."

Hall J (McClellan CJ at CL agreeing), in setting aside the conviction found that:

a) Defence counsel had in cross-examination, put to the complainant that she had helped the appellant pull his pants down. The failure to expressly put that she used her feet to do so was not a breach of the rule in *Browne v Dunn* [91].

b) The trial judge's directions should have expressly and directly dealt with the matter in a way that would have taken the issue of failure to cross-examine the complainant about the use of her feet, totally out of consideration [96].

c) The direction given to the jury, left as an issue for them to determine, whether defence counsel's failure to cross-examine was an oversight or not. The jury should have been directed that oversights by counsel do occur and that is what happened in this case [98].

d) The misdirection was important as it went to the issue of the appellant's credibility which was central to the issue of consent [100].

Garling J agreed that the conviction should be set aside for different reasons:

a) The clear intention behind the questions put by the Crown, was to suggest that because defence counsel did not question the complainant about specified matters, the appellant's evidence on those matters was not reliable.

b) There was no obligation on defence counsel to put to the complainant the precise detail of the way she assisted in removing the pants. Thus the occasion for the Crown being able to criticise the credibility of the accused did not arise [138].

c) The questions of the Crown Prosecutor necessarily engaged the appellant in giving a direct answer or else in re-examination revealing his instructions to counsel which were and remain privileged. To ask such a question was fundamentally unfair [140].

d) There was no basis for the Crown Prosecutor to ask the questions put and as a consequence the trial was unfair and the conviction must be set aside [142].

Discretionary Exclusion

DPP (NSW) v GW [2018] NSWSC 50

The DPP appealed a decision of the Local Court at Dubbo Children's Court dismissing three charges against GW, namely assault police, resist police and use offensive weapon.

The arresting officer saw GW in the street and recognised that she was in breach of a curfew bail condition, was aware she was on parole and knew she had outstanding warrants.

The arresting officer called GW by name and there was a split-second between the time he saw her and when she ran away. The officer gave chase having decided he would arrest her. GW picked up a rock and threw it at the officer hitting him in the face. That officer and another apprehended GW and she resisted arrest.

The Magistrate, following a voir dire found that the arresting officer acted improperly, excluded the evidence of the arresting officer and proceeded to dismiss the charges. The Magistrate referred to the case of *NT v R* [2010] NSWDC 348 and found that the absence or failure to consider alternatives to arrest for a breach of bail condition was improper.

In allowing the appeal and setting aside the orders dismissing the charges and remitting the matters back to the Children's Court, Rothman J found:

a) There was no attempt by the Magistrate to undertake the balancing act required under s 138 of the *Evidence Act.* Even assuming an impropriety occurred, the probative value of the evidence was fundamental, its importance was crucial, the impropriety was neither deliberate nor reckless and the gravity of the impropriety was not great. None of these things were referred to in Magistrate's reasons [27].

b) Questions arise as to whether the evidence was obtained was in consequence of an impropriety. Unless a but for approach was taken, it is not clear why the evidence of the throwing of the rock and the resisting of arrest was in consequence of the impropriety of not considering alternatives to arrest [29].

c) Not every case, where there is a failure to consider alternatives to arrest and all of the options available for a breach of bail, will render an arrest or chase improper. The circumstances of the situation must be considered. Where the defendant fled before the chase began, there may not be sufficient time to consider all the options available under s 77 of the *Bail Act*. In an urgent situation the failure to consider every other option may not be improper [40] – [41].

DPP (NSW) v Owen [2017] NSWSC 155

The defendant pleaded not guilty in the Local Court to one count of resist police and two counts of assault police.

The Magistrate dismissed all charges after concluding that the evidence relied upon was obtained inconsequence of an impropriety, namely a failure to caution the defendant when he was arrested.

The defendant was drinking at the Lone Pine Tavern. He was seen to move away from the tavern before lying down and later vomiting on himself. An ambulance was caused and he became agitated. Multiple police then attended the scene and ascertained he was the subject of an outstanding bench warrant. Police informed him that he was under arrest for an outstanding warrant, but failed to caution him. The Prosecution alleged that the defendant, when being placed in a police vehicle, resisted arrest and assaulted two police officers.

In allowing the appeal, R A Hulme J found:

a) The defendant was not being questioned at the time of arrest so the provisions of s 139 of the Evidence Act were not engaged, thus no impropriety under s 138 could arise as a consequence [82].

b) Even if s 139 was engaged, the evidence of police seeing the defendant resisting and assaulting police was not obtained in consequence of an impropriety of failing to caution and as such s 138 was not engaged [83] – [84].
c) Reference was made to the case of *R v Ladocki* [2004] NSWCCA 336. In this case the prosecution relied upon evidence of a registered police informant who bought heroin from the appellant in three “controlled buys”. The police officer who applied for the controlled operation authority failed to disclose that the informant was a heroin addict which was in breach of a code of conduct requiring an applicant for an authority disclosing all information that could have a bearing on the determination of the applicant. Mason P (Sully and Sperling JJ agreeing) strongly doubted s 138 was engaged and seriously doubted the relevant evidence (the appellant’s sale of heroin) was obtained in consequence of the asserted impropriety (the failure to disclose a material fact) [67] – [69].

d) Reference was made to *R v Dalley* [2002] NSWCCA 284. At issue was the admissibility of admissions made by the appellant while in police custody. The asserted impropriety was that police upon applying for an extension of time to detain the appellant, failed to provide an affidavit within one day, verifying the information relied upon for the application. Simpson J noted that the asserted contravention (the failure to provide an affidavit) did not occur until one day after the detention warrant was issued and "*it cannot be the case that the appellant's admissions and incriminating statements were obtained in consequence of a contravention which did not occur until 24 hours later*" [70] – [72].

Drugs

Nguyen v R [2018] NSWCCA 176

The applicant was sentenced to two counts of ongoing supply of drugs (s 25A *Drug Misuse and Trafficking Act 1985* (NSW) ("the *DMT Act*").

The agreed facts disclosed that of the thirteen supplies referred to in the first count, six of the supplies were in fact offers to supply as opposed to seven actual supplies. In the second count, of the nine supplies referred to, six of the supplies were offers to supply and three were actual supplies.

The applicant sought leave to appeal on the ground that:

"*In assessing the objective gravity of the offence, his Honour erroneously took into account occasions when the applicant did not, in fact, supply prohibited drugs for financial or material reward*".

The applicant argued that the extended definition of supply in s3(1) of the *DMT Act* which was constrained by the subsequent words "for financial or material reward" which appears in s 25A of the *DMT Act*.

Price J (Hoeben CJ at CL and Davies J agreeing) held:

a) That there was no ambiguity in the terms of s 25A and "*the mischief that the enactment of the section was designed to meet, was the on-going supply of small quantities of drugs*". As the extended definition of supply preceded the enactment of s25A, there is no rational basis for deciding the intention of the legislature was that the extended definition would not apply to s 25A [35].

b) In s 25A the preposition "for" appears before the words "financial or material reward". The preposition strongly indicates that the *purpose* of the act of supply has primary importance [36] - [37].

c) The offence of supplying drugs on an ongoing basis contrary to s 25A is not confined to actual supply of prohibited drugs (other than cannabis) for financial or material reward on three or more occasions.

The judge on sentence was entitled to take into account, when assessing the objective seriousness of the offences, the agreements to supply, which were all for the purpose of obtaining financial gain [40].

R v Busby [2018] NSWCCA 136

The respondent Busby entered pleas of guilty to two supply offences pursuant to s 25(2) of the *DMT Act.*

The first count involved knowingly taking part in the supply of more than the large commercial quantity of MDMA (20.88 kg). The second count involved knowingly taking part in the supply of cocaine (2.23 kg).

Busby told police and gave evidence on sentence that he believed the packages that contained the drugs actually contained cannabis. He denied ever opening the suitcase.

Button J (Hoeben CJ at CL and Walton J agreeing) held:

a) The pleas were not properly entered and the evidence given in the proceedings on sentence traversed the validity of his two pleas of guilty [60].
b) In applying what was said in *Jidah v R* [2014] NSWCCA 270, for the respondent to be guilty of the offence in question, he needed to believe that the suitcase contained a prohibited drug and needed to believe that the suitcase contained not less than the large commercial quantity applicable to the drug he believed to be in the suitcase [61].
c) Reference was made to *Jidah* at [34] where it was said:
"The elements of the offence under s25(2) of the DMT Act, applicable to this case were that the appellant attempted to obtain possession of what he believed to be a prohibited drug, for the purposes of supply in an amount not less than the large commercial quantity applicable to that drug. To establish the count, it was necessary for the prosecution to prove that the appellant attempted to take possession of the drug for the purposes of supply, knowing or believing that the substance in the 45 boxes was a prohibited drug or not less than a large commercial quantity".

Had the respondent given evidence at sentence that he believed the drugs in the suitcase contained cannabis and believed that the amount of cannabis in the suitcase was more than 100 kilograms (or more than the large commercial quantity for cannabis), the plea may have been acceptable.

Evidence (Domestic Violence Evidence in Chief (DVEC)

DPP (NSW) v Al-Zuhairi [2018] NSWCCA 151

Mr Al-Zuhairi was charged with assaulting the brother of his ex-partner and constituted a "domestic violence" offence under s 3 of the *Criminal Procedure Act 1986 (CPA)*.

Pursuant to s 289F(1) of the CPA, when criminal proceedings involve a domestic violence offence, a complainant can give their evidence in chief by way of a recorded statement also known as a DVEC (Domestic Violence Evidence in Chief), that is viewed or heard by the court.

Mr Al-Zuhairi appeared before Liverpool Local Court in relation to one count of assault occasioning actual bodily harm. During the Local Court proceedings, the DVEC, recording the statement of the complainant was marked "MFI A" and played in court.

Mr Al-Zuhairi was ultimately convicted and appealed against his conviction to the District Court. Colefax SC DCJ allowed the appeal and set aside the conviction on the basis that error had occurred in the Local Court, namely that the recording of the complainant's evidence had not been tendered in the Local Court proceedings.

Colefax SC DCJ submitted questions by way of a stated case to the NSWCCA.

The court (per Payne JA with R A Hulme and Fagan JJ agreeing) answered three questions as follows:

1) In proceedings for a domestic violence offence, where a complainant gives evidence wholly or partly in the form of a recorded statement pursuant to s 289F of the CPA, must the recording be formally tendered in the Local Court if there is no agreed transcript in order for the recorded statement to become "evidence given in the original Local Court proceedings" within the meaning of that phrase in s 18(1) of the *Crimes (Appeal and Review) Act 2001* ? **NO**

2) In proceedings for a domestic violence offence, where a complainant gives evidence wholly or partly in the form of a recorded statement, pursuant to s 289F of the CPA, is the viewing of the recorded statement in the Local Court sufficient for the recorded statement to become "evidence given in the original Local Court proceedings" within the meaning of that phrase in s 18(1) of the *Crimes (Appeal and Review) Act 2001* ? **YES**

3) Did I err in law in holding that where a recorded statement pursuant to s 289F of the *CPA* had been played in proceedings before the Liverpool Local Court on 15 September 2017, but had not been formally tendered and where there is no agreed transcript, that the

contents of that recorded statement were not "evidence given in the original Local Court proceedings" within the meaning of that phrase in s 18(1) of the Crimes (Appeal and Review) Act 2001? **YES**

The court found that there was no need for the DVEC recording to be formally tendered as s 289F(1) of the *CPA* made it clear that once the representations in the recording had been "viewed" and/or "heard" by the court, it became the complainant's "evidence in chief" as if the complainant had made such representations verbally while sitting in the court [40].

Expert Evidence

Chen v R [2018] NSWCCA 106

The appellant Chen was convicted of knowingly take part in the supply of a commercial quantity of pseudoephedrine (s 25(2) *DMT Act*).

At trial, the Crown relied on intercepted phone calls between the applicant and the identified supplier in order to prove an agreement to obtain the drug. The phone calls were in the Fuqing language and an expert translator was required to translate the calls.

Chen appealed his conviction and took issue with the admissibility of the evidence of the translator relied upon by the Crown. The grounds of appeal were as follows:

1) The trial judge erred in ruling the evidence of Lara Yang (translator) was admissible under s 79 *Evidence Act*.

2) The trial judge erred in failing to exclude the evidence of Lara Yang under s 135 or s 137 *Evidence Act*.

3) The trial judge erred in failing to withdraw the evidence of Lara Yang following evidence that Ms Yang was not born or initially raised in Fuqing and had not read or agreed to bound by the expert witness code of conduct.

Ground 1 – s 79 *Evidence Act*

The court found that there were issues for the jury to resolve in relation to Ms Yang's competence and the accuracy of her translations, however these were issues that the appellant was able to pursue in cross-examination [41].

At trial, under cross-examination Ms Yang accepted she had made some errors and some changes to her initial translations [48]. In addition Ms Yang stated on the voir dire that she had been born in Fuqing but later admitted at trial that she had since learnt from her father she had been born in Fuzhou [55].

Ms Yang had no formal qualifications or training in Fuqing and no professional body had ever recognised her as having any proficiency in that language, her exposure to the language limited to her childhood and occasional use of the language with friends and acquaintances [56].

The court noted, consistent with *Honeysett v The Queen* [2014] HCA 29 at [23] - [24], that s79(1) was concerned with two conditions of admissibility. First, that the specialised knowledge was based on the person's training, study or experience and second, the opinion must be wholly or substantially based on the specialised knowledge that is based on training, study or experience.

The court stated that Section 79 is not concerned with the reliability of the expert's opinions and found that the evidence established that as a result of her training Ms Yang had specialised knowledge and her opinions as to the meaning of words in the telephone calls were based on her training, study and experience [63]. The court found it was open for the trial judge to admit Ms Yang's evidence under s 79 and the credibility of her evidence and the reliability of her translations were matters for the jury [70] – [71].

Ground 2 – Section 135 and 137 *Evidence Act*

The court referred to the trial judge's ruling in relation to s135 and s137. The trial judge was of the view that Ms Yang's evidence were of considerable probative value as the intercepted phone calls and their translation, pointed to Chen's guilt and the transcripts would assist the jury to understand the content of the calls. The mere fact there was a dispute about the translations of the phone calls did not diminish the probative value of Ms Yang's evidence nor did it create an unfair prejudice, as the disputed translations could be addressed in cross-examination of Ms Yang [71].

The court ultimately found Ms Yang's evidence should not be excluded under s 135 or s 137, finding the trial judge correctly concluded that issues as to Ms Yang's credibility and the weight that could be given to her evidence were properly matters for the jury to consider and could not result in unfair prejudice [74].

Ground 3

Part 75 of the Supreme Court Act applied to the proceedings: s 171D of the *District Court Act.* Part 75 provides that unless the court otherwise orders, unless an expert witness who is to be called to give oral evidence acknowledges in writing that he/she has read the Code of Conduct and agrees to be bound by it and a copy of that acknowledgement is served on the parties affected by the evidence, oral evidence is not to be received from the expert: Part 75, r 3J(3)(c). Similar provision is made in respect of reports prepared by experts: Part 75, r 3J(3)(b).

The court rejected the appellant's submission that the failure to comply with Part 75, r 3J had the mandatory consequence of making Ms Yang's evidence inadmissible [16].

The court referred to the case of *Wood v The Queen* [2012] NSWCCA 21 as authority for the proposition that mandatory exclusion was not required. *Wood* referred to the fact that while there is no rule that precludes the admissibility of expert evidence that fails to comply with the Code of Conduct, the code is relevant when considering exclusion pursuant to s 135 and s137 of the *Evidence Act*. An expert's failure to understand their responsibilities as an expert may result in the probative value of the evidence being substantially outweighed by unfair prejudice [19].

The court found the correctness of *Wood* supported by other *Evidence Act* provisions. It was noted that s 177 of the *Evidence Act* imposes no requirement as to compliance with the expert's code of conduct [23].

Firearms

Baxter v R [2018] NSWCCA 281

The appellant pleaded guilty to four offences in the District Court. Two counts related to the attempted supply and possession of the same shortened single barrel 12 gauge shotgun.

During the appeal, the Crown conceded that the evidence was not capable of establishing that the firearm the subject of the charges was a "prohibited firearm". The court held that there was no definition of a prohibited firearm which could sustain the convictions of the appellant.

Section 4 of the Firearms Act defines "prohibited firearms" by reference to Schedule 1 of the Act.

Schedule 1 contains a list of firearms that are prohibited firearms.

Clause 16 of Schedule 1, states a prohibited firearm includes "*any firearm which, or part of which, has a dimension less than the minimum dimension prescribed for the firearm or part by the regulations*".

The difficulty is that the only relevant regulation that refers to the minimum dimensions of firearms is reg 152 of the *Firearms Regulation 2017 (NSW)*.

The regulation specifically states that its purpose is to prescribe the characteristics of shortened firearms "for the purposes of s62(2) of the Act".

Section 62(2) provides for the making of regulations as to the kinds of firearms that are to be considered as having been "shortened" for the purposes of this section.

The relevant legislation was not capable of establishing that the firearm in question was a "prohibited firearm" and as such the court set aside the convictions relating to the firearm offences.

Guilty Pleas

Gordon v R [2018] NSWCCA 54

The applicant was sentenced in the District Court following a plea to one count of reckless wounding, one count of pervert the course of justice. Each offence had a separate Form 1 attached.

The appeal was focused upon what was the appropriate plea discount for the various offences.

The applicant pleaded guilty to the reckless wounding offence about one year after being charged, after a committal hearing had been held where the complainant was cross-examined.

The applicant pleaded guilty to the pervert the course of justice offence four weeks after being charged.

The applicant was sentenced to an aggregate sentence and the sentencing judge allowed a reduction in the indicative sentences of 10 percent and formed the view the pleas were late.

The sole ground of appeal was that the sentencing judge erred in assessing and applying the discount for the pleas of guilty.

R A Hulme J (Hidden J agreeing) was of the view:

a) In relation to the plea discount for the reckless wounding offence, a plea in the Local Court usually attracts a discount at the high end of the range. However it was noted that in this case the plea was entered after a one year delay where the complainant was cross-examined at committal. As such a discount of 15% was warranted [89].
b) The plea discount in relation to the pervert the course of justice offence was entered at an early stage and should attract a discount of 25% [91].

c) There is no statutory requirement, nor any known requirement at common law, to take into account that an offender pleaded guilty to an offence/s where the court is not passing sentence but taking the offence/s into account on a Form 1 document [95].

Simpson J noted in her judgement:

a) The quantification of the reduction in sentence that is allowed for a plea of guilty is confined to the utilitarian value of the plea. Excluded from the assessment of utilitarian value are other factors such as saving witnesses (especially victims) from giving evidence at court. Such factors can be considered in line with general sentencing principles [33]

Jinde Huang aka Wei Liu v R [2018] NSWCCA 70

The applicant appeared before the District Court for sentence in respect of two Commonwealth offences. The first was that he imported a commercial quantity of a border controlled drug namely methylamphetamine. The second offence was that he dealt with money ($100 000) or property reasonably suspected of being proceeds of crime.

The applicant sought leave to appeal against his sentences on the following grounds:

1) The learned sentencing judge erred in his assessment of the significance of the applicant's plea of guilty and the discounts allowed by

    a) failing to take into account the utilitarian value of the pleas

    b) finding the discounts allowed for the pleas of guilty should be relatively modest because the decisions to plead was recognition of the inevitable in light of a strong Crown case.

    c) finding that the pleas of guilty involved only modest facility to the judicial process, warranting a discount of 10% - 15% (importation offence) and 5% - 10% (proceeds of crime offence).

2) The learned sentencing judge erred in specifying a range between which the discount for the pleas of guilty fell.

3) The sentence for the importation offence was manifestly excessive

Bellew J (Bathurst CJ, Beazley P, Hoeben CJ at CL and McCallum J agreeing) held:

a) The sentencing judge concluded that although the applicant's plea demonstrated a willingness to facilitate the course of justice, any discount should be relatively modest. However, the sentencing judge did not specifically refer to the utilitarian value of the plea and the only available conclusion is that he failed to have regard to the factor and as such Ground 1(a) was made out. Ground 1(a) having been made out is strictly unnecessary to consider Ground 2 and 3, [45] – [47].

b) Ground 2 was considered as it raised a discreet issue. In relation to Ground 2, Bellew J noted that the law strongly favours transparency in the sentencing process: *Markarian v R* [2005] HCA 25 at [39]. In terms of specifying a discount to reflect the utilitarian value of a plea, such transparency is best achieved by precision in the expression of the discount [55].

c) Bellew J illustrated the difficulty with the range of 10% - 15% utilised by the sentencing judge in relation to the importation offence. Depending on the discount applied, the starting point sentence was between 16 years and 8 months and 17 years and 8 months [56].

Legal Representation

Mendoza v R [2018] NSWCCA 257

Appeal against sentence based on the applicant's counsel failing to:

a) Obtain instructions as to whether the applicant wished to give or call evidence, a failure exacerbated by the appellant's lack of English and a hearing impairment and the fact they were not shown the Pre-Sentence Report.

b) Adduce evidence in the applicant's case on sentence (e.g., character references or evidence about background)

c) Make submissions relevant to the applicant's case on sentence

The applicant appeared in the District Court for sentence in relation to 12 offences of Break, Enter and Steal (s112(1)(a) Crimes Act).

The sentencing judge found the offences to be 'serious in the extreme' given the applicant:

a) Entered Australia on a false passport from Columbia, for the purpose of committing the offences on behalf of a criminal syndicate.

b) Used the phone book to target Indian and Chinese families. He would phone to ensure the houses were empty.
c) Used a crowbar or screwdriver to force entry, wore gloves and would carry flowers to avoid suspicion.

d) Had amassed jewellery and property worth around $394000.

Payne J and N Adams J found that a miscarriage of justice had taken place.

Payne J found the applicant's representation on sentencing '*fell well below the standard expected of legal practitioners experienced in the criminal law'.*

Payne J found the following facts:

a) The applicant was sent a brief of evidence in gaol that he could not read.

b) No meaningful advice was given to the applicant about the sentence proceedings.

c) The only conference prior to the sentence occurred on the day of sentence where the applicant was spoken to for 20 minutes.

d) The applicant was not asked and did not give instructions that he did not want to give evidence. In addition the applicant was not advised of his right to give evidence.

e) The applicant was not asked to confirm if the contents of the Pre-Sentence Report (which stated that he had little insight into his offending and believed his family's financial situation excused his actions) were true.

f) The applicant was not asked anything about his background, mental health, his personal circumstances or whether he wished to get a psychological report.

Payne J found that despite the sub standard level of representation, there would not have been a practical injustice, save for the fact:

a) the applicant was not asked to and did not give instructions that he agreed not to give evidence AND
b) the applicant was not advised that he had the right to give evidence.

The legal test to be applied in ascertaining whether a miscarriage of justice has occurred, is whether '*there was a significant possibility that the acts or omissions about which the complaint is made affected the outcome of the sentence*'. A miscarriage of justice occasioned by the conduct of an offender's legal representative is equivalent to a finding that there was a denial of procedural fairness (see ***Tsiakas v R*** [2015] NSWCCA 187).

Payne J found this was not a case where the conduct of counsel was capable of explanation by way of a forensic decision.

Payne J and N Adams J both found that that there was a significant possibility that the conduct of the legal representatives affected the outcome of the sentence and a miscarriage of justice was occasioned as a result.

Procedure

Elzahed v State of NSW [2018] NSWCA 103

The appellant commenced proceedings in the District Court for damages where there were allegations of assault and battery by police officers.

At the hearing, counsel for the appellant made an application that the appellant give evidence with her face covered by a veil known as a niqab, where only her eyes would be visible. There was discussion about the appellant giving evidence from behind a screen however this course was not adopted by the appellant.

The primary judge declined to allow the appellant to give evidence wearing the niqab and the issue on appeal was whether the primary judge's decision was affected by error.

The court (Beazley P, Ward JA, Payne JA) found that there was no error in the primary judge ruling that evidence could not be given while the appellant's

face was covered by a niqab. The court's reasoning at [64] included the fact that:

a) The appellant was not merely a witness but a party.

b) The primary judge would have to make findings about whether to accept the evidence of the appellant versus the conflicting evidence of police witnesses and as such the appellant's evidence was highly contentious.

c) Viewing the appellant's face while they gave evidence was capable of affecting what findings were made.

d) Fairness to all parties required the rejection of the appellant's application.

The court made it clear that the case was not about whether any alternative mode of giving evidence was permissible (see [5]).

In the District Court there was no application by the appellant to give evidence from behind a screen, in a remote witness room or by way of a closed court. As such, the case was about whether the decision to not allow the appellant to give evidence while wearing a niqab, was a decision affected by error.

For the appeal to succeed the appellant was required to demonstrate that the primary judge's decision was affected by error of the kind described in *House v King* (e.g. an error of principle, consideration of extraneous or irrelevant matters, mistaken facts or the failure to take a material consideration into account).

In the present case, the court stated that it is incumbent on the party who contends on appeal that attention was not given to a particular matter to demonstrate that the primary judge's attention was actually drawn to those matters, unless those matters were fundamental or obvious (see [2]).

The court found the appellant had failed to demonstrate that most of the matters about which complaint was made, was drawn to the attention of the primary judge or that those matters were fundamental or obvious (see [3]).

Such matters included:

a) a failure to take into account that failing to permit the appellant to give evidence while covered would deter Muslim women from accessing the courts (see [61]).

b) A failure to suggest that any implication arising from the Uniform Civil Procedure Rules 2005 (UCPR) or the Civil Procedure Act 2005 (NSW) was relevant to the discretionary decision that had to be made.

Commissioner of Corrective Services v Liristis [2018] NSWCCA 143

The respondent was on remand awaiting trial for a number of sexual assault charges. He filed a summons in the Supreme Court seeking orders that he have access to his printer/scanner and laptop computer as they were essential for his adequate preparation for trial.

The primary judge made the orders sought and the Commissioner of Corrective Services appealed.

The key issue in the appeal was whether the Supreme Court had jurisdiction to make the orders, in particular, whether the orders were an exercise of the Supreme Court's jurisdiction:

a) pursuant to s69 of the *Supreme Court Act 1970* (judicial review);

b) with respect of a contempt; or

c) pursuant to the inherent jurisdiction under s23 of the *Supreme Court Act 1970.*

The Court (Basten JA, Beazley P agreeing; White JA dissenting) allowed the appeal and set aside the orders of the primary judge.

Basten JA (Beazley P agreeing) found at [41] that the primary judge did not have the jurisdiction to make the orders:

1) The primary judge had power to review administrative decisions made by the Commissioner of Corrective Services but:
   a) did not purport to exercise any such power and
   b) would have been in error in doing so in the absence of any demonstrated error on the part of the Commissioner.

2) A court with jurisdiction to conduct a criminal trial has the power to order a stay to ensure a trial will not be unfair, on appropriate conditions or permanently. However the District Court not the Supreme Court was vested with criminal jurisdiction in the present case, and it was the District Court that had the power to order any stay.

3) The Supreme Court may have independent supervisory jurisdiction with respect to the conduct of criminal trials in the District Court, however those powers are vested in the Court of Appeal and could only be exercised where the District Court had exceeded or was threatening to exceed its jurisdiction.

4) A judge of the Supreme Court has no general power (or jurisdiction) to order officers responsible for the custody of prisoners to take steps thought necessary by the judge to ensure an accused is not subject to an unfair trial, unless the trial is within the jurisdiction of the Supreme Court).

The respondent submitted that he should not be restricted to making an application to the District Court where the District Court had no jurisdiction to order the Commissioner to grant access to a printer/scanner and laptop and was limited to granting a stay of the criminal proceedings (see [80] AND [108]).

Basten JA stated that '*while it may be undesirable for a person to languish in detention on remand because the State is unable or unwilling to take steps necessary to ensure a fair trial, the appropriate remedy is an application for bail*' [80].

Tendency

McPhillamy v The Queen [2018] HCA 52

The appellant was convicted of sexual offences against "A", an 11 year old altar boy.

The case involved a question about the admissibility of evidence led at trial, from two witnesses "B" and "C", that the appellant engaged in sexual misconduct towards them. The evidence was led as tendency evidence as proof the appellant offended against A. The acts B and C complained of occurred a decade prior to the alleged offending against A.

The appellant was charged with 6 offences against A between November 1995 and March 1996. A alleged the appellant had followed him into a toilet and masturbated in front of him, encouraged A to masturbate and briefly touched A's penis. A few weeks later the appellant again followed A into the toilet where he masturbated, encouraged A to masturbate, manually stimulated A's penis, performed oral sex upon A and then required A to perform oral sex on him.

B and C both gave evidence that they were boarders at St Stanislaus College in 1985.

B said on one occasion he was homesick and upset and went to the appellant's bedroom. The appellant cuddled him and rubbed his genitals. On a second occasion the appellant approached B as he was standing naked by a locker and "*grabbed both my arse cheeks and tried to separate them*".

C gave evidence that he went to the appellant's room and the appellant massaged his shoulders and back. The appellant touched C's genitals. On a subsequent occasion the appellant massaged C who fell asleep on the appellant's bed. C woke to find the appellant kneeling beside him with his head near C's groin. C also felt a sensation of wetness around his penis.

When considering whether the evidence of B and C constituted admissible tendency evidence, Kiefel CJ, Bell, Keane and Nettle JJ drew a distinction between having a tendency to have a particular state of mind, for instance a

sexual interest in teenage boys compared to a tendency to act in a particular way.

At [27] Kiefel CJ, Bell, Keane and Nettle JJ stated:

"*Proof of the appellant's sexual interest in young teenage boys may meet the basal test of relevance, but it is not capable of meeting the requirement of significant probative value for admission as tendency evidence. Generally, it is the tendency to act on the sexual interest that gives tendency evidence in sexual cases its probative value…….As Meagher JA noted, there was no evidence that the asserted tendency had manifested itself in the decade prior to the commission of the alleged offending against A*".

Their Honours went on to say at [30]:

"…..It may be accepted that the evidence that the appellant had acted on his sexual interest in young teenage boys on the occasions with B and C is relevant to proof that he committed the offences alleged by A, but it is not admissible as tendency evidence unless it is capable of significantly bearing on proof of that fact. In the absence of evidence that the appellant had acted on his sexual interest in young teenage boys under his supervision in the decade following the incidents at the College, the inference that at the dates of the offences he possessed the tendency is weak".

In McPhillamy, Kiefel CJ, Bell, Keane and Nettle JJ continued at [31]:

"*Moreover, where, as here, the tendency evidence relates to sexual misconduct with a person or persons other than the complainant, it will usually be necessary to identify some feature of the other sexual misconduct and the alleged offending which serves to link the two together……...The supervision exercised by the appellant as assistant housemaster in 1985 over vulnerable, homesick boys in his care has little in common with the supervision exercised in his role as acolyte over A, an altar boy……...The evidence does not suggest A was vulnerable in the way B and C were vulnerable".*

Ultimately the court found that the tendency evidence did not meet the threshold requirement of s 97(1)(b), that is, the evidence, by itself or having regard to other evidence, did not have significant probative value.

The Queen v Bauer (a pseudonym) [2018] HCA 40

The respondent was convicted at trial of 18 sexual offences committed against his foster child "RC" between 1988 and 1998.

The Court of Appeal held that the trial judge erred in admitting evidence of charged and uncharged acts as tendency evidence.

The High Court allowed the appeal and held that the tendency evidence adduced at trial was admissible.

The tendency evidence adduced at trial included:

a) evidence from RC of the acts comprising Charges 1 and 3 to 18;

b) evidence from TB (RC's foster sister) of the act comprising Charge 2;

c) evidence from RC of various uncharged acts including that the respondent grabbed RC's breasts and vagina, digitally penetrated her vagina, made her perform fellatio upon him and played pornographic videos to her.

The court, in a unanimous decision, referred to the distinction between cases involving the adducing of tendency evidence from multiple complainants compared to cases where there was only one complainant.

The court held at [48] that a complainant's evidence of uncharged acts in relation to him or her may be admissible as tendency evidence whether or not the uncharged acts have about them some special feature of the kind mentioned in *Imm v The Queen* (2016) 257 CLR 300 or exhibit a special, particular or unusual feature of the kind described in *Hughes v The Queen* [2017] HCA 20 at [57] – [58], [62] – [64].

The court at [51] set out the basis of the cross-admissibility of evidence of charged acts and admissibility of evidence of uncharged acts in relation to one complainant and stated that admissibility rested upon:

" *the "very high probative value" of that kind of evidence results from ordinary human experience that, where a person is sexually attracted to another and has acted on that sexual attraction and the opportunity presents itself to do so again, he or she will seek to gratify his or her sexual attraction to that other person by engaging in sexual acts of various kinds with that person*".

The court referred to the majority decision in Hughes and referred to multiple complainant cases at [58] and stated that where a question arises as to whether the accused having committed a sexual offence against one complainant is significantly probative of the accused having offended sexually against a different complainant, the "*logic of probability reasoning*" requires that there "*must ordinarily be some feature of or about the offending which links the two together*".

The court held that in the absence of such a feature, the evidence that an accused has offended against the first complainant, proves nothing more about the alleged offence against the second complainant beyond the mere fact that the accused has committed a sexual offence against the first complainant and "*the mere fact that an accused has committed an offence against one complainant is ordinarily not significantly probative of the accused having committed an offence against another complainant. If, however, there is some common feature of or about the offending, it may demonstrate a tendency to act in a particular way proof of which increases the likelihood that the account of the offence under consideration is true."*

The court distinguished multiple complainant cases with a single complainant case and stated at [60]:
"By contrast, in a single complainant sexual offences case, where a question arises as to whether evidence that the accused has committed one sexual offence against the complainant is significantly probative of the accused having committed another sexual offence against that complainant, there is ordinarily no need of a particular feature of the offending to render evidence of one offence significantly probative of the other……. evidence that an accused has committed one sexual offence against a complainant taken in conjunction with evidence of another sexual offence against the complainant suggests that the accused has a sexual interest in or sexual attraction to the complainant and a tendency to act upon it as occasion presents."

The court repeated at [62] that in the present case involving one complainant, where all charged and uncharged acts were not far different in nature and not far separated in time, there was no need for any "special feature" in order for the evidence of charged and uncharged acts to be admitted as tendency evidence. The "very high probative" value of the evidence rested on the logic that where a person is sexually attracted to another and has acted on that attraction by way of sexual acts, the person is more likely to seek to continue to give effect to that attraction by engaging in further sexual acts if the opportunity presented itself.