RECENT DECISIONS FROM THE APPELLATE COURTS

March 2020

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ARREST

State of NSW v Robinson [2019] HCA 46.
Appeal by State of NSW. Appeal dismissed.

Unlawful arrest - police officer had not formed intention to charge arrested person with offence at time of arrest - s 99 Law Enforcement (Powers and Responsibilities) Act 2002 ("LEPRA"),

On the facts, the police officer had no intention, at the time of the arrest, of bringing R before an authorised officer to be dealt with according to law unless it emerged there was sufficient reason to charge, depending on what R said in a police interview.

By majority (4:3), the High Court (Bell, Gageler, Gordon and Edelman JJ) held the arrest was unlawful: at [71], [116].

- A police officer does not have power to arrest a person without a warrant, under s 99 *LEPRA*, if at the time of the arrest the officer had not formed the intention to charge the arrested person with an offence (affirming *Robinson v State of NSW* [2018] NSWCA 231).
- Section 99(3) states an officer who makes an arrest under s 99 must intend, as soon as is reasonably practicable, to take the person before an authorised officer to be dealt with according to law to answer a charge for that offence. An arrest under s 99 can only be for the sole purpose as provided by s 99(3). *LEPRA* has not altered this single criterion for a lawful arrest that has been part of the common law in NSW (*Bales v Parmenter* [1935] NSWStRp 8): at [63], [109]-[111].
- The officer must have that intention without taking into account at the time of arrest the existence of the investigation period: at [114].

In dissent, Kiefel CJ, Keane and Nettle JJ (at [30]-[60]) said s 105 *LEPRA* permits a police officer to change their mind after arrest and release a person without charge, but the officer must still have had the intention to charge at the time of arrest. Section 99 and 105 mean the common law requirement that the arresting officer have made an unqualified decision to charge at time of arrest no longer applied. While the sole purpose for arrest remained to take the person arrested before an authorised officer, this includes where the officer intended at time of arrest to take a person before an authorised officer unless questioning / investigation showed his/her suspicion justifying arrest was not borne out.

BAIL

***El Khouli v R* [2019] NSWCCA 146**
Appellant sentenced to imprisonment by a jury and lodged an appeal. Prior to the appeal being heard, the Applicant applied for bail. During the determination of the bail application, the Court considered the relevance of the merits of the appeal. The Court made reference to the decision in *Petroulias v R* 'that where the grounds of appeal are 'the only or the principal factor'' relied upon to demonstrate special or exceptional circumstances, the applicant must show more than that the grounds appear arguable, but rather that they are likely to succeed. This decision has since been found to apply where the strength of the appeal is the exclusive ground for the application. The Court found that where the ground of

appeal is suggested with a combination of factors as warranting special or exceptional circumstances, the relevant criteria to assess the appeal is to be whether the ground relied upon in the appeal were reasonably arguable or that the appeal had reasonable prospects [27]. Ultimately it was held that the Appellant failed to demonstrate the strength of his appeal or that he had strong prospects of succeeding in either the sentence or conviction appeal.

CRIMINAL RESPONSIBILITY

Decision Restricted **[2019] NSWCCA 226**
The Appellant was found guilty for secondary participation to the offence of sexual intercourse without consent in company under s 61J of the *Crimes Act*. At trial there has been confusion as to whether the Crown's argument was that the Appellant was a participant through joint criminal enterprise, or in the second degree as an aider and abettor.

On appeal against conviction, the Crown contended that the case went to the jury on the basis of aiding and abetting. The Appellant argued that this required the Crown to have proven beyond a reasonable doubt that the principal offender had sexual intercourse with the complainant; the Appellant had knowledge the complainant did not consent; the Appellant knew that the principal offender knew or was reckless the complainant was not consenting; and that the Appellant intentionally assisted or encouraged the principle in their commission of the offence.

The Appeal was allowed on the basis that the directions given to the jury were erroneous as they allowed for guilt to be found on the grounds of recklessness. Rather, the jury must have been satisfied that the Appellant knew the complainant did not consent. Payne JA reiterated that the issue with the trial was that the jury were given the impression that recklessness to the complainant's consent would be a sufficient state of mind for guilt, and referred to *Giorgianni* as authority that the Appellant could not be found guilty without intentionally aiding, abetting, counselling or procuring the acts of the principal [58-59]. The implications of the decision is that a higher standard of proof is to be applied to an aider and abetter, being that they had knowledge of a lack of consent, than to a principle offender, where recklessness (and reckless disregard) will suffice.

DISCLOSURE

Marwan v DPP (NSW) **[2019] NSWCCA 161**
The Applicant was facing trial for sexual intercourse without consent. After the incident an ambulance officer attended to the complainant, and included a note revealing the complainant had a history of anxiety and depression, and was off medication. Evidence given by the complainant's sibling indicated her appearance after the incident was similar to after having a 'panic attack'. The complainant originated from the United Kingdom. The Applicant sought a stay of proceedings until the prosecution were able to obtain the complainant's medical records from the United Kingdom. The trial judge refused the application, resulting the applicant appealing under s 5F(3) of the *Criminal Appeal Act*. It

was held by the Court that the prosecution was under no duty to obtain the complainant's mental health records. This decision was made on the grounds that whilst the prosecution has an obligation to disclosure or consider disclosing material already in their possession, there is no obligation to obtain confidential information not already known to the prosecution [39].

EVIDENCE

Records of interview

***Taleb* [2019] NSWSC 241**

Hamill J excluded under s 138 the accused's electronically recorded police interview (containing admissions) where police questioning was impermissibly persistent after the suspect said he wished to remain silent from the outset and repeated this on six occasions. It is true he gave answers or said "no comment" to some questions, and asked why police were charging him and what evidence they had. However, until he spoke with his solicitor three hours later, the officers did not appear to be prepared to stop questioning when he said he wished to remain silent. Taking all matters under s 138(3) into account, the right against self-incrimination and desirability that such interviews be terminated once a suspect expresses clear desire not to answer questions, Hamill J ruled the evidence was improperly obtained: at [128]-[133]; *FE* [2013] NSWSC 1692; *R v Ireland* (1970) 126 CLR 321.

Brown v Dunne – The Rule in Brown v Dunne

***Hofer v R* [2019] NSWCCA 244**

Dismissing the appeal, (Fagan J; Fullerton J agreeing with additional comments; Macfarlan JA dissenting) held there was no miscarriage of justice caused by the Crown's cross-examination:

- In criminal cases, breach of the rule in *Browne v Dunne* may be used to attack an accused's evidence only rarely and may need to be applied with "some care": [120]-[125]; *Llewellyn* [2011] NSWCCA 66; *MWJ v The Queen (*2005) ALJR 329 at [18]; [41].
- If a jury is to draw an inference adverse to the accused for such a breach, three premises must be demonstrated: (1) The matter was not put to the witness; (2) Defence counsel had a duty to put in cross-examination all relevant matters of which the accused had provided instructions; and (3) Counsel fulfilled this duty: at [123].
- The jury is then invited to infer that because the matter was not put, counsel must have had no instructions on it; therefore the accused must have fabricated his evidence on the matter after questioning of the witness concluded (a "*Birks* comment"): [123].

In this case, the questioning was not enough to convey to the jury an implication of recent invention. It did not go beyond the first premise of a *Birks* comment and conveyed no more than that the Crown was critical of counsel's lack of thoroughness in questioning: at [130]-[132].

Birks comments by the Crown, in general

A Prosecutor should only pursue such cross-examination where there is a proper basis: at [113]; [203]. This ground has been gone over so often at intermediate appellate level that defence counsel should be well aware to take action to avert unfair prejudice: at [204].

- If it is not accepted by the Crown that fault lay with a defence legal representative, the accused may call his/her solicitor to establish instructions: *Birks* at 681E.
- If the accused does not waive privilege to reveal instructions, the Crown will not have a foundation for asserting recent invention: *Llewellyn* at [138(c)].
- If questioning clearly implies recent invention, defence counsel would need to seek a direction from the judge that failure to put the matter may be from reasons other than fabrication and the jury should not draw the inference: at [204].
- The prosecutor should apply for leave to reopen the Crown case for the limited purpose of recalling the witness so counsel can put the matter. If counsel declines, the Crown can invite the witness to comment upon the matter. Leave to ask a leading question may need to be sought: at [113] per Fullerton J; at [205] per Fagan J; *MWJ v The Queen* at [40].

Compellability

***R v A1 (No 2)* [2019] NSWSC 663**
During a murder prosecution the Crown proposed to call the wife of the accused to give evidence about a range of topics, with one topic relating to the conduct of the deceased. The wife had a legitimate fear of harm if she was required to give evidence about the deceased's behaviour. During the course of the objection the question was raised as to whether the wife could be compelled to give evidence about the other topics whilst upholding her objection regarding the conduct of the deceased.

Being a unique example of an objection under s 18, it was found that there was nothing that enforces an all or nothing approach to s 18. It was thus held that it is open for the court to not require the witness to give evidence about a certain topic whilst overruling the objection to give evidence in relation to other matters.

***Tran v R* [2018] NSWCCA 145**
Applicant's father was called to give evidence against her on drug supply charges. He objected to giving evidence under s 18 of the *Evidence Act*. At trial, the judge did not allow the Applicant's counsel to make submissions regarding the objection, and did not uphold the objection of the Applicant's father. The Applicant appealed, with the Court holding that an accused is party to s 18 hearings conducted within their own trial, stating that an accused will have their legal interests affected by a decision regarding s 18 whatever the outcome which enlivens the obligation of procedural fairness.

Sexual Assault Communications Privilege

***PPC v Stylianou* [2019] NSWCCA 300**

Leave was granted for subpoenas to be issues for the production of counselling records that were unmistakably the subject of sexual assault communications privilege. Another judge was persuaded by the Accused on a literal interpretation of the provisions of Ch 6, Pt 5, Div 2 of the *Criminal Procedure Act* that no further leave was required for the Accused to access the documents. The complainant, as the protected confider, appealed the decision under s 5F of the *Criminal Appeal Act.* The Court upheld the argument of the protected confider that the District Court has the implied power to withhold or grant access to documents produced under subpoena.

"It is clear that s 299B(3) of circumscribes the Court's power to grant access to documents recording protected confidences: the Court may not grant such access "unless" one of the conditions stated in that subsection is satisfied. The subsection does not however state, either expressly or impliedly, that the documents must be made available to the parties if one of those stated conditions is satisfied. Instead, it simply assumes the existence of a power of the Court to grant or without access and engrafts a stricture on the exercise of that power. Contrary to the respondent's submission, fulfilment of one of the alternative conditions in s 299B(3) is a necessary, but not a sufficient requirement, for entitlement to an order for access" [21].

Tendency & Coincidence

***DPP (NSW) v RDT* [2018] NSWCCA 293**
The Accused was charged with three counts of sexual intercourse with a child under the age of 10, and one count of act of indecency with a child under the age of 10. The alleged victim in each count was the Accused's daughter, aged between 3-5 years at the time. The Crown served a tendency notice regarding evidence in which it was submitted established that the Accused had a sexual interest in pre-pubescent children and the tendency to act upon those desires. The trial judge rejected the evidence, resulting in the Crown's appeal.

It was held that the trial judge erred in finding that the evidence did not have significant probative value. Basten JA noted that the trial judge failed to consider factors such as that there were qualitative differences between an interest in female toddlers and the interest in teenage boys as was the case in *McPhillamy v R*, that the temporal connection was created by the admission of the Accused of his interest existing for '10, 15 years. 20 years', and that the Accused had pled guilty to four related charges [34].

"The reasoning in particular cases will depend upon the nature of the alleged offending and the nature of the tendency evidence. Where the underlying propensity is accepted by the accused as operating over an extended period, its probative value is likely to be significant, even if the occasions upon which he acted upon the propensity were few and far between. The various factors set out above demonstrate that, in the present case, the tendency evidence had significant value" [36].

***Decision Restricted* [2019] NSWCCA 30**
At trial, the Crown relied upon evidence to establish a tendency that the Accused had a particular state of mind and that he acted upon that state of mind through the conduct of the alleged offences. For each count on the indictment, the Crown relied on evidence that

related to the other counts to establish the tendency. The Accused provided evidence that he argued established an opposite tendency, such as when he had the opportunity to engage in the conduct alleged and declined to do so, instead reporting those giving him the opportunity to police. At trial the judge gave the direction the evidence adduced by the Crown if they were satisfied beyond a reasonable doubt that events occurred and that a conclusion could be drawn the accused had that tendency alleged. Regarding the tendency evidence of the accused, the jury was directed the accused only had to prove the matter was 'likely'. Adamson J, with the others agreeing, held that the direction given about the standard of proof relating to the evidence of the Crown was incorrect and provided an overt advantage to the accused. The direction given in relation to the tendency evidence adduced by the Accused was also found to be erroneous, on the grounds that the accused bore no onus of proof and did not need to provide the evidence to a particular standard. Therefore the appeal was allowed.

***Davis v R* [2018] NSWCCA 277**

Three individual residents of an aged-care facility were injected with insulin without medical necessity, and as a result two died whilst the other was hospitalised for a long period before dying of unrelated causes. The issue at trial was whether it was the Accused who administered the injections. After a judge-along trial the Accused was convicted and appealed on the grounds, inter alia, that the judge erred in admitting coincidence evidence. A submission on appeal was made to the effect that the judge must have been satisfied the Accused had administered one of the pertinent injections before using coincidence reasoning to conclude he would be guilty on all counts. It was held that the constraint the Accused sought through the application of s 98 is not sustained by its working or by any authority.

"The constraint sought to be imposed by the applicant on the application of s 98 is not justified by its wording or by authority. There is no requirement in the application of s 98 in this case for there to be evidence directly linking the applicant to any of the instances involving the wrongful injection of insulin. To impose such a requirement flies in the face of the wording of s 98 and the proper approach to a circumstantial case. While it is true that the fact in issue to which the coincidence evidence relates has to be clearly identified, the fact in issue does not necessarily have to involve a direct link between the applicant and one of the episodes of insulin rejection" [76].

Unavailable Witness

***DPP (NSW) v Banks* [2019] NSWSC 363**

Respondent charged with a domestic violence offence, and the complainant did not attend the Local Court where the matter was due to be heard. As a result, it was held that her recorded statement was inadmissible under Pt 4B of of Ch 6 of the *Criminal Procedure Act*. The prosecutor attempted to have the statement admitted as maker unavailable hearsay under s 65(2) of the *Evidence Act.* The magistrate accepted the objection of the Respondent that Pt 4B of of Ch 6 of the *Criminal Procedure Act* acts to override s 65(2) of the *Evidence Act.* The Court considered that Pt 4B of of Ch 6 was enacted for policy reasons in order to address the difficulties of complainants giving evidence in chief in domestic violence matters

[39]. The appeal was allowed, with the Court finding that Pt 4B of of Ch 6 of the *Criminal Procedure Act* does not override s 65(2) of the *Evidence Act.*

OFFENCES

Break and Enter

***Singh v R* [2019] NSWCCA 110**
Appellant plead guilty to aggravated break, enter and commit serious indictable offence, being robbery in company under s 112(2) of the *Crimes Act*. Despite entering a plea, the conviction was appealed on the grounds that a miscarriage of justice occurred as the facts did not support the charge, given that there was no evidence of 'breaking'. The Court dismissed the appeal, and determined that based on centuries of common law, there was a constructive breaking in these circumstances. Constructive breaking was found to occur where a person intends to commit an unlawful act upon entry, and the entry into the premises is gained by trick or intimidation. It will not be constructive breaking when the intent to commit an unlawful act but gains permission for entry without force, trick or threat.

Driving Offences

***RMS v Noble-Hiblen* [2019] NSWSC 1230**
Respondent charged with a camera detected speeding offence alleging he travelled at 118 km/h in a 60 km/h area. He was acquitted by a magistrate after offering evidence demonstrating it was not physically possible that he was travelling at such a speed based on timestamped images of him entering and exiting the intersection. The RMS lodged the appeal. The Supreme Court allowed the appeal, determining that only expert evidence admitted in accordance with s 79 of the *Evidence Act* would be sufficient to raise doubt for the purposes of rebutting prima facie evidence. The calculations of the accused and the magistrate did not constitute expert evidence and therefore were not sufficient to raise doubt.

Drug Supply

***Roberts (a Pseudonym)* [2019] NSWCCA 102:**
The CCA allowed the sentence appeal on a count of knowingly taking part in not less than large commercial quantity of methylamphetamine (s 25(2) *DMTA*).

The judge erred by mistaking the threshold quantity for the offence as 500g, rather than 1kg.

The judge also erred in overemphasising the role of drug weight: at [70]. He emphasised that he calculated the amount as double the threshold for the large commercial quantity. He distinguished a third count by saying, "the amount is over the commercial quantity, but only over by a fractional amount: at [52]-[53].

While quantity has some relevance to seriousness, it is not the decisive factor. Weight must be considered in the context of all relevant facts. It is a fallacy to assume that any case involving more than 250g of heroin is likely to be worse than any case involving only 250g or less. For

example, a case involving a small quantity of heroin as being of very great seriousness when to create an addiction in an infant: at [50]-[51]; *Markarian v The Queen* (2005) 228 CLR 357 at [33].

Firearms Offences

***Darestani v R* [2019] NSWCCA 248**
Darestani was tried on a number of matters. Two counts alleged possession of an imitation firearm without authorisation, in relation to two plastic pistols in Darestani's possession upon arrest. These pistols were lightweight and had an orange trigger and insert in the barrel. Any items 'produced and identified as a children's toy' are excluded from the definition of imitation firearm. After conviction on these charges, an appeal was lodged on the grounds that the jury ought to have concluded the Crown failed to disprove the items were produced and identified as children's toys.

In considering this ground of appeal, the Court contemplated the meaning of 'identified as a children's toy'. The Court ultimately allowed the Appeal, determining that whether an object has been identified as a children's toy will require consideration of matters intrinsic to the object, it's use, and the intention of the wielder if the object is being used at the time of alleged possession. The Court held that an item could lose its identification as a children's toy based on the circumstances in which it is used.

***Sumrein v R* [2019] NSWCCA 83**
Applicant convicted with possess loaded firearm in public place. An appeal was lodged on the grounds that the sentencing judge erred in their assessment of the objective seriousness of the offence. On appeal it was held that the trial judge erred in determining the absence of criminal enterprise as being 'of minor consequence', and in failing to take into account the motives of the applicant as being for protection.

Self-Defence

***Doran v DPP (NSW); Brunton v DPP (NSW)* [2019] NSWCCA 1191**
The Appellants were intoxicated and consuming alcohol, when a group of also intoxicated adult men entered the house, violently assaulting the occupants. The Appellants responded violently, and alongside others, pursued the group of men to commit violent acts, threaten the use of firearms and threaten death. The Appellants and others were charged of various offences and later acquitted by a magistrate, aside from the charge of affray. The defence of self-defence had been relied upon, however this argument was rejected. The appeal was brought on the grounds that the magistrate erred in excluding intoxication as the second limb of self-defence. The appeal was dismissed, with Simpson AJA holding that the magistrate was correct in not taking intoxication into account when determining the reasonableness of the appellant's response to the circumstances they perceived them. Intoxication was found to be relevant in identification of the defendant's perception, however it is irrelevant to the objective assessment of the reasonableness of the conduct.

Sexual Assault

***Adams v R* [2018] NSWCCA 303**
Appellant charged with multiple sexual offences, and ultimately convicted on one count whilst acquitted on the remaining. He then appealed to the Court on the grounds that his conviction on the one count was inconsistent with the decision for acquittal on the rest of the counts, and that the trial judge erred in excluding evidence that suggested the complainant had made false complaints about various matters. At trial, this evidence was rejected due to none of the exceptions under s 293(4) of the *Criminal Procedure Act* had been made out.

It was held on appeal that the Appellant was entitled to acquittal as the verdict on the one count was unreasonable and unsupported by the evidence. The trial judge was found to have made multiple errors. In dealing with the ground regarding the judge erring in excluding the evidence of the alleged false complaints, the Court found that the evidence demonstrated made up part of a connected set of circumstances, and could reveal a tendency to make false complaints that 'bore on the objective likelihood on the commission of the alleged offences' [175].

MENTAL HEALTH

***Jones v Booth* [2019] NSWSC 1066**
P was charged with stalk or intimidate and common assault, and appeared in 2018 at Blacktown Local Court. P's solicitor made an application under s 32 of the *Mental Health (Forensic Provisions) Act*, and relied upon a psychological report prepared by psychologist Bradley Jones. The magistrate was concerned no psychiatric report was available, citing that Jones was not an expert as he lacked the requisite expertise. The matter was adjourned in order to obtain a psychiatric assessment of P. By summons, Bradley and P sought a declaration from the Court by way of summons, concerning the qualifications of the psychologist to prepare a report for the Local Court supporting a s 32 application. It was held that as P had been eventually successful in making a s 32 application, there was no question to be decided by the Court. However, it was determined that it would be an error for a magistrate to adopt blanket approach that only allowed the reports of psychiatrists in support of a s 32 application. Whilst the Court did not generalise as to when a psychologist's report could be received, it was noted that the type of report that is appropriate will be dependent on the case.

PRACTICE AND PROCEDURE

Non- Publication Orders

***AB (a pseudonym) v R (No 3)* [2019] NSWCCA 46**
AB pled guilty to sexual offences committed whilst he was a child. There was significant publicity regarding the appropriateness of the sentence, and AB was shunned by members of his community. Publicity was also given due to the fact the sentencing judge prohibited publication of his identity. AB sought an order from the District Court in accordance with s 7 of the *Court Suppression and Non-Publication Orders Act,* which was refused, resulting in the

appeal. The Court in determining the appeal considered the appropriate test to determine whether an order will be 'necessary'. The tests contemplated were the 'calculus of risk' approach, which involves the court considering the 'nature, imminence and degree of likelihood of harm', with severe prospective harm resulting in a likely finding that an order is necessary even where the risk is no more than a mere possibility; and the 'probable harm' approach which requires the applicant to prove that in the absence of an order it is 'more than probable' that the person would be harmed [56]. The Court concluded that the 'calculus of risk' approach is preferable, as it is more aligned with the purpose of s 8(1)(c) to protect the safety of individuals who may be harmed as a result of the publication of proceedings [58].

The CCA allowed the applicant's appeal against refusal for a non-publication order. An order of 20 years was necessary to protect the applicant's safety within s 8(1)(c): at [61]ff, [114]. The Court also found there was utility in an order, even in circumstances where a publication had already occurred.

Brown (a pseudonym) v R (No 2) **[2019] NSWCCA 69**
Applicant successfully made an appeal to NSWCAA and the matter was remitted for re-sentence at the District Court. During the appeal and sentence no non-publication order application was made. During resentence the District Court made non-publication orders. Once the decision was published by the NSWCCA, both parties sought orders under s 7(1) of the Court Suppression and Non-Publication Orders Act to prevent particular information being published.

The Court set aside the original District Court suppression orders, making a pseudonym order whilst also making an order to redact particular aspects of the Appeal judgment. The Court used a 'calculus of risk' approach to determine that a sufficiently serious potential risk to the appellant's safety had been demonstrated.

TRIAL DIRECTIONS

DPP Reference No 1 of 2017 **[2019] HCA**
An accused was tried before a jury for murder in the Victorian Supreme Court. At the close of the Crown case, the defence applied for the jury to be given a Prasad direction on the grounds that the Crown did not negative that the accused was acting in self defence. The application was granted, and the judge gave the direction. The DPP (Vic) referred to the Court of Appeal to determine whether the Prasad direction is contrary to law and whether it should be administered to a jury determining a criminal trial. The majority of the Court determined that a Prasad direction when in appropriate circumstances is not contrary to law. Leave was granted to appeal the matter to the High Court. The Court allowed the Appeal, finding that that the Prasad direction was contrary to law in that it contradicted the adversary and impartial nature of a trial, and should not be administered in a in a jury determining a criminal trial between the Crown and an accused.

"[T]o invite a jury to decide to stop a trial without having heard all of the evidence, without having heard counsel's final addresses, and without the understanding of the law and its

application to the facts that only the judge's summing-up at the end of the trial can given them, is to invite the jury to decide the matter from a basis of ignorance which may be profound. If evidence taken at its highest is capable of sustaining a conviction, it is for the jury as the constitutional tribunal of fact to decide whether the evidence establishes guilt beyond reasonable doubt. A jury is not fully equipped to make that decision until and unless they have heard all of the evidence, counsel's addresses and the judge's summing-up. Anything less falls short of the trial according to law which both the accused and the Crown are entitled" [57].

SENTENCING

Bugmy Principles

***R v Irwin* [2019] NSWCCA 133**
Irwin plead guilty to ten offences and requested that six further offences be taken into account on three separate Form 1s. Irwin relied on his deprived background during sentencing. Whilst the sentencing judge did not apply the *Bugmy* principles, the Crown appealed against the sentence, on the grounds of manifest inadequacy of the overall sentence. During the appeal, attention was given to the decision of the judge to not apply the *Bugmy* principles. It was held that failing to do so was a manifest error and that application of the principles was not discretionary [3]. In this case in particular, the judge had made a factual finding that Irwin had a background of deprivation. The appeal was allowed, with Walton J, Simpson AJA and Adamson J each in agreement that the sentencing judge was wrong in their refusal to apply the *Bugmy* principles.

Fact Finding

***Dean v R* [2019] NSWCCA 27**
Appellant charged with a range of offences, including possession of an offensive weapon, being a firearm, with intent to commit an indicatable offence. On the indictment the Crown did not nominate what indictable offence the Appellant was intended to commit. It was the Crown case the Appellant sought to murder his wife, whilst the Appellant contended it was to intimidate her. The Appellant pled guilty to the offence. A preliminary hearing was held, and the judge found beyond reasonable doubt the Appellant intended to commit murder. The sentencing hearing was later held and the Appellant was sentenced to imprisonment. He appealed on the grounds that sentencing proceedings miscarried as a result of the sentencing judge determining the Appellant's intention as a preliminary issue. It was held that the Crown should have made particular what indictable offence it alleged the Appellant intended, as part of the Crown's obligations of fairness, and that when the judge made his findings of fact at the preliminary hearing he did not have available to him evidence given at the later sentence hearing.

***Gwilliam v R* [2019] NSWCCA 5**

The applicant was sentenced for 'wound with intent to cause GBH'. The applicant claimed another man produced the knife. The sentencing judge made conclusions explaining the

applicant's conduct that: the applicant was not intending to buy drugs for a friend, did not have cash to pay, arranged the meeting to get drugs on credit, brought the knife and inflicted GBH on the victim to take the drugs.

The applicant submitted the judge erred in those conclusions and as he was not given an opportunity to address them was denied procedural fairness. The CCA dismissed the appeal.

The test as to whether a conclusion is inference or conjecture rests on reasonableness: on the basis of primary facts, is it reasonable to draw the inference. For an inference to be reasonable it must rest on something more than mere conjecture (*Baden-Clay* [2016] HCA 35 at [47]). In a criminal case, the conclusion of reasonableness must go one step further, and exclude other reasonable hypotheses (*Luxton v Vines* [1952] HCA 19 at 358): at [104].

The question is whether the judge's conclusions were available deductions from the evidence, or impermissible speculation: at [105]; *Lane* (2013) 241 A Crim R 321; [2013] NSWCCA 317. In answering that question, it is important to bear in mind the context of the sentence proceedings and matters in dispute.

Determining why these events occurred aided in determining the principle matter of dispute: who brought and produced the knife. The judge's conclusions were reasonable and available inferences. It should have been obvious to the parties the judge would make findings of fact on these aspects, without needing to raise each: at [106]-[108], [123]-[124].

Simpson AJA observed it was not open to the applicant to give a reason for bringing the knife because he claimed another man produced it. That issue having been found against the applicant, the judge was left to draw inferences available on the evidence as to the applicant's motive in arming himself: at [5].

Form One Offences

***RO v R* [2019] NSWCCA 183**

The Crown conceded the sentencing judge erred in stating that: "*… taking into account those matters on the Form 1* I find the offending to be in the mid-range of offending for matters of this kind. *Without the matter on the Form 1 I find that the offending* would have been only slightly below the mid-range for offending of this kind." (emphasis added) It was an error to take into consideration the Form 1 offence which concerned another incident at a different time, and in finding the Form 1 offence elevated objective seriousness of the offending: at [55]; *Abbas* [2013] NSWCCA 115.

***Huang v R* [2019] NSWCCA 144**

Applicant plead guilty to two offences, one being the supply of a commercial quantity of methylamphetamine and the other being possession of a prohibited firearm. During sentence, the judge stated:

> "in respect of the supply prohibited drug, I impose a head sentence of 14 years from which I take 25% for the plea of guilty and to that I add one year which is to represent the matters on the Form 1 document."

On appeal, it was contested that the judge had taken an incorrect approach to the Form 1 matters. The Court heard the Applicant's submission that the whilst Form 1 matters influence the increasing of the penalty for the principal offence, in this circumstance the

judge imposed an additional period of imprisonment as an additional penalty. It was found on appeal that the judge erred, in that the Form 1 matters should have been taken into account when determining the sentence for the commercial supply charge before the discount was applied.

***Purves* [2019] NSWCCA 227:**
Section 16BA(1) *Crimes Act* provides for the procedure by which additional offences may, following conviction, be taken into account. On being satisfied of various requirements, the procedure requires the court then to ask the convicted person whether s/he admits guilt of the additional offences, and wishes to have them taken into account.

It was an error to take into account additional offences in the absence of this procedure. The procedure was not brought to the attention of the sentencing judge. The judge thus did not make the statutory inquiries and the applicant did not make necessary admissions and state he wished the additional offences to be taken into account: at [5].

The satisfaction required by subs (1) is that of the court before which the person was convicted. The procedural error cannot be remedied by this Court on appeal: at [6].

The matter was remitted to the District Court.

Home – Offence in Home of Victim

***Patel v R* [2019] NSWCCA 170**
The Appellant was convicted for manslaughter, but tried for murder, on the grounds of excessive self-defence. The offence occurred in the deceased's home during an altercation in which the deceased wielded a knife in such a way that the Appellant perceived she was threatened and was required to defend herself, ultimately killing the deceased. At sentence, the judge found that the offence had occurred in the victim's home to be an aggravating factor. This was challenged on appeal. It was held that the judge erred in making such a finding, as the victim was the aggressor and therefore the risk to safety and security of the deceased's home was created by her own actions.

Section 21A(2)(e) does not aggravate an offence where an occupant of the home creates the perceived threat to which the offender responds by self-defence. The risk to safety and security of the deceased's home was created by her own actions: at [19]-[20].

Intensive Correction Orders

***Blanch v R* [2019] NSWCCA 304**
Campbell J reviewed the differences of opinion in *Pullen, Fangaloka* and *Casella,* stating it was not necessary to settle "these controversies", although they needed to be borne in mind as part of the appeal's context: at [1], [5], [42]-[53]. Campbell J states at [51]:
Under 66(1) community safety "must be the paramount consideration". The section's limited sphere of operation is when deciding whether to make an ICO.
When considering that matter the court is to assess which of an ICO or full-time detention is more likely to address the risk of re-offending: s 66(2).

Community safety may be paramount but the court *must also consider* the whole range of factors including questions of law, mixed questions of fact and law, and questions of fact relevant to sentence, and mode of service: s 66(3)
The paramount consideration of community safety must be weighed and assessed in the context of all facts, matters and circumstances relevant to the sentencing task applying the instinctive synthesis approach (*Pullen* at [87]; *Fangaloka* at [65] – [66]; *Karout* at [88]): at [51]).

***R v Fangaloka* [2019] NSWCCA 173**
Respondent pleaded guilty and sentenced to 2 years imprisonment for robbery in company and 12 months for assault occasioning actual bodily harm. The sentence was to be served concurrently by an intensive corrections order. The leniency of the sentence was appealed by the Crown. On appeal, the Court found that the sentencing judge had made errors during the sentencing process resulting in the imposition of a sentence that was manifestly inadequate. The Court considered specifically whether where a sentencing judge considers an ICO this will make the sentencing purposes set out in s 3A of the *Crimes (Sentencing Procedure) Act* subordinate under the operation of s 66.

The Court determined that the decision in *R v Pullen* [2018] NSWCCA 264 was not supported by the Statute, as it would have the implication the sentencing in the Local Court would need to consider making an ICO every time imprisonment was considered appropriate, and would also render the consideration of whether there is no alternative to imprisonment subordinate. Therefore the considerations of s 3A are not subordinate to s 66, and are in fact mandatory considerations. Rather the making of an ICO requires the sentencing judge to adhere to a three step process as outlined in *R v Zamagias* before directing that the sentence may be served by an ICO.

***Karout v R* [2019] NSWCCA 253**
Applicant sentenced to 2 years imprisonment with a npp of 1 year for knowingly participating in supply of cocaine. At sentence, the judge rejected a submission made that the sentence could be served by way of ICO. The applicant appealed on multiple grounds, including that the judge had failed to have regard to s 66 of the *Crimes (Sentencing Procedure)* Act 1999, particularly s 66(1) in regard to community safety and s 66(3) that the purposes of sentencing in s 3A be considered.

The appeal was dismissed unanimously by the Court. Having regard to the ground of appeal concerning s 66, Fullerton J determined that the judge's approach did not constitute an error [91]. It was determined that where the legislature stipulates community safety must be treated by sentencing courts as the paramount consideration in s 61, this does not intend that community protection be a mandatory sentencing consideration to the extent that it overrides considerations of broader sentencing considerations, such as considerations that determine nothing less than full time custody is the appropriate sentence [88].

The Court commented that were the legislation intending that sentencing courts be obligate to give paramount consideration to community supervised programs to ensure community safety as a purpose of sentencing under s 3A(c), or to impose a statutory obligation to give reasons for concluding the other purposes of sentencing in s 3A, alone or in combination,

dictate that even where the offender's risk of reoffending is such that community protection can be sufficiently addressed by an ICO, a sentence of full-time custody is the appropriate outcome, the legislature would have made that clear when the 2018 amending Act (*Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017*) was passed.

***Cross v R* [2019] NSWCCA 280**
Applicant sentenced to 2 years 6 months imprisonment on each charge of aggravated kidnapping in company. Included in the grounds of appeal was that the Judge erred in her consideration as to whether the sentences could be served by way of an ICO, by neglecting to take into account community sentencing as required by s 66 of the *Crimes (Sentencing Procedure) Act* 1999.

The appeal was dismissed, with the Court finding that the judge did not err by failing to expressly refer to s 66 of the Act, as the length of the sentence precluded it from being served by way of an ICO. The Court found that there is no requirement to consider s 66 outside of determining whether to make an ICO. As the period of the sentence exceeded two years, an ICO could not be made as per s 68 of the Act. At trial the judge has to make it clear that she was determining whether the sentence could be served through an ICO, and later explained why she was declining to make such an order. That the judge did not identify expressly the three-step process (referred to in *Fangaloka* [2019] NSWCCA 173 at [44]-[45]) is not an error where it is clear from the remarks on sentence that the sentencing exercise was done in accordance with that process.

Delay

***Tompkins v R* [2019] NSWCCA 37**
The judge erred by not taking account the effect of delay on sentence.

The applicant was on parole at the time he committed the index offences. His parole was revoked upon arrest. The balance of his parole was 23 months. The applicant was not sentenced for the index offences until 20 months later. The sentencing judge commenced sentence on the date it was imposed.

The CCA backdated commencement by six months. The judge failed to take into account the significant disadvantage of delay. Failure to take it into account except in relation to a finding of special circumstances is strongly suggestive the judge otherwise failed to take it into account: at [52]; *White* [2016] NSWCCA 190; 261 A Crim R 302.

Procedural Fairness in Sentencing

***Purdie v R* [2019] NSWCCA 22**
Appellant entered a plea of guilty to supply prohibited drug and knowingly deal with the proceeds of crime, to agreed facts. Counsel for the Appellant submitted that an ICO should be imposed whilst the Crown contended that the sentence should be full-time custody. The judge made controversial findings of fact that were unfavourable to the Appellant. On appeal the Court determined that the task of a sentencing judge is to find the relevant facts

for sentence, including finds of facts that are adverse to the offender must be established beyond reasonable doubt, other than those established by way of agreed facts and a plea. The Court found that the judge failed to maintain procedural fairness, and remitted the matter for sentence.

***Kha v R* [2019] NSWCCA 215**
During submissions for sentence, counsel for Kha requested the judge find special considerations. The Crown conceded that there were special circumstances, with the judge agreeing that 'prima facie… that must be so'. When the sentence was handed down the judge made no reference to the issue of the special circumstances, with the aggregate sentence being a reflection of the statutory ratio. On appeal, the Court held that a practical injustice had occurred from the failure of the judge to mention the issue of special circumstances in the light of the joint position of the Crown and defence, and his preliminary concurrence. The Court found that procedural unfairness occurred due to Counsel for Kha being denied to opportunity to make further submissions in favour of a finding of special circumstances.

***Neil Harris (a pseudonym) v R* [2019] NSWCCA 236**
Applicant plead guilty to two counts of suppling a pistol to a person not authorised to possess it. During sentence proceedings, the judge said during an exchange with a Crown representative that 'my impression of the risk of reoffending is minimal if at all'. In his sentencing remarks however, the judge found that the Applicant's rehabilitation prospects were poor to moderate. The appeal was argued on the basis, inter alia, that the sentencing proceedings were affected by procedural unfairness due to the sentencing judge leading the Applicant to believe a particular course was to be taken and preventing the Applicant from being heard in the matter. Whilst the Applicant could not identify that the judge had shifted from any preliminary finding made, it was held by the Court that procedural unfairness occurred due to the judge's finding that regarding the Applicant's prospects of rehabilitation being poor to moderate was not supported by any Crown submission nor any psychological report. Therefore, to be able to make such a finding he must have raised it with the Applicant's counsel. Thus the appeal was allowed in relation to this ground.

Youth

***Howard* [2019] NSWCCA 109**
The applicant turned 18 less than a month before committing an offence of 'throw explosive substance with intent to burn' (s 47 *Crimes Act).* He threw a Molotov cocktail during a group fight. He was sentenced to imprisonment for 9 years 6 months, NPP 6 years (riot on a Form 1).

Fullerton J (Macfarlan J agreeing; Bellew J dissenting) allowed the appeal and imposed a new sentence of 6 years 9 months, NPP 4 years.

The sentence was manifestly excessive given the sentencing judge found it appropriate to take into account s 6 *Children (Criminal Proceedings) Act 1987* (on the basis that Act would have applied had the offence been committed 27 days earlier), and accepted youth required emphasis on rehabilitation. The applicant's youth and immaturity and subjective circumstances (remorse and insight) were not reflected in the sentence: at [10], [12].

The cognitive, emotional and/or physiological immaturity of a young person can contribute to offending. Emotional maturity and impulse control may not be developed until the mid-20's (*BP* [2010] NSWCCA 159): at [13].

In the brief time the applicant picked up the Molotov cocktail, it is unrealistic to attribute to him the mature decision-making of an adult. It might be otherwise were he a gang member with a designated role in the planned confrontation who came armed with the Molotov cocktail: at [17].

Evidentiary basis: There need not be an evidentiary basis for a finding that immaturity contributed to the commission of the offence beyond the facts of the offending and circumstances of the offence. In most cases it is the offending conduct, coupled with youth, that allows the inference that an unpremeditated or unplanned criminal act was due to immaturity and compromised capacity for mature decision-making: at [14].

However, in some cases it may be necessary to adduce expert evidence to establish emotional, sexual or physical immaturity was causally related to particular offending. For example, an offence of *'*use carriage service to procure person under 16 to engage in sexual activity**'** as in *Clarke-Jeffries* [2019] NSWCCA 56: at [14].

Assistance to the Authorities

***HT v The Queen* [2019] HCA 40; (2019) 93 ALJR 1307**
Appeal from NSW. Appeal allowed.

Denial of procedural fairness by CCA - applicant not allowed access to evidence of assistance

The High Court held the NSW CCA denied procedural fairness to the appellant (a police informer) by not permitting her access to an affidavit by police detailing her assistance to authorities ("Exhibit C"): at [27]; [57]; [66]–[67]. At the original sentence hearing, defence counsel had agreed not to see Exhibit C on an assurance it would be a longer document and more advantageous to the appellant.

Procedural Fairness

Courts are obliged to accord procedural fairness. The person charged must be given reasonable opportunity of being heard, presenting his/her case, knowing how the opposite party seeks to make its case, and can only put his/her case if able to test and respond to evidence: at [17]; [64]; *Condon v Pompano P/L* (2013) 252 CLR 38; *International Finance Trust v NSW Crime Commission* (2009) 240 CLR 319.

The appellant could not test the evidence or make submissions on s 23(2) on whether it was open to the judge to conclude the sentence was not unreasonably disproportionate, the discount was appropriate and the residual discretion should be exercised in her favour: at [21]-[23]. Counsel could not check instructions against Exhibit C: at [25].

Tailoring orders

Orders as to non-publication could have been tailored to meet police concerns. Consistent with the rule of fairness, the courts' concern is to avoid practical injustice: at [43]-[46].

Residual discretion

In the absence of an order tailored to ensure basic procedural fairness, the CCA should have declined to exercise its discretion on this basis alone: at [52].

It was appropriate to dismiss the Crown appeal in exercise of the residual discretion. Because of the existence of non-publication orders (in relation to the CCA appeal and District Court sentence) no guidance to sentencing judges on the Crown appeal could be provided by a court under s 5D(1) *Criminal Appeal Act* 1912: at [51].

Recommendations

***Whyte v R* [2019] NSWCCA 218**
A sentencing judge, after sentencing an offender on numerous fraud charges gave directions to Corrective Services NSW that the offender be classified with acceleration, and that she be provided with particular rehabilitation programs. He also gave some recommendations directed to the State Parole Authority regarding the conditions for parole to be granted. Whilst the appeal was allowed in relation to another issue, it was held that whilst it is open to a sentencing judge to make recommendations to prison authorities, these should be given with caution and circumspection, and there is no power to make directions to those authorities administering sentences. It was also held that it is inappropriate to make recommendations to the State Parole Authority, and the Judge did so without power.

Miscellaneous

***JB [2019]* NSWCCA 48:**
The CCA allowed the NSW Bar Council's application for variation to a suppression order in the conduct of disciplinary proceedings against a Crown Prosecutor. (The suppression order was in relation to a witness in a trial in which the Prosecutor appeared: see *JB (No 2)* [2016] NSWCCA 67).

Section 13(2)(e) states: *"Each of the following persons is entitled to apply for and to appear and be heard by the court on the review of an order under this section: ……*

> *(e) any other person who, in the court's opinion, has a sufficient interest in the question of whether a suppression order or non-publication order should have been made or should continue to operate."*

The need for a suppression order or for particular restrictions or exceptions may vary over time. The persons referred to in s 13(2)(e) are persons who have an interest in the maintenance or continuation of the suppression order at the time the application for review is made. In this case, this includes the Bar Council and Law Society: at [25]-[32], [34], [35].