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1. Sentence Appeal Cases

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SENTENCE APPEALS

1. GENERAL SENTENCING

New Intensive Correction Order (ICO) scheme - Community safety is the paramount consideration

Pullen [2018] NSWCCA 264 applies the new ICO statutory scheme which commenced on 24.9.2018 (*Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017*). The scheme is contained in ss 7, 17B – 17D; 66, 68, 69 *Crimes (Sentencing Procedure) Act* 1999.

New ICO Scheme

The Court upheld the Crown appeal against the imposition of an ICO, and re-imposed a new ICO. The Court made these observations:

. Existing ICO's are subject to standard conditions in s 73 *Crimes (Sentencing Procedure) Act* that the offender must not commit any offence, and must submit to supervision by a community corrections officer: at [61]-[62].

. *Additional flexibility*. The new scheme provides additional flexibility. It decreases the number of mandatory conditions attached to ICOs and allows the Court to impose further conditions appropriate to the particular case: at [63] Many of the mandatory conditions in the old scheme are now reflected in the obligations attached to the supervision condition: see *Crimes (Administration of Sentences) Regulation 2014,* cl 187.

. *Additional leniency*. The main differences between the two schemes are that the older conditions are no longer mandatory conditions, and are also not included in the list of obligations attached to the supervision condition. As a result, to a small extent, the commencement of the new scheme affords some additional leniency to the applicant in this case: at [64]

This additional leniency is relevant to determining whether the residual discretion should be exercised: at [65]

. *Substantial punishment*. It remains the case that the new ICO scheme involves substantial punishment due to the multiple mandatory obligations attached to the standard conditions (*Pogson* (2012) 82 NSWLR 60). There are also additional obligations prescribed by regulation which attach to the additional conditions that may be imposed under s 73A(2): at [66].

. The degree of punishment involved in an ICO, and appropriateness in a particular case, must now be assessed having regard to the number and nature of conditions imposed. In some cases, as a result of the significant number of obligations prescribed by the regulations, an ICO will be more onerous than it was under the previous scheme: at [66].

Resentencing - "Community safety is the paramount consideration"

. *"Community safety is the paramount consideration" under s 66(1).* The concept of "community safety" as it is used in the Act is broad. Section 66(2) makes plain that community safety is not achieved simply by incarceration. It recognises that in many cases, incarceration may have the opposite effect. It requires the Court to consider whether an ICO or a full-time custodial sentence is more likely to address the risk of re-offending. The concept of community safety is inextricably linked with considerations of rehabilitation. The amendments recognise this is more likely to occur with supervision and access to treatment in the community: at [84].

Section 66(3) requires the Court to consider the purposes of sentencing under s 3A, common law sentencing principles and any other relevant matters; and an assessment report under s 69: at [85]-[86].

However, community safety as the "paramount consideration" means that other considerations, become subordinate: at [86].

This is likely to occur most frequently in the case of a young offender with limited or no criminal history and excellent prospects of rehabilitation: at [87].

Thus where prospects of rehabilitation are high and risk of reoffending will be better managed in the community, an ICO may be available, even if it may not have been under the old scheme. With community safety as the paramount consideration, in some cases this will be best achieved through incarceration, no doubt where a person presents a serious risk to the community. In other cases community protection may be best served by ensuring that an offender avoids gaol: at [89].

In imposing an ICO, the CCA said an ICO was more likely to address the risk of reoffending, progress would be lost by incarceration, prospects of rehabilitation were "excellent", reoffending "highly unlikely", and the applicant did not pose a risk to the community. The safety of the community would be better served if the offender continued on his current course: at [90] – [92].

Misstatement of maximum penalty – Duty of legal practitioners - Misstatement of maximum of Form 1 offence

In ***Campbell*** [2018] NSWCCA 17 the judge erred by acting on the erroneous maximum penalty. Misstating the maximum of a Form 1 offence did not constitute an error.

Misstatement of maximum penalty

It is difficult to assume a judge has not *acted* on a stated maximum penalty unless the contrary is clearly shown by materials before the Court. The materials may show the error was not operative and that the judge in fact bore in mind and applied the correct maximum (e.g. *Zaky* [2017] NSWCCA 141): at [31]; *Markarian* (2005) 228 CLR 357 at [30]-[31]; *Andreata* [2015] NSWCCA 239.

In this case the judge made the mistake twice. Although the judgment was ex tempore, it was carefully prepared and "revised" making it unlikely the error was a mis-transcription or mere slip: at [29]-[33]. The CCA found that in the absence of clarity on the materials, given the duty of the Court to avoid speculation and as it is not for the Court to assess "whether and to what degree the error influenced the outcome" (*Kentwell* (2014) 252 CLR 601 at [42]), error has been made out: at [33].

Some points of practice: at [34]-[35]

Given the prevalence of appeals on this ground, practitioners should be very astute to correct such misstatements when they occur.

. If a judge giving oral reasons misstates the maximum penalty it is the duty of practitioners to correct the error immediately or as soon thereafter, before proceedings are concluded and preferably before sentence. A slip can be corrected and a mistake expunged, even if in the latter it is necessary the judge review the decision to decide whether the mistake made a difference.

. In cases of alleged mis-transcription of reasons, the established practice in the Court of Appeal should be followed: the party alleging a defect or error in the transcript should file and serve affidavits, so the issue can be dealt with in a regular way: *Kilgannon v Sharpe Brothers P/L* (1986) 4 NSWLR 600.

. The absence of affidavit evidence from a person(s) present at proceedings on sentence is very likely to leave this Court with the conviction it is being asked to indulge in impermissible speculation.

Misstatement of maximum of Form 1 offence not an error: The sentence is not being imposed *for* the Form 1 offences. Once the s 33 procedure commences, notwithstanding an increase in sentence for the principal offence, it cannot be said legally the judge has acted on the maximum for the Form 1 offence whether misstated or not: at [35]-[36]; *A-G's Under s 37 Crimes (Sentencing Procedure) Act 1999 (No 1)* (2002) 56 NSWLR 146.

See also ***Battersby*** [2018] NSWCCA 141: Again the CCA allowed the appeal where the judge erred in misstating the maximum penalty. An error of that kind would vitiate the exercise of the sentencing discretion unless the Crown satisfied the Court that it was not a real possibility that it affected the exercise of that discretion: at [31]; *Lee* [2016] NSWCCA 146 at [37]; *Mooney* [2016] NSWCCA 303 at [33]; *Potts* [2017] NSWCCA 10 at [37]; *Nguyen* [2017] NSWCCA 39 at [120]; ***Campbell*** [2018] NSWCCA 17 at [30]-[33]. The CCA held it cannot be said that the error did not have a material impact upon the sentence imposed: at [38].

Misstatement of standard non-parole period

In ***Portelli*** [2018] NSWCCA 28 the judge erred in opening remarks by misstating the SNPP as 7 years when it was 5 years; and on two further occasions referred to the SNPP in general terms and did not nominate what that was. That the 7 year period was the SNPP applicable to the specially aggravated offence of which the applicant was acquitted (s 112(3) *Crimes Act*) cannot be overlooked. Due to the uncertainty, this ground of appeal was upheld: at [35]-[40].

Error as to quantity of drug - finding of objective seriousness – judge wrongly advised by Crown that commercial quantity was 500g when it was 1kg

In ***Greentree*** [2018] NSWCCA 227 the judge erred in assessment of objective seriousness due to misstating the relevant quantity of drugs. On a charge of manufacture commercial quantity amphetamine, the Crown erroneously advised the judge that the large commercial quantity was 500g whereas the relevant quantity was 1kg. The judge referred to the amount of methylamphetamine capable of being produced as being "greater than ten times the [large] commercial quantity" whereas it was only five times: at [43].The judge effectively acted on a "wrong principle" (*House* (1936) 55 CLR 499) in the same or analogous way that a judge who identifies the wrong maximum sentence acts on a wrong principle. Further, in circumstances where the indicative sentence for this count was a large proportion of the aggregate sentence, the ground must be upheld: at [45].

Failure to make explicit or implicit finding of objective seriousness - ongoing drug supply - quantity of drugs relevant to objective seriousness

Daher [2018] NSWCCA 287: The appellant was sentenced for ongoing drug supply (s 25A *DMTA*) and supply drugs (s 25 *DMTA*).

The CCA allowed the appeal. The judge did not, explicitly nor *implicitly*, make an assessment of the objective gravity of the offending or of the individual offences.

It is clear the judge did not, in terms, make an assessment of the objective gravity. The real question is whether the judge implicitly did so: did the judge specifically refer in sufficient detail to the factors which bore upon objective gravity such that it may be concluded that an assessment of the objective seriousness of the offending was carried out: at [46]; *Delaney* [2013] NSWCCA 150; (2013) 230 A Crim R 581.

The assessment of the objective gravity of an offence forms a significant part of the sentencing process for all offences, even those such as the present where a standard non-parole period did not apply: at [43]; ***Tepania*** [2018] NSWCCA 247. A bare recitation of the facts constituting the offences and a reference to the "objective features of the offences" does not satisfy the requirements of sentencing: at [44]-[45]; *Van Ryn* [2016] NSWCCA 1.

There was no assessment, explicitly or implicitly, as to the quantity of drugs supplied. It is well established that s 25A is directed to the business operation of drug supply, meaning that objective criminality is determined by reference to repetition, systems and organisation, not merely frequency of supply or quantity. But quantity is not irrelevant, nor are repetition, system and organisation of greater importance. They take their place beside the number and quantities of individual incidences of supply: at [52]; *MRN* [2006] NSWCCA 155 at [142]-[145]; ***Younan*** [2018] NSWCCA 180.

The judge took into account the appellant's role in "his drug network" and the period over which the offence took place. But finding the applicant had "trafficked in the drug cocaine to a significant extent" essentially addressed the question posed in *Clark* (NSWCCA, unreported, 15/3/1990) of whether the applicant was involved in "trafficking to a substantial degree" - *Clark* being overruled by *Parente* (2017) 96 NSWLR 633. This finding was not an implicit assessment of objective seriousness: at [47]-[48].

Assessment of objective seriousness– where no specific label of objective seriousness

It is not necessary to articulate a determination placing the offence at a point along a hypothetical range, such as "below mid-range" or "just below mid-range" in making an assessment of objective seriousness:

Elhassan [2018] NSWCCA 118 at [20]; ***Yeung*** [2018] NSWCCA 52 at [24]. Failure to attach a 'specific label' to the objective seriousness of the offence will not necessarily demonstrate failure to undertake the necessary task of making an assessment of objective seriousness. The Court will consider whether, reading the sentencing judgment as a whole, there has been failure to make that essential assessment: ***Yeung*** [2018] NSWCCA 52 at [30]; *Cage* [2006] NSWCCA 304; *Van Ryn* [2016] NSWCCA 1.

Matter relevant to assessment of objective gravity is the "circumstance that took the offence into the aggravated category" – Aggravated sexual intercourse with child s 66C(5) Crimes Act

In ***Dawkins*** [2018] NSWCCA 278 the applicant was sentenced for s 66C(2) *Crimes Act* Aggravated sexual intercourse with child aged 10-14. The circumstance of aggravation was that the victim was "under authority" (s 66C(5)(d)).

The applicant, aged 21, was babysitter to the victim, aged 12. A close relationship had developed and sexual intercourse took place on a number of occasions over six months.

The CCA allowed the applicant's appeal. In assessing objective gravity the judge failed to take into account "the circumstance that took the offence into the aggravated category": at [33]; *Cohen* [2011] NSWCCA 165.

The judge did refer to features such as nature and circumstances of the sexual acts; ages and relative difference (the judge accepted the case was not as serious as matters involving older offenders); position of trust as babysitter; absence of physical compulsion or grooming and the victim was consenting: at [38].

However, as explained in *Cohen*, those features had to be analysed in the context of the range of aggravating circumstances contemplated by the statute. The circumstances of aggravation in s 66C(5) contemplate cases involving actual violence, threats of violence involving weapons, gang rape, or physically or cognitively impaired victims – often committed in substantially more serious circumstances than the present case. Offences against a victim "under authority" can be committed by parents against their children; teachers against students and treating professionals against patients. The present offences are serious, however, within the range of s 66C offences it was not open to assess them as falling "just slightly below the mid-range of objective seriousness": at [39]-[40].

Child offender - serious sexual offences - error in stating full-time custodial sentence only appropriate sentence

In ***Campbell (a pseudonym)*** [2018] NSWCCA 87 the applicant, aged 13, was sentenced to full-time custody for two counts of sexual intercourse with child under 10 (s 66A *Crimes Act*) and one count of aggravated indecent assault (s 61M). The victims aged 6 and 7 were the applicant's cousins. The s 66A offences involved cunnilingus and fellatio.

The sentencing judge rejected the Crown's concession that *"*a sentence of other than full-time custody was within range" stating it was "contrary to sentencing principle". The CCA held the judge erred.

It not apparent what the judge meant by "contrary to sentencing principle". Comparative cases establish serious sexual offending by young children is flexible and does not necessarily result in full-time incarceration (*RP* [2015] NSWCCA 215). If the judge meant that there was a sentencing principle that children charged with offences of this kind and seriousness could never escape a full-time custodial sentence, the judge erred. The judge (incorrectly and impermissibly) felt "constrained" in the exercise of the sentencing discretion and bound to impose a full time custodial sentence (Cf *Robertson* [2017] NSWCCA 205 at [97]; *Parente* [2017] NSWCCA 284): at [38]-[40].

(Due to a procedural matter the matter was remitted to the District Court).

Reasonable apprehension of bias

There were two cases where the CCA found the judge's conduct gave rise to a reasonable apprehension of bias in the fair-minded lay observer.

Anae [2018] NSWCCA 73: judicial conduct included revoking bail without hearing from the legal representative or the Crown; failure to consider alternatives to full-time imprisonment based upon Crown's material without giving applicant an opportunity to argue for an Intensive Correction Order; failing to consider submissions without pre-judgment: at [52]-[57]; ***Tarrant*** [2018] NSWCCA 21.

Tarrant [2018] NSWCCA 21: judicial conduct included extensively questioning the applicant in an argumentative manner that conveyed disbelief in her evidence at trial; comments at a pre-sentence hearing implying the jury's verdict was based on a false evidential premise; leading questioning of psychiatrists at sentence and expressing doubt as to consistency of their evidence with the applicant's when that unchallenged evidence was put before the jury by the parties: at [51]-[72].

Tarrant at [9] summarised the test for apprehended bias and relevant principles:

- Where actual bias is not alleged, the legal test requires the court be satisfied 'a fair-minded lay observer *might* reasonably apprehend that the judge *might* not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide.
- The so-called 'double might' test is not easy to apply, requiring attention to four discrete elements.

  (1) The 'fair-minded lay observer' reflects the principle it is public confidence in the administration of justice which is to be preserved, not 'the assessment by some judges of the capacity or performance of their colleagues.'

  (2) The test is described as 'objective', meaning a third party's assessment of the judge's conduct and capacity; not, as with actual bias, an assessment of the judge's own state of mind.

  (3) A two-stage process required; it is necessary to articulate 'the connection between the events giving rise to the apprehension of bias through prejudgment and the possibility of departure from impartial decision-making.'

  (4) The term 'might' lowers the burden of proof below that of probabilities. The court need not be satisfied the fair-minded lay observer 'would' have such an apprehension; any apprehension in the mind of the observer need not involve a state of satisfaction on the probabilities." (Footnotes omitted.)

2. MITIGATING FACTORS

Whether Bugmy (2013) 249 CLR 571 requires causal link between significant childhood deprivation and offending - special leave to appeal to High Court refused

Special leave to appeal to the High Court was refused on 14.12.2018 in ***Perkins*** [2018] NSWCCA 62, on the issue of whether ***Bugmy*** (2013) 249 CLR 571 requires demonstration of *any causal link* between significant childhood deprivation and the offending in order for that background to be taken into account as a mitigating factor.

In ***Perkins*** the applicant was sentenced for murder. He was aged 18 and of prior good character, successful at school and social relationships. He suffered a relapse of cancer at 16 leading to depression and drug and alcohol use for a year prior to the offence. He committed the offence whilst extremely intoxicated. On sentence the applicant relied upon a psychological report that detailed his exposure to family and domestic violence for the first half of his life, including alcohol abuse and witnessing his mother "almost killed" on several occasions.

The applicant appealed on grounds including the sentencing judge had erred in respect of his findings concerning the effect of his background, including, inter alia, that the applicant's life had been "unremarkable and shared by countless other young men growing up in the Australian suburbs" and that whilst the offender's exposure to violence had its "distressing aspects" it did not impact upon his moral culpability. The applicant submitted that the sentencing judge had erred in failing to take into account in mitigation his childhood disadvantage (*Bugmy*), specifically his exposure to domestic violence and the abuse of alcohol and drugs by those around him, even though the applicant's background was not of the kind where alcohol abuse and alcohol fuelled violence was endemic throughout: at [26]-[29], [33].

The appeal was dismissed by majority (Hoeben CJ at CL; White JA in a separate judgment; Fullerton J dissenting).

Hoeben CJ at CL found the applicant's childhood was not a matter to properly take into account by way of mitigation because there was no evidence it was causally linked, stating (at [42]), that according to *Bugmy* (at [44]) it is not sufficient to simply establish some elements of a deprived upbringing and/or the presence of domestic violence unless there is evidence or it can be properly inferred that such exposure "may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced". His Honour held that because there was no evidence of any adverse effects of the exposure to family violence, such a connection could not be inferred (drawing a distinction between the disadvantage suffered by many Indigenous offenders where a causal link might be inferred).

White JA, agreeing with Hoeben CJ at CL as to the outcome of the appeal, said *Bugmy* does not provide a clear answer as to whether such a causal link must be established: at [73]. His Honour said that whilst the "question was left open" by the plurality in *Bugmy* (at [44]), he queried what weight by way of mitigation might be given to a deprived background where there was no established causal link to the offending conduct (at [76]-[77]).

His Honour concluded he did "not accept that it is only where an offender's background of social deprivation can explain the offender's recourse to violence such that his or her moral culpability is reduced that that background is relevant to the exercise of the sentencing discretion": at [88], however found that without a causal link it did not diminish his moral culpability [82]–[83].White JA found that although the sentencing judge did not adequately describe the applicant's background, giving "full weight" to those circumstances should not result in any lesser sentence: at [88].

Fullerton J (dissenting) found error on sentence, not limited to the sentencing judge's remarks about the impact of the violence on the applicant, her Honour noting "the insidious effects of exposure to family and domestic violence on children in their formative years and the potential for it to play out in unforeseen ways, as a young child develops from adolescence into adulthood, are well researched and documented" at [101]. Fullerton J said at [100]:

> "... the plurality in *Bugmy* did not say that deprivation will only be a mitigating factor lessening the moral culpability of the offender if it is causally linked to the offending but, rather, to adopt the approach of Gageler J at [56], the effects of social deprivation and its weight in the sentencing exercise is a matter for individual assessment."

Her Honour found it was an error by the judge to discount the applicant's life experience as irrelevant because there was no evidence of it being causally related to his offending: at [97]-[102]. Her Honour would have imposed a lesser sentence by virtue of a combination of factors: at [95].

In ***Judge*** [2018] NSWCCA 203 at [30]-[31] White JA (Wilson and Bellew JJ agreeing) repeated what he and Fullerton J said in ***Perkins*** at [77], [78], [80], [100], above.

In ***Holdom*** [2018] NSWSC 1677 R A Hulme J at [106] said: **"**the establishment of a causal link between the circumstances of the offender's upbringing and the commission of the offences is not essential for his upbringing to be a matter properly to be taken account in the assessment of sentence", citing ***Judge*** (at [29]-[32]).

Sentencing judge still had regard to "principles" in Bugmy (2013) 249 CLR 571 even though not expressly referred to - no error finding that dysfunctional background did not explain applicant's criminality

In ***Judge*** [2018] NSWCCA 203 the applicant submitted the sentencing judge erred in failing to advert to or apply the principles in *Bugmy* (2013) 249 CLR 571. No reference was made to *Bugmy* during submissions before the sentencing judge: at [13]. Counsel had submitted the applicant was an Aboriginal man of 24 years. However the report material before the judge made no reference to his asserted Aboriginality and the judge did not refer to the applicant's asserted Aboriginality: at [26]. The judge referred to the applicant's background of social deprivation but found none of it explained his criminality: at [25].

White JA (Wilson and Bellew JJ agreeing) dismissed the appeal.

Although no reference was made to *Bugmy* before the sentencing judge, counsel appearing at sentence did make submissions that sought to invoke what has been described as the "principles" in *Bugmy*: at [13]. The fact that the judge did not refer to the applicant's asserted Aboriginality, which was not in any

event proved, was not an error. The same issues as to the asserted background of profound social deprivation arise irrespective of his Aboriginality (*Fernando* (1992) 76 A Crim R 58): at [27]-[28].

The judge did in fact have regard to the factors relied upon to establish profound social disadvantage and did refer to the applicant's dysfunctional upbringing: at [29].

Consequently, there was no error in the judge's approach in finding that dysfunctional background did not explain the applicant's criminality because he did not discount the applicant's background as irrelevant to the sentencing discretion: at [32].

Family Hardship – whether family hardship not amounting to "exceptional" can be taken into account in the "general mix" of subjective factors

In a number of cases the CCA applied those authorities that have held the welfare of a third party, though not amounting to a circumstances of extreme hardship, can be taken into account as part of the offender's subjective case: see ***Shortland*** [2018] NSWCCA 34 at [117]; ***Matthews & New*** [2018] NSWCCA 186 at [33]; ***Carter*** [2018] NSWCCA 138 at [69]-[70]; ***Greentree*** [2018] NSWCCA 227 at [68]-[69]; ***Huynh*** [2018] NSWCCA 237 at [52]. (Those authorities are: *Girard* [2004] NSWCCA 170; *Tuhakaraina* [2016] NSWCCA 81; *X* [2004] NSWCCA 93; *Linden* [2017] NSWCCA 321).

In ***Matthews & New*** the CCA said that necessarily, great caution is required in applying this qualification lest it undermine the principle in *Edwards* (1996) 90 A Crim R 510) ("*Edwards"),* that it is only where circumstances are "highly exceptional" that hardship to others can be taken into account: at [33].

In ***Carter*** [2018] NSWCCA 138 McCallum J (Leeming JA and Fullerton JJ agreeing) the CCA held the sentencing judge erred in that he materially mistook the facts as to the likely hardship of the applicant's imprisonment on his family (Judge referred only to applicant's brothers' Tourette's syndrome when they suffered from many disabilities; finding applicant had not assisted his mother with brothers was an incomplete account and overlooked critical question of future hardship to family members): see at [26]-[30]. However, the CCA said the judge was correct to acknowledge that, while reduction of sentence on family hardship is reserved for the 'exceptional case', it is one of the relevant factors "in the general mix" of subjective factors in determining the appropriate sentence (*X* [2004] NSWCCA 93 at [24]; *Girard* [2004] NSWCCA 170): at [56], [68]. In this case, where the point had not been expressly taken by either party, it was appropriate (without deciding) to adopt the approach taken by the sentencing judge to take the evidence of family hardship into account in the "general mix" of subjective factors on re-sentence: at [68]-[70].

McCallum J discussed how *Edwards* has been interpreted differently on this issue in, for example, *Girard* (young children adversely affected by imprisonment of both parents taken into account on subjective case) on the one hand, and *Kremisis* [2016] NSWCCA 257 9 (effect of incarceration upon members of family not exceptional) on the other; and suggested this is an issue which should properly be determined by the High Court or an enlarged bench of this Court: see at [59]-[69].

In ***Greentree*** [2018] NSWCCA 227 Beech-Jones J (Hoeben CJ at CL and McCallum J agreeing) at [69] acknowledged there is some debate as to whether hardship to family members which does not amount to "exceptional" can be taken into account as one of the relevant factors in the "general mix" in the sentencing exercise (***Carter*** [2018] NSWCCA 138 per McCallum J and *Kremisis* [2016] NSWCCA 257 at [88]–[94]). However, neither of the parties sought to agitate or resolve that debate on the appeal. On re-sentencing, the CCA considered affidavit material of family hardship (health and financial problems faced by partner and infant son) and accepted that although it was not 'exceptional', it was admissible both as part of the "subjective mix" of the applicant's case (*Girard*) and as relevant to a finding of special circumstances (*Delaney* [2013] NSWCCA 150 at [81]), without determining whether those cases are consistent with other authorities in this Court: at [68]-[69].

In ***Huynh*** [2018] NSWCCA 237 Fullerton J (Hoeben CJ at CL and Davies J agreeing) found that despite being unexceptional in this case, hardship considerations remained part of the general mix of factors in the applicant's subjective case (impact of sentence of full-time custody on female applicant's children). Fullerton J, citing ***Mathews and New***, warned of the need for caution lest a reduction undermine the general principle that hardship must be exceptional: at [52].

Family Hardship – a more nuanced approach?

In ***Shortland*** [2018] NSWCCA 34 Hidden AJ at [115] (in a dissenting judgment) noted the "high bar" set by the requirement to demonstrate "exceptional circumstances" before family hardship can be taken into account as a matter resulting in a reduction or elimination of sentence (*Edwards*). A collection of cases which did not meet that standard are set out at [110].

Basten AJ opined that a more nuanced approach is not precluded by *Edwards* and "too much may have been read into it by way of expansion into a general rule" that no account may be taken of hardship unless exceptional. What *Edwards* in fact determined was that very significant hardship to a third party if the offender were subject to a custodial sentence was not sufficient to preclude a custodial sentence altogether: at [18].

Fullerton J in ***Huynh*** [2018] NSWCCA 237 at [52] noted the comments of both Hidden J and Basten AJ.

s 21A(2)(3)(e) failure to take into account lack of criminal record

Ul-Hassan [2018] NSWCCA 177**:** The applicant was sentenced for two offences of aggravated driving cause GBH. The judge erred by failing to take into account the applicant's lack of a criminal record: at [106]–[107]. Whilst the CCA found that the sentencing judge considered prior good character, he did not say anything about lack of a criminal record or that there was only one minor driving matter on his driving record, as required by s 21A(3)(e): at [105]. Even though the judge agreed at the sentence hearing he would not take an "adverse view" of the applicant's driving record, his remarks were silent about that matter and delivered almost five weeks later. The CCA found it could not be assumed the judge remembered that exchange and had considered it at the time sentence was imposed: at [106].

s 16A(2)(m) Crimes Act 1914 – good character – conspiracy to bribe foreign public official – judge erred in finding good character not a significant mitigating factor

Elomar [2018] NSWCCA 224: Section 16A(2)(m) *Crimes Act* 1914 (Cth) provides that the character of a person must be taken into account by the court when passing sentence.

The applicants were sentenced for conspiring to bribe a foreign public official (ss 11.5(1), 70.2(1) *Criminal Code* 1995 (Cth)). The applicants were directors of a construction company and agreed to bribe an Iraqi official to obtain large infrastructure government contracts. A number of character references were placed before the sentencing judge.

The CCA held the sentencing judge erred by finding the applicants' good character, though relevant, was not a significant mitigating factor: at [115]–[116].

The CCA distinguished the position from those cases where a person's good character was used as a way to facilitate the bribing of foreign officials, as against cases where there was no breach of trust and their position was not used for this purpose (*Ryan v The Queen* (2001) 206 CLR 267): at [115].

The Court found that the applicants' character was a significant mitigating factor because it went not only to not having been engaged in any criminal activity but also established that they had made a positive contribution to society and demonstrated a history of philanthropy to their fellow citizens: at [116].

3. AGGRAVATING FACTORS

s 21A(2)(c) use of weapon - wound with intent cause GBH s 33(1)(a) Crimes Act

In ***Hookey*** [2018] NSWCCA 147: The appellant was sentenced for wound with intent to cause GBH (s 33(1)(a) *Crimes Act*). He had stabbed the victim with a knife. The judge erred in determining that "where the allegation is 'use of a knife' it is an element of the offence". The use of a knife could never be an element of an offence under s 33(1)(a). The judge did take into account the use of the knife in determining the objective seriousness of the offence. It could therefore not be counted again as a factor further aggravating the offence under s 21A(2)(c) and was an error. However, the error had no effect on the sentence imposed and the appeal was dismissed: at [48]-[49].

s 21A(2)(ea) presence of child – error where children inside home and offence took place outside

In ***Alesbhi*** [2018] NSWCCA 30 (affray) the judge erred in finding the offence was committed in the "presence of a child" when the children were "inside the home" but the affray was committed outside and nothing was said about whether they had any awareness of it. The provision is principally aimed at the deleterious effect a crime might have on the emotional wellbeing or moral values of a child: at [53].

s 21A(2)(j) - breach of conditional liberty - a subjective consideration only

In ***Elhassan*** [2018] NSWCCA 118 the judge erred in taking into account that the applicant had been on parole when assessing objective seriousness: at [15]-[16]. Section 21A(2)(j) provides that an offender on parole is an "aggravating factor" to be taken into account in determining sentence. At common law, an "aggravating factor" was understood to mean one that makes the offence more serious. However, that is not the sense in which the word "aggravating" is used in the Act. The list of "aggravating factors" in s 21A(2) was intended to encompass both subjective and objective considerations (*McNaughton* (2006) 66 NSWLR 566 at [30]-[34]). The fact that the offence was committed while the offender was on conditional liberty was relevant as a *subjective* consideration but not as part of the assessment of the objective seriousness of the offence: at [12]-[16]; *Hillier v DPP (NSW)* (2009) 198 A Crim R 565; [2009] NSWCCA 312; applied in *Smith v R* [2011] NSWCCA 163 at [26].

Note McCallum J at [25]: The commission of similar offences whilst on parole has been treated as a matter of "major aggravation" (*Yousif* [2014] NSWCCA 180; *Jones* (Unreported, NSW CCA, 30.6.94)). Her Honour "did not think those remarks were intended to (or can) be elevated to a rule that the commission of an offence whilst on parole must necessarily be treated as a matter of 'major aggravation'. The relevance of that factor must always be assessed according to the circumstances of each individual case".

s 21A(2)(k) - "the offender abused a position of trust or authority" – error to take into account "breach of trust" on "under authority" offence - judge did not advert to, or at least maintain, distinction between breach of trust and breach of authority

Beavis [2018] NSWCCA 248: The judge erred in taking into account s 21A(2)(k) 'breach of trust' as an aggravating factor where this was also an element of an offence of 'Aggravated sexual intercourse with child between 10 and 14 years [under authority] (ss 66C(2), (5)(d) *Crimes Act* 1900).

The matters said to demonstrate that the complainant was under the authority for the purposes of the circumstance of aggravation for the offence were the same as those matters said to constitute the breach of trust for the offence, namely that the applicant was responsible for the victim's safety and security as she was staying in his house. The sentencing judge either did not advert to, or at least maintain, a distinction between a breach of trust and a breach of authority, resulting in breach of trust being treated as an aggravating factor when that breach was actually an element of the offence under s 66C(2): at [245]-[246]; *Franklin* [2016] NSWCCA 319 at [75].

A similar ground of appeal had failed in *MRW* [2011] NSWCCA 260 and *JRM v R* [2012] NSWCCA 112 on the basis that in those cases the sentencing judge had specifically alluded to the fact that the victim having been under the authority of the offender was an element of the offence; and expressly stated that "breach of trust" was a "separate circumstance from part of the indictment that the complainant was under the offender's authority." By contrast, in *Franklin* (as here) the judge did not see a distinction between a breach of trust and a breach of a position of authority; if he did, he did not explain what it was: at [249]-[256].

s 21A(2)(l) - vulnerable victim

In ***Katsis*** [2018] NSWCCA 9 (murder) the female victim aged 66, living alone at a Housing Commission with few visitors, was 'vulnerable' within s 21A(2)(l). In our urban society there is a class of persons with these characteristics: elderly, lives alone, does not associate with others, has no community support and does not look after one's self. Such persons are often frail and undernourished and can be

regarded as members of a class who are vulnerable. The examples in s 21A(2)(l) are not exhaustive but illustrative. What is required is that a particular class of person with a particular vulnerability deriving from the person's membership of that class is identified rather than focusing upon the particular circumstances of the particular victim (*Longworth* [2017] NSWCCA 119): at [61]-[62].

s 21A(2)(o) financial gain - not applicable where applicant promised $2000 in context of drug transaction involving $1.2 million – double counting

In ***Lin*** [2018] NSWCCA 13 the CCA allowed the applicant's appeal against sentence for supply large commercial quantity of a prohibited drug. The judge erred in acting on the only evidence available that the applicant was promised $2000. In the context of a transaction involving a payment of $1.2 million it is difficult to accept $2000 constituted the kind of financial gain that would further aggravate the offence. The judge erred by "double counting" the applicant's financial gain by taking it into account when determining objective seriousness and then again separately as an aggravating circumstance under s 21A(2)(o): at [10]; [33], [45]-[46].

Financial gain pursuant to s 21A(2)(o) was also erroneously applied as an aggravating factor in the co-offender's sentence in ***Chen & He*** [2018] NSWCCA 95. In the absence of evidence to justify a finding that the financial reward was more than that inherent in the offence itself, it was not open to find the aggravating factor under s 21A(2)(o) established: at [32]-[35], [45]; ***Lin*** [2018] NSWCCA 13.

4. SENTENCING OPTIONS

Accumulation - offender subject to another sentence at time sentence passed - s 55(1) Crimes (Sentencing Procedure) Act 1999 (NSW) does not create a presumption in favour of concurrency

Section 55(1) *Crimes (Sentencing Procedure) Act* 1999 provides:

> *In the absence of a direction under this section, a sentence of imprisonment imposed on an offender:*
>
> *(a) who, when being sentenced, is subject to another sentence of imprisonment that is yet to expire… is to be served concurrently with the other sentence of imprisonment...*
>
> *(2) The court imposing the sentence of imprisonment may instead direct that the sentence is to be served consecutively (or partly concurrently and partly consecutively) with the other sentence of imprisonment.*

In ***Yeung*** [2018] NSWCCA 52 the CCA said that s 55(1) *Crimes (Sentencing Procedure) Act* 1999 does not create a presumption in favour of concurrency: at [46]. Section 55 is directed to ensuring that, if the judge does not expressly address that issue, the default position is the sentences are to be served concurrently. The discretion otherwise remains unconstrained by the section: at [46]. The judge did not err in directing the sentence for drug offences be served wholly consecutively on a sentence being served for unrelated driving offences. The judge had a discretion to make the sentences wholly cumulative (or concurrent or partially concurrent) in the circumstances: at [42]; *Callaghan* (2006) 160 A Crim R 145. Even if wrong, an obvious reason for departing from the default position in s 55(1) was the entirely different nature of the offending: at [47]-[48].

Time spent on remand in relation to another offence is not time being held in custody "in relation to" the subject offence - ss 24, 47 Crimes (Sentencing Procedure) Act

Section 24(a) *Crimes* (*Sentencing Procedure) Act* provides the court must take into account "any time for which the offender has been held in custody *in relation to* the offence". Section 47(3) requires a court exercising its discretion under s 47(2) (to backdate a sentence) to take into account time the offender has been held in custody "in relation to the offence".

In ***Refaieh*** [2018] NSWCCA 72 the offender, whilst on bail for a drug offence, was remanded in custody for a separate murder charge that was later no billed. There was no error by the sentencing judge finding the time on remand was not "in relation to" the drug offence. There is no overriding obligation to take into account custody that does not fall within the definition of being "in relation to" the subject

offence. Time spent in custody in relation to one offence cannot be "banked" so that if the applicant is subsequently acquitted on that charge it must be applied to the current sentence: at [74]; *Hampton* (2014) 243 A Crim R 193; *Niass* (unreported, NSWCCA, 16.11.1988).

Pre-sentence custody - applicant solely in custody for offences when NPP for pre-existing offences expired - sentence should have been backdated - s 47 Crimes (Sentencing Procedure) Act 1999

In ***Kaderavek*** [2018] NSWCCA 92 the judge failed to backdate the sentence to take into account pre-sentence custody.

The applicant was sentenced to 7y NPP 5y to commence on 7 July 2015. When bail refused for subject offences, he had been serving a sentence of 1y 3m, NPP 1y for other offences. On 7 April 2015 he was automatically released on parole for those other offences (statutory parole order for sentence less than 3 years- s 158 *Crimes (Administration of Sentences) Act* 1999). Accordingly, the applicant was in custody bail refused on the subject offences alone since 7 April 2015. The judge erred by failing to backdate the sentence to take into account the applicant's pre-sentence custody from 7 April 2015 at the latest: at [15], [22].

Section 47 *Crimes (Sentencing Procedure) Act,* which provides for the commencement dates of sentences, provides a degree of flexibility, with the *prima facie* position being that the sentence commences on the day it is imposed. If the sentence is to commence *before* that date, s 47 provides no guidance except that the judge "must take into account any time for which the offender has been held in custody in relation to the offence". Otherwise, the commencement date is to be determined by reference to general sentencing principles and other relevant provisions: at [19].

If the sentence is to commence *after* the date sentence is imposed, there is less flexibility as ss 47(4) and (5) provide that if the sentence is to be accumulated on a sentence which is to expire in the future it can only be accumulated on the *non-parole period* for that pre-existing sentence. There is no similar provision in relation to sentences ordered to commence before the date of sentence: at [19].

It may be that s 47 on its own terms does not prohibit the commencement date in the present case: at [19]. However, s 47(3) and general principles of sentencing require that an offender be given credit (at least) for periods of incarceration that are solely referable to the offences for which they are being sentenced and the preferable course is to "backdate" the commencement of sentence: at [20]; *Newman & Simpson* (2004) 145 A Crim R 36.

Pre-sentence custody included period serving balance of parole – no error to backdate sentence

Gray [2018] NSWCCA 241: The CCA dismissed the Crown appeal. The respondent was on parole for previous offences when arrested for robbery offences on 30 April 2016. His parole was revoked with effect from that date. The judge imposed a sentence of 7 years, NPP 3 years 6 months for the robbery offences and backdated the sentence from that same date of 30 April 2016. The period of imprisonment solely referable to the robbery offences (after the previous sentence had expired) was 1 year, 10 months and 14 days.

The CCA found the judge did not err in backdating the sentence to that date. Whether a sentence should be backdated upon revocation of parole is a matter of discretion: at [62],[122]; *Callaghan* [2006] NSWCCA 58; *White* [2016] NSWCCA 190 at [117]–[122]. Matters justifying the judge's approach include that during the period the respondent was serving the sentence for the previous offence, he was also bail refused for the robbery offences; and the effect of s 47(5) *Crimes (Sentencing Procedure) Act* 1999 is the sentences could not commence any later than the date of sentence: at [65]- [66], [122].

Quasi-custody – factual assessment of program – program part of bail conditions

Kelly [2018] NSWCCA 44: If conditions amounting to quasi-custody are established then the extent to which the sentence should be adjusted is a matter for the discretion of the sentencing judge (*Bonett* [2013] NSWCCA 234): at [50]. In this case, the applicant was committed by bail conditions to reside at the residential Centre, to accept treatment reasonably recommended, and the Centre was required to inform police if he "self-exited" or was ejected from the program. Whilst the CCA described

the issue as to whether the program amounted to quasi-custody as "borderline" it was nonetheless open to the judge. However, despite the judge's statement that he had taken the period into account, there was a failure to effect that recognition by backdating the sentence accordingly: at [3]-[4]; [51]-[52]; *Hughes* [2008] NSWCCA 48.

The CCA said that whether a person should be entitled to credit for time in a rehabilitation program calls for a factual assessment of the conditions of the program and, in particular, the degree of constraint on the person's liberty: at [2]. The onus of establishing whether a rehabilitation program fulfils the description of quasi-custodial conditions falls on the offender on the balance of probabilities. Factors relevant to determination of this factual issue include (at [2], [10]-[11]):

- whether the course was residential: *R v Eastway* (CCA, unreported, 19 May 1992);
- whether the environment is a disciplined one, and how strict that discipline is: *R v Delaney* [2003] NSWCCA 342 at [22];
- whether the person is subject to restrictions and if so, the nature and extent of these restrictions: *R v Campbell* [1999] NSWCCA 76 at [24]; and
- whether the time spent in rehabilitation has been productive: *Hughes v R* [2008] NSWCCA 48 at [38], but see also *R v Marschall* [2002] NSWCCA 197; (2002) 129 A Crim R 381 at [30]; and *Truss v R* [2008] NSWCCA 325, where credit was given although the offender had not successfully completed the rehabilitation course.

Quasi-custody – self-referral / voluntary participation – evidentiary foundation - judge may be obliged to have regard even when not specifically asked – justice requires matter be permitted to be raised for the first time on appeal

In ***Reddy*** [2018] NSWCCA 212 the CCA allowed the applicant's appeal. The judge failed to backdate the sentence to allow for quasi-custody for the period spent in a residential rehabilitation program. The matter had not been raised at sentence.

The applicant had voluntarily referred himself to two residential rehabilitation programs. However, legal representatives did not ask the judge to make a finding that the programs amounted to quasi-custody and to backdate the sentence. The judge was aware of the applicant's participation but did not expressly take it into account.

The CCA said that while reducing a sentence for quasi-custody is not a mandatory relevant consideration, in circumstances where there is an evidentiary foundation for its being taken into account, the sentencing judge may be obliged, in some circumstances, to have regard to it even when not specifically asked to (citing *Bonett* [2013] NSWCCA 234 at [50]-[51]; see also *Renshaw* [2012] NSWCCA 91; *Gardiner* [2018] NSWCCA 27): at [30]-[34].

As to voluntary self-referral, the CCA also said it makes no difference that the applicant's participation was voluntary, rather than by compulsion of court order (rejecting a Crown submission this was a relevant consideration): at [33], [45]. In this case, programs were residential with limited opportunity to leave the facility; absences were required to be in company of a staff member; activities, telephone and internet were restricted; activities were compulsory; there were strict rules and discipline: at [43]-[45].

The applicant's own attempts at rehabilitation were to his credit; he actively pursued it and it was productive. Justice requires the matter be permitted to be raised albeit for the first time on appeal: at [33] (cf *Zreika* (2012) 223 A Crim R 460).

5. PLEA OF GUILTY

s 16A(2)(g) Crimes Act 1914 (Cth) – Commonwealth offences - utilitarian value of guilty plea

Xiao [2018] NSWCCA 4 (Five-judge Bench): s 16A(2)(g) *Crimes Act 1914* (Cth) requires a court to take into account the utilitarian value of a guilty plea: at [269]–[278] following *DPP (Cth) v Thomas* [2016] VSCA 237. ***Xiao*** resolved the divergence of authorities on whether the utilitarian value of a guilty plea is

a relevant consideration for federal offences: see *Cameron* (2002) 209 CLR 339; *DPP (Cth) v Gow* (2015) 298 FLR 397; *Harrington* (2016) 11 ACTLR 215.

It is desirable the discount to be given for a guilty plea is specified. However, there is no obligation on the sentencing judge to do so and failure does not of itself amount to error: at [280].

In ***Huang*** [2018] NSWCCA 57 the CCA said the discount for the utilitarian value depends primarily upon its timing. Where a plea is entered on the first day fixed for trial, its utilitarian value must be "severely reduced", with 10 per cent usually allowed in such circumstances: at [81]-[83]; *Nash v Silver City Drilling (NSW) Pty Ltd* [2017] NSWCCA 96; *Zhao* [2016] NSWCCA 179. In this case, an appropriate discount is 10 per cent based upon the plea being entered on the day the appellant's trial was listed for hearing and in the circumstances in which the case was not complex, the utilitarian value was determined not to be high: at [86].

Discount not to be expressed as a range

In ***Huang aka Wei Liu*** [2018] NSWCCA 70 (Five-judge Bench) the applicant was sentenced for two Commonwealth offences. The CCA found the judge erred in stating the range for discounts for a guilty plea as a range "between 10% and 15%". It was an error to specify a range between which the discount for the guilty plea fell: at [4], [16], [24], [26], [59].

Section 16A(2)(g) *Crimes Act* 1914 (Cth) neither requires nor prohibits the specification of a discount. However it is desirable, in the interests of transparency, that any discount applied be specified: at [4], [49]; ***Xiao*** [2018] NSWCCA 4 at [280]. The judge did not specify the starting point adopted for either offence, or the respective discount he applied other than a range (which can be very significant for determining the starting point of a sentence): see at [56].

Note McCallum J and Hoeben CJ at CL, whilst agreeing the specification of a range produced such uncertainty as to amount to error in the present case, said it would be permissible to specify a discount in the terms of "about x%": at [26].

Section 16A Crimes Act 1914 (Cth) - judge not required to separately distil factors relevant to contrition without reference to guilty plea — sentencing factors in s 16A often overlap

In ***Singh*** [2018] NSWCCA 60 (Cth money laundering offences) the CCA rejected a submission that s 16A(2) *Crimes Act* 1914 requires the judge to deal with contrition and remorse "and to distil what factors were relevant to the question of contrition without reference to the entering of the plea of guilty": at [25]. Section 16A prescribes a number of matters required to be taken into account. Contrition and remorse are factors required to be taken into account separately under s 16A(2)(f) in addition to the plea of guilty under s 16A(2)(g), however, those factors often overlap: at [26]-[29]; ***Xiao*** [2018] NSWCCA 4 at [134], [272]; *Gallagher* (1991) 23 NSWLR 220; *Wong* (2001) 207 CLR 584.

Further, in dealing with the contrition and remorse, the sentencing judge did allow a reduction of 25 per cent. The judge was not obliged to accept the expert psychologist report which (together with the applicant's plea of guilty) was the only source of what the applicant submitted the judge failed to take into account. The judge was entitled to exercise considerable caution in relying upon the report in the absence of sworn evidence from the applicant (*Qutami* [2001] NSWCCA 353; (2001) 127 A Crim R 369): at [31].

s 22* Crimes Act 1900 *(NSW) – pleas of guilty entered at different stages incorrectly characterised as "late"

In ***Gordon*** [2018] NSWCCA 54 the judge failed to discriminate between the procedural histories of two offences when considering plea discounts. It was an error to describe both pleas as "late" when they were entered at different stages – one a year after committal, the other just four weeks after being charged. The judge erroneously discounted both sentences by 10 per cent on the basis the pleas were "late." An appropriate allowance was 15 per cent for the first offence and 25 per cent for other offence: per R A Hulme J (Hidden AJ agreeing) at [102]- [104]; Simpson J dissenting at [81]-[82].

6. DISCOUNT FOR ASSISTANCE

Failure to fulfil undertaking for future assistance - Whether Court can deal with entire discount or only amount attributed by sentencing judge for future assistance - Proper approach to reversing or adjusting of sentence - s 5DA Criminal Appeal Act 1912

In ***OE*** [2018] NSWCCA 83 the Crown appealed the respondent's sentence pursuant to s 5DA *Criminal Appeal Act* for failure to fulfil his undertaking to assist authorities. The respondent received a total discount of 65% for past and future assistance and plea of guilty. 15% was attributable to future assistance.

Whether Court can deal with entire discount or only amount attributed by sentencing judge for future assistance

A question arose as to whether s 5DA enables the Court to deal with the entire discount under s 23 (and perhaps the other sections) in totality, or only that amount attributed by the sentencing judge for future assistance. The Crown submitted that more than the discount of 15% is available in the exercise of the Court's discretion: at [49].

The CCA said it is unnecessary to finally determine whether an appeal court has power under s 5DA to reconsider the entire sentence because the Crown had not suggested the sentence imposed was inappropriate or that the distinction between future and past assistance was incorrect, determining it was not appropriate for the Court to deal with more than the 15% discount identified: at [50].

However, without finally determining the issue, the CCA said in obiter, that the terms of s.5DA are sufficiently wide to allow the Court, where necessary, to examine the entirety of the discount to determine that which truly reflects the value of the undertaking to give future assistance, and is not, necessarily, bound by the allocation of the sentencing judge: at [44].

Proper approach to reversing or adjusting of sentence

The proper approach to reversing or adjusting a sentence to take account of failure to adhere to an undertaking is:

- first, to remove all discounts to find the starting point of the head sentence;
- secondly, to apply the discount for the plea and any remaining discount for assistance actually given (or so much of the future assistance that is not to be reversed) to calculate the discounted head sentence; and
- thirdly, to apply the same ratio of non-parole period to head sentence as fixed by the sentencing judge: *GD* [2013] NSWCCA 212 at [48]-[52]; *Shahrouk* (2014) 241 A Crim R 274 at [65].

The CCA allowed the Crown appeal. For supply drugs, the respondent's sentence was 7 years 4 months, NPP 3 years 9 months. If the 7 years 4 months period is 35% of the starting point, then the starting point is 20 years 11 months (rounded down). Applying the discount that remains (50%, being 65% less 15%), the sentence to be imposed to reverse the 15% discount for future assistance becomes 10 years 5.5 months. The sentencing judge fixed the ratio of NPP to head sentence of 51.1%. Applying the ratio of 51% to the newly calculated head sentence results in NPP 5 years 4 months (rounded down, but only marginally). The CCA imposed a new increased sentence of 10 years 5.5 months imprisonment, NPP 5 years 4 months: at [57]-[58].

Failure to fulfil undertaking due to "self preservation" - fear, by itself, not a reasonable excuse - entire discount for future assistance removed where partial compliance effectively worthless - s 16AC Crimes Act 1914 (Cth)

In ***MI*** [2018] NSWCCA 251 the respondent was sentenced for conspiring to import commercial quantity of border controlled precursor (ss 11.5, 307.11 *Criminal Code 1995* (Cth).

He received a 12.5% discount for future assistance to authorities, giving an undertaking to give evidence against a co-offender under s 16AC *Crimes Act* 1914 (Cth).

At the co-offender's trial, the respondent provided a brief supplementary statement which named a person not disclosed previously. However, he then failed to give evidence in accordance with his undertaking, stating a need for "self-preservation" due to threats in custody. The Crown appealed.

The relevant legislation provides:

> *The DPP may appeal against the reduced sentence if the offender "without reasonable excuse" does not cooperate in accordance with the undertaking:* s 16AC(3)
>
> *If an offender has failed entirely to co-operate, the appellate court must substitute the sentence that would have been imposed but for that reduction:* s 16AC(4)(a)
>
> *If an offender has failed in part to co-operate, the court may substitute a sentence not exceeding that which could be imposed under s 16AC(4)(a):* s 16AC(4)(b)

The CCA (Button J; Gleeson JA and R A Hulme J agreeing) allowed the appeal, re-sentencing the respondent by removing the entire 12.5% discount given for future assistance.

Three issues are to be addressed on an appeal under s 16AC (at [25]–[28]):

(i) whether failure to cooperate (whether entire or partial) was without reasonable excuse

The respondent did not have a "reasonable excuse" for failing to comply with his undertaking: at [53]. Being frightened or apprehensive of the consequences (for himself or others) of giving evidence cannot, by itself, be a reasonable excuse. It is the fact the respondent placed himself in jeopardy by giving evidence that led to the discount being imposed: at [41]–[46]; *DPP (Cth) v Parsons* (1992) 74 A Crim R 172; *YZ* [1999] NSWCCA 263; *DPP (Cth) v Haunga* (2001) 4 VR 285 at [12]. This matter falls towards the end of the spectrum. The respondent had a general fear of "a few" threats in custody and was unable to determine if they were genuine: at [50]-[52].

(ii) whether the failure was entire or partial

Abundant caution should be adopted towards the question of whether failure to provide assistance is entire or partial: at [59], [63]. On the view most favourable to the respondent, he partially complied with his undertaking via the supplementary statement: [63]-[64], [75].

(iii) if the failure was partial, whether and to what degree should the sentence be adjusted

The partial compliance, in context, was completely worthless in a *practical* sense. Further, various factors favour removal of the entire reduction including the respondent's intransigent position, the unearned benefit by sentence reduction, absence of any other strong factor to the contrary and the need to encourage undertakings to be honoured: [76]–[78].

Note: ***MI*** was applied in ***R (Cth) v Madgwick*** [2018] NSWCCA 268 at [81]–[89].

7. PARTICULAR OFFENCES

Manslaughter - culpability increased where applicant aware deceased had terminally ill wife and young daughter

Sheiles [2018] NSWCCA 285: The applicant was sentenced for manslaughter on the basis of excessive self-defence. The judge found the gravity of the offence was increased because the homicide resulted in the deceased's terminally ill wife being deprived of her primary carer and would substantially contribute to the deceased's daughter being an orphan: at [12], [42]-[44].

Dismissing the appeal, the CCA held the judge did not err in his approach to the consequences of the deceased's death: at [44]. It may not have been correct for the judge to include his finding on this issue under "Objective Seriousness". But it was relevant to the applicant's moral culpability, applying *Lewis* [2001] NSWCCA 448: at [38]-[39].

It is a common law principle that it is inappropriate to impose a harsher sentence because the value of the life is perceived to be greater in one case than it is in the other: at [18]; *Previtera* (1997) 94 A Crim R 76.However, the degree of harm which the offender knows will be caused by the offence is highly relevant to the offender's moral culpability: [29]–[30]; *Lewis* at [67]; as applied in *Aytugrul* [2009] NSWSC 275, *Naden* [2013] NSWSC 759, *Droudis (No 16)* [2017] NSWSC 20.

Requisite mental element with regard to quantity in State drug offences - evidence of respondent on sentence inconsistent with pleas of guilty - pleas of guilty rejected.

In ***Busby*** [2018] NSWCCA 136 the CCA rejected the respondent's pleas of guilty to two offences of supply *more than the large commercial quantity of ecstasy and cocaine*, respectively. The drugs were found in a suitcase in a car driven by the respondent. The respondent told police, and gave evidence at sentence, that he believed the suitcase contained *cannabis leaf*.

The CCA found that the respondent believed he possessed for supply something more than 1.5 kg of *cannabis*. The large commercial quantity of cannabis is 100 kg. The combined weight of the ecstasy and cocaine was no more than 24 kilograms. All that the respondent intended to possess for supply was something over 1.5 kg of cannabis, nothing more. On his evidence, the respondent never intended to possess for supply more than the large commercial quantity of a prohibited drug: at [58].

To be guilty of the offence in question, the respondent needed to believe the suitcase contained a prohibited drug, and for him to believe it contained not less than the large commercial quantity applicable to the drug that he believed it to be (*Jidah* [2014] NSWCCA 270 at [34]). The respondent's evidence traversed the validity of his pleas: at [59]-[61], and the matter was remitted to the District Court: at [63]-[67].

Drugs – ongoing supply s 25A(1) Drug Misuse and Trafficking Act 1985 — s 25A applies to offences where A did not actually receive financial or material reward if purpose was to obtain it

Section 25A *Drug, Misuse & Trafficking Act* 1985 states:

> "A person who, on 3 or more separate occasions during any period of 30 consecutive days, supplies a prohibited drug (other than cannabis) for financial or material reward is guilty of an offence."

Section 3 defines *"supply"* to include: "sell and distribute, and also includes agreeing to supply, or offering to supply, or keeping or having in possession for supply, ….."

In ***Nguyen*** [2018] NSWCCA 176 the CCA held that s 25A(1) is not confined to actual supply and that where an accused's purpose in supplying, agreeing to supply, or offering to supply a prohibited drug is to obtain a financial or material reward, the offence is committed provided the other elements of s 25A are met: at [37]. On the facts of this case overall, that inference is overwhelming: at [27]. The sentencing judge was entitled to consider *agreements* to supply, which were for financial gain, in assessing the objective gravity of offences under s 25A: at [40]. "Supplies" in s 25A must be read in accordance with the extended definition in s 3(1): at [33]–[35]; *Kelly v The Queen* (2004) 218 CLR 216. The word "for" before "financial or material reward" indicates the purpose of the act of supply has primary importance in the construction of s 25A: at [37].

Younan [2018] NSWCCA 180 affirmed ***Nguyen***: at [21]-[24].

Drugs – lack of information regarding less common drug - quantity alone not a reliable guide to seriousness

El-Sayed [2018] NSWCCA 250: The applicant was sentenced for two offences of supply commercial quantity of prohibited drug, namely, *1,4 Butanediol* (1,117.1 grams and 1,981.1 grams, respectively).

The CCA allowed the appeal on the ground of manifest excess. On re-sentence, the CCA said the judge's finding of "middle of the range" objective seriousness should be revised. This was due to the lack of information about the drug *Butanediol* such as potency; whether it could be diluted to make greater quantities; its value; and the potential financial gain from selling it. With other more commonly encountered drugs there is knowledge about how much a user might consume and what it would cost. Quantity alone is not a reliable guide to seriousness aside from the fact that Parliament has determined that a particular quantity will be classed as a commercial quantity. Without further information, these offences were below the middle of the range: at [46].

Firearms – s 51D(2) Firearms Act 1996 – Possess more than three prohibited firearms

Taylor [2018] NSWCCA 50 at [59ff] set out sentencing principles relating to possess more than three prohibited firearms under s 51D(2) *Firearms Act*:

. The offence may be committed in a wide range of circumstances.

. Public safety is a factor of significance.

. The purpose of s.51D is broader than punishment of criminals who warehouse and harbor illegal firearms. It extends to stockpiling of weapons without any further criminal intent because of the risk a stockpile may inadvertently feed the market in the illegal supply of firearms (*Cromarty* (2004) 144 A Crim R 515 at [86]).

. The registration system enables tracking of stolen firearms and appropriate storage. There is a risk of firearms being stolen from remote rural properties by persons engaged in criminal activities (*Naden* [2013] NSWSC 759; *Stocco* [2017] NSWSC 304). Such matters are relevant to an assessment of objective seriousness and the need for general deterrence for persons possessing firearms illegally in rural areas: at [50], [60].

. Where the offender had a significant criminal history for firearm offences, there was a particular need for specific and general deterrence (*Mahmud* [2010] NSWCCA 219 at [71]; *Lachlan* (2015) 252 A Crim R 277 at [68]).

. Other matters relevant to an assessment of objective seriousness:

- the location of firearms in immediate proximity to additional rounds of ammunition (*Thalari* (2009) 75 NSWLR 307);
- the fact all firearms were in working order and not stored securely, with several being loaded (*Lachlan* at [73]);
- the offender's knowledge of the illegality of his behaviour (*Basedow* [2010] NSWCCA 76 at [20]).

Goldberg [2018] NSWCCA 99: The CCA allowed the sentence appeal where the applicant received an aggregate sentence for 5 firearm offences including one offence under s 51D(2) for which he received an indicative term 10 years imprisonment, NPP 7 years 6 months. Section 51D(2) has a standard non-parole period of 10 years.

Four pistols were found at the applicant's premises. The judge's assessment of the objective seriousness of the s 51D(2) offence as "above the mid-range" was not open: at [76]. The applicant's possession of pistols on behalf of people involved in a criminal milieu made the offence serious, but the judge did not take into account that of the four pistols, one was not in working order and another fired only intermittently. Failure to securely store the firearms is a material consideration, but the pistols were stored in unoccupied rental premises used as a "safe house" which militated against the risk they would be accessed by anyone other than the people the applicant was holding them for: at [10]-[12], [78].

The indicative sentence was unjustifiably excessive as seen by other cases involving s 51D(2): at [80]–[107]. There were few prohibited pistols in the applicant's possession, in contrast to the number of weapons possessed and additional Form 1 offences in *Dionys* (2011) 217 A Crim R 280 and *Taylor v* [2013] NSWCCA 157: at [109].

White JA noted the sentencing judge described the s 51D(2) offence as "possessing three or more firearms". However, the offence is "possessing more than three firearms". This is material to objective seriousness. It is difficult to say the applicant's offence is above the mid-range of seriousness when the number of weapons involved is the bare minimum to meet the threshold for the offence: at [8]–[9].

The indicative sentence was reduced to 6 years 7 months, NPP 5 years.

Child pornography – two further matters relevant to objective seriousness

In ***Hutchinson*** [2018] NSWCCA 152 the CCA added two matters to the list of factors set out in *Minehan* [2010] NSWCCA 140; 201 A Crim R 243 that may bear upon the assessment of the objective seriousness of child pornography / child abuse material offences. The CCA amended the 9th item in the list to include deception and added a new 10th item: at [44]-[45]. Individual cases can always identify other matters relevant to an assessment of objective seriousness and so this list is not exhaustive: at [46] . The amended items:

"9. The degree of planning, organisation, sophistication and/or deception employed by the offender in acquiring, storing, disseminating or transmitting the material.

10. The age of any person with whom the offender was in communication in connection with the acquisition or dissemination of the material relative to the age of the offender."

Participates as a client with a child in an act of child prostitution - s 91D(1)(b) Crimes Act

In ***Darwich*** [2018] NSWCCA 46 the CCA allowed the Crown appeal against sentence imposed for participates as a client with a child in an act of child prostitution under s 91D(1)(b) *Crimes Act*. The CCA discussed the criminality and objective seriousness of this offence.

Section 91C defines broadly an 'act of child prostitution' to range from any service whether or not involving an indecent act to sexual intercourse for payment aimed at sexual arousal or gratification. The section refers to "any sexual service" rather than any specific act and more than one act can be relied upon in relation to each single count: at [79]. Factors relevant to objective seriousness are:

. A "mature pimp" exploiting children for financial gain may lead to a finding of objective seriousness of "above midrange." However, that does not mean objective seriousness of an offence under s 91D(1)(b) would necessarily fall below such a finding.

. Degree of planning: Motivation to seek out children as prostitutes may point to a finding of greater objective seriousness than where the offender did not seek out a child under 18. Each case is to be assessed on its particular facts: at [87].

. The particular form of "sexual service", frequency of offending, number of complainants and age of the child: at [90].

The respondent had received an aggregate sentence of 3 years 6 months, NPP 1 year 8 months for five counts. Over one year, he was a client in a child prostitution syndicate. The offences were: paid $50 to have penile-vaginal intercourse with victim aged 15-16; cunnilingus and fellatio with victim aged 15 on three occasions; paid $100 to have penile-vaginal intercourse with victim aged 12.

The CCA imposed a new sentence of 5 years, NPP 3 years. The judge erred in assessing objective seriousness as "below midrange and *possibly towards the lower end of the range*": at [106]. Undue emphasis was placed on finding none of the acts involved mistreatment and coercive conduct: at [100]-[101]; *CTG* [2017] NSWCCA 163. The judge did not have regard to the broad definition of an act of child prostitution, to the type of sexual service, that some counts included two acts of sexual intercourse; and made the same finding of objective seriousness for each count despite one offence involving a younger victim crying throughout intercourse: at [103]-[105].

See also ***Toma*** [2018] NSWCCA 45.

8. APPEALS

When interests of justice so dictate, the Court will entertain appeal ground that raises issues overlooked at first instance - Lambert [2015] NSWCCA 22 – cf Zreika (2012) 223 A Crim R 460

In two cases the CCA allowed the applicant's appeal, citing *Lambert* [2015] NSWCCA 22 which held that when the interests of justice so dictate, the Court will entertain an appeal ground that raises questions or issues that have been overlooked by the applicant's legal representatives at first instance. Ordinarily, an offender is bound by the way in which the proceedings are conducted at first instance: *Zreika* (2012) 223 A Crim R 460.

Portelli [2018] NSWCCA 28: The CCA found the judge gave little if any weight to the applicant's back condition which would render prison time more onerous. The applicant's legal representatives at sentence did not present any medical evidence perhaps wrongly believing such evidence presented at an earlier bail application was properly before the judge for sentencing purposes. Nonetheless, the CCA found that justice may not have been done *(*citing *Lambert*): at [41]-[45].

Gardiner [2018] NSWCCA 27**:** The CCA (citing *Lambert*) did not accept the applicant's right to consideration of amelioration in sentence was forfeited by failure of his legal representatives at sentence to explicitly ask for the sentence to be backdated or reduced on account of the applicant's quasi-custody. The CCA noted that "Although it may not have been obligatory upon his Honour to have taken it [that is, a period of residential rehabilitation] into account, it is significant that he stated that intention to do so, but that that intention was not carried into effect": at [34]. The CCA allowed the applicant's appeal and backdated the sentence accordingly.

Gardiner was cited in ***Reddy*** [2018] NSWCCA 212 where the CCA allowed the applicant's appeal where the issue of quasi-custody was raised for the first time on appeal. (***Reddy*** is discussed under "Quasi custody").

Applicant not precluded from reformulating case as to mental condition on appeal – cf Zreika (2012) 223 A Crim R 460

In ***Griffin*** [2018] NSWCCA 259 the CCA held that the failure by the defence to properly address the applicant's mental condition at sentence did not preclude the matter being raised on appeal (cf *Zreika* (2012) 223 A Crim R 460).

At sentence there was cogent evidence by way of reports that the applicant suffered from mental issues. The sentencing judge received almost no assistance on these matters and subjective circumstances were addressed cursorily: at [20].

McCallum J (Beazley P and Davies J agreeing) rejected the Crown's reliance on *Zreika* that as the significance of the applicant's mental condition was not advanced on the plea, the applicant should not be permitted to reformulate his case in this Court. The "practical expectation that an offender's legal representative will make submissions at sentence to the particular factors … sought .. in mitigation" (*Zreika* at [79]-[81]) cannot be elevated to a principle subverting the entitlement of an offender to be sentenced according to law: at [34]-[35].

In *Zreika* the judge failed to consider that the matter could have been prosecuted in the Local Court. Abject disadvantage of the kind in the present case is in a different category. The ultimate question in sentence appeals is whether the applicant was sentenced according to law. That issue is not necessarily determined, as an issue raised in a civil appeal might be, by whether the point was taken in the court below: at [36].

Where there was cogent evidence as to the applicant's mental condition, the sentencing judge was required to consider that evidence (*Markarian v The Queen* (2005) 228 CLR 357). For this Court to refuse to have regard to that evidence would perpetuate a serious injustice in this case (*cf Zreika* at [81]): at [37]-[38].

Affidavit evidence on re-sentencing - relevance

In ***Greentree*** [2018] NSWCCA 227 on re-sentencing following a finding of error, the applicant sought to rely on affidavit evidence from his family as to family hardship. The CCA allowed the evidence.

The CCA rejected the Crown's submission that the receipt of further evidence when error is established was limited to material concerning the "appellant's progress in custody since the sentence hearing" especially rehabilitation (*Betts v The Queen* (2016) 258 CLR 420 at [2]; *DL v The Queen* [2018] HCA 32 at [7]). Those cases were to do with evidence received on 'the usual basis' and relied on to reagitate findings of the sentencing judge, which is contrary to principle because such evidence cannot be used to "run a new and different case on appeal" (*Betts* at [2]). *Betts* at [2] and [22] is not inconsistent with this Court's role that once error is established, it must "tak[e] into account all relevant matters, including evidence of events that have occurred since the sentence hearing" (*Kentwell* (2014) 252 CLR 601 at [43]-[44]).

What is to be considered is the relevance of the affidavit to the resentencing process and the weight to be afforded it. The affidavit did no more than update the material that was before the sentencing judge and confirm that what was anticipated before the judge had come to pass: at [68]-[69].

The affidavit was admissible, to be taken into account as part of the "subjective mix" of the applicant's case and in the consideration of whether a finding of special circumstances should be made: at [70]-[71]. *Note:* This aspect of the case is discussed under "Family hardship", above.

Applicant's sentence partially accumulated on unrelated sentence subsequently quashed on appeal - applicant re-sentenced

In ***Little*** [2018] NSWCCA 63 the CCA allowed the applicant's appeal where the applicant's sentence had been partially accumulated on an unrelated sentence which was subsequently quashed on appeal. This did not necessarily mean the applicant should automatically have the commencement date of sentence backdated to when bail in this matter was first refused. Error having been identified, albeit of a technical kind, it is necessary to re-exercise the sentencing discretion: at [45]-[46].

Section 11 Criminal Appeal Act 1912 - Judge's notes and report furnished on appeal

Section 11 *Criminal Appeal Act* 1912 provides: "11 The judge of the court of trial may, and, if requested to do so by the Chief Justice, shall, in case of any appeal or application for leave to appeal, furnish to the registrar the judge's notes of the trial, and also a report, giving the judge's opinion upon the case, or upon any point arising in the case …"

In ***Zhang*** [2018] NSWCCA 82 the CCA Registrar supplied the parties with a purported s 11 report by the sentencing judge which sought to explain why he did not refer in his sentencing judgment to allowance for a 25% discount for the early plea. The CCA held the report did not meet the purposes of s 11 and disregarded it: at [39].

The content and purpose of a report under s.11 (*Sloane* (2001) 126 A Crim R 188) is not to justify or explain why a Judge has dealt with a matter in a particular way. The proper place for exposure of such reasoning is the Reasons for Sentence. An important function of a Report under s 11 is:

. to inform the CCA of any problems which might have emerged during trial, which do not appear on the face of the record, or which are imperfectly or ambiguously recorded.

. to raise any matters of irregularity, which may give cause for significant doubt in relation to a guilty verdict, and not apparent upon a bare reading of the record.

. in response to a specific request from the CCA.

The provision of a s.11 Report should only arise in exceptional circumstances. It is no function of a report under s.11 to provide reconsideration of sentence (*Vos* [2006] NSWCCA 234): at [37]-[38].

CCA has no jurisdiction to hear further grounds of appeal once orders are perfected – Criminal Appeal Rules

In ***Dickson (No 2)*** [2018] NSWCCA 183 the applicant made application for leave to appeal the CCA's judgment in *Dickson* [2016] NSWCCA 105 (where the Crown sentence appeal against the applicant was allowed). The applicant submitted the CCA had not given consideration to ground 7 which had been filed late; and also submitted additional grounds of appeal against sentence.

Dismissing the application, the CCA held it has no jurisdiction to hear and determine further grounds of appeal once proceedings are finalised and orders in its judgment have been "perfected": at [4]; [17]-[18]; [30]; *Achurch* (2014) 253 CLR 141; *Burrell* (2008) 238 CLR 218.

The arguments in support of ground 7 were effectively considered and dismissed given its oVerlap with ground 2: at [48]-[49]. Regarding the further grounds of appeal against sentence, the Court has no jurisdiction to sit as an appeal court against its own decision: at [11]; [15]; [52]; *DAO (No 2)* [2014] NSWCCA 126.

Rule 50C *Criminal Appeal Rules* (power to set aside or vary an order) can only be if the application is made prior to, or within 14 days of, the orders being entered into the court computer system: at [7]; [15];

[39]. Rule 50C does not confer jurisdiction to re-hear the merits of an appeal once determined: at [41]–[43]; *Langelaar (No 2)* [2017] NSWCCA 228.

Rule 25A, which permits an appellant to send notice of additional grounds of appeal, applies only to current notices of appeal not yet been determined by the Court. It does not apply here: at [8]; [15]; [37].

Post-sentence events – permitted where Crown correctly conceded judge erred by rejecting applicant's evidence of assistance to authorities

In ***Agnew (A pseudonym)*** [2018] NSWCCA 128 the Crown conceded on appeal that the sentencing judge erred by rejecting the applicant's letter to provide assistance to authorities on the basis it was not in the appropriate form. The applicant sought to tender further material, including evidence of ongoing assistance provided *after* he had been sentenced.

The CCA accepted the material and allowed the appeal.

An appeal will only be allowed where error is shown (ss 5, 6 *Criminal Appeal Act* 1912). Events post-sentence will not demonstrate such error. Historically, where injustice arose from post-sentence events, intervention was the province of the executive and not an appeal court: at [38]; *Munday* [1981] 2 NSWLR 177. However, the inflexibility of this approach has been ameliorated: at [39]; *Springer v The Queen* (2007) 177 A Crim R 13; *JM* [2008] NSWCCA 254 .

Where the statute does not mandate a particular approach, a degree of flexibility is preferred. One consequence may be to encourage appellate courts to take greater account of post-sentence events: at [40].

The evidence here could either be identified as events that post-date sentencing, or as events which demonstrate the continuing effects of assistance provided at the time of sentencing, but was not fully foreseen: at [41]; *JM* at [26]. Whilst not seeking to discourage assistance to authorities, the Court should not encourage the view that a post-sentence reduction can be achieved by an appeal where no error or miscarriage has been established. In this case, it is open to the Court to take account of post-sentencing events because error by the trial judge is conceded: at [42].

CCA CONVICTION AND OTHER APPEALS

1. EVIDENCE

s 79 Evidence Act - Expert witness - failure to comply with code of conduct does not result in mandatory exclusion - application for withdrawal of evidence relevant to ss 135 and 137 – Evidence Act provisions prevail over Supreme Court Rules

In ***Chen*** [2018] NSWCCA 106 (supply drugs) the judge did not err in admitting translations of phone intercepts under s 79 *Evidence Act* 1995 where the expert witness translator was unfamiliar with the expert witness code of conduct (the code) in the *Uniform Civil Procedure Rules* 2005, Sch 7.

The code is to be complied with in criminal proceedings (*Supreme Court Rules* 1970, Pt 75, r 3J(2); s 171D *District Court Act*). Rule 3J(3) provides oral evidence is not to be received from an expert witness unless they acknowledge in writing they have read the code and agree to be bound by it.

Wood (2012) 84 NSWLR 581 correctly held the Rules do not confine the operation of s 79 so that failure to comply with the Rules results in mandatory exclusion. Where the requirements of the Rules have not been satisfied, then that is relevant to a consideration under ss 135 and 137 (and which the judge properly did in this case): at [20]-[21].

Any tension in criminal proceedings between the express provisions in the *Evidence Act* as to admissibility of evidence and the *Supreme Court Rules*, is prevailed by the specific provisions enacted by Parliament in the Act, unless there are express words to the contrary: at [29]-[30]; *De L v D-G Dept Community Services (NSW)* (1997) 190 CLR 207.

Section 87(1)(c) - audio recordings of conversations between co-conspirator and another person, but not involving offender - reasonably open to find that co-conspirator's representations made in 'furtherance' of common purpose – s 87 is not directed to admission of evidence in substantive proceedings

Decision Restricted [2018] NSWCCA 127: Section 87(1)(c) *Evidence Act* 1995 states a court is to admit a representation by a person for the purpose of determining whether it is also taken to be an admission by a party, if "reasonably open to find" that the "representation" was made by the person "in furtherance of a common purpose" that the person had with the party.

The respondent, charged with drug supply, supplied drugs to M who on-sold to RS. Pursuant to s 87(1)(c), the Crown sought to rely on recorded conversations between M and RS in which M referred to the person from whom she purchased drugs. The trial judge ruled the recordings were inadmissible.

The CCA allowed the Crown appeal (s 5F(3A) *Criminal Appeal Act* 1912), set aside the trial judge's rulings and declined to make an order that the evidence was admissible: at [62]–[63].

Section 87(1) contains no element of discretion. If, having applied the test - was it reasonably open to find both common purpose and a representation made in furtherance of the common purpose? - the court is required to admit the evidence, but only for the limited purpose of determining whether a previous representation made by one person should be taken to be an admission by a party. Satisfaction of s 87(1)(c) does not render evidence of the representation admissible in substantive proceedings. That question requires a further evidentiary decision: at [24]–[26].

Common purpose: The judge erred in finding there was no common purpose between M and the respondent. It was reasonably open to find the respondent and M had a common purpose, being the completion of a transaction involving the transfer of property from one to the other: at [36]; *Watt* [2000] NSWCCA 37; *May (No 2)* [2008] NSWSC 595.

"Representation": The judge erred in finding M's statements were not "representations". "Representation" has the broadest application. It is the assertion of the existence of a fact or state of facts. It includes non-verbal representations to be inferred from conduct, and representations not intended to be, and not, communicated: at [43]–[47]; *Lee* (1998) 195 CLR 594.

"in furtherance": The judge erred in concluding M's statements were not made "in furtherance" of the common purpose. 'Furtherance', in the context of s 87(1)(c), denotes an act done to advance, aid or help a common purpose. It was reasonably open to find M's representations, orally and in the context of her conduct, advanced the object of the agreement between M and the respondent: at [53]-[56]; *Landini v State of NSW* [2007] NSWSC 259.

Thus the judge ought to have held that it was reasonably open to find: (i) the respondent and M shared a common purpose; and (ii) M made representations in furtherance of that common purpose; and therefore should have admitted evidence of those representations in the determination of whether those representations ought to be taken to be admissions by the respondents: at [57].

ss 97, 101(2) Evidence Act - tendency - error to rely on dissenting judgment in CCA decision of McPhillamy [2017] NSWCCA 130 when High Court had reserved reasons - underlying propensity accepted by accused as operating over an extended period - evidence admissible - cf McPhillamy v The Queen (2017) 92 ALJR 52

RDT [2018] NSWCCA 293: The respondent was indicted on child sexual assault offences against his daughter aged 3 – 5, between 2006 and 2008. The trial judge rejected the Crown's application to adduce tendency evidence (s 97) of conduct that occurred in 2015 which demonstrated an interest by the respondent in gaining access to toddlers in nappies and pre-pubescent girls for sexual activity, and an admission to police that he had had an interest in young girls for " 20 years".

Four weeks before the trial judge's ruling, the High Court made orders setting aside *McPhillamy* [2017] NSWCCA 130 but reserved its reasons [*McPhillamy v The Queen* (2017) 92 ALJR 52; [2017] HCA 20]. Having read the transcript of the High Court hearing, the trial judge proceeded on the basis that the dissenting judgment in the NSWCCA in *McPhillamy* had been accepted by the High Court: at [28].

The Crown appealed pursuant to s 5F (3A) *Criminal Appeal Act* 1912. The CCA allowed the appeal and directed that the evidence was admissible at trial.

Where High Court reasons reserved:

The trial judge erred by applying the reasoning of the dissenting judge in *McPhillamy* [2017] NSWCCA 130. The correct approach to the High Court's orders was to disregard *McPhillamy* in this Court. The judge should have applied the principles in earlier High Court authority, including *Hughes v The Queen* (2017) 92 ALJR 52: at [30], [35], [58], [61].

Circumstances different to McPhillamy (2017) 92 ALJR 52:

The judge was wrong to treat the reasoning in *McPhillamy* as determinative when the circumstances of this case bore little relationship to the circumstances in *McPhillamy*: at [31], [47], [58], [61]. In *McPhillamy* (2017) 92 ALJR 52 at [27], accepting that a sexual interest in young boys may continue over a decade, the absence of any evidence of acting on that tendency during a 10 year period deprived earlier events of cogency in supporting alleged later conduct: at [33].

The present case involved factors to which the trial judge did not refer. These included: the temporal connection in the respondent's admission he had an interest in young girls for " 20 years", and the 2015 offending were more than uncharged allegations as charges had been laid and guilty pleas entered: at [34].

The reasoning in particular cases will depend upon the nature of the 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 above factors demonstrate that the tendency evidence had significant probative value: at [36]; *Hughes* at [57], [60].

Evidence admissible:

The issue is whether the accused committed acts on his daughter aged between 3 -5 for sexual gratification. Ordinary human experience suggests such conduct is most unusual. It is difficult to identify the prejudicial effect: see at [40]-[46]; s 101.

Tendency evidence the subject of previous acquittal based on doli incapax - evidence inadmissible

In ***DS*** [2018] NSWCCA 195 the accused was convicted at trial of the alleged sexual assault of his nephew. The Crown was permitted to lead as tendency evidence of an earlier sexual assault by the accused of his niece when he was aged 11. That earlier offence was proven but he had been acquitted of it on the basis of doli incapax.

The CCA allowed the conviction appeal and quashed the conviction. The evidence was inadmissible.

The question of inadmissibility involves three steps.

. First, the principle that the Crown cannot rely upon conduct subject of an acquittal in a way which would controvert the acquittal.

. Second, the acquittal does not mean the conduct may not be admissible in a subsequent criminal trial for a different offence. If relied on as tendency, it will be necessary to consider s 97 and s 101 *Evidence Act*.

. Third, the evidence raises a question of whether objectively there is any basis to conclude that the way an 11 year old boy, not proved to have an understanding of the distinction between right and wrong, behaves in relation to a 4 year old niece gives any reliable indication as to a tendency to sexually abuse a nephew some 7 - 8 years later when intellectual and emotional maturity has increased; further, whether it is right to expect a jury to have experience of such matters to draw inferences in a criminal trial: at [3]-[10].

There is little basis to conclude that a tendency to act in a particular sexual manner at an early age, without the necessary understanding of its wrongfulness, would continue to affect the person's behaviour, after achieving a sufficient understanding of its wrongfulness. The evidence had little or no probative value. Further, the fact it is presented to the jury will lead them to infer it is relevant and

provides a basis for them to draw inferences. That factor involves a significant risk of prejudice. The evidence should have been rejected: at [11].

s 98 Evidence Act 1995 - two counts of murder on same evening - Crown did not rely upon coincidence or tendency reasoning - transactional evidence - evidence relating to each count admissible in trial of the other count

Haines [2018] NSWCCA 269: The applicant was convicted at trial of two counts of murder. The applicant, employed as a nurse at an aged care facility, murdered two residents on the one evening by injecting each with insulin. Both victims fell into a coma and died. The applicant's motive was that each victim had made complaints against her.

The Crown had served a notice of intention to adduce coincidence evidence (ss 98, 99 *Evidence Act* 1995), but did not seek leave to rely upon that coincidence notice at trial.

The applicant submitted there was a miscarriage of justice because the Crown was permitted to argue coincidence where no leave or application to allow the coincidence rule to be used was made; the trial judge treated the two counts as cross-admissible and failed to direct the jury to give separate consideration to each count.

The CCA dismissed the appeal.

The Crown did not present a case based on coincidence evidence: at [233]. The Crown case was circumstantial, relying on motive and opportunity, that the same person must have murdered both victims because their deaths were part of the one transaction, and it was the applicant who murdered each: at [233]. Significantly, it was not an issue that the same person did not commit both killings, rather, the issue was who was that person: at [217], [229].

From the way the trial proceeded, the two murders were admissible as transactional evidence being a connected series of events forming part of a single transaction (*O'Leary v The King* [1946] HCA 44; 73 CLR 566 at 577-578). Their relevance to each other, and their interdependence, were not put forward on the basis of improbability reasoning, pursuant to s 98 *Evidence Act:* at [218]-[219].

Transaction evidence, admissible pursuant to the test of relevance in s 55, is not used to prove that a particular person did a particular act or had a particular state of mind on the basis that it is improbable that two or more related events occurred coincidentally. Where there is one transaction, "two or more related events" do not exist: at [222]-[224], [226]; *Adam* [1999] NSWCCA 189; 106 A Crim R 510 at [26]-[27]; *Mostyn* [2004] NSWCCA 97; 145 A Crim R 304 at [126]-[128].

As the two offences were treated as part of a single transaction, the judge was not required to warn the jury that each count should be looked at separately (*Markuleski* (2001) 52 NSWLR 82): at [227].

As tendency and coincidence reasoning were not used to link the murders, the judge was not obliged to direct the jury not to rely upon propensity or coincidence reasoning: at [227]-[228].

Therefore, the evidence relating to each count was admissible in the trial of the other count and the particular facts of this case did not require resolution by reliance upon coincidence evidence or tendency reasoning: at [231].

Note: The Court noted at [237] that in *R v Gibbs* [2004] ACTSC 63; 146 A Crim R 503 at [14]-[15] Gray J had properly accepted that coincidence evidence could be used to prove the same unknown person committed two acts on *separate* days.

ss 90, 189 Evidence Act 1995 – murder – spontaneous admissions directed to a fictional state of affairs - admission of evidence not unfair within s 90 - voir dire - "preliminary question"

Haines [2018] NSWCCA 269: see facts above.

Crown witness AB stated in his statement that while watching a TV show with the applicant about a murder victim being poisoned, the applicant said, amongst other things, *"I know how to commit … murder", "Inject them with insulin … it looks like natural causes."*

The applicant at trial objected to the evidence (s 137), however, before the judge ruled on admissibility, the parties agreed on parts of the conversation and that AB's statement would be led at trial.

The appellant submitted the trial judge failed to address the proper test for admissions under s 90*;* and erred in failing to make a finding and conducting an inquiry pursuant to s 189(1)(a).

The CCA dismissed the appeal.

Evidence Act, s 90

The discretion to refuse to admit evidence of an admission pursuant to s 90 depends on a trial judge concluding that to admit the evidence would be unfair to an accused in all the circumstances.

The focus of s 90 is on the unfairness of the use of the admission in the trial. The scope of the discretion cannot be defined exhaustively. The reliability of the admission is a factor but not an exclusive factor affecting the unfairness of its use. Its application is likely to be "highly fact specific": at [269]-[270]; *Em v The Queen* (2007) 232 CLR 67 at [56], [107], [109]. The unfairness associated with the use of an admission might extend to forensic disadvantages that an accused might suffer at trial (e.g. *Swaffield* (1998) 192 CLR 159 at [78]): at [271]. The application of the *Evidence Act* cannot of itself cause unfairness: at [272]; *XY* [2013] NSWCCA 121; 84 NSWLR 363.

The applicant's admission was unsolicited and purely hypothetical. It was directed to a fictional state of affairs: at [265].

There was no unfairness in the Crown making use of the admissions at trial. They were not, for example, given in the course of a police interview attracting disapproval; the applicant spoke spontaneously; there was nothing to suggest a lack of reliability and the applicant's evidence at trial supported the reliability of the admission: at [273]. There was no basis for asserting unreliability on the part of AB: [275].

Evidence Act, s 189

Section 189 relevantly provides:

> *(1) If the determination of a question whether:*
> *(a) evidence should be admitted (whether in the exercise of a discretion or not)*
> *……*
> *depends on the court finding that a particular fact exists, the question whether that fact exists is … a preliminary question.*
>
> *(2) If there is a jury, a preliminary question whether:*
> *(a) particular evidence is evidence of an admission, or evidence to which s 138 applies, or*
> *(b) evidence of an admission, or evidence to which section 138 applies, should be admitted,*
> *is to be heard and determined in the jury's absence.*

Section 189 provides for a procedure where there is a voir dire and whether a jury should be present in court when the voir dire takes place: [277].

The applicant submitted an error by the trial judge in there not being a voir dire pursuant to s 189(1)*:* at [276].

Section 189(1) merely provides that a particular issue is a "preliminary question". It has no effect on whether a voir dire should be held: at [277].

The admissibility of AB's statement was determined pursuant to s 189(2), during a voir dire. There was no fact required to be decided as part of the decision as to the admissibility of the alleged admission. Accordingly, the applicant's reference to s 189(1) is in error; and the submission that the trial judge should have compelled a voir dire should be rejected: at [280].

There was no need for AB to be called, and no error in AB not being examined on the voir dire. The applicant at no time said that the admission was not made. Her position was that she could not remember having made the statements. The need to cross-examine AB largely disappears: at [280].

Whether there should be a voir dire is determined by the issues at trial. No accused has an unqualified right to a voir dire. The accused must make application for such an examination, specify the issues to be explored and show there is a significant issue to be tried: at [278], [279]; *Lars et al* (1994) 73 A Crim R 91; *Bin Sulaeman* [2013] NSWCCA 283.

s 100 Evidence Act – tendency evidence - judge erred in refusing to dispense with notice requirements

In ***AC*** [2018] NSWCCA 130 (historic sexual offences involving five complainants) the Crown failed to serve a tendency notice within time as required by s 97(1)(a) *Evidence Act.* The primary judge refused to dispense with notice requirements for service under s 100(1) on the basis there was no sufficient explanation for failure to serve the notice and it was "not in the interests of justice" such a direction be made.

The CCA allowed the Crown s 5F(3A) appeal and granted the Crown's application under s 100(1).

Section 100(1) provides: "The court may, on the application of a party, direct that the tendency rule is not to apply to particular tendency evidence despite the party's failure to give notice under s 97." The power conferred in s 100(1) is to "direct" that the tendency rule does not apply. Accordingly it is subject to s 192 (Leave, permission or direction may be given on terms).

The judge erred in:

- finding that a mandatory and determinative matter was there be a sufficient explanation for failure to comply with s 97(1)(a). Section 192 requires five matters be taken into account in determining whether to give a direction: at [28].
- treating as a relevant factor a perceived need to address the Crown's conduct in relation to the service of tendency notices. That consideration is beyond the purposes for which the power in s 100 is conferred: at [29].
- making no reference to the matters in s 192(2). Whilst not necessary to make specific reference to these matters (*Reardon* [2002] NSWCCA 203; 186 FLR 1), there is no reference or analysis in the judge's reasons as to the effect of the direction on those matters: at [32].

Evidence Act s 101 - trial judge erred in finding probative value did not substantially outweigh prejudice - high level of speculation as to future events - "prejudicial effect [evidence] may have on the defendant" not limited to potential effect of evidence on a jury

Chase (a pseudonym) [2018] NSWCCA 71: The respondent was charged with supply drugs. He had an earlier conviction for drug supply which he intended to appeal. The Crown proposed to tender, as tendency or coincidence, evidence of that earlier supply (though not the conviction itself).

The judge held the evidence was inadmissible as it would cause the respondent "invidious" prejudice not substantially outweighed by its probative value pursuant to s 101(2) *Evidence Act 1995.*

The CCA allowed the Crown interlocutory appeal against the trial judge's ruling (s 5F(3A) *Criminal Appeal Act).*

The judge erred by taking into account factors which did not constitute relevant prejudice. The matters the judge said would give rise to prejudice involve a high level of speculation as to future events, some of which are quite unlikely to occur: at [34].

First, the judge said that it was highly prejudicial to revisit a trial and its verdict before a judge alone. That may be seen as a challenge to the finality of a verdict and conviction, but it is not prejudice to the respondent: at [26]–[27].

Second, the judge considered if the evidence were admitted, the respondent would be "forced" to give evidence. However, this would be a forensic choice and does not demonstrate prejudice: at [28].

Third, there is no element of prejudice in the fact that admitting the evidence might create the possibility of pre-empting things that might be said on the outstanding appeal: at [29]–[30].

However, there was no error in the fact the judge did not limit consideration of prejudicial effect to the potential effect on the jury, rather than on the interests of the *defendant in a* "*fair trial*": see at [32]-[33]. Section 101(2) speaks in general terms of "the prejudicial effect [the evidence] may have *on the defendant*." It is not necessary to give that language a limited operation. Thus prejudice might arise if a defendant's appeal on an earlier conviction was successful and a retrial ordered: at [31].

s 293 Criminal Procedure Act 1986 (Admissibility of evidence relating to sexual experience) - Evidence of "false complaints" should not have been ruled inadmissible

***Adams v R* [2018] NSWCCA 303:** The applicant was convicted of aggravated indecent assault, and acquitted of three further sexual offences. The Crown alleged the offences occurred on the evening of 30 January 2013. The complainant was aged 14 and assessed as having a mild to moderate intellectual disability.

Although not necessary on the appeal (the appeal having been allowed and conviction quashed on a separate unreasonable verdict ground) , the CCA (by majority) found the trial judge erred in excluding evidence of "false complaints" by the complainant under s 293 *Criminal Procedure Act* 1986: at [4]; [177].

The evidence was that the complainant had made nine false complaints to police and other authorities of other serious sex abuse matters from March 2012 to February 2013.

The false sexual complaint evidence is caught by the exclusionary rule in s 293(3), however, falls within the exception in s 293(4)(a)(i)-(ii).

Evidence the complainant made false complaints up to and after the alleged offence is evidence of a lack of sexual activity taken part in by the complainant "at about the time of" the alleged offence, satisfying the temporal requirement in s 293(4)(a)(i); and capable of being evidence of "events" (or "non-events") which form "part of a connected set of circumstances" in which the alleged offence was committed (s 293(4)(a)(ii)): [4]; [163]; [167], [171]-[172], [204]-[205], [211]; (however cf. per N Adams J at [212]); *M v R* (1993) 67 A Crim R 549; *GEH v R* (2012) 228 A Crim R 32; [2012] NSWCCA 150 at [11].

The trial judge erred by separately considering each instance of complaint by reference to the charged incident rather than look at the total effect of the instances of false complaint which straddled the date of the alleged offending, being ten months before and concluding two days later: [4].

In particular, the complaints on 29 January 2013 and 1 February 2013 enjoyed a very close temporal relationship to the alleged offending: [173]-[174], [204]-[205].

2. JURY

Juror internet search made for personal reasons - not misconduct - did not give rise to a "risk of a substantial miscarriage of justice in the trial" - s 68C(1), ss 53A(2)(a),(b) Jury Act 1977

It is an offence for a juror in a criminal trial to "make an inquiry for the purpose of obtaining information about the accused, or any matters relevant to the trial": s 68C(1) *Jury Act*.

A judge must discharge a juror who has engaged in "misconduct", being an offence against the Act, or conduct giving rise to a "risk of a substantial miscarriage of justice in the trial": s 53A *Jury Act*.

Hoang [2018] NSWCCA 166: A juror, during a child sexual assault trial, disclosed prior to verdicts that she had searched the internet for the 'working with children check' as she wanted to find out why she (a retired school teacher) had never obtained one. The judge took guilty verdicts for eight counts, then examined and discharged the juror. The judge then took guilty verdicts from the remaining jurors for the last two counts.

The CCA dismissed the appeal. The trial judge erred in finding this was "misconduct" under s 53A(2)(a). The ordinary meaning of "for the purpose of" in s 68C(1) is "with the intention of". The relevant inquiry must be for the purpose of obtaining information "about the accused, or any matters relevant to the trial": at [100]-[102]. The juror's purpose was to make an inquiry about a matter relevant to herself, not the trial, and the requisite intent was not established: at [138]-[139].

However, if a trial judge errs in finding misconduct, failing to comply with a procedure which is only mandatory if misconduct has in fact been found does not mean the trial is flawed in a fundamental respect: at [139].

The juror's conduct further did not give rise to a "risk of a substantial miscarriage of justice in the trial" under s 53A(2)(b): at [135]. The test under s 53A(2) is to be assessed prior to verdict and is whether there has been a *risk* of a substantial miscarriage of justice. The question is assessed by considering whether the juror's inquiry and introduction of results of that inquiry into the jury room could have affected the trial outcome: at [132]. In this case, the foreperson did not believe the inquiry had an impact and it was conducted after guilty verdicts had already been reached for the eight counts: at [133]-[135].

As to the last two verdicts, the removal of a juror by virtue of an error in the evaluative assessment of whether there had been a breach of s 68C does not represent a fundamental defect in the trial process affecting the those verdicts: at [150]; *Katsuno v The Queen* (1999) 199 CLR 40; s 22 *Jury Act.*

Potential juror irregularity – CCA orders additional sheriff's report – appeal adjourned – s 73A Jury Act 1977

Section 73A(1) *Jury Act* 1977 allows a court to request or consent to the sheriff conducting an investigation if there is a reason to suspect the verdict of a jury in a trial may have been affected by improper conduct by a member of the jury.

In ***Higgins*** [2018] NSWCCA 258 the appellant was convicted of fraud offences. The day after the verdicts a juror emailed the sheriff about "the manner in which the verdict was reached" stating two jurors were not given an opportunity to have their doubts addressed during deliberations. The trial judge ordered an investigation under s 73A(1). The ensuing sheriff's report referred to a juror who allegedly witnessed jurors "making racist and derogatory comments about the accused in the jury room". The trial judge found no further steps needed to be taken.

The CCA (Schmidt J, Harrison J agreeing, Hoeben CJ at CL dissenting on the question of a further investigation) ordered a further investigation under s 73A and adjourned the appeal.

What was actually said, and whether that amounted to "racist and derogatory remarks" which deprived the applicant of the fair trial because of bias, has not been investigated: at [122]-[123]. A further inquiry should be ordered exercising the powers given by s 73A.

An inquiry would not lack utility (*Lodhi v AG NSW* (2013) 241 A Crim R 47) and in the circumstances this Court must be satisfied that justice was not only done at trial, but that it can be seen to have been done (*Webb* & *Hay* (1994) 181 CLR 41): at [17], [86], [121].

The utility of the resulting report will be that this Court will be in a position to hear the parties to determine whether any remarks made by a juror can properly be described as having been "racist or derogatory" and if so, if there was a miscarriage of the kind dealt with in *Webb & Hay*: at [127].

What is required is a circumscribed investigation into objective facts. It would involve the Sheriff obtaining an account from the juror and other jurors as to the words spoken; when; and in whose hearing: at [126]. This would not involve destruction of the jury system as an investigation into the psychological relationships between the jurors: at [124]; *Petroulias* [2013] NSWCA 434; (2013) 306 ALR 210.

3. APPEALS

Guilty verdict, but no conviction entered – falls within "an appeal against conviction" in s 5(1) Criminal Appeal Act 1912

Sections 5(1)(a) and (b) *Criminal Appeal Act* 1912 provide that "a person convicted on indictment" may appeal "on any ground involving a question of law alone" (s 5(1)(a)) or on any ground involving a question of fact alone or a question of mixed law and fact with the court's leave (s 5(1)(b)).

In ***Cabot (A pseudonym)*** [2018] NSWCCA 265 the CCA held that the right to appeal "against the person's conviction" in s 5(1)(a) and (b) is available when the jury has returned a guilty verdict, even if no steps have been taken to record a conviction or sentence the person: at [53].

The jury verdict is distinct from the conviction (*NH v DPP* (SA) (2016) 260 CLR 546). There are multiple meanings of "conviction" – sometimes used as meaning the *verdict* of a jury, or in its more strictly legal sense, for the *sentence* of the court. The meaning of "convicted" turns on the context in which the statement is made: at [50]; *MAJW* [2007] NSWCCA 145; (2007) 171 A Crim R 407.

This Court should apply the same approach to s 5 as was applied in *MAJW* to s 5A(1). In *MAJW* a jury returned guilty verdicts but the trial judge was unwilling to sentence because he considered the counts on the indictment did not disclose an offence at law. This Court did not accept there had been no "conviction" for the purposes of s 5A; and had jurisdiction to hear and determine 'a question of law' submitted by the trial judge under s 5A: at [50].

There is a close correlation between the right of appeal against "conviction on any ground which involves a question of law alone" in s 5(1)(a) and the power to submit a question of law arising at or in reference to trial or conviction in s 5A(1). It would be strange if only s 5A(1) but not s 5(1)(a) were available following a verdict and in the absence of a formal conviction, and if a jury's verdict were sufficient for s 5(1)(a) but not sufficient for s 5(1)(b), since those two paragraphs are together intended to cover the field: at [52].

4. PARTICULAR OFFENCES

s 24(2) Drug Misuse and Trafficking Act 1985

Cashel [2018] NSWCCA 292: The CCA held:

. s 24(2) contains two separate offences of 'manufacture' and 'knowingly take part in manufacture' of prohibited drug

. the 'manufacture' offence requires that drug be actually manufactured

. quantity of precursor underpinning count of manufacture precursor offence could be taken into account for separate offence of knowingly take part in manufacture drug

The applicant pleaded guilty to manufacture pseudoephedrine (count 1) and manufacture not less than the commercial quantity of methylamphetamine (count 2); each an offence pursuant to s 24(2) *Drug Misuse and Trafficking Act 1985*.

Police located three relevant quantities: 89.88 grams of pseudoephedrine which it was agreed could be manufactured into approximately 79 grams of methylamphetamine; 272 grams of pseudoephedrine which could be manufactured into approximately 241 grams of methylamphetamine; and 12.7 grams of methylamphetamine actually manufactured.

Count 1 was based on the 89.88 grams of pseudoephedrine.

Count 2 was based on all three quantities, that is, the agreed calculated quantity of approximately 320 grams of methylamphetamine that could have been manufactured from the two quantities of pseudoephedrine, plus the 12.7 grams of methylamphetamine actually manufactured: at [26]–[30].

Section 24(2) *DMTA* provides that a *person who manufactures or who knowingly takes part in the manufacture or production of a prohibited drug not less than the commercial quantity is guilty of an offence.*

Section 3 *DMTA* provides that "*manufacture"* includes *"the process of extracting or refining the prohibited drug".*

The applicant submitted the conviction for count 2 be quashed as the drug was not actually manufactured. Only 12.7 grams of methylamphetamine was actually manufactured when the applicable commercial quantity was 250 grams. The appropriate offence was 'knowingly take part taking part in manufacture' under s 24(2): see at [51]-[55].

The CCA allowed the appeal against conviction on count 2 and substituted a conviction for 'knowingly taking part': at [101].

s 24(2) contains two offences

Section 24(2) is an *offences*-creating provision containing two offences, not two ways of describing the one offence, nor two ways of being guilty of one offence (*Deng*; *Dayment* [2018] NSWCCA 132 at [66], *Hosseini* (2009) 193 A Crim R 444 at [39]). The two offences are conceptually separate; one captures a process that does not come to fruition, the other a completed process: at [75].

Manufacture offence requires drug to be actually manufactured

To be guilty of the offence of manufacturing a prohibited drug under s 24(2), including but not limited to the "aggravated offences" of manufacturing a commercial or large commercial quantity, a person needs to have actually produced the prohibited drug: at [72]. For full reasons see [2]-[5]; [72]-[90]. Reasons include:

- The reference to the idea of a "process" in the definition of "manufacture" (s 3 *DMA* Act) is not determinative and can be understood as extending the parameters of the physical act of manufacture, not as focusing the offence upon the process and not the outcome: at [78].
- Section 24(2) criminalises "a person who manufactures *or* produces…a prohibited drug", however, "manufactures" and "produces" are used as "catch-all" synonyms, not to draw a distinction between the two: at [79].
- Parliament does not refer to an intention that the offence of manufacturing encompasses circumstances in which no drug was actually produced: [84]; NSW Legislative Council, *Parliamentary Debates* (Hansard), 28 November 1985 at 11122.
- The most natural meaning of "to manufacture", and the flavour of Dictionary definitions of "manufacture", is that something is actually brought into existence: at [85]–[87].

Elements of count 1 not fully subsumed within the elements of substituted count 2

The applicant submitted the conviction on count 1 be quashed because it exposed the applicant to double punishment. The Court dismissed this ground: at [101].

The elements of count 1 are not fully subsumed within the elements of substituted count 2 (*Pearce* (1998) 194 CLR 610; *Island Maritime Ltd v Filipowski* (2006) 226 CLR 328). The applicant knowingly took part in one offence, and one way in which he did so was by committing another, separate offence: at [113]–[115].

There was some overlap but the two offences were discrete. The manufacture of pseudoephedrine in count 1 was merely *one* factor that underpinned the calculation of the quantity of methylamphetamine intended to be manufactured, and which now underpins the substituted count of knowingly taking part in the manufacture of prohibited drug. Count 1 was merely one of a number of evidential components of count 2: at [116].

Detain for advantage 86(1)(b) Crimes Act - taking complainant's phone and saying "come on, get up" was 'detention' — physical contact or detention for any length of time not required

***Baradi* [2018] NSWCCA 143:** The appellant pleaded guilty to assault (s 61 *Crimes Act*) and aggravated break and enter and commit serious indictable offence (s 112(2), namely, detain with intent to obtain an advantage (under s 86(1)).

The appellant kicked in a hotel room door, took the complainant's mobile phone and said '*Come on, get up*' (s 112(2) offence). The appellant took the complainant's wrists and walked her 20 metres out room to the lift (s 61 offence).

The appellant submitted there was double punishment because the assault was encompassed by the aggravated break and enter offence. The CCA (Johnson J, Adamson J agreeing; Simpson AJA dissenting) dismissed the conviction appeal.

Section 86(1) can be committed by either 'taking' or 'detaining'. Here, the Crown alleged the applicant had detained the complainant. The conduct of taking the complainant's mobile phone and saying "*Come on, get up*" was an act of control exercised over the complainant. These acts interfered with the liberty of the complainant and was detention for the purpose of s. 86(1). It is the interference with liberty that is at the heart of the conduct caught by s.86. Taking a physical hold of, or physical contact with, the person is not essential for there to be a 'detention' or a 'taking'. There does not have to be a physical

detention nor for any specific length of time to be detaining provided it interferes with the person's liberty: at [73]-[79], [81], [86]-[91]; *Davis* [2006] NSWCCA 392; *Homsi* [2011] NSWCCA 164; *Campbell and Brennan* [1981] QdR 516; *Speechley* (2012) 221 A Crim R 175; [2012] NSWCCA 130 cited.

There was no double punishment. The assault offence commenced in the hotel room but continued outside the room and into the foyer where hotel staff caused the applicant to let go of the complainant and leave the hotel. There were features of the assault offence which involved additional criminality to that which formed part of the s.112(2) offence: at [86]; *Jidah* (2014) 246 A Crim R 368.

Meaning of "procure" in s 66EB Crimes Act 1900 - importance of context when considering meaning

In ***ZA [2018] NSWCCA 116*** the accused father arranged the marriage of his 12 year old daughter. He was convicted by judge alone of 'Intentionally procuring a child under 14 for unlawful sexual activity' under s 66EB *Crimes Act*. The appellant appealed his conviction submitting the trial judge erred in her interpretation of the word "procure."

Dismissing the appeal, the CCA held the judge was correct to find "procure" in s 66EB means "to cause or bring about". The CCA rejected the applicant's narrower interpretation that the appellant must have taken action involving "care and effort" to bring about the desired end such that mere acquiescence or permission was insufficient: at [35].

"Procure" has different meaning in different sections of the *Crimes Act* as well as within the same section. Accordingly, the meaning of the word in the present context requires a textual analysis of the section: see at [20]-[27]. The purpose of s 66EB is to protect children from sexual abuse (Second Reading Speech referred to). Unlawful sexual activity is a form of sexual abuse. To require "care and effort" would not advance the purpose of the section. The use of "easier" in s 66EB(3)(b) [engage in grooming "with the intention of making it easier to procure the child for unlawful sexual activity"] further indicates the broader meaning adopted by the judge is to be preferred. There is no textual or contextual basis to attribute different meanings to the word in s 66EB: at [36]-[37].

5. OTHER CASES

Defence of mental illness - temporary disorder of the mind associated with ingestion of intoxicating substances – mental illness where mental disorder is "prone to recur" - principles - what must be established for defence to be left to jury – s 38 Mental Health (Forensic Procedures) Act 1990

Fang [2018] NSWCCA 210: The appellant was convicted by jury of murder. The appellant was experiencing a drug-induced psychosis at the time of the stabbing, under the influence of alcohol and methylamphetamine (Ice). The trial judge declined to leave the defence of mental illness to the jury.

The CCA dismissed the appeal. The judge was correct to find there was no evidence that "a drug-induced psychosis (unaccompanied by a separate psychiatric illness) constitutes a disease of the mind as understood in the common law"; and there was no evidence the appellant had a recurring mental disorder: at [76]; [94].

Principles of the defence of mental illness

The CCA set out the principles regarding the defence of mental illness and what must be established in order for the defence to be left to the jury.

. Whether the defence of mental illness is established by the evidence is a question of law.

. Whether or not the accused suffered from a mental illness at the relevant time is a question of fact: at [58]-[59]; *Falconer* (1990) 171 CLR 30.

. The defence of mental illness in NSW is governed by s 38 *Mental Health (Forensic Provisions) Act 1990,* which give effect to the common law principles. The legal test for whether a person suffered from a mental illness at the time of the commission of a crime is: it must be established there is a defect of reason in the *M'Naghten* sense which results from "*an underlying pathological infirmity of the mind*": at [89], ([66]-[71]); *Falconer* (1990) 171 CLR 30, adopting *Radford* (1985) 42 SASR 266 at 274-275).

. In determining whether to leave the defence to the jury, the question for the trial judge is whether there was some evidence from which it could be inferred that there was a reasonable possibility that the appellant was mentally ill, having regard to the meaning of that term for the purposes of the defence of mental illness: at [59] – [62], [99]; *Woodbridge* (2010) 208 A Crim R 503; [2010] NSWCCA 185; *Ayoub* [1984] 2 NSWLR 516, followed.

A temporary disorder of mind will be a mental illness in the legal sense where the mental disorder is "prone to recur"

Where a person suffers from a temporary disorder of the mind associated with ingestion of intoxicating substances, the question is whether the person suffered from a mental illness in the legal sense or was acting under an external stimulus such as drugs or alcohol but was otherwise of sound mind. There is an acceptance there will be a mental illness in the legal sense where the mental disorder is "*prone to recur*": at [91]; *Radford* at 274; *Falconer* at 54.

Here, the judge was correct to state that "a drug-induced psychosis (unaccompanied by a separate psychiatric illness) does not constitute a disease of the mind": at [76]. There was no evidence the appellant had a recurring mental disorder: at [94]. It was open to the judge not to leave the defence of mental illness to the jury.

Unlawful arrest - victim's description of offender not a reasonable ground for police officer's suspicion appellant had committed offence - compensatory damages

Lule v State of NSW [2018] NSWCA 125: The Court of Appeal awarded the applicant compensatory damages of $30k and allowed his appeal against the District Court's rejection of a claim for damages for unlawful arrest, false imprisonment and assault. The Court held that there were no reasonable grounds for suspicion and the applicant's arrest was unlawful (s 99(1)(a) *Law Enforcement (Powers and Responsibilities) Act 2002)* and the appellant was subjected to a traumatic, humiliating experience.

The applicant had been arrested for an alleged break and enter. Constable T acted on a description of the alleged offender by the victim of: **"**male, Black African appearance, 175cm tall, shaved hair, slim build to Medium, [and "possibly"] white t-shirt, baby blue shorts".

The Court found the only possible reasonable ground for suspicion that the applicant committed the offence was the victim's description. The sufficiency of a description depends upon the particular circumstances of the case, here: uncertainty in the description of the offender's clothing, the clothing not being distinctive and the applicant's actual clothing not precisely matching the description. The source of information held by police needs to be evaluated and "the broader and less specific the description" the less likely it will be that a match with the description on its own constitutes reasonable grounds: at [65], [89] (*George v Rockett* (1990) 170 CLR 104). The issue of "reasonable grounds" is to be "judged against what was known or reasonably capable of being known at the relevant time" (*Ruddock v Taylor* (2005) 222 CLR 612). The police came to a peaceful gathering of four men of similar heritage. The applicant was a professional man in his mid-thirties. In these circumstances, and in light of the generality and uncertainty of the victim's description, the police should have asked those present where the applicant had been at the time of the offence: at [87]-[94].

Five judge bench - Prohibition against admission of FACS reports in criminal proceedings –The Application of the A-G for NSW dated 4 April 2014 (2014) 246 A Crim R 150 distinguished

Section 29 ***Children and Young Persons (Care & Protection) Act 1998*** provides:

"*29 Protection of persons who make reports or provide certain information*

(1) If, in relation to a child or young person …, a person makes a report … to the Secretary or to a person who has the power or responsibility to protect the child or young person …:

……

(d) the report, or evidence of its contents, is not admissible in any proceedings other than the following proceedings (and appeals arising from the following proceedings):

(i) care proceedings in the Children's Court,

(ii) proceedings in relation to a child or young person under the Family Law Act 1975 ….

(iii) proceedings in relation to a child or young person before the Supreme Court ....."

Hayward [2018] NSWCCA 104 (five-judge Bench): The applicant, indicted in the District Court for physical child abuse offences, sought FACS reports under subpoena regarding the victim. The parties successfully applied to have the indictment filed in the Supreme Court after arguing reports by the Dept Family & Community Services (FACS) are barred in the District Court by s 29 *Children and Young Persons (Care and Protection) Act 1998*, but would be admissible in the Supreme Court under s 29(1)(d). The Supreme Court judge ruled the report inadmissible. The appellant appealed pursuant to s 5F(3)(a) *Criminal Appeal Act* 1912.

The CCA upheld the decision of the Supreme Court. Section 29(1)(d)(iii) does not apply to criminal proceedings in the Supreme Court. Therefore reports about the victim produced under subpoena from FACS were inadmissible in Supreme Court criminal proceedings relating to child abuse.

By s 29(1)(d)(iii), properly construed, the legislature intended to exclude production of reports in criminal proceedings. Section 29(1)(d)(iii) is limited to proceedings which affect the legal rights, interests or welfare of a child / young person and is not wide enough to include criminal proceedings for sexual abuse or otherwise. Otherwise reports would be admissible in prosecutions for child abuse in the Supreme Court but not District Court– an intention which should not be attributed to the legislature: at [76]-[82].

The Application of the A-G for NSW dated 4 April 2014 (2014) 246 A Crim R 150 interpreted s 29(1)(d) differently to not preclude the accused from compelling by subpoena the production of reports under s 29 which are relevant to the issues at trial. It is unnecessary in the circumstances to reach a conclusion it was "plainly wrong". That case did not directly concern s 29(1)(d). Although it does mean that a different interpretation is placed on the phrase "any proceedings" in s 29(1)(d) and s 29(1)(e), the two provisions can operate together notwithstanding the different interpretations: at [85], [69].

Stated case - domestic violence complainant evidence by "recorded statement" - need not be formally tendered in Local Court proceedings - s 289F(1) Criminal Procedure Act 1986 - "evidence given in the original Local Court proceeding" s 18(1) Crimes (Appeal and Review) Act 2001

In '*domestic violence offence'* proceedings, a complainant may give evidence by a recorded statement that is viewed or heard by the Court: s 289F(1) *Criminal Procedure Act* 1986.

Section 18(1) *Crimes (Appeal and Review) Act* 2001 provides that a conviction appeal heard in the District Court is to be by way of rehearing on the basis of evidence given in "the original Local Court proceedings".

DPP (NSW) v Al-Zuhairi [2018] NSWCCA 151: At the Local Court hearing for a 'domestic violence offence' (assault), the complainant's evidence was given by "recorded statement" played to the court. The recorded statement was "Marked for identification" but not formally tendered. On appeal, the District Court set aside the offender's conviction then stated a case to the CCA. The CCA allowed the appeal, quashed the District Court orders setting aside the conviction and remitted the matter to the District Court. The Stated Case questions and answers are as follows:

1. In proceedings for a "domestic violence offence" in the Local Court, should the recording of the complainant's evidence be formally tendered?

   No

2. Where the complainant's evidence is given in the form of a recorded statement, is viewing the recorded statement sufficient for it to become "evidence in the original Local Court proceedings"? (see s 18(1) *Crimes (Appeal and Review) Act* 2001)

   Yes

3. Did the judge err by holding that where a recorded statement pursuant to s 289F was played in the Local Court but not 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"?

   Yes

Section 18 *Crimes (Appeal and Review) Act* appeals are based upon "evidence given in the original Local Court proceedings" and are not restricted to "*certified transcripts of evidence* given in the original Local Court proceedings" nor whether that evidence forms part of the transcript: at [34], [45]; *Charara* (2006) 164 A Crim R 39 distinguished. The recorded statement was "evidence given in the original Local Court proceedings" once played in the Local Court. Once "viewed" or "heard", the representations in the recorded statement become the complainant's "evidence in chief" as if such "representations" were made verbally from the witness box: at [38]-[44], [54]. The prosecution method of having the recording marked for identification was consistent with longstanding practice for video / audio evidence, and contrary to authority to expect it to be tendered: at [47]-[53]. It is desirable a transcript is produced which includes the actual "evidence given in the proceedings" but it is not a requirement of the law: at [55]–[56].

STATISTICS. *Judicial Commission Statistics for CCA sentencing and Crown appeals*.

Table 1 — Severity Appeals (2000–2016)

Year	Severity Appeals	Allowed	
	No.	**No.**	**%**
2000	313	127	40.6
2001	343	138	40.2
2002	331	148	44.7
2003	272	109	40.1
2004	285	131	46.0
2005	318	141	44.3
2006	259	106	40.9
2007	242	94	38.8
2008	216	83	38.4
2009	230	78	34.3
2010	216	84	38.9
2011	188	93	49.5
2012	168	65	38.7
2013	224	57	25.4
2014	191	61	31.9
2015	208	74	35.6
2016	176	59	33.5
	4172	**1648**	**39.5**

Table 2 — Crown Appeals (2000–2016)

Year	Crown Appeals	Allowed	
	No.	**No.**	**%**
2000	84	42	50.0
2001	55	34	61.8
2002	80	49	61.3
2003	65	32	49.2
2004	101	52	51.5
2005	58	34	58.6
2006	76	47	61.8
2007	59	35	59.3
2008	62	32	51.6
2009	48	31	64.6
2010	69	49	71.0
2011	34	15	44.1
2012	32	12	37.5
2013	33	19	57.6
2014	55	36	65.5
2015	26	11	42.3
2016	41	28	68.3
	970	**554**	**57.1**

A. HIGH COURT CASES 2018

Three cases in 2018 dealt with the common form proviso.

***1. Kalbasi v The Queen* [2018] HCA 7; (2018) 92 ALJR 305.** Appeal from WA. Appeal dismissed.

Proviso - misdirection - no substantial miscarriage of justice - Jury misdirected proof of possession of substitute "drugs" would suffice to prove intention to sell or supply - sole issue at trial was proof the appellant was in possession of the substitute "drugs"

The appellant was convicted of attempt to possess prohibited drug with intent to sell or supply to another. The jury was misdirected as to the presumption a person in possession of a specified quantity of a prohibited drug is deemed to possess it with intent to sell or supply - the presumption has no application to a charge of attempted possession (*Krakouer* (1998) 194 CLR 202): at [1].

The High Court by majority dismissed the appellant's appeal. The WASCA was correct to conclude although the jury was misdirected, the proviso applied and no substantial miscarriage of justice had occurred. The Court stated, inter alia:

. *Weiss* (2005) 224 CLR 300 requires the appeal court to consider the nature and effect of the error in every case. The fundamental question remains whether there has been a substantial miscarriage of justice: at [15]-[16].

. A misdirection upon a matter of law is always contrary to law and a departure from the requirements of a fair trial according to law. But sometimes a misdirection on a matter of law will prevent the application of the proviso; and sometimes it will not. The question is always whether there has been a substantial miscarriage of justice. The resolution of that question depends on the particular misdirection and the context in which it occurred: at [57].

In this case, the offence was an attempt because police had substituted rock salt for the drugs (methylamphetamine). The sole issue at trial was proof the appellant was in possession of the substitute "drugs". There was no evidence or the way the appellant's case was advanced which left open he may have been in possession of some lesser part of the substitute "drugs" with a view to purchase for his own use. Proof beyond reasonable doubt the appellant attempted to possess nearly 5kg of 84% pure methylamphetamine compelled the conclusion it was his intention to sell or supply. The WASCA was thus correct to find the misdirection did not result in a substantial miscarriage of justice: at [60].

***2. Collins v The Queen* [2018] HCA 18**. Appeal from Qld. Appeal allowed.

Proviso - appeal court erred in finding no miscarriage of justice – where prosecution conceded miscarriage of justice - error in applying proviso without notice – misdirection where proof of guilt wholly dependent on acceptance of complainant

The appellant was convicted of sexual offences against V. At the 2014 trial, V's mother M stated in evidence V's complaint to her was "… *she had been raped*". Under cross-examination, M agreed her evidence at the 2007 committal was V said "*I think I've been raped*" and "*I had some wine …and I don't remember every – anything after a certain time*". M accepted her memory was better in 2007. The trial judge directed the jury the 2007 account could be used to assess the credibility and reliability of M's evidence at trial, but was not evidence that V said those things to M.

The QCA found the jury had been misdirected, however, applied the proviso even when the prosecutor conceded that "if the appellant's argument was accepted, it could not be submitted that there had been no substantial miscarriage of justice". The QCA did not put the appellant on notice that it was disposed to apply the proviso.

The High Court allowed the appellant's appeal, quashed the convictions and ordered a new trial. The Court held:

. The QCA correctly found the directions to be erroneous. The jury should not have been directed it could only use the 2007 account in assessing the credibility and reliability of M's evidence. The 2007 account was adopted by M at trial. It was evidence of the terms of V's complaint and could be used by the jury in assessing the reliability of V's evidence: at [27].

. The QCA failed to give the appellant an opportunity to be heard on the question of dismissal under the proviso. Whether an error or irregularity has occasioned a substantial miscarriage of justice calls for a judgment upon which the parties are entitled to be heard. The QCA was obliged to put the appellant on notice that, notwithstanding the concession, dismissal under the proviso remained a possibility and to give an opportunity to be heard: at [32].

. It was not open to find that no substantial miscarriage of justice actually occurred. The trial was fought on the issue of consent; the 2007 account, if accepted, had capacity to affect the jury's assessment of the credibility and reliability of V's account: at [33]-[37].

***3. Lane v The Queen* [2018] HCA 18**. Appeal from NSW. Appeal allowed.

Proviso – appeal court erred in finding no miscarriage of justice - trial judge failed to give specific unanimity direction –proviso could not be applied to cure uncertainty as to whether the jury's verdict unanimous

The appellant was found guilty of manslaughter. CCTV footage showed that the deceased fell and struck his head on the road on two separate occasions. It was accepted the head injuries suffered by the deceased in each fall were separately sufficient to cause his death. The Crown relied on two separate physical blows by the appellant resulting in the two falls. The CCA (by majority) held the judge should have directed the jury that it must be unanimous about which of the appellant's blows caused the deceased's death; however, dismissed the appeal as there was no substantial miscarriage of justice: at [1]-[3].

The High Court allowed the appellant's appeal, quashed the convictions and ordered a new trial. The High Court stated, inter alia:

. A misdirection by a trial judge always involves an error of law, but "sometimes [it] will prevent the application of the proviso; and sometimes it will not." It is necessary for the appellate court to consider the nature and effect of the error in every case: at [31]-[32]; ***Kalbasi v Western Australia*** [2018] HCA 7; (2018) 92 ALJR 305 at [57], [15].

. The appellant could not have been lawfully convicted unless the jury agreed upon the action that caused the fatal injury. The absence of the direction means it cannot be assumed the jury discharged its function to reach a unanimous verdict: at [45]-[47].

. A misdirection that is apt to prevent performance by the jury of its function, without more, will result in a substantial miscarriage of justice. The proviso permits the appellate court to dismiss an appeal which gives effect to the verdict of the jury: the proviso does not permit the appellate court to exercise the function of the jury: at [48].

The NSWCCA disregarded the requirement of a unanimous verdict so as to "substitute trial by an appeal court for trial by jury." (*R v Baden-Clay* (2016) 258 CLR 308 at [66]). Such an error is apt to deny the application of the proviso because it means that it cannot be said that no substantial miscarriage of justice has actually occurred (*Weiss v The Queen* (2005) 224 CLR 300 at [46]): at [49]-[50].

***4. Craig v The Queen* [2018] HCA 13.** Appeal from Qld. Appeal dismissed.

Incorrect advice by counsel – appellant did not give evidence at trial - no evidence to suggest trial would have been conducted differently absent incorrect advice.

The High Court dismissed the appellant's appeal brought on the ground there had been a miscarriage of justice because his decision not to give evidence at trial was based on incorrect advice of counsel.

The appellant was convicted of murder by stabbing. His counsel gave incorrect advice that if he gave evidence it was likely he would be cross-examined on his criminal history, which included a conviction for a fatal stabbing offence. His counsel also correctly advised if he gave evidence consistent with a written account given to his solicitor, he would be cross-examined on inconsistencies between that account and the account in his police interview: at [1]. The appellant relied on his account in his police interview to raise a doubt, due to his intoxicated state, as to intent to murder: at [11].

The High Court stated:

. Whether receipt of incorrect legal advice bearing on the accused's choice not to give evidence is productive of a miscarriage of justice requires consideration of the effect of the advice on the conduct of the trial: at [3]. Assessment of whether the decision not to give evidence deprived the accused of a fair trial looks to the nature and effect of the incorrect legal advice on that decision. The appeal court is required to be satisfied it was the accused's wish to give evidence and incorrect legal advice deprived the accused of that opportunity: at [33]-[34].

In this case, the appellant understood the tactical merit in not giving evidence and having his defence conducted on his account to police. The error in counsel's advice was not in advising of the risk the jury might learn of the prior convictions, but in the estimate of the likelihood the risk would eventuate; a material factor in the appellant's decision was the understanding it was a likely, rather than merely possible, consequence of testifying. Physical and mental issues played a part in the decision not to give evidence. Notably, the appellant did not say that absent the incorrect advice he would have given evidence. There was not a miscarriage of justice where the evidence did not establish the trial would have been conducted differently had the incorrect advice not been given: at [35]-[37].

***5. The Queen v Falzon* [2018] HCA 29.** Appeal from Vic. Crown appeal allowed.

Drug trafficking - evidence of cash admissible as part of Crown's circumstantial case relevant to prove respondent involved in drug trafficking - s 137 Evidence Act – adherence to authority

The respondent was convicted of cultivating cannabis plants found at various properties. Some cannabis, paraphernalia and $120,800 cash was also found at respondent's home. The VSCA (by majority) allowed the respondent's conviction appeal, holding the trial judge erred in admitting the evidence of the cash as part of the Crown's circumstantial case. The cash evidence was irrelevant; or alternatively, inadmissible pursuant to s 137 *Evidence Act*.

The High Court allowed the Crown appeal.

Relevance of cash evidence. The cash was admissible as an item of circumstantial evidence that in conjunction with evidence of other indicia of drug trafficking, was capable of founding the inference that the respondent was carrying on a business of trafficking in cannabis, and thus his purpose in possessing the cannabis found at the other properties was the purpose of sale. The fact that the evidence tended to show the commission of other offences of trafficking did not render it inadmissible because it was relevant to establishing the intent to sell and to counter the respondent's claim that the cannabis was possessed for personal consumption: see at [40]-[44]; *Edwards* [1982] 2 VR 354 at 367-370; *Sultana* (1994) 74 A Crim R 27 at 28-29.

Section 137: The probative value was high and part of a powerful circumstantial case the respondent was engaged in a business of cultivating and selling. The evidence was prejudicial because it assisted to demonstrate his purpose in possessing the cannabis was for sale, but that is why it was admissible. It was not unfairly prejudicial to a significant extent: at [45].

Adherence to authority: The VSCA distinguished leading authorities on the untenable basis of physical separation of the cash from the cannabis and the misconception the evidence was unfairly prejudicial (*McGhee* (1993) 61 SASR 208; *Sultana* (1994) 74 A Crim R 27; *Blackwell* (1996) 87 A Crim R 289; *Edwards* [1998] 2 VR 354; *Evans* [1999] WASCA 252). Intermediate appellate courts are bound to follow the decisions of other intermediate appellate courts unless persuaded those decisions are plainly wrong: at [49].

***6. DL v The Queen* [2018] HCA 32.** Appeal from NSW. Appeal allowed.

Appellate court erred in departing from primary judge's factual findings without giving notice to parties — procedural unfairness

The appellant was convicted of murder. On appeal against sentence to the NSW CCA, psychiatric evidence was tendered "on the usual basis." The CCA (by majority) held it was not bound by the primary judge's factual findings and substituted the judge's findings of 'intention to inflict grievous bodily harm' with 'intention to kill'. The Crown had not sought to disturb the judge's findings.

The High Court allowed the appellant's appeal and remitted the matter to the CCA. The CCA's decision to depart from the judge's unchallenged factual findings without notice to the appellant was procedurally unfair and occasioned a miscarriage of justice: at [44]. In an exceptional case new evidence may be received for purpose of revisiting findings of primary fact (*Betts* (2016) 258 CLR 420). However, neither party invited the CCA to depart from the judge's findings: at [38]. Where the judge (or appellate court) is minded not to act on a concession by the prosecution, the failure to put the offender on notice and give an opportunity to make submissions will ordinarily be a miscarriage of justice: at [39].

***7. The Queen v Bauer* [2018] HCA 40.** Appeal from Vic. Crown appeal allowed.

s 97 Evidence Act - Tendency evidence - jury directions in single complainant sexual offences cases – no "special feature" required in single complainant cases

The respondent was convicted of a number of child sexual offences against a single complainant RC. The Crown relied on the evidence of RC for all offences except one. On that one charge, the Crown relied on evidence from RC's younger sister TB. The trial judge admitted evidence by RC and TB of the charged acts as well as uncharged acts as tendency evidence (s 97 *Evidence Act* 2008 (Vic)).

The VSCA held the trial judge erred and that the evidence of uncharged sexual acts was inadmissible as tendency. A complainant's evidence of uncharged sexual acts is not considered to be of significant probative value in proof of charged sexual acts unless there are "special features" of the complainant's account, relying on *IMM v R* (2016) 257 CLR 300; *Hughes v R* (2017) 344 ALR 187.

In a unanimous judgment, the High Court allowed the Crown appeal and dismissed the appeal to the VSCA.

In a multiple complainants case (whether evidence of sexual offence against one complainant is significantly probative of a sexual offence against another complainant), "there must ordinarily be some feature of or about the offending which links the two together"; some common feature may demonstrate a tendency to act in a particular way: at [57]-[59]; *Hughes* (2017) 92 ALJR 52.

In a single complainant case (whether evidence of one sexual offence against the complainant is significantly probative of another sexual offence against that complainant), there is ordinarily no need of a special particular feature of the offending. *IMM* (2016) 257 CLR 300 is restricted to facts of that case - single uncharged act remote in time and significantly less serious) or a special feature of the kind described in *Hughes*: at [52]-[55]; [60]-[62]. The "very high probative value" and thus admissibility of each charged and uncharged act rests on logic that, where a person is sexually attracted to another and has acted upon that attraction, the person is more likely to engage in further sexual acts with that person: at [60]-[62]; *HML* (2008) 235 CLR 334.

Directions in single complainant sexual offences cases (at [86)]:

. Trial judge should direct the jury the Crown argues the evidence establishes the accused had a sexual interest in the complainant and a tendency to act upon it which makes it more likely the accused committed the charged offence(s).

. If the Crown also relies on the evidence as putting the charged offence(s) in context in some other identified respects, the judge should further direct the jury that the Crown contends the evidence serves also to put the charged offence(s) in context and identify the respects in which the Crown contends that it does so.

. The judge should stress evidence of uncharged acts has been admitted for those purposes and, if the jury are persuaded by it, it is open to use the evidence in those ways, but no other. The trial judge should further stress it is not enough, however, to convict the accused that the jury may be satisfied of the commission of the uncharged acts or that they establish the accused had a sexual interest in the complainant on which the accused had acted in the past.

. The jury cannot find the accused guilty of any charged offence unless upon their consideration of all of the evidence relevant to the charge they are satisfied of the accused's guilt of that offence beyond reasonable doubt.

Standard of proof: Contrary to the practice in NSW**,** juries should not ordinarily be directed that before they may act on evidence of uncharged acts, they must be satisfied of the proof of the uncharged acts beyond reasonable doubt. However, such a direction may be necessary if there is a significant possibility of the jury treating the uncharged acts as an indispensable link in their chain of reasoning to guilt: at [86]; *DJV* (2008) 200 A Crim R 206; *FDP* (2008) 74 NSWLR 645.

Contamination, concoction or collusion: The risk of contamination, concoction or collusion goes only to the credibility and reliability of evidence and is an assessment which must be left to the jury: at [69]-[71]. To the extent that *GM* [2016] NSWCCA 78 or *BM* [2017] NSWCCA 253 suggests otherwise, it should not be followed: at [69].

Whether tendency evidence is of significant probative value is a matter for appellate court: The High Court said at [61] that the question of whether tendency evidence is of significant probative value is one to which there can only ever be one correct answer, albeit one about which reasonable minds may differ. Consequently, it is for the appellate court itself to determine whether evidence is of significant probative value, as opposed to deciding whether it was open to the trial judge to conclude that it was.

***7. Rodi v State of WA* [2018] HCA 44.** Appeal from WA. Appeal allowed.

Fresh evidence – Where earlier inconsistent evidence of expert witness not disclosed to appellant at trial – Miscarriage of justice

The appellant was convicted by a jury of possess cannabis with intent to sell or supply. At trial, Detective C gave expert evidence about the yield of plants found at the appellant's home which contradicted the appellant's case that the cannabis was for his own personal use.

In the Court of Appeal, A relied on new evidence of transcripts of earlier proceedings where Detective C had given different evidence. This evidence was not disclosed to A at trial. The Court of Appeal held the non-disclosure the "earlier evidence" did not give rise to a miscarriage of justice. The Court of Appeal admitted the evidence as "fresh evidence" and accepted Detective C's explanation for why his opinion had changed as "credible and cogent".

The High Court allowed the appeal and ordered a new trial. The Court of Appeal erred in finding that the fresh evidence did not give rise to a significant possibility of acquittal by the jury. The Court of Appeal did not resolve the possibility the jury may have taken a more favourable view of the appellant's credibility in light of the "earlier evidence". The Court of Appeal reached their own favourable conclusion as to the credibility of Detective C's explanation for the change in his evidence. In the context of a challenge to a verdict based on fresh evidence, the requirement that the fresh evidence relied upon be "credible and cogent" is a requirement relating to evidence

which *impugns* the verdict at trial. Detective C's evidence was directed to sustaining the verdict against the attack based on the fresh evidence: at [37]; *Ratten* (1974) 131 CLR 510; *Gallagher* (1986) 160 CLR 392.

8. *Johnson v The Queen* [2018] HCA 48. Appeal from SA. Appeal dismissed.

Historical child sexual assault — SA Court of Appeal correct to find evidence of uncharged acts to explain otherwise implausible aspects of complainant's evidence admissible — no substantial miscarriage of justice

The High Court dismissed the appellant's appeal and held the SA CCA was correct to find that evidence of uncharged acts to explain otherwise implausible aspects of complainant's evidence was admissible.

The appellant was convicted of five historical sexual assaults against the complainant (his younger sister): indecent assault when he was aged 10-12 and doli incapax (count 1); carnal knowledge when aged 17 (count 2); persistent sexual exploitation (count 3); and rape (counts 4-5). At trial, the Crown led evidence of other alleged childhood sexual misconduct. Section 34P(2)(a) *Evidence Act* 1929 (SA) states "discreditable conduct evidence" may be admitted if the judge is satisfied its probative value substantially outweighs any prejudicial effect.

The High Court held the SA CCA was correct to find that, except for one incident when the appellant was 6 (the bath incident), the evidence for counts 1 and 3 was admissible on the other counts as "context evidence": at [1], [10].

The probative value of that evidence substantially outweighed any prejudicial effect. The earlier incidents were relevant to understanding the dysfunctional family of the children and important to understanding the complainant's account of the incidents leading up to and including the charges and for evaluating her evidence: [54]–[60]; *Roach v The Queen* (2011) 242 CLR 610; *HML v The Queen* (2008) 235 CLR 334 at [12]. In assessing probative value, evidence of the appellant's sexual misconduct when he was presumed to be doli incapax provides important explanatory evidence to help the jury understand other evidence and of substantial value for understanding the case as a whole: at [53]; *R v M (D)* [2016] 4 WLR 146; *DPP (Vic) v Martin* (2016) 261 A Crim R 538. Without the background of earlier evidence, the complainant's evidence of the later offences would have seemed implausible: at [54]-[55]. The jury was properly directed that evidence of the other sexual misconduct was only led to understand the context of the charged offences: at [19]-[20], [56]-[61].

***9. McPhillamy v The Queen* [2018] HCA 52.** Appeal from NSW. Appeal allowed.

Tendency evidence - historical child sexual offences - tendency evidence of acts occurring 10 years earlier - No evidence other than complainant's evidence that appellant had offended again in 10 year period – evidence did not meet threshold requirement of significant probative value – insufficient link between earlier acts and charged offences

The appellant was convicted of sexual offences committed during 1995-1996 against "A", an 11-year old altar boy under the appellant's supervision as an acolyte. The appellant followed "A" into a public toilet and assaulted "A".

The Crown led tendency evidence from "B" and "C" that 10 years earlier in 1985 when they were 13 at boarding school, the appellant was housemaster and assaulted them when they each went to his room feeling 'homesick'.

There was no evidence other than A's evidence that the appellant had offended again in that 10 year period. The NSW CCA dismissed the appellant's conviction appeal.

The High Court allowed the appellant's appeal and ordered a new trial.

The tendency evidence did not meet the threshold requirement of "significant probative value" in s 97. The tendency evidence rose no higher than to insinuate the appellant was the kind of person who was more likely to have committed those alleged offences: at [32].

Proof of the appellant's sexual interest in 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. The evidence demonstrating that tendency was confined to "B"'s and "C"'s evidence of events in 1985. There was no evidence the asserted tendency had manifested itself in the 10 years prior to offending against "A": at [27].

Where the tendency evidence relates to sexual misconduct with person(s) 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 (*Hughes v The Queen* (2017) 92 ALJR 52 at 69 [64]; *R v Bauer* (2018) 92 ALJR 846 at 863 [58]). The suggested link is the appellant's tendency to act on his sexual interest in teenage boys under his supervision. The supervision exercised by the appellant as 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" in 1995-1996. "A" was not vulnerable in the way "B" and "C" were vulnerable. The tendency to take advantage of young teenage boys who sought out the appellant in the privacy of his bedroom is contrasted with "A"'s account the appellant followed him into a public toilet and molested him: at [31].

10. Strickland (a pseudonym); Galloway (a pseudonym); Hodges (a pseudonym); Tucker (a pseudonym) v DPP (Cth) **[2018] HCA 53.** Appeal from Victoria. Appeal allowed.

Appellants declined to be interviewed by AFP - ACC permitted AFP officers to watch examinations from nearby room without appellants' knowledge

The Australian Crime Commission (ACC) received information of alleged criminal activity by the appellants' company. The ACC did not conduct its own investigation under the *ACC Act* 2002 (Cth) but referred the matter to the Australian Federal Police (AFP). Each appellant declined to be interviewed by the AFP. The ACC then compulsorily examined each appellant while AFP officers watched from a room without the appellants' knowledge. Examination material was disseminated to the AFP and Commonwealth DPP. The appellants were charged. The trial judge permanently stayed the proceedings, however, the VSCA allowed an appeal.

The High Court (by majority) allowed the appellants' appeals. To allow the prosecution to proceed would bring the administration of justice into disrepute: at [107], [169], [254]. The ACC conducted unlawful examinations acting as a facilitator for the AFP: at [70]-[74]; *X7 v Australian Crime Commission* (2013) 248 CLR 92. The prosecution derived a forensic advantage by compelling the appellants to answer questions they had lawfully declined to answer, locking them into a version of events from which they could not credibly depart at trial: at [75].

11. AB v CD; EF v CD **[2018] HCA 58.** Appeal from Victoria. Special leave revoked. VSCA orders to take effect.

Lawyer deployed as police informant whilst representing accused persons

EF, a barrister, acted as a police informant whilst representing accused persons. The Victorian Court of Appeal held the public interest in disclosure of information to the accused persons, relating to EF and the Commissioner of Victoria Police, outweighed public interest immunity.

EF and the Commissioner were granted special leave to appeal. The High Court ordered that leave be revoked and the Court of Appeal's decision take effect.

EF's actions were fundamental breaches of counsel's obligations to clients and the court. Victoria Police were guilty of reprehensible conduct in knowingly encouraging EF and sanctioning breaches of the duty of police. The prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system. The public interest favouring disclosure is compelling: the integrity of the criminal justice system demands that the information be disclosed and that the propriety of each conviction be re-examined. The public interest in preserving EF's anonymity is subordinate to the integrity of the criminal justice system: at [10].

It is of the utmost importance that assurances of anonymity given to EF are honoured. But where the agency of police informer has been so abused as to corrupt the criminal justice system, there is a greater public interest in disclosure to which the public interest in informer anonymity must yield. If EF chooses to expose herself to risk by declining to enter into the witness protection program, she will be bound by the consequences. If she chooses to expose her children to similar risks, the State is empowered to take action to protect them from harm: at [12].

12. McKell v R **[2019] HCA 5.** Appeal from NSW. Appeal allowed.

Directions – trial judge's summing up lacked judicial balance - comments unfair to appellant

The appellant was convicted at trial of drug-related offences. His appeal to the NSW CCA, on the ground a miscarriage of justice was caused by comments by the trial judge during summing up, was dismissed by majority (*McKell* [2017] NSWCCA 291).

The High Court allowed the appellant's appeal, quashed the convictions and ordered a new trial.

Comments by the judge included: suggesting a consignment may have contained drugs, the importation of which was the appellant's responsibility as part of "an organisation of great sophistication", when no such suggestion had been made by the prosecution; and suggesting a text message from the appellant to his co-accused showed the appellant was knowingly involved in drug importation.

The statements were so lacking in balance as to be an exercise in persuading the jury of the appellant's guilt; they were unfair and gave rise to a miscarriage of justice: at [4]. The remarks were unnecessary for a fair and accurate summary of the cases by the parties. Their content and tone (in relation to the text message by the appellant) would not have been out of place in a powerful address by prosecution counsel: at [36], [40].

A trial judge may comment on factual issues, however, is not bound to do so except to the extent that the judge's other functions require it. The fundamental task of a judge is to ensure a fair trial of the accused within a framework where it is "for .. the jury alone, to decide the facts": at [1]-[2]; *RPS v The Queen* (2000) 199 CLR 620.

The issue is whether the comments were apt to create a "danger" or a substantial risk the jury might actually be persuaded of the appellant's guilt by comments in favour of the prosecution case made with the authority of the judge: at [42]; *B v The Queen* (1992) 175 CLR 599 at 605-606.

The scope for comment: There is a risk that comments unnecessary for the performance of the duty to give fair and accurate instructions may occasion a miscarriage of justice, and a judge should be astute to avoid that risk. These points are most compelling in relation to expressions of opinion by a judge as to the determination of disputed issues of fact: at [48]. Fair and accurate instruction to a jury is always concerned with practical fairness to both sides: at [55].

***13. Grajewski v DPP (NSW)* [2019] HCA 8.** Appeal from NSW. Appeal allowed.

Damage property s 195(1)(a) Crimes Act – requires some alteration to physical integrity of property, even if temporarily

The NSWCCA in *Grajewski v DPP (NSW)* [2017] NSWCCA 251 held that physical damage was not an essential element to offence of damaging property under s 195(1)(a) *Crimes Act*. A protester activist suspended himself from a coal loader which was not damaged. The NSW CCA held it was sufficient there was physical interference with the property and the coal loader was rendered temporarily inoperable. The activist was guilty under s 195(1)(a).

The High Court allowed the applicant's appeal and quashed the conviction. Damage to property within the meaning of s 195(1) requires proof that the act or omission has occasioned some alteration to the physical integrity of the property, even if only temporarily: at [9]. As a matter of ordinary English, to damage a thing means to injure or harm the thing in some way that, commonly, lessens the value of the thing; a thing is not damaged if the physical integrity of the thing is not altered in any respect. Contrary to the NSW CCA's analysis, the legislative history does not support a construction that extends s 195(1) to any "interference" that results in the property being inoperable": at [13]. On the facts stated, nothing done by the applicant brought about any alteration to the physical integrity of the loader. The decision to shut down the loader was taken due to safety concerns for the applicant: at [54].

***14. DPP Reference No 1 Of 2017* [2019] HCA 9**. Appeal from Victoria. Appeal allowed.

'Prasad direction' contrary to law and should not be administered to a jury in a criminal trial

Following a trial in which a Prasad direction was given to the jury, over objection by the Crown, and the jury returned verdicts of not guilty of murder and manslaughter, the DPP (Vic) referred a point of law to the Court of Appeal of the Supreme Court of Victoria: whether a *Prasad* direction is contrary to law and should not be administered to a jury determining a criminal trial.

The VSCA (by majority) answered in the negative. The Director appealed to the High Court.

The High Court allowed the appeal. The direction commonly referred to as the 'Prasad direction' is contrary to law and should not be administered to a jury determining a criminal trial between the Crown and an accused person": at [58]. It should be accepted that the common law of Australia does not recognise that the jury empanelled to try a criminal case on indictment have a right to return a verdict of not guilty of their own motion at any time after the close of the prosecution case: at [32]; see preceding historical discussion. The exercise of the discretion to give a Prasad direction based upon the trial judge's estimate of the cogency of the evidence to support conviction is inconsistent with the division of functions between judge and jury and, when given over objection, with the essential features of an adversarial trial: at [56]. 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: at [57].

B. NSW SUPREME COURT CASES 2018

***R v Mercury* [2019] NSWSC 81 -** *Admissibility of 1971 police record of interview governed by s 13* Children *(Criminal Proceedings) Act 1986 – retrospective application of statute dealing with procedure*

Section 13 *Children (Criminal Proceedings) Act* 1986 requires a parent / adult / lawyer be present at a police interview with a child as a precondition for admissibility, unless the judge finds the exceptions in ss 13(1)(b)(i)-(ii) to be made out.

In 1971 the accused, then aged 17 and therefore a "child", had entered a police record of interview regarding the murder at which no adult or lawyer were present. In 2017 the accused was charged with the 1971 murder.

R A Hulme J held the interview was inadmissible.

The question of admissibility of the 1971 interview is governed by s 13. Statutes dealing with mere matters of procedure are an exception to the presumption against the retrospective operation of a statute: at [19]-[22]; *Rodway v The Queen* (1990) 169 CLR 517; *Aquilina* [1978] 1 NSWLR 35.

Applying s 13, his Honour found there was "proper and sufficient reason for the absence of such adult" within s 13(1)(b)(i) - that being the fact that the police were not, and could not be, aware that this would at some time in the future become a statutory requirement for them to adhere to. Further, the interview should not be admitted having regard to the "particular circumstances of the case" within s 13(1)(b)(ii), relating to the manner in which the interview was conducted and the particular vulnerability of the accused at the time: at [104]-[105].

In the alternative, for essentially the same reasons for upholding the objection based upon s 13, his Honour found it would be unfair to admit the evidence under s 90 *Evidence Act*: at [101], [106].

In the judgment, his Honour provides a useful discussion on the rationale and history of s 13.

Noufl v DPP (NSW) **[2018] NSWSC 1238** – *Bail Act 2013 - single judge of Supreme Court has no jurisdiction to hear bail application where District Court sentence appealed and no previous application has been refused*

Hamill J held that under the *Bail Act* 2013 a single judge of the Supreme Court is no longer empowered to hear a bail application while an appeal is pending in the CCA unless: (i) The proceedings for the offence were dealt with in the Supreme Court and the applicant is yet to make their first appearance before the CCA (s 62); or (ii) A release application has been refused by another court, police or authorised officer (s 66): at [60]-[68].

The offender was convicted and sentenced in the District Court, and had lodged a sentence appeal in the CCA. The offender had not been bail refused previously. Such a bail application can only be dealt with by the District Court or CCA: at [60]-[68].

Roylance v DPP (NSW) **[2018] NSWSC 933** - *magistrate failed to provide adequate reasons - obligation extends to sentence proceedings heard ex-parte*

The Magistrate's entire reasons for convicting the plaintiff in her absence and imposing fines for possess prohibited drugs offences were:

> "[The plaintiff's] written in and she's pleading guilty. She's providing some references. In each case she is convicted, in each case she is fined $330.00. Obviously inserting it into her body in that fashion indicated an intent to try and avoid detection."

Bellew J allowed the appeal, set aside the Magistrate's decision and remitted the proceedings to the Local Court. The Magistrate's reasons were inadequate and constituted an error of law: at [16]- [19]. A judicial officer is obliged to give reasons for their decision, a record of the facts upon which the conclusion is based, and the process of reasoning by which the conclusion is reached. What is adequate must be assessed according to the circumstances of each case. Proper allowance must be made for ex-tempore decisions delivered in a busy Local Court with an extremely heavy workload: at [12]-[14]; *JCE* (2000) 120 A Crim R 18. Even making allowance for the fact the proceedings were ex-parte and the reasons ex-tempore, the Magistrate remained under a duty to give reasons which enabled the parties to understand the basis for his decision. The reasons do not satisfy that test. It is not apparent from the reasons how and why it was determined appropriate to impose a fine of $330 in each case: [15].

Fell v Chenhall **[2018] NSWSC 1574** – *filing of Court Attendance Notice in registry other than that before which proceedings listed did not invalidate CAN — Rule 8.7(4) Local Court Rules 2009*

Rule 8.7(4) *Local Court Rules* 2009 states that Court Attendance Notices ('CANs') are "except with the leave of the registrar" to be filed in the registry where the relevant proceedings are to be listed.

Button J held that the filing of CANs in a registry other than that before which proceedings listed did not invalidate them. Therefore the Magistrate was correct in holding the Local Court in which the proceedings were listed, and which had received the CANs by the relevant date, had jurisdiction to hear the matters. It cannot be said that failing to comply with r 8.7(4) is to be inferred as attracting the intention of invalidation by Parliament: at [63]. The failing does not relate to an Act of Parliament, but to a delegated statutory instrument; it is not easy to accept Parliament intended failure to comply with such an instrument would lead to invalidation: at [68]- [69]. A prosecutor's failure to obtain leave to file CANs in one registry for a prosecution in another of the same Court does not lead to *ab initio* invalidation of the prosecution: at [70].

***Devitt v Ross* [2018] NSWSC 1675 –** *appeal to Supreme Court against Local Court orders incompetent - Local Court orders no longer operative where District Court had dismissed application for leave to appeal –inconsistency between court order / file and Justicelink*

The plaintiff was sentenced in the Local Court. An application for leave to appeal his sentence to the District Court was dismissed because it was not made within 3 months (as required by s 13(2) *Crimes (Appeal and Review) Act* 2001 ("*CARA*").

Hoeben CJ at CL dismissed the plaintiff's summons to the Supreme Court seeking an extension of time to appeal. The appeal to the Supreme Court was incompetent. After challenging the Local Court decision in the District Court, the plaintiff is seeking to challenge a decision that is no longer operative: at [60]–[62]; *Nand v DPP (NSW)* [2016] NSWSC 85 at [61]–[64]. When the District Court dismissed the plaintiff's application, its orders became the operative orders and displaced the orders of the Local Court. Accordingly, the Supreme Court has no jurisdiction to determine a challenge to the conviction in the Local Court in those circumstances: at [60]-[62]; *Wishart v Fraser* (1941) 64 CLR 470; *Nand v DPP*.

Inconsistency between court order / file and Justicelink: The District Court judge did not sign any record but an entry was made on the computer record, i.e. Justicelink, which recorded: "Sentence appeal dismissed – Order Confirmed: at [49].

In the event of an inconsistency between what is recorded in Justicelink and a formal order signed by the Judge, the formal order prevails (*DPP (NSW) v Kmetyk* [2018] NSWCA 156 at [28]-[34]).

However, in this case the judge did not sign a formal order. Therefore what is recorded in Justicelink should prevail. It reflects the order of the District Court which was "entered on the appropriate computer record": Pt 53, r 12 *District Court Rules*.

(In this case, the Justicelink record ought to be read as "Application for Leave to Appeal Against Sentence is dismissed"): at [54]- [55], [65].

***DPP v Jay Williams* [2018] NSWSC 1832** – *underground car park of apartment complex within same "curtilage" as dwelling – s 4 Crimes Act 1900*

"Dwelling-house" is defined in s 4(1)(c) *Crimes Act* to include: any building or other structure *within the same curtilage as a dwelling-house*, and occupied therewith or whose use is ancillary to the occupation of the dwelling-house.

The defendant and co-offenders entered the secure underground car park of an apartment complex, smashed a car window belonging to one of the residents, Mr L, and took a wallet. The defendant was charged with enter dwelling with intent to steal in circumstances of aggravation under s 111(2) *Crimes Act* 1900.

Wilson J held that the underground carpark of an apartment complex fell within the same "curtilage" of the dwelling. "Curtilage", for the purposes of s 4, means a piece of ground or land belonging to and lying near a dwelling house (*Pilbrow v St Leonard Shoreditch Vestry* [1895] 1 QB 433). The land belonging to and lying near Mr L's dwelling is that on which the apartment block is situate. The car park is a building or other structure within the same curtilage as Mr L's dwelling. It was occupied by Mr L, meeting the first limb of s 4(1)(c). A car park is ancillary to the occupation of a dwelling, meeting the second limb of s 4(1)(c).

C. LEGISLATION 2018

Major legislation this year:

. *Justice Legislation Amendment (Committals and Guilty Pleas) Act* 2017

. *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act* 2017

. *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018 No 33*

1. *Justice Legislation Amendment (Committals and Guilty Pleas) Act* 2017

Commenced 30.4.2018

Criminal Procedure Act 1986:

. Replaces committal proceedings for indictable offences with new procedure overseen by a Magistrate that requires prosecutor to disclose a brief of evidence to the accused and to certify charges proceeding to trial

. Introduces formal conferencing procedure to enable opportunities for appropriate early guilty pleas

Crimes (Sentencing Procedure) Act 1999

. New specified sentencing discounts depending on timing of plea. Court must discount a sentence for the utilitarian value of a guilty plea by:

- 25% if plea accepted before committal: s 25D(2)(a)
- 10% if offender committed for trial and pleaded guilty at least 14 days before first day of trial; or accepted an offer or offered, to plead guilty at least 14 days before first day of the trial and at the first available opportunity: s 25D(2)(b); or
- 5% in any other case: s 25D(2)(c).

. Applies to ex officio indictments or if new offence added to indictment: s 25D(3). However, 25% discount does not apply in case of ex officio / amended indictment if elements of new offence are substantially same as offence in original indictment and penalty is the same as / less than original offence, or if accused had previously rejected an offer to plead guilty to the offence on the later indictment: s 25D(4).

. Applies to offender found fit to be tried after being committed for trial and whose matter has not been remitted to a Magistrate for further committal proceedings and offender pleads guilty: s 25D(5).

. *Discounts where guilty plea offer was made to different offences but refused when made*. The sentencing discount regime applies:

- if offer to plead guilty was recorded in a negotiations document, the offer was never accepted and subsequently found guilty of the different offence or reasonably equivalent offence: s 25E(1), or
- if offender's offer to plead guilty to an offence not the subject of proceedings is rejected but later accepted by prosecutor after offender is committed for trial and s/he pleaded guilty to the different offence at the first available opportunity: s 25E(2).

. A reduced discount may be applied if Court determines offender's level of culpability is so extreme: s 25F(2).

. Offender bears the onus of proving on balance of probabilities that grounds exist for discount: s 25F(5).

See generally: Mark Ierace SC, Senior Public Defender, *Early Guilty Pleas: A New Ball Game (2018)* & accompanying documents - available on Public Defenders NSW website.

2. *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017*

Commenced 24.9.2018

Crimes (Sentencing Procedure) Act 1999

. New community-based sentencing options:

- Community Correction Orders
- Conditional Release Orders

- Intensive Correction Orders are restructured

. Repeals suspended sentences, home detention, community service orders and good behaviour bonds

. Status of old community-based sentencing options:

- Home Detention now taken to be Intensive Correction Order
- Community Service Orders and s.9 bonds now taken to be Community Correction Orders
- s.10 bonds now taken to be Conditional Release Orders without conviction
- Suspended sentences to remain in force for 3 years from commencement of legislation 24.9.18

Crimes (Administration of Sentences) Act 1999:

. Additional powers given to community corrections officers to vary certain conditions with respect to ICOs, CCOs and CROs at sentence

. Powers given to community corrections officers with respect to ICO breaches

See generally: Richard Wilson, Deputy Senior Public Defender, *Quick Reference to Sentencing Reforms (2018)* & accompanying documents - available on Public Defenders NSW website.

2. Justice Legislation Amendment Act 2018

Crimes Act 1900

s 73 Sexual intercourse with child 16-18 under special care - commenced 21.3.2018

PJ [2017] NSWCCA 290 permanently stayed an indictment under s.73 because the accused was on the school teaching staff but was not the direct teacher of the pupil (victim).

s 73(3)(b) amended to be more expansive - "the offender is a member of the teaching staff at the school.."; and includes teacher, principal, or any person employed at school with students under care or authority: s 73(6) .

s.94 Robbery or stealing from the person —commenced 2.7.2018

Offence separated into s 94(a) rob, or assault with intent to rob; and s 94(b) stealing from the person.

Criminal Procedure Act 1986 – commenced as indicated

Four strictly indictable offences are now Table 1 offences and may be dealt with in Local Court:

- s 94(a) *Crimes Act* – Rob, or assault with intent to rob (commenced 2.7.2018)
- s 319 *Crimes Act* - Pervert course of justice (commenced 16.4.2018)
- s 25(1) *Drug Misuse and Trafficking Act* 1985 - Supply prohibited drug where more than indictable and less than commercial quantity (commenced 2.7.2018)
- s 193B (3) *Crimes Act* - Recklessly deal with proceeds of crime where value over $5,000 (commenced 16.4.2018)

Now a Table 2 offence (election may be made by prosecutor):

- s 193B(3) *Crimes Act* - Recklessly deal with proceeds of crime where value $5,000 or less (commenced 16.4.2018).

s 174 Private prosecutions: amended so that in respect of summary matters, where Registrar refuses to sign a court attendance notice, the question of whether it should be signed and issued is determined by a Magistrate. The amendment means the process for commencing private prosecutions is the same for both indictable and summary matters.

Evidence Act 1995 - commenced 2.7.2018

s 160(1) Postal articles - postal article sent by prepaid post presumed to be received 7 working days after being sent (previously s 160 stated it was 4 working days).

Law Enforcement (Powers and Responsibilities) Act 2002 — commenced 21.3.18

s 134(5) Orders for the taking of identification particulars - amended to include offence of 'driving under influence of drugs' (*Road Transport Act* 2013, s 111(1), (3)). Gives court power to order a person convicted of drug-driving to submit to taking of identification particulars (photograph, fingerprints and palm prints). People convicted of drug‑driving offences are thus treated similarly to persons who have committed drink-driving offences whereby proper identification may become relevant for proving subsequent offences.

3. Justice Legislation Amendment Act (No 2) 2018

Commenced 21.6.2018 unless otherwise indicated.

Crimes Act 1900

Definition of "private parts" in ss 91FB(4), 91I(1), 91N(1)) amended to include 'breasts whether or not sexually developed'; and 'anal area' includes 'whether bare or covered by underwear'. This amendment is in response to *Turner* [2017] NSWCCA 304 which held that "private parts" in s 91FB [for child abuse, voyeurism and intimate images offences] refers to 'unclothed genitals and breasts with a visible degree of sexual development' so that the accused's possession of film of girl in underwear and of chest of pre-pubescent girl did not amount to possess / produce child abuse material.

Court Suppression and Non-Publication Orders Act 2010

New s 8(3) - a court may only make a suppression or non-publication order to avoid undue distress or embarrassment to a defendant accused of a sexual offence if there are exceptional circumstances.

Crimes (Sentencing Procedure) Act 1999

s 21A(2)(l) vulnerable victim - amended to include 'person working at a hospital'

Criminal Procedure Act 1986

s 279 amended to provide a parent or child of accused (in addition to existing provision for spouses) can be compelled to give evidence in cases of domestic violence and child assault (except where accused is under 18). Amendment applies to proceedings commenced on or after 21 June 2018.

New s 298A [Sexual Assault Communication Privilege] - victim of sexual assault offence cannot be compelled by subpoena/other procedure to disclose identity of counsellor. Applies to proceedings commenced but not determined before 21 June 2018.

Criminal Records Act 1991

New s 7(5) - If an aggregate sentence is imposed, the indicative terms should be used to determine whether each conviction is spent. Only prison sentences of 6 months or less are capable of becoming spent.

Law Enforcement (Powers and Responsibilities) Act 2002 (commenced 1.12.18)

New s 23 Search and seizure of dangerous implements - empowers police to search and detain person in public place or school, without warrant, if suspects on reasonable grounds person has dangerous implement (defined in s 3 as including a knife blade, razor blade or any blade). Police may search a person's school locker or bag: s 23(2). Child at school must be allowed to nominate adult on school premises to be present: s 23(4).

***4. Road Transport Legislation Amendment (Road Safety) Act* 2018**

Commenced 1.7. 2018

Road Transport Act 2013

s 112(1) - Increase maximum penalties for driving while under influence of alcohol / drug. The amendments bring penalties in line with driving with high-range prescribed concentration of alcohol.

- First offence: maximum penalty increased to 30 pu and/or 18 months imprisonment (previously 20 pu and/or 9 months imprisonment).
- Second or subsequent offence: maximum penalty increased to 50 pu and/or 2 years imprisonment (previously 30 pu and/or 12 months imprisonment).
- The increased maximum penalties apply to s 112(1)(c) - occupying the seat next to a learner driver driving a vehicle while under the influence of alcohol or any drug.

ss 112, 205: Licence disqualification periods increased

- Automatic disqualification period increased to 3 years (previously 12 months)
- Minimum disqualification is increased to 12 months (previously 6 months)
- A police officer charging a driver with offence under s 112(1) will have power to issue immediate licence suspension notice: s 224(1)(b).

Cocaine added to definition of "prescribed illicit drug" under s 4(1) so that driving with presence of illicit drug under s 111(1) includes cocaine; and roadside mobile drug testing now includes cocaine. (NSW the first jurisdiction to do so). Automatically applies to drug testing for vessels under *Marine Safety Act* 1998.

s 134 amended (photographing of mobile phone use) Governor may approve devices to photograph drivers of vehicles using mobile phones in contravention of statutory rules.

New s 139A - Evidence of a mobile phone offence by such a device admissible in court proceedings.

***5. Crimes Amendment (Publicly Threatening and Inciting Violence) Act* 2018**

Commenced 13.8. 2018

Crimes Act 1900

New s 93Z: Offence of publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status. Maximum penalty: individual - 100 pu or imprisonment 3 years or both; corporation - 500pu: s 93Z(1). To be dealt with summarily unless prosecutor or defendant elects otherwise: *Criminal Procedure Act* 1986, Sch 1, Table 1.

The following offences are repealed in the *Anti-Discrimination Act* 1977: serious racial vilification (s 20D); serious transgender vilification (s 38T); serious homosexual vilification (s 49ZTA); and serious HIV/AIDS vilification (s 49ZXC).

6. Criminal Legislation Amendment (Child Sexual Abuse) Act 2018 No 33

The following amendments commenced on 31.8. 2018:

Crimes (Sentencing Procedure) Act 1999

New s.25AA Sentencing for child sexual offences:

- Court must sentence an offender for a "child sexual offence" in accordance with sentencing patterns and practices at time of sentencing, not at time of the offence: s.25AA(1)
- Court must have regard to the trauma of sexual abuse on children as understood at time of sentencing: s.25AA(3)
- "child sexual offence" includes offences listed in new Schedule 1A, *Crimes Act* 1900 : s.25AA(5)

Crimes Act 1900

New Schedule 1A – 'Former Sexual Offences" inserted; relevant to s.25AA *Crimes (SP) Act*; and new s.316A *Crimes Act*

New s.43B offence - Failure to reduce or remove risk of child becoming victim of child abuse. Maximum penalty 2 years.

New s.316A(1) offence - Concealing child abuse. Maximum penalty 2 years.

New s 316A(4) offence - Solicits benefit for committing s 316A offence. Maximum penalty 5 years.

s 316A applies to information obtained on or after commencement, including in relation to a child abuse offence that occurred before commencement. Note: These penalties have been subsequently amended by the *Community Protection Legislation Amendment Act* 2018 – see below.

The following amendments commenced on 1.12. 2018:

Crimes Act 1900

Sexual Offences

Pt 3 Div 10 'Rape, Sexual Assault' re-titled 'Sexual offences against adults and children". The Division is restructured (various sections re-numbered) and offences modernised.

The following offences are repealed: s 61L Indecent assault; s 61M Aggravated indecent assault; s 61N Act of indecency; s 61O Aggravated act of indecency.

New offences of 'Sexual Touching' and 'Sexual Acts':

s 61KC Sexual touching [5 years]

s 61KD Aggravated sexual touching: [7 years; SNPP 5 years]

s 61KE Sexual act [18 months]

s 61KF Aggravated sexual act [3 years]

New offences relating to children:

s 66DA Sexual touching – child under 10 [16 years; SNPP 8 years]

s 66DB Sexual touching – child between 10 and 16 [10 years]

s 66DC Sexual act – child under 10 [7 years]

s 66DD Sexual act – child between 10 and 16 [2 years]

s 66DE Aggravated sexual act – child between 10 and 16 [5 years]

s 66DF Sexual act for production of child abuse material – child under 16 [10 years]

Sexual touching" and "sexual act" are defined: new ss 61HB and 61HC.

Transitional provisions - references in any Act or law to indecent assault are taken to include references to sexual touching, and to acts of indecency are taken to include references to sexual touching and sexual act, within their meanings in Pt 3, Div 10: sch 1[62].

s 61HE - New consent provision.

- Definition of consent extends to "sexual activity": includes sexual intercourse, sexual touching or sexual act: s 61HE(11). (No longer limited to "sexual intercourse" as under previous s 61HA consent provision, which is repealed).
- Applies to ss 61I, 61J, 61JA, 61KC, 61KD, 61KE, 61KF: s 61HE(1).

s 66EA Persistent sexual abuse of child

- s 66EA substituted with a new provision. An offence is committed where adult engages in 2 or more unlawful sexual acts with or towards a child (someone under 16) over any period. Maximum penalty Life imprisonment. (The old s 66EA required a person engage in conduct on 3 or more occasions in relation to a particular child, being someone under 18. The maximum penalty was 25 years imprisonment).
- The jury is no longer required to agree on which unlawful sexual acts constituted the unlawful sexual relationship: s 66EA(5)(c).
- *Transitional provision*: New s 66EA extends to a relationship that existed wholly or partly before 1.12.2018 provided the acts were unlawful sexual acts during the relationship period: s 66EA(7).
- In sentencing, a court must take into account the maximum penalty for the unlawful sexual acts: s 66EA(8).

Grooming offences

s 66EB(3) Grooming a child - expanded to include circumstances where adult provides child with "financial or other material benefit" intending to make it easier to procure the child for unlawful sexual activity.

New s 66EC offence - Provide person with financial or material benefit intending to make it easier to procure a child under that person's authority for unlawful sexual activity. Maximum penalty: 6 years if child under 14, or 5 years in any other case. Prosecutions can only commence with approval by DPP: s 66EC(3).

New s 73A offence - Sexual touching of young person (16-18) under special care

Maximum penalty: 4 years if young person aged 16, and 2 years if young person aged 17. New s 72B includes definitions of an 'authorised carer' and a 'member of the teaching staff'.

Uncertainty about time when sexual offence against child occurred

New s 80AF(1) - Where:

(a) it is uncertain as to when during a period conduct is alleged to have occurred, and

(b) the victim was for the whole of that period a child, and

(c) there was no time during that period that the alleged conduct, if proven, would not have constituted a sexual offence, and

(d) because of a change in law or age of the child during that period, the alleged conduct, if proven, would have constituted more than one sexual offence during that period.

In such a case, a person may be prosecuted in respect of the conduct under whichever of those sexual offences has the lesser maximum penalty regardless of when during that period the conduct actually occurred: s 80AF(2).

Reducing criminalisation of children

New s 80AG - Defence of similar age

It is a defence to an offence under ss 66C (3), 66DB, 66DD, 73 or 73A if alleged victim is 14 or above and the age difference with the accused is no more than 2 years. The prosecution has onus of proving beyond reasonable doubt that victim was less than 14 and that the difference in age is more than 2 years.

Exception and defences to child abuse material offences

New s 91HAA - exception to an offence under s 91H of possess child abuse material where accused was under 18 and a reasonable person would consider the possession acceptable having regard to the matters identified in s 91HAA(b)

New s 91HA(9)-(12) - additional defences for offences against s 91H:

- possession offences - if only person depicted in material is the accused: s 91HA(9); and
- production or dissemination offences - if only person depicted is the accused and production or dissemination occurred when they were under 18: s 91HA(10).

Sections 91G and 91H amended to provide that proceedings for those offences against a child or young person may only commence with the consent of DPP

Child Protection (Offenders Registration) Act 2000

New s 3C *Discretion to treat child offenders as non-registrable persons* – A court sentencing for a sexual offence committed when person was a child may make an order declaring person not to be treated as a registrable person under the Act for that offence. Various conditions to be met before order made are set out in s 3C(3). *Transitional*: Amendment applies to sentences passed after 1.12.18, regardless of when offence committed.

Criminal Procedure Act 1986

New s 293A: Warning may be given by Judge if differences in complainant's account

In prescribed sexual offences trial proceedings, where judge considers there is evidence suggesting a difference in complainant's account which may be relevant to truthfulness or reliability, the judge may inform the jury of reasons why there may be differences in a complainant's account (s 293A(2)(a)) and that it is for the jury to decide whether or not any such differences are important in assessing the complainant's truthfulness and reliability (s 293A(2)(b)).

7. Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2018

Commenced 2.11.2018

Amendments made in regard to pre-trial disclosure by Crown and defence.

Criminal Procedure Act 1986

The amendments apply to proceedings in which the indictment was presented or filed on or after 2 November 2018.

Prosecution's notice - New s 142(1)(c2) : Prosecution's notice must contain copy of transcript of audio or visual recording proposed to be adduced at trial. Notice not required to contain copies of transcripts of recorded statements (within s 289D) unless prosecutor proposes to adduce such transcripts at trial.

Defence response – New ss 143(1)(h)-(k) state the following additional mandatory disclosures are required in response to the prosecution notice:

- copies of reports of expert witness the accused proposes to call at trial and on which accused intends to rely: s 143(1)(h)
- notice as to whether accused proposes to raise any issue regarding continuity of custody of any proposed exhibit disclosed by prosecutor: s 143(1)(i)
- notice of any significant issue the accused proposes to raise regarding the indictment, severability of charges or separate trials: s 143(1)(j)
- any request to edit audio or visual recordings (or transcript) the prosecutor proposes to adduce at trial, and particulars of edits: s 143(1)(k)

Previously, the defence response was only required to contain the matters in (h), (i) and(j) if the court ordered. The requirement in s 143(1)(k) is new.

Prosecution response to defence response: new s 144(d1) requires prosecution response to state notice of whether the prosecutor disputes any defence request to edit audio / visual recordings /or transcript

***8. Community Protection Legislation Amendment Act* 2018**

Following amendments commenced on 28.11.2018.

Crimes Act 1990

New s 25C - supply drugs causing death: Supply for financial or material gain, and drug is self-administered by another person (whether or not the person to whom drug was supplied), and causes or substantially causes death. It is necessary to prove accused knew, or ought reasonably to have known, that the supply would expose the person to a significant risk of death as a result of self-administration.

Proceedings may only be instituted by approval of DPP. Section 18 does not apply to this offence: ss 25C(1)-(5). Maximum penalty 20 years.

New s 316 - Conceal serious indictable offence: Can only be committed by an 'adult' i.e. person over 18y. The amendment recognises children and young persons can be vulnerable to being pressured into not reporting another person's offending (Second Reading, *Hansard*, LA, 13.11.18).

New graded penalty regime for concealing offences ss 316 and 316A ('conceal child abuse') aims to reflect the seriousness of the offence concealed. For example:

> New s 316 concealing serious indictable offence:
>
> 2 years—if maximum penalty for serious indictable offence not more than 10 years imprisonment;
>
> 3 years—if more than 10 years but not more than 20 years imprisonment;
>
> 5 years—if more than 20 years imprisonment.

Section 203E Bushfire offence - Increased maximum penalty for 'intentionally causing a fire and being reckless as to spread to land' from 14 years to 21 years imprisonment.

***9. Justice Legislation Amendment Act (No 3)* 2018**

The following amendments commenced on 28.11.2018, unless indicated.

Crimes Act 1900

s 61J Aggravated sexual assault - New circumstance of aggravation in s 61J(2)(b1) ' threaten to inflict GBH or wounding'.

s 545B Intimidation - Extended to apply to a person's spouse or a defacto partner.

Criminal Procedure Act 1986

Court may direct expert evidence be given concurrently or consecutively

New s 275C provides a Court may direct expert evidence be given concurrently or consecutively in criminal proceedings. Allowing expert evidence to be given concurrently will enable expert witnesses to be called immediately after one another.

A direction may be given only with the consent of the prosecutor and accused. Directions may include the following prescribed matters:

(i) that more than one expert witness give evidence at the same time,

(ii) that an expert witness:

- give evidence at any stage of proceedings,
- give an oral exposition of the witness's opinion on a particular matter,
- be examined, cross-examined or re-examined in a particular manner or sequence, including by putting to each expert witness, in turn, each question relevant to one matter or issue at a time,
- be permitted to ask questions of another expert witness who is giving evidence at the same time during the proceedings.

Backup summary offences

s 179 amended so that where a person is found guilty / convicted in Local or Children's Court of an indictable offence and any related backup summary offences are withdrawn or dismissed, then if a person successfully appeals their finding of guilt / conviction in the District Court, the backup summary offences can be re-laid outside 6 month time limit for summary offences. *Transitional and savings* - The amendments do not apply in respect of a backup summary offence if conviction for the related indictable offence is set aside by District Court on appeal before commencement of the amendments.

Disclosure of personal information in subpoenaed material

New s 280A provides a person is not required to disclose any personal information in subpoenaed material unless a materially relevant part of the evidence or the court makes an order requiring disclosure. An application for such an order may be made by the prosecution or defence.

Sensitive evidence held by a health authority

New ss 281FA - 281FG are inserted into Part 2A of Chapter 6 so that 'sensitive evidence' includes such evidence held by a health authority. A health authority that wishes to refuse production of sensitive evidence under subpoena must give the court and accused a written sensitive evidence notice: s 281FB(1). A court must set aside a subpoena to the extent it relates to sensitive evidence and order the accused be given access to the evidence in accordance with the notice: s 281FB(3).

Section 281FC makes it an offence for a person given access to, without permission, copy, permit a person to copy, give or remove the evidence. Section 281FF creates an offence of improper copying or circulation of sensitive evidence. Maximum penalty for each: 100pu, 2y imprisonment, or both.

Recorded interviews with children outside of NSW

New s.306M provides that recorded interviews of children conducted by authorised persons outside of NSW are admissible as evidence in chief in NSW proceedings.

Crimes (Sentencing Procedure) Act 1999

s 17C - amended to provide that a court determining an appeal against sentence may request an assessment report be prepared in respect of the offender; and during any other times as prescribed by the regulations.

Crimes (Administration of Sentences) Act 1999

ss 107C, 108C - amended to enable courts to deal with a breach of a community correction order or a conditional release order after the order has expired.

s 128C - amended to provide the supervision period of an offender on a parole order will be prescribed by the regulations. (The courts' power to set non-parole period and the period during which the offender may be released on parole is not affected).

Bail Act 2013 – *to commence on proclamation*

s 16B - amended to require that the show cause requirement applies to a serious indictable offence committed while an accused person is on bail / parole granted under the law of another jurisdiction.

s 18(1)(e) - amended to require a bail authority, in making an assessment of bail concerns, to consider whether the accused person has previously committed a serious offence while on bail granted under the law of another jurisdiction.

Criminal Appeal Act 1912

s 5DA(3) - amended to provide Crown may appeal against a sentence on appeal from Local or Children's Court to the District Court if sentence was reduced because person fails to fulfil undertaking to assist law enforcement authorities.

Children (Detention Centres) Act 1987 - *to commence on proclamation*

s 55 - amended to provide that the supervision period of a juvenile offender on a parole order will be prescribed by the regulations. (The courts' power to set the non-parole period and the period during which the offender may be released on parole is not affected).

s 102 re-enacts repealed s 37D, being an offence relating to the unlawful disclosure of information obtained under the Act, with a new specified exception of disclosure for the purpose of any legal proceedings (s 102(1)(c)). Maximum penalty 10pu, or imprisonment 12m, or both. The amendment clarifies that Juvenile Justice Officers will be lawfully permitted to include information in reports to courts without having to be subpoenaed for such information.

Crimes (Appeal and Review) Act 2001

New s 63(2C) - execution of a sentence is stayed pending determination of an appeal against the disqualification of a driver licence, regardless of whether the appeal is against conviction or sentence. This amendment was a consequence of *DPP (NSW) v Kmetyk* (No 2) [2018] NSWCA 195.

Interpretation Act 1987

s 76 - amended to provide that a document served by post is presumed to have been served on the seventh working day after it is posted, rather than on the fourth working day.

Road Transport Act 2013

s 221A - amended to clarify definition of "*relevant offence-free period*" so that a person convicted of an offence listed under s 221A(a) is subject to a 4 year offence-free period regardless of whether the disqualification period for that offence has expired, before being eligible to have their licence disqualification removed. *Savings and transitional* – The amendment extends to an application made to the Local Court but not finally determined before commencement.

A person declared to be a "habitual traffic offender" before the abolition of the habitual traffic offender scheme on 28 October 2017 may apply to the Local Court to have the declaration quashed. The Local Court may determine the application even if it was not the court that convicted the person of the relevant offence: Cl 65(2) inserted into Sch 4.

Retirement Age for Judicial Officers – various Acts amended.

Maximum retirement age for NSW judges and magistrates increased from 72 to 75.

Acting judges and magistrates will be able to serve as acting judicial officers up to the age of 78, rather than 77.

10. Crimes Legislation Amendment (Victims) Act 2018

The amendments below commenced 1.12.2018. (Remaining provisions commence on proclamation). The amendments apply to proceedings which commence after 1.12.2018.

Criminal Procedure Act 1986

Support person. Following persons now entitled to have a support person present when giving evidence:

- Complainants, witnesses and defendants aged 16 – 17 in criminal proceedings in any court and AVO proceedings: new ss 306ZK(7). (Previously only available to children under 16).
- Domestic violence complainants in proceedings for domestic violence offences: new s 306ZQ.

An accused is not entitled to object to suitability of person(s) chosen, and court cannot disallow choice unless it is likely to prejudice accused's right to a fair hearing: ss 306ZK(3A), 306ZQ(3).

A complainant in a prescribed sexual offence proceeding who is a vulnerable person (child or cognitive impairment) has additional rights to a support person in s 306ZK to those in s 294C: s 294C(7).

Original evidence of 'special witnesses' in re-trials or subsequent proceedings. A complainant's original evidence in prescribed sexual offence proceedings may be used in re-trials and subsequent trials so the complainant does not have to give evidence in person again: existing s 306B.

Protection now extended to the following "*special witnesses*" as defined in s 306A (ss 306B-306K):

- sexual offence witnesses (also known as tendency witnesses)
- witnesses under 18
- cognitively impaired persons

The following new provisions provide for use of original evidence in subsequent proceedings:

- if a complainant in earlier proceedings for a prescribed sexual offence is the complainant in later proceedings and offence in both proceedings allegedly committed by the same accused in related circumstances: s 279A
- a complainant in earlier proceedings for a prescribed sexual offence is called as a *sexual offence witness* in later proceedings for a prescribed sexual offence: s 294CA.

The prosecution must give notice if they intend to tender the original evidence: ss 279A(4), 294CA(4). A court can decline to admit the original evidence if the accused would be unfairly disadvantaged, having regard to prescribed matters including completeness of the original evidence and the interests of justice: ss 279A(8), 294CA(8).

The court has a similar power to decline to admit original evidence of special witnesses: s 306B(5D).

Complainant for female genital mutilation offences in ss 45, 45A Crimes Act 1900

Complainants in proceedings for an offence of female genital mutilation now have certain protections:- giving evidence by alternative means, support person, admission of original evidence in new or subsequent trials: amendments to ss 290A, 306A, 306H.

Sexual offence witnesses and vulnerable witnesses in committal proceedings

New ss 84(1A) and (1B) - the following witnesses can only be directed to give evidence in committal proceedings:

- vulnerable persons (child under 16 and cognitively impaired) for an offence involving violence, unless court satisfied there are special reasons in interest of justice *or* prosecutor consents;
- sexual offence witnesses in prescribed sexual offence proceedings, unless court satisfied there are special reasons in the interests of justice;

Complainants in an offence involving violence directed to attend can only be cross-examined about additional matters if magistrate is satisfied there are special reasons: new s 84(5).

Commonwealth offences. The protections available to complainants in committal proceedings for offences involving violence and prescribed sexual assault offences will be extended to complainants in Commonwealth offences of a similar nature. The Commonwealth offences will be prescribed via amendments to the *Criminal Procedure Regulation*: Sch 5 of Amending Act; to ss 83 and 84.

Children (Criminal Proceedings) Act 1987

New Part 3 Division 3AA - new procedure for proceedings in Children's Court for 'child sexual assault offences' to save a complainant who is under 16 or of certain age in respect of specified offences, from being required to give evidence for purpose of deciding whether proceedings should be dealt with on indictment when prosecution requests they be dealt with according to law.

Crimes (Domestic and Personal Violence) Act 2007

The following proceedings are to be heard in closed court:

- *all* apprehended violence order proceedings involving a 'young person' (aged 16 - 17), unless court otherwise directs: new s 41AA.
- application proceedings for an interim or final apprehended violence order, if defendant under 18. If appropriate, court may permit persons who are not parties or representatives to be present: s 58.

11. Crimes (Domestic and Personal Violence) Amendment Act 2018

Commenced 1.12.2018

Cr*imes (Domestic and Personal Violence) Act* 2007 ss 7(1)(a), 8: Offences of stalking and intimidation can be committed by 'cyberbullying' i.e by internet, social media etc

Transitional: The amendments do not apply to an application for an apprehended violence order made but not finally determined before 1.12.2018. The amendments extend to the consideration by a court of an application, made after 1.12.2018, for variation or revocation of a final apprehended violence order or interim court order in force immediately before 1.12.2018.

ANNEXURE D - CCA CASES 2019

SENTENCE APPEALS

Disputed facts – basis of drawing inferences - test as to whether a conclusion is inference or conjecture rests on reasonableness

Gwilliam [2019] NSWCCA 5: The applicant was sentenced for Wound with intent to cause grievous bodily harm. The applicant claimed that it was another man who produced the knife. The applicant submitted the judge erred in making findings explaining the applicant's conduct which were not supported by the evidence; and as they were not raised with him in his evidence or addressed in submissions, he was not given an opportunity to address them and was denied procedural fairness. The CCA dismissed the appeal.

The applicant complained there was no basis for the judge to conclude: the applicant was not intending to buy drugs for a friend and did not have $250 cash to pay, he arranged the meeting hoping to get drugs on credit and brought the knife in case that did not eventuate; he got cold feet about asking for drugs on credit; he inflicted grievous bodily harm on the victim to take the drug.

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 (*The Queen v 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 here is whether the judge's conclusions were available deductions from the evidence, or impermissible speculation: at [105]; *Lane v R* (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 the matters in dispute. The primary issue in dispute was whether the applicant brought the knife and produced it prior to using it. That is a question concerning who did a particular thing; a finding that would clearly be significant in answering that question, was why it happened: at [106].

The judge's conclusions were reasonable, and open on the evidence as available inferences. No other reasonable hypotheses favourable to the applicant were available in light of the case he presented. That the judge would make findings of fact on these aspects should have been obvious to the parties, without any need for the judge to specifically raise each. Determining why these events occurred went to aid the sentencing court in determining the principle matter of dispute: who brought and produced the knife: at [107]-[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 such inferences as were available on the evidence as to the applicant's motive in arming himself: at [5].

No breach of principle R v De Simoni (1981) 147 CLR 383

Toksoz [2019] NSWCCA 10: The applicant was sentenced for accessory after the fact to serious offences (s 350 *Crimes Act* 1900). He was present when his co-offender wounded two people then drove the co-offender from the scene.

The sentencing judge stated: "…but in addition to that *the Offender failed to report the matter to the police* at any time and when questioned by police as to the Principal Offender's identity he *failed to disclose that matter* (emphasis added)."

The applicant submitted the judge breached the principle in *R v De Simoni* (1981) 147 CLR 383 as those matters gave rise to more serious offending under s 315 "Hindering Investigation' which has a maximum penalty of 7 years imprisonment.

The CCA dismissed the appeal.

The judge proceeded on the basis of facts which satisfied the elements of the offences charged. Even if those facts did constitute an offence contrary to s 315, it would not automatically follow the *De Simoni* principle was breached. The sentencing process will not miscarry if the sentencing proceeds on facts that merely satisfy the elements charged, even if one of those elements can amount to a circumstance of aggravation sufficient to found guilt for another more serious offence. However the sentencing process may miscarry if those facts amounted to such a circumstance which is not an element of the offence charged (*Turkmani* [2014] NSWCCA 186): at [36].

Further, s 315(3) states: *"It is not an offence against this section merely to refuse or fail to divulge information or produce evidence."* The two failures which the judge referred to fall squarely within s 315(3). The applicant was therefore not liable to be prosecuted for an offence contrary to s 315, and there was no breach of *De Simoni*: at [39].

Denial of procedural fairness - adverse findings by judge beyond agreed facts not raised with parties

In ***Purdie*** [2019] NSWCCA 22 (drug offences) the CCA held there was a denial of procedural fairness where the sentencing judge made adverse findings of facts beyond the agreed facts, and without giving the applicant an opportunity to address those findings: at [51]-[52], [58]; ***DL v The Queen*** (2018) 92 ALJR 764; *Nguyen* [2015] NSWCCA 268. The judge's factual findings included the "inevitable inference" the applicant was approached because his friends believed he could in fact supply and source cocaine and was trusted to make the delivery. The findings went beyond the agreed facts, heightened culpability and were adverse, by implicating prior involvement in supply and a greater level of participation and planning: at [54]. The CCA quashed the sentence and remitted the matter to the District Court.

s 21A(3)(i) Crimes (Sentencing Procedure) Act 1999 – remorse not properly taken into account – unfair approach where applicant not cross-examined and judge made no finding

***Mihelic v R* [2019] NSWCCA 2:** (drug supply) The sentencing judge erred by not taking into account the applicant's remorse identified in the applicant's evidence. The applicant stated he took "full responsibility" for his actions with an apology to the community, friends and family; he is drug free in goal and had treated his time on remand as a full-time rehabilitation program. The applicant was not cross-examined on these matters: at [65].

A judge is not obliged to accept evidence of remorse, even when the offender has given evidence on oath expressing remorse, and even where there is no cross-examination of that remorse: at [69]; *Alvares; Farache* (2011) 209 A Crim R 297 at [65]; *Newman* [2018] NSWCCA 208 at [28], [31].

However the CCA said this case is in a different category: there was no cross-examination as to remorse; the applicant had attempted to remove himself from the drug supply environment but was brought back into it by contact from the undercover operative; the judge does not express any opinion on whether the applicant's expressions of remorse and contrition are genuine or should be believed; and the applicant indicates he has been drug free and gives a rational basis for his remorse.

Fairness: Even where the rules of evidence do not apply (as in sentence proceedings) it is an essential rule of fairness that, if it is to be said that a witness is not telling the truth or is mistaken as to a fact, that proposition should be the subject of cross-examination: at [74]; citing *Marelic v Comcare* (1993) 47 FCR 437 at 442; *Haberfield v Department of Veterans' Affairs as Delegate for Comcare* (2002) 121 FCR 233 at 345; *Re Noeleen Fairlie Dolan v the Australian and Overseas Telecommunications Corporations* (1993) 42 FCR 206.

Whether or not it is necessary for the Crown to put in issue the genuineness of any remorse, at the very least, it should be expected that if a judge is not to believe an accused's sworn testimony, some comment should be made to that effect: at [77]. The judge did not refer in Remarks to remorse. Where a judge does not refer to a required aspect of mitigation presented to a court, it must be assumed that no regard has been given to it, notwithstanding the extraordinary workload on District Court judges: at [64].

Aggravating circumstances - s 21A(2)(j) on "conditional liberty"

Turnbull [2019] NSWCCA 97: The applicant was on parole when he committed offences and parole was revoked. He was not taken into custody and remained at large. He then committed the index offences subject of this appeal.

The sentencing judge erred in finding that the objective criminality of the index offences were aggravated by the application of s 21A(2)(j) that the applicant was "on conditional liberty". Although commission of an offence while at conditional liberty is, by s 21A(2)(j), an aggravating factor for sentencing purposes, it is not a circumstance that aggravates the objective criminality of the offence (*Simkhada* [2010] NSWCCA 284 at [25]; *Martin* [2011] NSWCCA 188 at [17]; *Elhassan* [2018] NSWCCA 118 at [12]–[16]). While the distinction is a fine one, an essential part of sentencing is the assessment of the objective seriousness. Objective seriousness is not determined by an offender's personal circumstances: at [17]-[18]; [120]; [166].

The applicant further submitted the judge erred in finding the offences were committed while 'on parole' and in 'breach of his parole which was revoked'. However, no material error is demonstrated. This raises an issue about the meaning of "while the offender was on conditional liberty" in s 21A(2)(j). Technically, the judge was wrong to identify the nature of the conditional liberty as parole, but was correct to say that the applicant was at large on conditional liberty. But even if that were not correct, the list of aggravating features in s 21A(2) is not exhaustive (see s 21A(1)(c)). It was open to take into account the applicant's status at the time of the offending: at [21]-[24]; [166].

[In *R v King* [2003] NSWCCA 352 (prior to the enactment of s 21A) an offence committed by an offender whilst at large after escaping from lawful custody was aggravated by that circumstance. In *Jones v R* [2015] NSWCCA 180 the applicant was not lawfully at liberty after a parole order had been "cancelled" and that circumstance afforded no assistance to the offender:]

s 21A(2)(o) "financial gain" – identification information offence s 192J Crimes Act

Lee [2019] NSWCCA 15: The judge did not err in finding as an aggravating factor that the applicant committed an identification information offence contrary to s 192J *Crimes Act* for financial gain by reference to s 21A(2)(o).

The applicant made false identification cards and sold them to members of a criminal group. Section 192J states: "A person who deals in identification information with the intention of committing, or of facilitating the commission of, an indictable offence is guilty of an offence."

The indictable offence particularised was fraud and charged as offences of "facilitating" the commission of the fraud. The applicant argued that financial gain, while not an element of the offences as charged, was an inherent characteristic.

The CCA held that financial gain is not an inherent characteristic of offences under s 192J. It is not uncommon for false identity documents to be created for purposes unrelated to financial gain. Whilst the applicant's motive in producing the fraudulent identification documents was money, this does not lead to the conclusion that financial gain is an inherent characteristic of a s 192J offence: at [61].

The case is not analogous to offences of supply drugs of a large commercial quantity where it will almost inevitably be the case that an inherent characteristic is financial gain (*Prculovski* [2010] NSWCCA 274 or *Wat* [2017] NSWCCA 62): at [61].

Possess loaded firearm - motive or purpose for obtaining firearm relevant to objective gravity and moral culpability

Sumrein [2019] NSWCCA 83: The CCA allowed the appellant's appeal against sentence for possess loaded firearm in a public place (s 93G(1) *Crimes Act*). The judge erred by failing to take into account the applicant's stated motive for obtaining the firearm was for the protection of himself and family as he feared for their safety after being the victim of a drive-by shooting: at [46]. While not advancing that motive as "mitigation", the applicant's motive for obtaining the gun was a relevant matter in assessing objective gravity and moral culpability: at [46]; *Mack* [2009] NSWCCA 216.

Possession of a firearm in connection with a criminal enterprise is a matter which elevates the objective gravity of the offence (authorities referred to). That feature was absent in this case and did not deserve to be characterised as "of minor consequence": at [45].

Drug supply – error in labelling offender a "middleman" - difficulties in using "shorthand description" of an offender's role

Thomas [2019] NSWCCA 88**:** The CCA allowed the applicant's appeal against sentence for supply commercial quantity of a prohibited drug. The judge erred in finding the applicant was a "middleman" and the offence was "just at the mid-range of objective seriousness." There was little to suggest the applicant had done more than a "courier". The agreed facts do not permit a finding other than he delivered the bag to the co-accused knowing it contained cocaine: at [75]-[78].

The judge's shorthand description of "middleman" was not used to indicate the applicant was a "link in the chain". The difficulties that arise by using a "shorthand description" of an offender's role occur in this case: at [74].

An assessment of the applicant's role is not to be determined by selection of a label. As with a Commonwealth importation offence, the criminality of a NSW drug supply offender ought be assessed by consideration of involvement in the steps taken to effect the offences. Problems may emerge when a court attempts to categorise their role as, in many cases, the full nature and extent of the drug enterprise is unlikely to be known to the Court: at [76]; *Paxton* [2011] NSWCCA 242; (2011) 219 A Crim R 104 at [131]-[132].

Use carriage service to procure person under 16 to engage in sexual activity - not a case of grooming - offender just turned 18 - victim 15.

Clarke-Jeffries [2019] NSWCCA 56: The CCA held the applicant's sentence was manifestly excessive for use carriage service to procure person under 16 to engage in sexual activity, to solicit child pornography material (s 474.26(1*),* s 474.19(1)(a)(iv) *Criminal Code* Cth) and demand with menaces (s 249K(1)(a) *Crimes Act* NSW).

The CCA set aside the original sentence of 4 years 4 months, NPP 2 years and imposed a new sentence of 2 years imprisonment, with conditional release after 9 months recognisance.

The applicant, aged 18, persistently sent the 15 year old victim crude sexually explicit text messages demanding nude photos. The victim complied. The applicant used the photos to demand money from her.

The CCA said there was considerable displacement between the judge's favourable findings, in terms of objective seriousness and subjective case, and the sentences imposed. Three matters of significance were:

- Youth. The applicant at the time of the offending had just turned 18. Because it is an element of the s 474.26(1*)* offence that the sender of the communication be at least 18, the applicant would not have committed an offence at all had he not turned 18. That circumstance, in particular, highlighted the applicant's youth: at [48].
- The victim's age. An offence against s 474.26 is committed only where (inter alia) the victim is, or the offender believes the victim to be, under 16. The victim was 15. This was not a case of a person of mature years grooming a much younger victim: at [52].
- The applicant's mental state, due to depression as a teenager, secondary to the sexual abuse by his step-brother, and suicidal ideation. His mental illness at the time of offending made him an inappropriate vehicle for general deterrence. The sentence did not reflect this factor being given the weight deserved: at [53].

The comparative cases relied on by the Crown were distinguishable, involving much older offenders and calculated and predatory conduct: at [55]ff.

On re-sentence, relevant considerations included: offending at the lower end of the scale, unequivocal contrition and remorse, co-operation with police, general deterrence of reduced significance, applicant's age, background and mental health, and positive prospects of rehabilitation: at [63]-[72].

Crown appeal – supply large commercial quantity methylamphetamine – ICO manifestly inadequate

Qi [2019] NSWCCA 73: The CCA allowed the Crown appeal against an Intensive Correction Order (ICO) of 2 years 6 months imposed for supply large commercial quantity methylamphetamine (s 25(2) *DMTA*). A new sentence of 3 years imprisonment, NPP 1 year was imposed.

The respondent, aged 22, was found by police with the drugs (1,983 grams; purity 57.5%). He pleaded guilty. The sentencing judge found the respondent to be a drug user, otherwise of good character with family support and lack of criminal history.

The less prescriptive approach to sentencing in drug matters in *Parente* [2017] NSWCCA 284 was emphasised on appeal by senior counsel for the respondent: at [67].

The CCA held that the ICO fell outside the discretion available to the sentencing judge and was manifestly inadequate for reasons (at [71[-[83]):

. The maximum penalty of Life imprisonment speaks for Parliament's view of the seriousness of the offence. Without purporting to promulgate any sort of prescriptive rule, an inevitable function of that maximum penalty is that it would only be in very exceptional circumstances that a sentence other than full-time imprisonment would be imposed.

. This was not a very exceptional matter. A young person of otherwise good character, with a challenging upbringing and dependence upon gambling and drugs, involved to a significant degree in supply, is not an uncommon occurrence in Australian society.

. The standard non-parole period of 15 years is to the same effect.

. Almost 2 kg of methylamphetamine, at a purity of 57.5%, is smaller than the maximum (infinite) quantity of the drug captured by the offence, but it is well beyond the "border line" between "commercial quantity" and "large commercial" quantity. This is not a case where offending just "tipped over" into its more serious form.

. In 2015 Parliament reduced that border line from 1kg to 500g (*Drug Misuse and Trafficking Amendment (Methylamphetamine) Regulation 2015*).

. The substantial amount of drug had the potential to do significant harm to people's lives.

. The respondent was a mere deliveryman with limited knowledge of what he was transporting. But *someone* must undertake the essential task of transporting large amounts of drugs for criminal enterprises, which the respondent chose.

. Forgiveness of a debt of $30,000 is to be generally equated with a payment in that sum. The respondent was to receive a significant financial benefit for his crime.

. An ICO is characterised as a form of imprisonment and can be a significant restriction on liberty. Yet it has inherent leniency and must be seen as a much lesser sentence than full-time imprisonment.

Manslaughter sentence appeal allowed

***Lees* [2019] NSWCCA 65**: The CCA allowed the applicant's appeal against sentence for manslaughter, quashing the original sentence of 16 years, NPP 12 years and imposing a new sentence of 12 years, NPP 9 years.

The applicant drove her motor vehicle into the deceased, her long-term partner, after an argument. There was a background of domestic violence. The sentencing judge found the offence did not arise out of the offender responding to an assault by the deceased in the context of domestic violence.

Effect of psychiatric problems on moral culpability: The judge failed to have regard to the effect of the applicant's psychiatric problems on moral culpability: at [91]. The applicant's mental condition was not confined to the issue of domestic violence. It had an effect beyond that, which the judge did not take into account: at [87]. Expert opinions were that there was a more generalised problem, and explain how the applicant could intend to drive the vehicle into the deceased, yet have no intention to cause serious bodily harm or not formed an intention at all: at [90]-[93]; *Muldrock* (2011) 244 CLR 120.

One useful comparative case: Senior counsel for the appellant referred to a number of comparative cases of manslaughter by motor vehicle. Although manifest excess is not established simply by a

comparison of sentences in other cases which involve different facts, such cases can be of assistance: at [94].

One case, *Gordon (No 8)* [2017] NSWSC 574, was useful. Importantly, there is a close similarity in the facts. There were also important differences. However, the importance of this case is that it is a recent decision of this Court and no challenge was made to the sentence by the Crown. When one compares that sentence, it is significantly more lenient: at [94]-[97].

Commencement date of sentence – significantly disadvantaged by delay

Tompkins [2019] NSWCCA 37: The CCA allowed the applicant's sentence appeal on the ground the sentencing judge erred in the exercise of his discretion as to the commencement date of 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 the sentence on the date it was imposed.

The CCA backdated the commencement of the sentence by six months. The judge failed to take into account an important factor, i.e. the effect of delay on the applicant's sentence in that he was significantly disadvantaged by that delay. Failure to take it into account in any way except in relation to a finding of special circumstances is strongly suggestive that the judge otherwise failed to take it into account: at [52]. A similar conclusion was reached in *White* [2016] NSWCCA 190; 261 A Crim R 302.

Supply drugs – overemphasising role of weight as factor in sentencing

Roberts (a Pseudonym) [2019] NSWCCA 102: The applicant pleaded guilty to three drug offences. Count 2 was knowingly taking part in not less than the large commercial quantity of methylamphetamine (s 25(2) *DMTA*). The Crown conceded the sentencing judge erred by mistaking the threshold quantity for the offence as 500 grams, rather than 1 kilogram.

Allowing the appeal, the CCA concluded the judge also erred in overemphasising the role weight has to play as a factor relevant to sentencing: at [70]. The judge put particular emphasis upon the consideration that he calculated the amount as double the threshold for the large commercial quantity, and distinguished the third count by saying of that offending, "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 of the case. 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 relatively 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].

The most serious offence of the three matters, especially having regard to the offences on the Form 1, is the third count. A need for internal consistency means the sentence for Count 2 should be reduced: at [70].

Manufacturing and supply drugs – concurrency and accumulation

Campbell; Smith [2019] NSWCCA 1: The CCA allowed the Crown appeal against sentences imposed for manufacture and supply drug offences. It is not necessarily the case where an offender is to be sentenced for drug manufacturing and supply that the sentences should be concurrent, or even substantially concurrent. This is so even where the drug the subject of the supply offence is part of the drug the subject of the manufacture offence (***Kwok*** [2018] NSWCCA 200): at [281].

The judge erred by finding the criminality of the supply methylamphetamine was encompassed within the manufacture methylamphetamine offence. The supply offences had no relationship with the manufacture offence. The drug the subject of the supply offences was clearly the subject of some other episode of manufacturing. Further, the precursor possession offences did not relate to the manufacture offences but to intended manufacture in the future: at [184]-[185]. The level of notional partial

accumulation was overly generous. The total criminality involved in the constellation of offences is not reflected by a proportionate aggregate sentence: at [196].

Practice and procedure - Indictable offence not particularised by Crown – determination of factual issue at "preliminary hearing" erroneous

Dean [2019] NSWCCA 27: The applicant was charged with counts including possess offensive weapon with intent to commit an 'indictable offence' under s 33B(1)(a) *Crimes Act*. The Crown did not particularise the 'indictable offence'. However, the Crown case was that the accused intended to murder his wife. At a "preliminary hearing" convened by the judge at the request of the parties, the judge was asked to determine as a preliminary issue the applicant's intention when he possessed the firearm. The judge found that the applicant possessed the firearm "with intent to murder".

The CCA allowed the appeal and remitted the matter to the District Court. The sentence proceedings miscarried.

The preliminary hearing

The judge's approach to the fact-finding exercise miscarried. Evidence additional to that adduced in the preliminary hearing emerged in the sentence hearing a few weeks later which could have supported the applicant's contention that he only intended to scare his wife not kill her. The evidence was effectively beyond the judge's consideration in the sentence hearing, and productive of procedural unfairness: see at [23].

Particularisation of the 'indictable offence'

The s 33B(1)(a) count as framed technically disclosed an offence known to law. However, by the parties identifying the issue in dispute and inviting the judge to resolve that dispute to the criminal standard, clearly indicates a fact essential to the charge should have been particularised: at [19]. The applicant was deprived of the opportunity to fully litigate the factual matters inherent in the elements of the offence: at [21]. It is fundamental to the Crown's obligation of fairness that particulars of a charge contain the description of the conduct said to constitute the commission of the offence: at [22].

Children – judge failed to have regard to youth, immaturity and impulsivity - community protection as deserving "particular weight" not applicable to sentencing of juveniles - Bugmy v The Queen (2013) 249 CLR 571

CA [2019] NSWCCA 93: The applicant aged 12 years 10 months was sentenced for specially aggravated break and enter and commit serious indictable offence (s 112(3) *Crimes Act*). The applicant and 17 year old co-offender broke into 78 year old female victim's home and struck her with bricks and a piece of wood. The victim suffered serious psychological and physical injuries. The applicant was sentenced to imprisonment for 3 years and 9 months, NPP 2 years.

The applicant submitted the sentencing judge erred in his interpretation and application of the principles relating to youth and immaturity (*KT v R* [2008] NSWCCA 51; 182 A Crim R 571).

The CCA (Garling J, Hidden J agreeing; Hoeben CJ at CL dissenting) allowed the appeal and imposed a new sentence of imprisonment 3 years with NPP 1 year 4 months.

The applicant was of Aboriginal heritage. As a child, he was subject to domestic violence and drug and alcohol abuse by his parents. His cognitive function was in the extremely low range. The judge, who faced an "unenviable task," erred by failing to have due regard to the youth, immaturity and impulsivity of the applicant in the following respects:

- The judge's remarks (a "*calculated, cruel and callous attack*" as being "*an act not borne from the immaturity and impulsivity of youth*") refers to the entire attack and all of the applicant's actions which constitute the offence, and was not limited to the element of gratuitous cruelty involved: at [116].
- The judge made his remarks in respect of both offenders. In discussing the effects of immaturity and impulsivity as causal features of the offence, attention needed to be explicitly given to the

significant disparity in age of 4½ years between the applicant and co-offender. The immaturity and impulsivity of the applicant could not be equated with that of his co-offender as causal features of their respective offending. The judge erred in dealing with them together in this respect: at [117].

- The judge regarded considerations of community protection as deserving "*particular weight*" and "*considerable weight*" referring to *Bugmy v The Queen* (2013) 249 CLR 571 at [43]-[44] and *Engert v The Queen* (1995) 64 A Crim R 67 at pages 68, 71.

  In those case passages, there is no statement of principle except that a sentencing judge is required to take account of all relevant factors, including profound childhood deprivation and the effect of mental disorder. Both cases involved adult offenders and were not concerned with the sentencing of juveniles. Accordingly, neither case examines the interaction in juvenile sentencing of factors that are in tension or makes statements applicable to the present circumstance: at [118]-[119].

Appeal - principles - sentence is unreasonable or plainly unjust

Singh [2019] NSWCCA 110: The CCA referred to *Hughes v R* [2018] NSWCCA 2 where the Court summarised the principles relating to a claim that a sentence imposed is unreasonable or plainly unjust:

> *"*[86] *Consideration of sentence appeal*
>
> When it is contended that a sentence is manifestly excessive it is necessary to have regard to the following principles derived from *House v The King* (1936) 55 CLR 499; [1936] HCA 40 at 505; *Lowndes v The Queen* (1999) 195 CLR 665; [1999] HCA 29 at [15]; *Dinsdale v The Queen* (2000) 202 CLR 321; [2000] HCA 54 at [6]; *Wong v The Queen* (2001) 207 CLR 584; [2001] HCA 64 at [58]; *Markarian v The Queen* (2005) 228 CLR 357; [2005] HCA 25 at [25], [27]; and *Hili v The Queen*; *Jones v The Queen* (2010) 242 CLR 520; [2010] HCA 45 at [59]:
>
> > (1) appellate intervention is not justified simply because the result arrived at in the court below is markedly different from sentences imposed in other cases;
> >
> > (2) intervention is only warranted where the difference is such that it may be concluded that there must have been some misapplication of principle, even though where and how is not apparent from the reasons of the sentencing judge, or where the sentence imposed is so far outside the range of sentences available that there must have been error;
> >
> > (3) it is not to the point that this Court might have exercised the sentencing discretion differently;
> >
> > (4) there is no single correct sentence and judges at first instance are allowed as much flexibility in sentencing as is consonant with consistency of approach and application of principle; and
> >
> > (5) it is for the applicant to establish that the sentence was unreasonable or plainly unjust.
>
> See *Obeid v R* [2017] NSWCCA 221 (R A Hulme J, Bathurst CJ, Leeming JA, Hamill and N Adams JJ agreeing) at [443]."

<u>CONVICTION APPEALS and OTHER CASES</u>

Evidence - Drawings of penis by complainant showing frenulum/"abnormal skin flap" – photographs of penis properly excluded – danger of unfair prejudice, s 137 Evidence Act

Denton [2019] NSWCCA 81: The respondent was on trial for child sexual offences. The respondent told the complainant, "I have something abnormal on my penis," and showed her the tip of his penis where the skin was abnormal. Drawings by the complainant of the respondent's penis with a label

"abnormal skin flap" were admitted (on the pre-recorded evidence) as Exhibits. The Crown sought to tender two police photographs of the respondent's penis for the jury to make a comparison with the drawings. There was no expert opinion as to whether there was anything unusual, abnormal or distinctive about the penis. The trial judge ruled the photographs inadmissible.

The CCA dismissed the Crown appeal (s 5F *Criminal Appeal Act*).

The probative value of the photographs was so low that they are inadmissible because of the danger of unfair prejudice (s 137 *Evidence Act*): at [5], [9], [34]. That arose from the possibility the jury would make the comparison on the false assumption the photographs depicted a penis that was other than normal where there was no evidence supporting that assumption: at [32].

This is different to where a witness provides a sketch plan of a house and the admissibility of a photograph by police of the house. That involves a comparison of specific and known criteria such as location of the rooms or items of furniture. Similarly, the complainant gave evidence the respondent had a tattoo on his buttock and a photograph of the tattoo was tendered. This involved a comparison of clearly identifiable features of the object or thing depicted in the photograph: at [29].

Directions - Failure to direct jury of need to be unanimous as to possession of particular quantity of drugs

Decision Restricted [2019] NSWCCA 6: The appellant was convicted of two counts of supply drugs (s 25(2) *DMTA*). The drugs were located in various amounts in four different places. The Crown relied upon deemed supply such that each separate quantity of drugs fell within the deeming provision (s 29 *DMTA*).

The CCA held the trial judge erred by directing the jury as to proof of possession in these terms:

> "… The question really asks you 'Are you satisfied beyond reasonable doubt that [A] was in possession, as I have defined it, of at least one of those individual finds of drugs?' …..
>
> In this regard, it is possible some of you might be so satisfied in relation to all of them. Some of you might not be satisfied in relation to all of them, but one or more of them. Even then, you might not all agree on the same one or more. That would not matter."

The erroneous direction left it open to the jury to convict, even if not unanimously satisfied that the appellant was in possession of one particular package, providing that each juror was satisfied he was in possession of at least one package albeit that the packages were different: at [46]; *The Queen v Klamo* (2008) 18 VR 644; *Lane v The Queen* [2018] HCA 28; (2018) 92 ALJR 689.

There are two distinct types of case dealing with jury unanimity (*Klamo* at [75] citing *The Queen v Walsh* [2002] VSCA 98; (2002) 131 A Crim R 299 at 316): at [46]

(i) Alternative legal bases of guilt are proposed by the Crown but depend substantially upon the same facts. There is no need for a direction on 'unanimity' about one or other or more of these bases, at least if they do not 'involve materially different issues or consequences'.

(ii) Where one offence is charged, but a number of discrete acts is relied upon as proof and any one of them would entitle the jury to convict. If those discrete acts go to the *proof of an essential ingredient of the crime charged*, then the jury cannot convict unless they are agreed upon that act which, in their opinion, does constitute that essential ingredient. [Emphasis added.]

The present case falls into the second type of case: at [46]. The CCA quashed the conviction and ordered a new trial.

Crown Prosecutor referred to evidence inadmissible against appellants in closing address - no substantial miscarriage of justice

Charbaji [2019] NSWCCA 29: (murder) AC, HC and J were tried together. The Crown Prosecutor, in closing address to the jury, suggested that evidence admitted only against J could be used in considering the guilt of the appellants, AC and HC. The judge refused to discharge the jury and directed the jury not to take that evidence into account against the appellants.

The CCA dismissed the appeal.

As there was no doubt the Crown impermissibly referred to evidence that was admissible only against J, the case falls into the third limb of s 6(1) *Criminal Appeal Act*, being a case where, by reason of irregularity or otherwise, an accused has not received a trial according to law or has not received a fair trial (*Filippou v The Queen* (2015) 256 CLR 47). The question then arises as to whether those references by the Crown constituted a "*substantial miscarriage of justice*": at [99]-[100]. In determining whether there has been a substantial miscarriage of justice, the appellate court is not seeking to predict the outcome of a hypothetical, error-free trial, but is required to decide whether, notwithstanding error, guilt was proven to the criminal standard on admissible evidence: [104]-[108]; *Kalbasi v Western Australia* (2018) 352 ALR 1 at [12]-[13].

In this case, the Court must consider each of the impermissible statements, their importance in the trial overall having regard to the other evidence, the corrective direction by the trial judge and other directions to the jury: at [110]. The CCA concluded in the context of the trial as a whole, that the Crown's impermissible references did not permeate the entire trial so as to require the jury be discharged. The CCA held it was satisfied guilt was proved to the criminal standard, accordingly, there was no substantial miscarriage of justice: at [125]-[126]; *Kalbasi v Western Australia* at [13].

Whether accused's level of intoxication precluded requisite intent is a matter for jury to be inferred from all of the surrounding circumstances - murder

Siale [2019] NSWCCA 80: The CCA dismissed the applicant's appeal against conviction for murder. The applicant had argued it was not open to the jury to be satisfied beyond reasonable doubt that, due to his level of intoxication, he formed the requisite intent to inflict grievous bodily harm (s 18 *Crimes Act*).

Evidence showed the applicant had consumed a large amount of alcohol which expert pharmacologists said would result in severe cognitive impairment. A sample of the applicant's urine or blood was not taken to ascertain his blood alcohol concentration. The deceased's parents gave evidence of the applicant's conduct at the scene.

The CCA said the question of whether an accused's level of intoxication precluded him having the necessary intent for the offence in question is "very much a matter for the jury to determine" to be inferred from all of the surrounding circumstances: at [55]; *Blackwell* (2011) 81 NSWLR 119 at [105].

Neither expert stated the applicant would not have the capacity of forming the intention to inflict grievous bodily harm. It remained a matter for the jury to determine, taking into account the evidence including the expert evidence of the significant cognitive impairment due to the level of intoxication: at [60]. Even if the experts had stated a view, it would be a matter for the jury to determine on all the evidence, including expert opinions: at [60].

The jury was entitled to conclude that the applicant formed the requisite intent based on the evidence of the deceased's parents: that the applicant knew where he was, spoke coherently, the way he attacked was demonstrative of an intention to inflict grievous bodily harm. Further, in considering the extent to which the intoxication had impaired his faculties, the jury was entitled to take into account their evidence that he walked normally from the scene. The trail of blood in Exhibit J showed he walked in a relatively straight line: at [61]-[63].

Irregularity where jury given unsupervised and unrestricted access to video of complainant's evidence-in-chief and cross-examination from first trial - "repetition warning"

Section 306B *Criminal Procedure Act* 1986 provides:

> *306B Admission of evidence of complainant or special witness in new trial proceedings*
>
> *(1) If a person is convicted of a prescribed sexual offence and, on an appeal against the conviction, a new trial is ordered, the prosecutor may tender as evidence in the new trial proceedings a record of the original evidence of the complainant or a special witness.*

In ***AB (a pseudonym)*** **[2019] NSWCCA 82** the CCA held the judge erred in giving the jury unsupervised and unrestricted access to a DVD video (marked as an Exhibit) of the complainant's

evidence-in-chief and cross-examination from the first trial pursuant to s 306B(1). This constituted an irregularity, however, the appeal was dismissed on the basis no miscarriage of justice resulted.

DVD should not have been marked as an exhibit; Access should not have been given to jury

The giving of evidence by way of playing a DVD or sound recording does not constitute the DVD or sound recording itself as evidence in the proceedings: at [40]; *NZ* (2005) 63 NSWLR 628 at [194]; *Gately* (2007) 232 CLR 208 at [86].

That position under the general law is not affected by s 306B(1). As decided in *CF* [2017] NSWCCA 318 at [65], the 'tender as evidence' in s 306B(1) refers to the 'admission' or receipt of such evidence in a subsequent trial, and does not prescribe the course to be adopted upon admission of such evidence: at [36], [40]-[42].

Thus the DVD should not have been marked as an exhibit. The ordinary rule that exhibits are made available to the jury during deliberations, subject to the court's discretion, (see *NZ* (2005) 63 NSWLR 628 at [183]-[192]), did not apply. Instead, it was for one of the parties to persuade the judge there was a good reason why the DVD be available to the jury: at [42].

The judge should have approached the issue on the basis that it will "seldom, if ever", be appropriate to allow access to such a recording in the jury room. The judge's exercise of discretion miscarried because she approached her decision on the basis that, absent good reason to the contrary, the DVD should be provided. There was therefore an irregularity in the DVD being provided: at [43]; *CF* [2017] NSWCCA 318.

No miscarriage of justice

However, the irregularity did not result in a miscarriage of justice. There was no risk of disproportionate weight being given to the evidence in the Crown case for reasons including: the applicant did not call any evidence; the complainant's evidence-in-chief and cross-examination were recorded; and the prime focus at trial was credibility of the complainant: at [44]-[50].

"Repetition warning" unnecessary

A "repetition" warning as described in *NZ* (2005) 63 NSWLR 628 at [210]: "because they are hearing the evidence in chief of the complainant repeated a second time and well after all the other evidence, they should guard against the risk of giving it disproportionate weight..." was not necessary. There was no significant risk the jury would give the complainant's recorded evidence disproportionate weight: at [53].

Tendency to pervert the course of justice not an element of the offence - s 319 Crimes Act

***Johnston* [2019] NSWCCA 108**: The applicant was convicted of pervert the court of justice under s 319 *Crimes Act*. The applicant, an off-duty sergeant of police, prevented a probationary constable stationed at the same police station from administering a random breath test on her by telling the constable it would be a conflict of interest for him to do so.

The applicant submitted the judge erred in not directing the jury that the act must have a *tendency* to pervert the court of justice. Prior to the introduction of s 319, the common law offence of pervert the court of justice required that the act or omission said to constitute the offence, besides being *intended* to pervert the course of justice, must also have a *tendency* to do so.

The CCA dismissed the appeal. As a matter of statutory construction and based upon a review of the authorities (see at [74]ff) the CCA held that it is not an element of the offence under s 319 that the act or omission in question had a *tendency* to pervert the course of justice: at [74]; [82]; *The Queen v Beckett* (2015) 256 CLR 305; *R v Einfeld* (2008) 71 NSWLR 31; *R v Karageorge* (1998) 103 A Crim R 157 considered.

As to intention, the CCA found it was open to the jury to be satisfied beyond reasonable doubt that the Crown had proved the applicant had the necessary intention: at [97].

***Non-publication orders – necessary to protect the safety of any person – calculus of risk approach - includes physical as well as psychological safety of applicant and his family – s 8(1)(c) Court Suppression and Non-Publication Orders Act* 2010**

Section 8(1)(c) *Court Suppression and Non-Publication Orders Act* 2010 states:

> "8 Grounds for making an order
>
> (1) A court may make a suppression order or non-publication order on one or more of the following grounds:
>
> ……
>
> (c) the order is necessary to protect the safety of any person."

In ***AB (A Pseudonym) v R (No 3)* [2019] NSWCCA 46** the CCA allowed the applicant's appeal against a refusal for a non-publication order. The applicant had been sentenced for historic child sexual assault offences. The matter was misreported in the media. The applicant and his wife received threats of physical harm and suffered psychological trauma.

Correct approach is calculus of risk

The CCA held the court below erred in applying the 'probable harm' approach to the interpretation of s 8(1)(c). This approach requires an applicant to prove that, in the absence of an order, it would be more probable than not that the relevant person would suffer harm: at [56].

The correct approach is the 'calculus of risk' approach, which requires the court to consider the nature, imminence and degree of likelihood of harm occurring to the relevant person. If the prospective harm is very severe, it may be more readily concluded that the order is necessary even if the risk does not rise beyond a mere possibility: at [56]-[58]; *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* at [46]..

For example: The probable harm approach would require an applicant to prove that death threats would be likely to be carried out. Under the calculus of risk approach the nature of the harm (death) would carry weight in the calculus of risk which would have the effect that it would not be necessary for the court to be satisfied it was *probable* the threats would be carried out. The fact the possible harm was so serious would lead to the court being satisfied under s 8(1)(c) an order was necessary in circumstances where it could not be said to be probable the threats would be carried out: at [57].

Section 8(1)(c) includes physical and psychological safety of applicant as well as wife

The court below also failed to take account under s 8(1)(c) evidence as to the risks of physical and mental injury to the applicant and wife. The section includes physical and psychological safety, including aggravation of a pre-existing mental condition and risk of physical harm by suicide or other self-harm. This matter alone was sufficient to warrant grant of leave: at [59]-[60].

Determination by CCA on rehearing

See at [61]ff. The found an order was "necessary to protect the safety of a person" within s 8(1)(c). There is a significant risk that, if an order is not made, others might act to imperil the applicant's and his wife's physical safety and psychological well-being, and physical safety of his children: at [114].

Delay in application for suppression orders and pseudonym orders - assistance to authorities may be set out in a judgment without pseudonyms or other redactions

Brown (a pseudonym) v R (No 2) [2019] NSWCCA 69: The appellant had earlier successfully appealed against sentence in *Brown* [2018] NSWCCA 257. No suppression orders or pseudonym orders were sought at that sentence hearing or on the appeal. That sentence judgment was duly published on NSW Caselaw. A month later the Court was informed the parties intended making a joint application to redact parts of the published judgment and it was removed from Caselaw. The appellant and NSW Police each filed applications to the effect there be no publication of information tending to reveal the identity of the applicant or his assistance to authorities.

The CCA made a pseudonym order and an order redacting parts of the judgment.

Delay

This application has many undesirable features, particularly the gross delay in making the application: at [28], [38]; *Matthews v R (No 2)* [2013] NSWCCA 194.

Applications for suppression and/or pseudonym orders should be raised prior to or at a hearing: at [13]-[14], [34].

If the police harbour concerns about the safety of a person, it is incumbent upon the police to communicate those concerns to the appellant's legal representatives and legal representatives of the Crown. It is highly desirable the DPP and NSW Police establish a system to ensure that what occurred does not happen again: at [13]-[14] (Note: The Crown neither joined in, nor opposed, this application).

"Calculus of risk" approach

Sections 8(1)(a) to (e) require that the order sought be "necessary" to protect an identified interest. The exceptional nature of the power and the high threshold imposed by "necessity" may be seen from the fact that it is not enough that it appears the proposed order is convenient, reasonable or sensible: at [25]-[26]; *Rinehart v Welker* (2011) 93 NSWLR 311at [31]; *D1 v P1* [2012] NSWCA 314 at [48].

Another important matter in this case is whether the orders sought will be effective or lack utility: at [27]; *D1 v P1*.

Applying the "calculus of risk" approach as set out in ***AB (A Pseudonym) v R (No 3)*** [2019] NSWCCA 46, it is appropriate to make the order due to there being a sufficiently serious potential risk to the appellant's physical safety. The possible harm identified is so serious the Court is satisfied under s 8(1)(c) a pseudonym order is necessary: at [37]-[39].

Assistance to authorities

Such assistance may be addressed in judgments without pseudonyms or other redactions. Where parties wish to contend a pseudonym be used where an offender has provided assistance, the issue should be raised directly with the Court so that the application can be considered on its merits and the Court's conclusion implemented in publication of reasons: at [34]; *Greentree* [2018] NSWCCA 227.

Jury – alleged improper conduct – Sheriff ordered to conduct investigation under s 73A Jury Act 1997

Agelakis [2019] NSWCCA 71: This is another recent instance of the CCA ordering the Sheriff, under s 73A *Jury Act*, to investigate whether jury members may have engaged in improper conduct or whether any irregularity or improper conduct occurred. See also ***Higgins*** [2018] NSWCCA 258.

The applicant was found guilty of sexual intercourse taking advantage of cognitive impairment (s 66F(3) *Crimes Act*). The District Court judge refused an application for an investigation by the Sheriff. The applicant appealed to the CCA.

The CCA found two factual matters were capable of giving rise to a reasonable apprehension, or else suspicion, that the jurors concerned did not discharge their task impartially: at [22]; *Lane* [2017] NSWCCA 46 at [74].

First, the day before the verdict, juror "Q", posted on Facebook the statement: "When a dog attacks a child it is put down. Shouldn't we do the same with sex predators?" with photos of rooms or implements by which lawful executions are carried out. Juror Q was also related, by marriage, to a complainant who had separately alleged being sexually assaulted by the applicant of which he was acquitted.

Second, that juror "Z" socialised with a key Crown witness: at [13]-[19].

There is an unresolved question as to whether the power to request the Sheriff to conduct an inquiry falls within s 12(1)(d) *Criminal Appeal Act*. At the least, this Court in its inherent jurisdiction can order such an investigation as it did in *Higgins*: at [25]-[29]; *Petroulias v McClellan* (2013) 85 NSWLR 463; *Lodhi v The Attorney-General of NSW* (2013) 241 A Crim R 477.

Defence of mental illness rejected by judge alone – appeal allowed – s 7(4) Criminal Appeal Act

Carter [2019] NSWCCA 11: The CCA allowed an appeal against conviction by a judge sitting alone. The judge had rejected a defence of mental illness for wound with intent to murder and police pursuit. The judge rejected the joint position of the parties, based on unanimous expert opinion, that verdicts of not guilty on the grounds of mental illness should be returned (s 38 *Mental Health (Forensic Provisions) Act* 1990).

The appellant appealed his conviction pursuant to s 7(4) *Criminal Appeal Act* 1912 submitting that s 7(4) permits the Court to determine for itself whether the appellant was mentally ill. Section 7(4) provides:

> "*If, on any appeal, it appears to the court that, although the appellant committed the act… charged …, the appellant was mentally ill, so as not to be responsible, according to law … the court may quash the conviction and … order that the appellant be detained in strict custody*"

The CCA allowed the appeal, quashed the convictions and entered special verdicts of not guilty on the ground of mental illness.

- The sole condition of the exercise of the power in s 7(4) is that it appears to the Court that the accused was mentally ill. The power is used sparingly: at [10]–[14]; [268]–[279]; *R v Jenkins* (1963) 64 SR(NSW) 20; *R v Derbin* [2000] NSWCCA 361; *Da-Pra* [2014] NSWCCA 211.
- Section 7(4) confers a power on the Court to examine the evidence and to act upon its view of that evidence: at [13], [27], [269], [278]. That process of determination does not require identification of error in the verdict, in the sense of it being unreasonable or unsupportable: at [272]; *R v Jenkins* (1963) 64 SR(NSW) 20; cf s.6(1) *Criminal Appeal Act* 1912.
- Even if the verdict is not unreasonable, it is open to the Court to exercise the special power conferred by s 7(4): at [278]; *Da-Pra* [2014] NSWCCA 211.

The CCA found the appellant was mentally ill so as not to be responsible according to law. The evidence showed he suffered from paranoid schizophrenia and, on the balance of probabilities, did not appreciate the profound moral wrongfulness of his actions: at [16]–[17]; [23]–[24]; [299]–[324].

SUPREME COURT 2019

Hayes v DPP(NSW)* [2019] NSWSC 378 (Campbell J) – *Magistrates – duty to consider whether conviction should be recorded – duty to give reasons

H lodged a written plea of guilty (s 182 *Criminal Procedure Act*) for his drug matter. He did not attend Court. The Magistrate adjourned the matter saying she was giving H the opportunity "to come in person if he wants leniency or otherwise he is going to be convicted." At the next occasion, before a different Magistrate, H again did not appear. The different Magistrate convicted H in his absence without reasons.

Campbell J allowed the appeal and remitted the matter. It is necessary for the court to turn its mind to the question of whether a conviction should be recorded, that is, whether s 10 *Crimes (Sentencing Procedure) Act* is available to a person even if that person has lodged a s 182 written plea to have the matter dealt with under s 182(3). In the vast majority of cases s 10 will not arise. But when it does, any practice adopted by the Court of not considering s 10 because the accused is not present in a court (although s/he is taken to have attended) should no longer be followed: at [16].

The obligation to give reasons is an important judicial duty, even in small matters: at [12].

DPP (NSW) v Banks)* [2019] NSWSC 363 (Ierace J) - *s 289F Criminal Procedure Act not overridden by s 65 Evidence Act

B was charged with a domestic violence offence. As the complainant did not attend the Local Court hearing, and she was not available for cross-examination, her recorded statement was not admissible under Part 4B, Chapter 6, *Criminal Procedure Act* ('Giving of evidence by domestic violence complainants'). The Magistrate rejected the DPP's proposed tender of the complainant's statement under s 65(2) *Evidence Act* ('maker unavailable hearsay').

Ierace J allowed the DPP Appeal holding that s 289F(5) *CPA* does not override s 65 *EA*. It is apparent from s 289E that the *EA* provisions continue to apply, specifically the note to s 289E specifies s 65 as an example of a provision of the *EA* that is intended to continue to apply. The defendant may invoke ss 135, 137 as bases for exclusion. Section 289F is concerned only with the form of the evidence-of-chief of a complainant: [36]-[39], [43].

Dirani (No 7)* [2018] NSWSC 945 (Johnson J)** - ***Accused required to sit in dock, and stand during trial - s 34 Criminal Procedure Act 1986

The accused stood trial for a terrorism offence.

Section 34 *Criminal Procedure Act 1986* states:

> "34 Practice as to entering the dock
>
> The Judge may order the accused person to enter the dock or other place of arraignment or may allow him or her to remain on the floor of the court, and in either case to sit down, as the Judge considers appropriate."

Requirement to sit in dock

Johnson J refused the accused's application made on prejudicial grounds to be permitted to sit in the body of the court and not the dock. There is discretion under s.34, but the usual location for an accused on trial is the dock, even if on bail. This is not of itself prejudicial. Juries understand the formality of a criminal trial. The Judge will remind the jury of the presumption of innocence: at [34], [39]-[40]; *Stephen (No. 2)* [2018] NSWSC 167 (Button J); *R v Baartman (No. 2)* (unreported, 23.10.1998, Dunford J); *Burke* (1993) 1 QdR 166 at 174. Relevant to the exercise of discretion under s.34 are the nature of the charges and evidence of the accused's custodial classification and behaviour in custody: at [41]-[42].

Requirement to stand

Johnson J refused the accused's application made on religious grounds to be excused from standing in the manner required of an accused during a criminal trial.

A proper and substantial basis must be demonstrated before a court would excuse compliance with the obligation that an accused stand on the usual occasions in a criminal trial: at [81].

The evidence regarding compliance with religious beliefs by Muslims is that standing for judicial officers (and presumably juries) is not prohibited (2017 *"Explanatory Note on the Judicial Process and Participation of Muslims"*, Australian National Imams Council). There is no evidentiary foundation here for the accused to be excused under s.34 from standing at appropriate times during the trial: at [72].

See also now the 'disrespectful behaviour in court' offence provisions (s.131 *Supreme Act 1970* and corresponding provisions for District and Local Courts) which may apply. In *R v Moutiaa Elzahed (No. 2)* [2018] NSWLC 13 offences were proven where the litigant failed to stand when the District Court Judge entered or departed: at [72]-[73].

LEGISLATION 2019

1. *Crimes Legislation Amendment (Victims) Act* 2018

The following provisions commence on 27 May 2019.

The Act substitutes and substantially re-enacts Div 2, Pt 3 *Crimes (Sentencing Procedure) Act 1999* in relation to VIS; and makes key amendments including new provisions for VIS in proceedings under the *Mental Health (Forensic Proceedings) Act* 1999 ("*MHFPA*").

Applies to proceedings which commence 27 May 2019. The previous VIS provisions continue to apply to proceedings which commenced before that date.

Victim's "immediate family" extended

Section 26 Definition of "*member of the primary victim's immediate family*" to include:

- A step-grandparent, step-grandchild, aunt, uncle, niece or nephew of the victim
- In case of victim who is Aboriginal or Torres Strait Islander - a person who is /was part of the close family or kin according to the Indigenous kinship system of the victim

. Any person who the prosecutor is satisfied is a member of the victim's extended family or culturally recognised family to whom the victim is / was close, or had a close relationship analogous to a family relationship, or whom the victim considered to be family.

Offences added in respect of which a VIS may be made:

. "Form 1" offences: s 27(6). Victims of offences taken into account on a Form 1 can now make a VIS. Previously, VIS provisions were only enlivened upon conviction for an offence.

. Offences sexual or indecent in nature or involving violation of privacy, namely voyeurism or recording/distributing intimate images under ss 91H, 91J-L, 91P-R *Crimes Act*: s 27(2)(e), (4).

Types of harm extended

Previously, only actual bodily harm or psychological or psychiatric harm suffered by a primary victim could be included in a VIS.

A VIS can now include these harms suffered by the victim or victim's immediate family:

(a) actual bodily harm or psychological or psychiatric harm;

(b) any emotional suffering or distress;

(c) any harm to relationships with other persons;

(d) any economic loss or harm that arises from matters (a)–(c): s 28(1).

Court must receive and acknowledge VIS

Previously, the legislation stated a court *may* receive and consider a VIS from a primary victim, but *must* receive, acknowledge and comment on a VIS from a family member of a victim who has died.

. A court *must* receive, acknowledge and consider a VIS from both primary victims *and* family victims, and comment as appropriate: ss 30B and 30E(1).

. The absence of a VIS does not give rise to an inference that the offence had little or no impact on the victim or family victim: ss 30E(5), (6).

. A court must not consider a VIS unless it has been prepared by the victim, nor any material that is not specifically authorised by Division 2 to be included in a VIS: s 30F.

Reading of VIS: support person, closed court, CCTV

Previously, victims of prescribed sexual offences were able to read out a VIS in closed court and have a support person. Victims of prescribed sexual offences, children or cognitively impaired persons were entitled to read a VIS by CCTV.

Support person

. *All* victims when reading a VIS are now entitled to have a support person present: s 30H.

Closed court and CCTV

. Victims of prescribed sexual offences are still entitled to a closed court and CCTV when reading a VIS: ss 30I – 30J.

. *All other* victims may, with leave of the court, now read a VIS in closed court or by CCTV: s 30K(1).

In determining whether to grant leave to read a VIS in closed court, the court to consider whether it is reasonably practicable to exclude the public, there are special reasons in the interests of justice, and any other relevant matter: s 30K(2).

In determining whether to grant leave to read a VIS by CCTV, the court to consider availability of facilities and any matter the court considers relevant: s 30K(4).

Victim of offence by forensic patient under *MHFPA* (Subdivision 5)

A Court may accept a VIS after:

. a verdict of not guilty by reason of mental illness under the *MHFPA*; or

. a verdict in a special hearing under the *MHFPA* that, on the limited evidence available, an accused person committed an offence: s 30L(1).

A Court:

. must acknowledge receipt of the VIS: s 30L(2).

. may consider a VIS when it considers conditions to be imposed on the release of the accused: s 30L(3).

. must not consider a VIS when determining the limiting term to be imposed: s 30L(4).

. may seek submissions by the designated carer or principal care provider after special hearing verdicts: s 30M.

A victim may request a court not disclose a VIS to the accused or that the statement not be read out to the court: s 30N(1). The court is to agree unless it is not in the interests of justice: s 30N(2).

The court is not prevented from disclosing a VIS to the accused's legal representative on the condition the VIS is not to be disclosed to any other person, if it is in the interests of justice: s 30N(3).

The court is required to give a copy of the VIS to the Mental Health Review Tribunal after the court's decision that results in the accused person becoming a forensic patient: s 30N(4).