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Reasonable Cause CPD Conference

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Public Defenders' Chambers

Evidence – Admissions - Whether prosecutor is obliged to tender interview between police and accused containing both inculpatory and exculpatory statements

***Nguyen v R* [2020] HCA 23, 380 ALR 193**

N was interviewed by police concerning matters of violence. During the course of an interview with police he made inculpatory statements to the effect that he had trown a bottle at another person. However, he also made exculpatory statements to the effect that he had done so in self-defence.

At trial the prosecutor informed the Court that the Crown would not be tendering the recorded interview for tactical reasons as the Crown had a "better chance of winning" by not tendering the interview. The trial was styed whilst two questions were referred to the Full Court of the Supreme Court of the Northern Territory.

The Northern Territory held that the prosecution was entitled to proceed as intended. N appealed to the High Court of Australia, who upheld his appeal. The HCA held that the Crown's position did not accord with prosecutorial obligations, disadvantaged the accused. The prosecution was obliged to tender the interview.

Per Kiefel CJ, Bell, Gageler, Keane and Gordon JJ:

> ***Differences of opinion and practice***
>
> *[28] It has been observed that there has been a divergence of opinion in Australian courts as to whether the prosecution has an obligation to tender mixed statements …*
>
> *[31] A line of authority in New South Wales refers to the common practice of the prosecution adducing evidence of conversations with police containing exculpatory statements. A justification for the practice is said to be that otherwise the jury would be left to speculate as to whether the accused had given any account of their actions when first challenged by the police.*
>
> *[32] Whatever be the difference in prosecutorial practices or the views of judges and intermediate appellate courts of the States and Territories concerning mixed statements, there can be no question about the obligation of the prosecution to present its case fully and fairly. It is an obligation which informs the rules of conduct of prosecutors which apply to members of the legal profession in the Northern Territory. It is an obligation which has been reiterated in a number of decisions of this Court as a fundamental principle. And it is that fundamental principle which resolves the question on this appeal.*
>
> ***Prosecutorial discretion and fairness***

[33] In Richardson v R [(1974) 131 CLR 116 at 119] it was pointed out that any discussion of the role of a Crown prosecutor must commence with the fundamental proposition, … that it is for the prosecutor to determine what evidence will be called and how the case for the Crown will be presented. The Court went on to say that the prosecution also has the responsibility of ensuring that the Crown case is presented with fairness to the accused.

[34] In Richardson the Court acknowledged that there may be many factors for the prosecution to take into account regarding evidence, including whether it is credible and whether it is in the interests of justice that it be tendered. Importantly, the Court observed, it is in light of those factors that a prosecutor must determine the course "which will ensure a proper presentation of the Crown case conformably with the dictates of fairness to the accused". This, the Court said, is what is meant by prosecutorial "discretion".

[35] … Whilst the decision remains one for the prosecutor to make, the reality is that if the exercise of that discretion miscarries the accused might be denied a fair trial. In Whitehorn v R [(1983) 152 CLR 657 at 674] it was explained that because a failure to call evidence may result in a miscarriage of justice and a new trial it is possible to speak of a Crown prosecutor being bound, or under a duty, to call all available material witnesses. It is not to be understood as a duty owed to an accused. It forms part of the functions of a prosecutor.

[36] It has been said that the concept of a fair trial cannot comprehensively or exhaustively be defined. But there can be no doubt that fairness encompasses the presentation of all available, cogent and admissible evidence. In Ziems v The Prothonotary of the Supreme Court of New South Wales [[1957] HCA 46; (1957) 97 CLR at 294, quoting R v Harris [1927] 2 KB 587 at 590], Fullagar J observed the rule in criminal cases to be that "the prosecution is bound to call all the material witnesses before the Court, even though they give inconsistent accounts, in order that the whole of the facts may be before the jury". This statement was quoted with approval by the Court in Richardson, where, as noted above, it was said that it was the responsibility of the prosecution to present the case for the Crown "conformably with the dictates of fairness to the accused". In Whitehorn [v R (1983) 152 CLR 657 at 674] Dawson J said that "[a]ll available witnesses should be called whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based".

[37] The respondent to this appeal sought to distinguish these and other cases on the basis that they concerned decisions whether to call material witnesses, the implication being that mixed inculpatory and exculpatory statements made by an accused when interviewed by police about an offence are not subject to the same or similar considerations. The simple answer to that submission is that what was said in cases such as Richardson and Whitehorn about the responsibilities of a prosecutor apply by analogy. They apply to the tender of all evidence which may properly and fairly inform the jury about the guilt or otherwise of the accused. As Dawson J said in Whitehorn,

the prosecutorial obligation to call all witnesses is but an aspect of "the general obligation which is imposed upon a Crown Prosecutor to act fairly in the discharge of the function which he performs in a criminal trial. That function is ultimately to assist in the attainment of justice between the Crown and the accused."

[38] So understood, the power or discretion of a prosecutor is not unconfined. It is subject to the principle that, as a general rule, the prosecution must offer all its proofs during the progress of its case. Thus in R v Soma [(2003) 212 CLR 299 at 309–310] it was said that the prosecution could not, conformably with its obligations, tender part only of a tape recording of an interview with the accused to prove that he had made a prior inconsistent statement. If the prosecution case was to be put fully and fairly, it had to adduce any admissible evidence of what the accused had said to the police when interviewed. To the extent that the recording of the interview contained exculpatory material, if the prosecution wished to rely on inculpatory material, it was "bound to take the good with the bad". The prosecutor's obligation to put the case fairly required the prosecutor to put the interview in evidence "unless there were some positive reason for not doing so".

[39] What was said in Soma should be understood not just as a caution to prosecutors about being selective but rather as a reminder about the prosecutorial obligation to present all available, cogent and admissible evidence. Cases involving the omission of a vital witness may provide somewhat more stark examples of a failure properly to exercise that discretion than a mixed statement given by an accused in a police interview, but the latter may have just as important an impact on the outcome of the trial and the need for a new one. It was considerations of what is necessary for the proper presentation of the prosecution case which led Hayne J to say in Mahmood v Western Australia [(2008) 232 CLR 397 at 409] that:

> *If there is admissible evidence available to the prosecution of out-of-court statements of the accused that contain both inculpating and exculpating material, fair presentation of the prosecution case will ordinarily require that the prosecution lead all that evidence.*

[40] The use of digital recordings together with statutory provisions aimed at ensuring that they have not been tampered with have alleviated some concerns formerly held about methods of questioning suspects. The fact that suspects are invariably questioned by police is widely known, including to persons who may become members of a jury. The point made by the New South Wales Court of Criminal Appeal as explaining the practice of prosecutors to tender mixed statements is apposite. To do otherwise would encourage juries to speculate as to whether the accused had given an account of their actions when first challenged by the police. The omission of that evidence may for this reason also work an unfairness to the accused.

[41] There may be circumstances where it would be unfair to an accused to tender a record of interview, for example where the accused has refused to comment. In such a circumstance the omission of that evidence is justified. But where an accused provides both inculpatory and exculpatory statements to investigating police officers, it is to be

expected that the prosecutor will tender that evidence in the Crown case, unless there is good reason not to do so, if the prosecutorial duty is to be met.

…

Countervailing factors

[44] What has been said about the obligations which attach to the power or discretion of a prosecutor with respect to the tender of evidence does not detract from the need for a prosecutor to consider factors about particular evidence which may properly influence the decision whether to call that evidence. There may be valid reasons not to do so. In Richardson the prosecutor had grounds for believing that the witness in question was not credible or truthful. The prosecution could not be expected to tender the evidence of a witness whose account has been carefully prepared or is otherwise contrived. It would not be necessary for the full presentation of the prosecution case to adduce evidence which is no more than a scurrilous attack on the character of a witness or when it is clear to demonstration that it is false, as where it is contradicted by other, objective evidence. But circumstances such as these may be expected to be rare. The decision whether to tender evidence should be guided in each case by the overriding interests of justice. It should only be where the reliability or credibility of the evidence is demonstrably lacking that the circumstances may be said to warrant a refusal, on the part of a prosecutor, to call such evidence.

[45] A prosecutor acting in accordance with the responsibilities of their office is not to be expected to be detached or disinterested in the trial process. A prosecutor is to be expected to act to high professional standards and therefore to be concerned about the presentation of evidence to the jury. It is to be expected that some forensic decisions may need to be made. It is not to be expected that they will be tactical decisions which advance the Crown case and disadvantage the accused. In Ziems v [The Prothonotary of the Supreme Court of NSW [(1957) 97 CLR 279 at 294], Fullagar J observed that in that case the object of not calling a vital witness could only have been to deny the other party the ability to cross-examine him. Whilst the creation of a tactical advantage might be permissible in civil cases, in criminal cases it may not accord with traditional notions of a prosecutor's function, his Honour said. In Whitehorn [(1983) 152 CLR 657 at 663–664], Deane J said that the observance of traditional considerations of fairness requires that prosecuting counsel refrain from deciding whether to call a material witness by reference to tactical considerations. It will be obvious that a decision by a prosecutor to refuse to tender a mixed statement so that the accused is forced to give evidence falls into this category.

Conclusion and orders

[46] The recorded interview of the appellant provided his detailed account of what occurred. He was challenged a number of times by the interviewing police officer but his account remained consistent. It was not suggested that his account could be described as demonstrably false because it differed from the account of others. It

provided the foundation for a claim to self-defence and the basis for questioning Crown witnesses by defence counsel. It is evident that the appellant believed that what he was to say in the interview would be placed before the court. The decision not to adduce it was admittedly a tactical one, to favour the Crown. It did not accord with the prosecutorial obligation respecting the presentation of the Crown case and disadvantaged the appellant.

[47] There should be orders allowing the appeal. The answer to the second question referred to the Full Court should be set aside. That question should be answered: "Yes".

Evidence – *Browne v Dunn* – impact on closing address

Petryk v R [2020] NSWCCA 157

P was on trial for murder. During the course of cross-examination of a Crown witness counsel for P suggested that P was not present at the time of the murder. The Crown witness denied this proposition. Later in the trial counsel for P informed the Court that he could no longer act for P. New lawyers took carriage of the matter.

During the course of closing address, the new counsel suggested that if P was present at the time of the murder, the jury might accept that he was not the shooter. In the absence of the jury the trial judge dissuaded new counsel from pursuing the submission any further as it was not supported by the evidence and was inconsistent with the manner in which the Crown witness had been cross-examined.

P appealed on the basis that the trial judge was in error in not allowing new counsel to make such submissions. The appeal was dismissed on the basis that counsel is not entitled to put a new proposition for which there was neither evidence nor grounding in cross-examination.

Bathurst CJ:

[29] Mr Ramrakha, who appeared on behalf of the applicant, submitted that the effect of what her Honour said to Mr Webb in the absence of the jury during his closing address was to prevent him from putting to the jury a viable alternative hypothesis consistent with innocence. He submitted that, although the applicant's case had been conducted by Mr Austin on the footing that the applicant was not present at the deceased's home at Wickham when the shooting occurred (the absence hypothesis), the applicant was entitled to have put a further hypothesis: that he was present when the shooting occurred but had not been the shooter (the non-shooting hypothesis). Mr Ramrakha contended that her Honour was not entitled to prevent Mr Webb from putting the non-shooting hypothesis to the jury. He submitted that her Honour ought not to have stopped Mr Webb from putting to the jury that, because of Ms Bronner's prior relationship with the co-accused, she had exaggerated the applicant's role and diminished the co-accused's role.

[30] Mr Ramrakha cited authorities to the effect that the rule in Browne v Dunn (1893) 6 R 67 (that a party is not entitled to put a submission where the party has not put the matter to a relevant witness to give the witness an opportunity to provide an answer) does not apply strictly in criminal proceedings.

[31] The difficulty with this submission is that, before her Honour made the remarks set out above, Mr Webb had already made submissions about that very matter to the jury in the passage highlighted above. The jury would have understood that section of the closing to be a reference to the hypothesis that Ms Bronner had given evidence which exonerated the co-accused from the murder charge and implicated the applicant. The submission carried with it an implication that the applicant was actually there at the deceased's home at Wickham but had not been the shooter.

[32] In effect, her Honour raised the issue because of a concern that Mr Webb would develop the submission in such a way as to put a positive proposition for which there was no evidence, as distinct from raising a possibility which had not been excluded by the Crown, as he had done in the first segment of his closing. Although her Honour's remarks were couched in terms of the matters not put to Ms Bronner, this did not amount to a strict enforcement of the rule in Browne v Dunn. Rather, her Honour was concerned that there was no evidence that Ms Bronner had been influenced by her relationship with the co-accused. Had it been put to Ms Bronner, her answer might have constituted evidence sufficient to put the positive proposition. However, as it was not, the highest it could be put was as a hypothetical possibility, which is how it was put at the beginning of the defence opening. In any event, as set out above, the Crown had elicited evidence from Ms Bronner in her evidence in chief to exclude the hypothesis that her relationship with the co-accused had inclined her to give evidence favourable to him.

[33] The outline of the relevant events in the trial demonstrates the context in which her Honour's remarks appeared. Mr Webb was not appointed trial counsel for the applicant until after the close of the Crown case. He had been given the opportunity to have any prosecution witness recalled in order to put matters to him or her. Ms Bronner was plainly a witness who must have been considered as a candidate for being recalled. Mr Webb can be taken to have decided, for good forensic reasons, not to recall Ms Bronner. To put again to Ms Bronner that the applicant was not there and then put, in the alternative, that if he was, he was not the shooter would hardly have engendered confidence in the applicant's primary case. Although there are occasions when counsel might decide to engage in such an exercise, it is understandable that Mr Webb decided not to in the present case. This was an objectively reasonable forensic decision by which the applicant is bound: R v Birks (1990) 19 NSWLR 677 at 685 (Gleeson CJ).

[34] In the defence closing address, her Honour was entitled to make Mr Webb aware of the way in which the trial on behalf of the applicant had been conducted, in case his trial preparation had left him in any doubt about it. In the passage extracted above, Mr Webb did not maintain his initial objection to what her Honour was putting and appeared to accept its correctness. In particular, he did not maintain that it was

necessary for him to put the non-shooting hypothesis to the jury in his closing address as a non-fanciful hypothesis which had to be excluded by the Crown in order to raise it as a viable hypothesis which ought to be included in the summing up. He can be taken to have chosen to accept the force of her Honour's observations and leave the point as he had put it before her Honour made the remarks. Mr Webb is an experienced criminal trial counsel. No allegation was made on behalf of the applicant that he was incompetent.

[35] We are not persuaded that in the interchange with Mr Webb set out above, her Honour was in error. The relevant principle, which her Honour sought to enforce, was that counsel is not entitled to put as a positive proposition any matter for which there was neither evidence nor grounding in the cross-examination. This did not amount to an inappropriate adherence to Browne v Dunn. Rather, it constituted an appropriate control on counsel by the trial judge who might otherwise have been obliged to remind the jury that there was no evidence of the proposition put by Mr Webb in closing address and that Mr Austin had not put the proposition to Ms Bronner in cross-examination.

[36] In these circumstances it is not necessary to address the effect of Browne v Dunn in criminal cases. It is sufficient to observe that it has been authoritatively held that the rule is to be applied in criminal cases with due regard to the nature and course of the proceedings: MWJ v R [2005] HCA 74; (2005) 80 ALJR 329 (MJW) at [18] (Gleeson CJ and Heydon J). Trial judges are generally to abstain from making adverse comments about parties and witnesses where the rule has not been complied with: MJW at [39] (Gummow, Kirby and Callinan JJ). It is not for the defence to clear up inconsistencies in the prosecution case by cross-examining prosecution witnesses about such inconsistencies: MJW at [41].

Evidence - Character Evidence

Hogg v R [2019] NSWCCA 323

H was charged with sexual intercourse without consent. The complainant was a vulnerable 16-year-old from a troubled background. The appellant was a school chaplain and Baptist youth minister. The appellant was aware of the complainant's troubled background.

The appellant was cross-examined about his experience with troubled youth and his awareness that such youth were vulnerable as victims of sexual offending. The appellant had led significant evidence of his prior good character.

In his closing address, the prosecutor suggested that there are reasons why vulnerable youth are targeted as victims of sexual abuse, and that people of outwardly good character may offend against such youth. The prosecutor stated in closing address *"….you might think the fact that he has good character doesn't really determine the matter because it can cut both ways".* It was held that this submission impermissibly undermined the evidence of good character:

White JA (other members if the court agreeing):

> *[117] As explained above, this ground concerned the Crown's response to the evidence of the appellant's good character by putting before the jury that the appellant's experience with vulnerable children made him aware that such children were vulnerable to sexual assault and were less likely to report it than a less vulnerable child might be expected to do.*
> *[118] R v MWL [2002] VSCA 221; (2002) 137 A Crim R 282 concerned a judge's directions to a jury that undermined evidence of the accused's good character. The trial judge said:*
>
> > *Consistent with what I have just told you it comes as no surprise to you to learn, of course, that generally speaking crimes of a sexual nature as are alleged in this trial are by and large secret crimes by their very nature. In other words you seldom would expect to hear from an eye witness to crimes involving sexual abuse of children, and we know from our experience that in this day and age or even over the decades that so-called pillars of society have been involved with sexual crimes involving children, leaders of our community, politicians, even members of the clergy, and people are often shocked by those revelations, believing that those sort of people have led exemplary lives. They do on the surface, but we now we (sic) know from our experience that sometimes these people lead double lives.*
>
> *[119] Buchanan JA, with whose reasons Phillips CJ and Phillips JA agreed, said of this direction:*
>
> - *10 An important part of the applicant's case was that because he was a man of good character he was unlikely to have committed the offences with which he was charged. The trial judge undermined that defence and did so in a manner which was likely to cause a miscarriage of justice. The trial judge invited the jury to view persons of apparently good character with suspicion. …*
> - *11 Counsel for the applicant at trial took no exception to this part of the charge. In Clarke v Johnstone [1986] VR 643, where the Full Court followed the general rule that an applicant for leave to appeal against conviction is not allowed to rely on appeal on a criticism of the charge, which had not been taken by way of exception at the trial, the Court spoke of the duty of counsel 'to ensure that any errors are drawn to the attention of the trial judge so that he may correct them.' [Above at 661. See also General Motors-Holdens Pty Ltd v Moularas (1964) 111 CLR 234 at 242 per Barwick CJ]. In the present case, I doubt that anything the trial judge could have said would have undone the effect of his statements rather than emphasize their damaging effect. I regard the statements as so clearly damaging to the applicant's case that the failure to take exception does not lead me to conclude that there was no injustice because counsel steeped in the atmosphere of the trial saw no error. In my view, the statements did lead to a miscarriage of justice.*
>
> *[120] The same comments are applicable to this case. The cross-examination of the appellant, and of Mr Sibbald called to give evidence of good character in his defence,*

was undermined by the Crown's inviting the jury to view the appellant, apparently a person of good character, with suspicion because he worked with vulnerable children.

[121] The Crown's cross-examination of the appellant and Mr Sibbald was not corrected in the trial judge's directions. (No such direction was sought.) Rather, (as quoted at [37] above) the trial judge quoted, without criticism, the Crown's address to the jury that the appellant had accepted that "vulnerable children are targeted for sexual abuse because they can be isolated and often do not complain." The appellant's acceptance of that proposition was not an answer to the evidence of good character upon which he relied and which was unchallenged. Counsel for the appellant at trial sought to rebut the suggestion made by the Crown by pointing to the fact that there was no evidence of any other complaint against the appellant, notwithstanding his work over many years with other vulnerable children. That point was not addressed in the trial judge's directions to the jury (at [38] above).

[122] Notwithstanding that no objection was taken to the trial judge's directions, nor to the cross-examination by the Crown of the appellant and Mr Sibbald, the cross-examination was unfairly prejudicial to the appellant and that prejudice was not corrected by the directions to the jury, resulting in a miscarriage of justice.
[123] The miscarriage was not one that could have been cured by a direction even if one were asked for. As in R v MWL, little could have been done to alleviate the prejudicial effect of the cross-examination and summing-up. Nor is this a case where this Court could be satisfied that the jury would inevitably have convicted the appellant had the trial not played out in this way (Domican v R (1992) 173 CLR 555 at 565–566; ; [1992] HCA 13; Wilde v R (1988) 164 CLR 365; [1988] HCA 6 at 371–372;). This is so notwithstanding the strength of the evidence of contemporaneous complaint. The complaint did not go into the detail of the conduct with which the appellant was charged amounting to sexual intercourse. In terms it was that the appellant attempted to have sex with the complainant. That was consistent with the evidence the complainant gave and inconsistent with the appellant's denial that anything untoward happened, but ultimately the conviction rested on an assessment of the credibility of the complainant and the credibility and character of the appellant. The Crown's case was not so strong that a conviction was inevitable. For these reasons the proviso in s 6(1) does not apply.

Evidence – Character Evidence

Merhi v R [2019] NSWCCA 322

M was a customs officer who later worked as a police liaison officer. Whilst a police liaison officer she committed the offences of bribery of a public official, aiding and abetting the importation of tobacco products with intent to defraud the revenue, and dealing with proceeds of crime. The co-offender was a former colleague who was a customs officer.

The appellant contended that the sentencing Judge was in error to find that there was a a "seriously aggravating" factor that she had committed an abuse of trust, office or position or authority. This ground of appeal was dismissed.

The appellant also asserted that the judge was in error in giving little weight to her prior good character. This ground of appeal was upheld.

Per Cavanagh J, with whom the other members of the court agreed (allowing the appeal):

Re breach of trust, Cavanagh J stated:

> *[31] The point made by the applicant is that there could be no breach of trust or authority unless the applicant was employed in a position of authority or trust at the time of the commission of the offending. I do not agree.*
>
> *[32] There is no principle or precedent which limits a finding of a breach of trust to offences which happen during the period when the offender is employed in the position of trust or authority. I agree with the sentencing judge that it is important that not only current employees but also former employees can be trusted with the information that they gain through their employment.*
>
> *…*
>
> *[37] The factual foundation for the applicant's submission, being that her former employment was of no relevance other than that she met the co-offender whilst so employed, is thus not made out. It is clear that the applicant was using the information and knowledge that she had gained whilst employed by the ABF as part of the process in working with the co-offender as well as the associates of the syndicate to ensure that the illegal importation went undetected.*
>
> *[38] The sentencing judge accepted that the breach of trust was a matter which seriously aggravated the applicant's criminality. Bearing in mind the ongoing obligations of confidentiality ordinarily imposed upon persons in a position of authority and trust even after the employment ceases, it might be surprising if a misuse of such confidential information for criminal purposes after cessation of employment did not involve an abuse of trust such as to constitute an aggravating factor.*

RE prior good character, Cavanagh J stated:

> *[47] The applicant submitted that the sentencing judge engaged in a form of double-counting, in the sense that the fact of the applicant's former employment with the ABF led to a finding of an aggravating factor and that fact ultimately also led to the exclusion of a factor which was relevant for the purposes of considering the overall severity of the sentence. Further, the applicant submitted (validly) that her employment with the NSW Police Force at the time of committing the offence had no bearing on or relevance to the commission of the offence.*
>
> *[48] The respondent submits that an offence such as bribery of a Commonwealth official is a corruption offence and that prior good character is generally of less weight as a mitigating factor for corruption offences: see R v Obeid (No 12) [2016] NSWSC*

1815 ("Obeid (No 12)") and Obeid v R (2017) 96 NSWLR 155; [2017] NSWCCA 221 at [423] (R A Hulme JA).

[49] In Obeid (No 12), the sentencing judge, Beech-Jones J, observed at [94]:
[I]n cases of corruption including wilful misconduct in public office where the need for general deterrence is especially strong, prior good character is to be afforded less weight than it otherwise would (R v Rivkin (2004) 59 NSWLR 284; [2004] NSWCCA 7 at [410] and R v Williams [2005] NSWSC 315; ; (2005) 152 A Crim R 548, at [60] per Wood CJ at CL; Blackstock at [67] per Campbell J with whom Macfarlan JA and Barr AJ agreed)." (Some footnotes omitted.)

[50] The respondent points to the observations of Howie J (Simpson J agreeing) in R v Kennedy [2000] NSWCCA 527 at [21]–[22] as follows:

- *21It is unnecessary for the purposes of determining this appeal to consider the circumstances in which a court may legitimately determine that it will give less weight to prior good character as a mitigating factor. Generally speaking such a situation might arise where general deterrence is important, the particular offence before the court is serious and it is one frequently committed by persons of good character. Another situation may be where the prior good character of the offender has enabled him or her to gain a position where the particular offence can be committed.*
- *22Less weight might also be given to prior good character in a case where there is a pattern of repeat offending over a significant period of time. That will frequently be the case in child sexual assault offences because such offences are often committed during a period of an ongoing relationship between the offender and the complainant. But that was not this case.*

[51] In this matter, the sentencing judge has taken into account general deterrence as a significant factor and has had regard to the applicant's breach of trust as an aggravating factor. In then reducing the significance of prior good character based on the same factor, the sentencing judge may have erred in considering that a mitigating factor, which would otherwise be available under s 16A(2)(m) of the Crimes Act 1914, should be given little weight.

[52] It may be that in some circumstances good character should be given less weight, particularly if the offender has used that good character to gain a position of trust so as to enable the offence to be committed. Having said that, a different situation arises in circumstances in which an offender has not obtained the position of trust with the specific purpose of committing the offence and has demonstrated prior good character over a long period whilst so employed.

[53] The applicant had no prior convictions. She had worked for ABF for a period of 17 years. Whilst she misused the information and knowledge that she had obtained whilst employed by ABF for the purposes of committing the offending, she had, up to the time of commission of the offences, an unblemished record.

[54] Generally, it may be that an appeal based on the weight that a sentencing judge gave to any particular factor would be difficult. As was said in Wong v R (2001) 207 CLR 584; [2001] HCA 64 at [66] (Gaudron, Gummow and Hayne JJ):

> *So long as a sentencing judge must, or may, take account of all of the circumstances of the offence and the offender, to single out some of those considerations and attribute specific numerical or proportionate value to some features, distorts the already difficult balancing exercise which the judge must perform. (Emphasis in original.)*

[55] However, as I have taken his Honour's comments to mean that he was, in effect, dismissing prior good character as a relevant mitigating factor (having regard to the way in which his Honour indicated that he was taking account of the other matters referred to in s 16A of the Crimes Act 1914), I accept the applicant's submission that this is not merely an error in the weighting process or balancing the various factors.

[56] In my view, the applicant's prior good character was a relevant factor in the sentencing process. To not have regard to it may be viewed as a form of double-counting. …

Evidence - Client Legal Privilege - Circumstances in which misconduct can cause client legal privilege to be lost

Director of Public Prosecutions (NSW) v Izod; Director of Public Prosecutions (NSW) v Zreika [2020] NSWSC 381

I was charged with a matter before the Local Court. Z was a solicitor appearing for I.

On the morning of the hearing, I and Z communicated with each other by way of text messages and phone calls. Z advised I and I produced a medical certificate (based upon a false medical history) in support of an application for an adjournment of the hearing. As a result, both I and Z were charge with perverting the course of justice.

The prosecution sought to rely upon the text messages and phone calls. I and Z objected on the grounds of client legal privilege. The magistrate upheld the objection and as a result the prosecution offered no evidence. The prosecution appealed to the Common Law Division of the Supreme Court.

Result: Appeal allowed.

Simpson JA:

[30] The grounds of challenge, both with respect to s 56(1)(c) of the Appeal and Review Act, and s 69 of the Supreme Court Act, fall into four categories. The principal complaint by the DPP is that the magistrate misconceived the question she was required to determine on the voir dire and applied a test that was erroneous in law.

The DPP relied on a number of passages in the reasons, all of which are contained in the extracts above. Specifically, the DPP complained of the directions the magistrate gave herself in the passages italicised above, as follows:

The real issue and this is the nub of the prosecution case, is, did Mr Zreika go beyond what was required …;

The issue is whether or not this is sufficient to establish the illegal purpose that the police are asserting in this matter …;

… what I need to do is to be satisfied that the advice was being part of a criminal or an unlawful proceeding or was made in furtherance of an illegal object …

I am not satisfied today that what has been established was in furtherance of an illegal object …;

MISCONDUCT HAS NOT BEEN ESTABLISHED.

[31] The DPP contended that these passages indicate that the magistrate proceeded on the basis that, for the s 118 privilege to be lost, it was necessary that the prosecution establish as a fact that the communications were made in furtherance of the commission of the offence in question. The correct approach, the DPP contended, was to inquire whether there were reasonable grounds for finding that the communications were made in furtherance of the commission of that offence.

…

[36] In my opinion the correct construction of the judgment, taken as a whole, is that the magistrate did misconceive the question submitted to her and applied the wrong test. What s 125(2) required (for the purposes of this case) was an evaluation of evidence said to provide the basis for a conclusion that there were reasonable grounds for finding that the communications in question were made in furtherance of the s 319 offences. That is a lesser test than that can be discerned to have been applied from the extracts above, in which the magistrate can plainly be seen to have asked whether, in fact, the communications were made in furtherance of the offences.

Evidence - Compellability of Witnesses – section 18

***Jurd v R* [2020] NSWCCA 91**

J faced trial in the District Court. The Crown called evidence from a Ms Best, J's de facto partner. Through oversight she was not advised about her right to object to giving evidence pursuant to s 18 of the Evidence Act 1995. It was only after she had completed her evidence that this was realised. She was recalled and questions were asked of her on the voir dire. She said that, had she been aware of her right to object to giving evidence, she would have done so. Following that, the trial judge ruled that had Ms Best been made aware of her right to object to giving evidence, and had she objected, he would nevertheless have ruled that she was required to give evidence anyway. J was convicted and on appeal argued that the judge erred in allowing the evidence of Ms Best to be admitted.

Held, per Price J, with whom the other members of the court agreed (dismissing the appeal):

> *[81] Section 18(3) provides that the objection is "to be made before the person gives the evidence or as soon as practicable after the person became aware of the right so as to object, whichever is the later."*
>
> *[82] In my view, where the awareness of the right to object arises after the completion of the evidence that the person was required to give as a prosecution witness, it is doubtful that s 18 can be complied with.*
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> *[83] Where an objection is raised, the matters the court must take into consideration under subsection (7) in carrying out the balancing test include having regard to "any evidence the person might give and the weight that is likely to be attached to it," and "whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the defendant." It is apparent from the language of the statute that it is expected such objections will be considered before a witness completes his or her evidence.*
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> *[84] This view finds some support in the second reading speech for the Evidence Bill 1994 (NSW). The then Attorney General said with respect to s 18 that:*
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> > *The approach which has been adopted in the bill offers the best means of ensuring the achievement of the underlying policy objectives of protection of the family unit and the avoidance of undue hardship to the witness.*
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> *[85] In a case such as this, where any potential hardship and harm caused to Ms Best and the family unit was already occasioned, it is difficult to see how the legislative intent could be fulfilled retrospectively.*
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> *[86] Another consideration militating against the correction of an error such as the present one after the proverbial "horse has bolted" is the subconscious desire of a trial judge to continue with a trial.*
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> *[87] As this Court did not have the benefit of argument on this issue, it is not appropriate to finally determine this question of retrospective correction. In any event, the parties' submissions concentrated upon whether in conducting the voir dire the judge satisfied himself that Ms Best was aware of the effect of s 18.*
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> *[88] In Tran (No 1), Macfarlan JA focussed on the obligation of the court under s 18(4) to "satisfy itself that the person is aware of the effect" of the section. Macfarlan JA said:*
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> - *[27]In my view, to be "aware of the effect" of the section in accordance with s 18(4) the prospective witness needs to be aware not only of his or her right to object but also:*
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> *That the court will decide whether or not the objection should be overruled and the person required to give evidence;*

That that decision will be based upon the court's findings concerning the matters referred to in subsection (6), of which the judge should apprise the witness.
That in making its decision the court will take into account at least the five matters referred to in subsection (7), of which the judge should again apprise the witness.

- *[28]Unless the prospective witness is aware of these matters, he or she will not know to what issues his or her evidence and submissions should be directed in an attempt to persuade the court of the force of the objection to giving evidence. Where the prospective witness is represented by a solicitor or counsel it will usually be sufficient for the judge to ask the representative to confirm that the person is aware of the relevant matters. Where, as here, the person is unrepresented, an explanation of the matters to which I have referred will need to be given.*
- *[29]Usually it would not be sufficient for the judge to have counsel acting for the accused confirm that the prospective witness is aware of the relevant matters if the counsel is not also acting for that person. However not even that happened in the present case as the judge simply asked Mr Tran (not counsel) whether he had spoken to either of the lawyers (the representatives of the Crown and the accused). The judge did not ask Mr Tran what explanation, if any, he had been given about the effect of the section (see [8] above).*

[89] In a separate judgment, Schmidt J opined:

- *[40]Given that the witness must be made "aware of the effect of the section", it follows that he or she must be informed of the provision made in s 18(6), that he or she will not be required to give the evidence, if it is found that:*
  - *(a)there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives the evidence, and*
  - *(b)the nature and extent of that harm outweighs the desirability of having the evidence given.*
- *[41]Further, the witness must also be informed of the mandatory considerations specified by s 18(7), which the trial judge must consider before concluding that the nature and extent of the likely harm which outweighs the evidence might cause the desirability of having the evidence given. That is necessary if the witness is to be given a fair opportunity to address those and any other considerations which are relevant to the objection which he or she wishes to advance.*
- *[42]It follows that procedurally, just like in the case of s 128, it will thus be desirable for such a witness to be given an opportunity to obtain advice about the right of objection which s 18 grants. If it is not possible for the witness to obtain such advice, then it will be for the trial judge to give the witness an explanation of the effect of the section, before consideration is*

given to whether the witness should be required to give evidence, notwithstanding the objection which is pressed.

[90] Prior to commencing the voir dire, the judge was told by the crown prosecutor that Ms Best "had the advice in relation to the section." Although there had been an earlier reference by the crown prosecutor to it being prudent that Ms Best obtained independent legal advice and they were trying to arrange that now, the crown prosecutor did not subsequently make it clear to the judge that Ms Best had received independent legal advice. Unfortunately the judge made no enquiries as to who provided the advice or the extent of that advice to Ms Best. On the paucity of the information before his Honour, the judge was obliged to enquire of Ms Best from whom she had obtained legal advice and to confirm that she was aware of the relevant matters under s 18.

[91] It is evident from the exchange between his Honour and Ms Best when she returned to the witness box that his Honour confined himself to being satisfied that Ms Best was aware that she may have a right to object.

[92] His Honour could neither have been satisfied that Ms Best had obtained independent legal advice nor that she had been apprised of the matters referred to in subsection (6) or (7) of s 18. His Honour failed to satisfy himself that Ms Best was aware of the effect of the section.

[93] This case may be distinguished from McKinnin to which the Crown drew this Court's attention. In McKinnin, the judge had been informed that the prosecution had arranged for the witness to be provided with independent legal advice and that the advice was imminent. The Victorian Court of Appeal (Niall, T Forrest and Weinberg JJA) were of the opinion in the circumstances of that case that the judge was entitled to proceed on the basis that the witness had received independent legal advice. Furthermore, in McKinnin no argument was raised that the judge under s 18(4) had not satisfied himself that the witness was aware of the effect of the section.

[94] Ms Best's evidence was wrongly admitted before the jury and the subsequent steps taken by the judge did not make that evidence admissible.

The Court applied the proviso as no substantial miscarriage of justice had occurred.

Evidence - Compellability of a complainant to give evidence at a new trial

WX v R [2020] NSWCCA 142

The complainant had given evidence at an earlier trial that had aborted towards the end of the defence case. A new trial commenced before a different judge. W made application for the complainant to attend and be further cross-examined. W had different counsel who asserted that the approach at the first trial was "inadequate" ad the trial would be unfair if the defence was limited to challenges raised by the previous counsel. The second trial also

aborted. The trial judge at the third trial regarded the ruling at the second trial as being binding.

It was held that the refusal to allow the application to compel the complainant to attend and be further cross-examined caused a miscarriage of justice.

Beech-Jones J (the other members of the court agreeing):

> ***Section 306J***
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> *[30] Part 5 of Chapter 6 of the Criminal Procedure Act is headed "Evidence in sexual offence proceedings". Division 4 of Part 5 is headed "Special provisions relating to subsequent trials of sexual offence proceedings". Division 4 was inserted by the Criminal Procedure Amendment (Sexual and Other Offences) Act 2006 and commenced operation on 1 January 2007. Division 4 applies when a trial for a prescribed sexual offence has been discontinued and a new trial is listed. Hence, it was applicable to the Appellant's second and third trials.*
> *[31] Within Division 4, s 306I permits previously recorded evidence given by a complainant in sexual assault trials involving a prescribed sexual offence or a "special witness" to be admitted in a new trial, including evidence-in-chief, cross-examination and any re-examination. (A "special witness" is a witness other than a complainant in a trial for certain sexual offences who is a cognitively impaired person or is under the age of 18 years: s 306A). Section 306I relevantly provides:*
>
> - *(1)If the trial of an accused person is discontinued following the jury being discharged because the jurors could not reach a verdict, or discontinued for any other reason, and, as a result, a new trial is listed, the prosecutor may tender as evidence in the new trial proceedings a record of the original evidence of the complainant or a special witness.*
> - *…*
> - *(5)Despite subsection (3), the court hearing the new trial proceedings may decline to admit a record of the original evidence of the complainant or a special witness if, in the court's opinion, the accused would be unfairly disadvantaged by the admission of the record, having regard to the following—*
>   - *(a)the completeness of the original evidence, including whether the complainant or special witness has been cross-examined on the evidence,*
>   - *(b)the effect of editing any inadmissible evidence from the original evidence,*
>   - *(c)the availability or willingness of the complainant or special witness to attend to give further evidence and to clarify any matters relating to the original evidence,*
>   - *(d)the interests of justice,*
>   - *(e)any other matter the court thinks relevant.*

[32] Section 306J deals with the compellability of a complainant whose evidence is tendered. It provides:

- *(1)If a record of the original evidence of the complainant or a special witness (or any part of the record) is admitted in proceedings under this Division, the complainant or special witness is not compellable to give further evidence in the proceedings unless the court is satisfied that it is necessary for the complainant or special witness to give further evidence—*
  - *(a)to clarify any matters relating to the original evidence of the complainant or special witness, or*
  - *(b)to canvas information or material that has become available since the original proceedings, or*
  - *(c)in the interests of justice.*
- *(2)Subsection (1) applies despite anything to the contrary in this Act or the Evidence Act 1995.*
- *(3)The court is to ensure that the complainant or special witness is questioned by any party to the proceedings only in relation to matters that are relevant to the matters mentioned in subsection (1).*
- *(4)Subject to subsection (3), if a complainant or special witness gives any further oral evidence under this section, the complainant or special witness is compellable (for the prosecution or the accused person) to give evidence.*

…
[37] … s 306J(1) has not been considered by this Court. Even so, four general matters can be stated about its operation.

[38] First, as stated in the Second Reading Speech, the starting point is the presumption that the complainant is not compellable.

[39] Second, as noted, s 306J(1) does not confer a discretion but instead requires an evaluative judgment be formed, such that if the court is satisfied in terms of the provision then the complainant is deemed compellable.

[40] Third, a restrictive aspect of the provision is that, before it is determined that a complainant is compellable, the Court must be satisfied that it is "necessary" for the complainant to give further evidence as per any of ss 306J(1)(a) to (c). The word "necessary" is a "strong word" and requires more than the formation of an opinion that something is "convenient, reasonable or sensible" (Hogan v Australian Crime Commission (2010) 240 CLR 651; [2010] HCA 21 at [30] to [31]).

[41] Fourth, against that, each of the criteria in ss 306J(1)(a) to (c) is expressed in relatively broad terms. In particular, the phrase "interests of justice" is a protean one taking its meaning from its context. It operates as the determinant of the most convenient and effective forum for the resolution of a civil dispute (BHP Billiton Ltd v Schultz (2004) 221 CLR 400; [2004] HCA 61; "BHP v Schultz"), whether to call a further

coronial inquest if further evidence becomes available (Attorney General v Coroner of South Yorkshire(West) [2012] EWHC 3783) and embraces the potentially competing considerations of fairness to an accused and the proper prosecution of persons guilty of crimes (Re Mickelberg (1992) 59 A Crim R 208 at 302 to 303). Generally, the "interests of justice are not the same as the interests of one party, and there may be interests wider than those of either party to be considered" (BHP v Schultz at [15]).

[42] In the context of s 306J(1)(c), the concept of "interests of justice" clearly embraces (and requires) a consideration of the impact on the fairness of the accused's forthcoming trial if the complainant does not give further evidence and the desirability of not occasioning further trauma to the complainant if they do. In relation to the former, if the court concludes that a trial will definitely be unfair if the complainant is not called then this would almost certainly compel a conclusion that s 306J(1) is satisfied (and, if not, the trial would have to be stayed). However, the converse does not apply, that it is not necessary to conclude that a trial will be unfair for s 306J(1) to be satisfied. Otherwise, the breadth of the criteria in ss 306J(1)(a) to (c) and the requirement that the court be satisfied that it is "necessary" for the complainant to give further evidence defy any attempt to proscribe any rules concerning when, or the circumstances in which, a complainant will or will not be required to give evidence at a subsequent trial.

[43] As I will explain, in this case Colefax DCJ proceeded on the basis that, if the cross-examination of CD at the first trial was objectively capable of being justified by "considered forensic decisions", then that was determinative of whether s 306J(1) is satisfied by reason of ss 306J(1)(a) or (c). That approach imposes a gloss on a statutory test that has no basis in the statute. Moreover, it distracts from the proper inquiry posited by s 306J(1). Section 306J(1) requires a consideration of the effect of the complainant's absence on the trial that is to come and the effect on the complainant if they are to give evidence at such a trial. The outcome of an application under s 306J(1) is not necessarily determined by an inquiry into the integrity of the trial that was aborted. The fact, if it be the fact, that the cross-examination of the complainant at the aborted trial was competent and comprehensive is a matter than may or may not be (highly) relevant to an assessment of the fairness of a subsequent trial at which the complainant will not give further evidence and overall whether it is necessary in the "interests of justice" for the complainant to give further evidence. However, the fact that the cross-examination at the aborted trial was competent and thorough is not determinative.

…

[58] After summarising the background to the application and the legislative provisions, Colefax DCJ noted (correctly) that the provision enacted a presumption against the recall of a witness so as "to alleviate the trauma to a complainant of having to give sensitive evidence again", which was "strengthened" in the case of a child complainant. His Honour also noted that "[w]here an accused is represented in the original proceedings by experienced and competent counsel … considerable care must be taken to give proper weight to the forensic decisions made by such counsel and not to allow an application under s 306J to amount to a second bite of the cherry". His

Honour then addressed the various points in the written submissions noted above. His Honour made no mention of the change in the defence case, namely, the dropping of the suggestion that CD's mother had induced him to lie about the Appellant to cover up for her own misconduct.

[59] The approach that Colefax DCJ took to s 306J(1) can be ascertained from considering how his Honour approached so much of the application as concerned the inconsistences in CD's evidence noted in [49] and [55] above as well as the attempt to rely on s 306(1)(b) and the subpoenaed school records. In relation to the first of those inconsistencies his Honour stated:

> *First, the evidence given by the complainant as to whether the accused went into the complainant's bedroom on the occasion of the neighbour's birthday.*
> *It may be accepted that the evidence was inconsistent. Whether it was inconsistent with the evidence of complainant's mother cannot be assessed in this application because that evidence was not adduced on the voir dire; and in any event it is not relevant for present purposes.*
> *Previous counsel for the accused might reasonably have thought that the inconsistent evidence was of considerable forensic advantage to the accused and deliberately did not pursue that topic.*
> *I'm not satisfied that it is necessary for the complainant to clarify the matter; nor would it be in the interests of justice to require him to give evidence on the topic." (emphasis added)*

[60] In light of the view I take to the balance of this passage, it is not necessary to determine whether the evidence of CD's mother was before Colefax DCJ on the application under s 306J. It is certainly before this Court and the inconsistency between that evidence and CD's mother is definitely "relevant" for the reasons noted above (at [50]).

[61] In relation to the inconsistency concerning who pulled up CD's pants, Colefax DCJ found:

> *... attention is directed to the slightly inconsistent evidence in connection with the last incident as to whether the accused pulled up the complainant's pants or whether the complainant pulled his own pants up. The two versions are undoubtedly inconsistent. Arguably previous defence counsel, might have thought that the inconsistencies were not a matter of much moment. Alternatively, he may have thought that the inconsistency was one of a series of inconsistencies and he did not wish to lose the forensic advantage by further pursuing it in cross-examination. Either conclusion seems to me to be open.*
>
> *I'm not satisfied that it is necessary for the complainant to clarify the matter; nor would it be in the interests of justice to require him to give evidence on the topic." (emphasis added)*

[62] Counsel for the Appellant contended that these passages reveal that his Honour erred in law in applying s 306J(1)(a) and (c). In particular, it was contended that his

Honour applied a test applicable to whether a miscarriage of justice within the meaning of s 6(1) of the Criminal Appeal Act 1912 has occurred as a consequence of the conduct of counsel for an accused at trial. Thus, in TKJW v R (2002) 212 CLR 124; [2002] HCA 46 ("TKJW"), a miscarriage of justice was held not to be occasioned through the failure of trial counsel to adduce evidence of the accused's good character. Gleeson CJ concluded that "[v]iewed objectively, [the decision of counsel] was a rational tactical decision, made in order to avoid a forensic risk" (TKJW at [17]). In the circumstance of that case that finding "was conclusive" as to whether there was a miscarriage of justice (Nudd v R [2006] HCA 9; 80 ALJR 614 at [9] per Gleeson CJ).

[63] In this Court, the Crown contended that Colefax DCJ "carefully applied the correct test" and the reference to "forensic decisions" by his Honour should be viewed in the context of the Appellant's submissions which referred to the cross-examination at the first trial in detail.

[64] I accept that the Appellant's submission accurately characterises Colefax DCJ's reasoning and that it is erroneous in law. Throughout the judgment on the application, the only matter that his Honour pointed to as justifying his lack of satisfaction that the statutory test was made out was his Honour's findings that the cross-examination by counsel for the Appellant at the first trial "might reasonably" have been justified by a "considered forensic decision". His Honour did not expressly address the impact on any second or subsequent trial of the Appellant if CD was not recalled, especially in light of what his Honour was advised was the change in the defence case. Instead, his Honour treated his findings about the conduct of counsel at the first trial as determinative of whether the statutory test was made out.

[65] Consistent with TKJW, his Honour's findings were at best only determinative of whether the first trial was affected by a miscarriage of justice. The approach in TKJW was derived from a consideration of the role of the advocate in an adversarial system and in the context of an appeal where it is said that the conduct of the advocate at the trial occasioned a miscarriage of justice (TKJW at [17]). Those considerations have no or little relevance to s 306J(1). Section 306J(1)is not concerned with overturning any verdict much less a verdict that followed from a mistake by counsel. Instead, s 306J(1) is concerned with the conduct of second and subsequent trials where no verdict has been reached at a previous trial. As stated, the fact, if it be the fact, that a complainant such as CD was the subject of a cross-examination that reflects "considered forensic decisions" that "might reasonably" have been taken by counsel may be relevant to an assessment of the fairness of a second trial in which the record of that cross-examination was sought to be tendered without recalling CD. However, that is a forward-looking assessment of the trial to come and not one exclusively focused on an objective assessment of the competence of counsel at the aborted trial.

[66] A similar error is evident in Colefax DCJ's treatment of so much of the application as sought to invoke s 301J(1)(b) and rely on the material subpoenaed from CD's school. Understandably, Colefax DCJ was sceptical of its evidentiary value concluding that "there is no clear evidence from the subpoenaed documents that the complainant ever received the detailed instructions". However, his Honour also stated:

> *… Counsel for the accused now wishes to cross-examine on that topic [ie CD's lack of complaint] on the basis of subpoena material provided by the school. No such subpoena had been issued in the original proceedings. In this regard the following observations should be made.*
> *First, s 306J(1)(b) should, on its proper construction, be limited to material which was not reasonably available in the original proceedings. There is no evidence that such a subpoena could not have been issued and those documents produced in those proceedings … (emphasis added)*

[67] The emphasised portion of this passage reveals that Colefax DCJ construed s 306J(1)(b) in accordance with the test for the admission of evidence on an appeal to this Court against a conviction where that evidence was not led at the trial (Ratten v R (1974) 131 CLR 510 at 517per Barwick CJ ; [1974] HCA 35; "Ratten"; MRW v R [2011] NSWCCA 260 at [46] per Bathurst CJ). The necessity for such evidence to be, inter alia, not reasonably available at the trial reflects the adversarial nature of the system of criminal justice and respect for the finality of the outcome of a jury trial (Ratten at 517). However, for the reasons already explained, that context is very different to the context in which s 306J is being applied. Otherwise, there is nothing in the text of s 306J(1)(b) that warrants the construction adopted by his Honour. The circumstance that in applying s 306J(1)(b) his Honour directly transposed a precondition imposed by this Court when receiving new evidence on appeal, supports the conclusion that in applying ss 306J(1)(a) and (c)his Honour applied a test used by this Court on appeal where it is alleged that a miscarriage of justice was occasioned by the incompetence of counsel.

Evidence – Complainant in Child Sexual Assault - Allowing complainant to point at answer cards.

ABR v R [2020] NSWCCA 33

The child complainant became upset during the course of cross-examination. The trial Judge granted (over objection) an application by the Crown that the child complainant be permitted to give evidence by way of pointing to pieces of paper that contained an answer – either "Yes" or "No" od "I Don't Understand".

ABR appeal upon a number of grounds, including that he trial judge was in error in allowing the complainant to answer in the manner outlined above.

The Court held that there was no error. Meagher JA (with other members of the Court agrein stated:

> *[77] Shortly after cross-examination of the complainant commenced, it became apparent that she was upset and struggling to answer questions. After she had two breaks in quick succession, the Crown suggested that she be given the ability to answer questions by pointing to pieces of paper that contained an answer. Defence counsel*

objected to the taking of that course. His Honour proceeded on the basis that he had power under Evidence Act, ss 26(a) and 31(2)to do so, and acceded to the Crown's suggestion. The complainant was given three cards containing the answers "Yes", "No" and "I don't understand". The applicant submits that the trial judge had no power to permit such a procedure under Evidence Act, s 31 and in doing so, his Honour contravened Criminal Procedure Act, s 275B.

[78] Section 275B had no application in the trial, and does not apply to specify exclusively when a witness can give evidence using a communication aid. Section 31 is directed to evidence given by deaf and mute witnesses. As the complainant is neither deaf nor mute, the trial judge did not have power under s 31 to allow the complainant to give evidence by pointing to answer cards.

[79] However, the trial judge had broad powers under Evidence Act, s 26 to control the manner in which the witnesses were questioned. His Honour exercised that power by instructing the complainant to raise her hand whenever she needed a break from questioning and by giving her the option to give evidence by answer cards.

[80] As to the exercise of that power, the applicant contends that this particular procedure should not have been allowed as it "reduces the ability to cross-examine a witness as it gives them a choice to avoid detailed answers". It might equally have been contended that the procedure did not accommodate any questions calling for an answer other than one described by the three cards. However it is not necessary to pursue those difficulties because ultimately they did not materialise, the complainant using the cards only twice and then only in response to leading questions.

[81] It is further suggested that "interference by the witness assistance officer" also illustrated the "substantial disadvantage" of the procedure. The "interference" referred to is one instance only when that officer pointed to a card following an inaudible answer. The complainant was asked to clarify her answer and she chose for the question to be asked again. When that occurred, the complainant gave her answer without resorting to the cards. Having regard to its extremely limited use, the procedure adopted by his Honour did not lead to a miscarriage of justice. Ground 12 is not made out.

Evidence - Exclusion of improperly or illegally obtained evidence

Kadir v R; Grech v R [2020] HCA 1

The appellants stood trial for offences of animal cruelty. At trial the admissibility of certain evidence was challenged, specifically:

- Covert video surveillance made by a documentary photographer
- Evidence obtained through the execution of a search warrant
- Admissions

The trial Judge rejected all three forms of evidence on the basis that the surveillance video evidence had been obtained in breach of the *Surveillance Devices Act 2007 (NSW),* and that the evidence from the search warrant and the admissions had been obtained in consequence of that contravention.

An appeal by the Crown to the NSWCCA was upheld in part. There was a further appeal by K and G to the High Court of Australia.

The Court held that he trial judge was correct in rejecting the evidence obtained in breach of the Surveillance Devices Act 2007 (NSW), but was in error in rejecting the evidence obtained following the execution fo the search warrant, and the admissions.

Regarding section 138, the Court held:

> *[17] As earlier noted, a focus of this case is s 138(3)(h), being the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law. In the equivalent provision of the draft Bill in the Interim Report, factor (h) was expressed as "whether the evidence could have been obtained in some other way". In the draft Bill in the Final Report, factor (h) is in the terms enacted in the Act. There is little discussion of the treatment of improperly or illegally obtained evidence in the Final Report, and no explanation of the reason for the change.*
>
> *[18] The provenance of factor (h) can be traced to the analysis in Bunning v Cross. It will be recalled that the illegal conduct in that case was the patrolman's failure to require the driver of a motor vehicle to undergo an "alcotest" before requiring that he undergo a "breathalyser" test. In their joint reasons, Stephen and Aickin JJ identified as a relevant consideration the "ease with which the law might have been complied with in procuring the evidence in question". Their Honours explained that while a deliberate "cutting of corners" would tend against admission of the illegally obtained evidence, in the circumstances of this case, the fact that the driver had been unlawfully required to undergo a test which he could easily have lawfully been required to undergo was a factor of little significance. Their Honours said that there appeared to be no doubt that the results of an alcotest would have been positive and the course adopted by the officers may have been the result of their understandably mistaken assessment of the driver's condition (the officers were unaware that the driver had a chronic condition of the knee joints that may have affected his gait). In the circumstances, ease of compliance with the law was a "wholly equivocal factor".*
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> *[19] The ALRC, adopting the language of Bunning v Cross, proposed "ease of compliance" as a relevant factor to the assessment of the gravity of the misconduct, stating:*
>
> > *Ease of Compliance. Evidence that it would have been easy to comply with legal requirements or other standards of behaviour may, depending on the circumstances, either support or detract from an argument for exclusion. A deliberate 'cutting of corners' would support exclusion, particularly from a deterrence perspective. But failure to comply with a rule which could have been*

simply complied with may suggest that the rule was trivial and that therefore the misconduct was not serious.

[20] The significance of factor (h) to the balancing of the competing public interests under s 138(1) will vary depending upon the circumstances. In a case in which action is taken in circumstances of urgency in order to preserve evidence from loss or destruction, it is possible that factor (h) would weigh in favour of admission, notwithstanding that the action involved deliberate impropriety or illegality. Putting such a case to one side, where the impropriety or illegality involved in obtaining the evidence is deliberate or reckless (factor (e)), proof that it would have been difficult to obtain the evidence lawfully will ordinarily weigh against admission. By contrast, where the impropriety or illegality was neither deliberate nor reckless, the difficulty of obtaining the evidence lawfully is likely to be a neutral consideration. The assumption on which the parties and the Courts below proceeded, that proof that it would have been difficult to lawfully obtain the surveillance evidence was a factor which weighed in favour of admitting evidence obtained in deliberate defiance of the law, inverts the policy of the exclusion for which s 138 provides.

Regarding the surveillance evidence, the Court held:

[36] The error which the Court of Criminal Appeal identified in the trial judge's determination of the admissibility of the surveillance evidence was the failure to weigh the gravity of the contravention (factor (d)) and the difficulty of obtaining the evidence without contravention of Australian law (factor (h)) separately in relation to the first video-recording. The Court of Criminal Appeal observed that it stands to reason that once the first video-recording was obtained any perceived difficulty associated with the investigation of the anonymous complaint must have been lessened. Their Honours reasoned that the difficulty of lawfully obtaining evidence of live baiting "tip[ped] the balance" in favour of admitting the first video-recording. Their Honours said that although vigilantism (taking the law into one's own hands), even for laudable reasons, cannot and should not be encouraged, nevertheless there were "real concerns as to the unlikelihood of an anonymous complaint being able to be properly and effectively investigated" and the suspected criminal activities were of a "high degree of seriousness".

[37] The gravity of the contravention (factor (d)) and the difficulty of obtaining evidence lawfully (factor (h)), along with whether the impropriety or contravention was deliberate or reckless (factor (e)), are overlapping factors. In the circumstances of this case, the trial judge did not err in failing to weigh the s 138(3) factors separately in relation to the first video-recording. His Honour was right to find that each video-recording was the product of a serious contravention of Australian law. The seriousness of the contravention was in each case the greater because the recording was made in deliberate contravention of the law with a view to assembling evidence which it was believed the proper authorities would be unable to lawfully obtain. To the extent that it was more difficult to lawfully obtain evidence of live baiting before the first video-recording was made, this was a factor which weighed against admitting it. There is no suggestion that the trial judge erred in his assessment of the other s 138(3)

factors. His Honour's determination that none of the surveillance evidence is admissible is correct.

Regarding the search warrant evidence, the Court held:

[47] The onus is upon the respondent to establish that the desirability of admitting the search warrant evidence outweighs the undesirability of admitting evidence obtained in the way it was obtained. The capacity of the search warrant evidence to rationally affect the assessment of the probability that the appellants committed acts of serious animal cruelty is high. The fact that the prosecution case does not include the surveillance evidence increases the importance of the search warrant evidence in the proceeding. Its importance is high. The nature of the offence is, as the trial judge found, serious. The gravity of the contravention is, as his Honour found, "very high". The contravention was repeated and deliberate. It interfered with Mr Kadir's privacy, a breach of Art 17 of the ICCPR. In circumstances in which the recording was confined to activity in the bullring and did not extend to Mr Kadir's home, and in light of the nature of the activity conducted in the area that was the subject of the recording, his Honour was right to accord this factor no particular weight. The circumstance that neither Ms White nor Ms Lynch is likely to be subject to any proceeding arising out of the contravention is a neutral consideration. In circumstances in which the RSPCA was not complicit in the contravention, factor (h) is also neutral.

[48] The admissibility of the search warrant evidence arises in criminal proceedings in which the desirability of admitting the evidence reflects the public interest in the conviction of wrongdoers. The undesirability of admitting evidence obtained in consequence of the deliberate unlawful conduct of a private "activist" entity is the effect of curial approval, or even encouragement, of vigilantism. The RSPCA had no advance knowledge of Animals Australia's plan to illegally record activities at the Londonderry property. There is nothing to suggest a pattern of conduct by which Animals Australia or other activist groups illegally collect material upon which the RSPCA takes action. The desirability of admitting evidence that is important to the prosecution of these serious offences outweighs the undesirability of not admitting evidence obtained in the way the search warrant evidence was obtained.

Regarding the evidence of admissions, the Court held:

[51] Since the evidence of the admissions is capable of rational acceptance, consideration of the probative value of the admissions is to be assessed upon the assumption that the evidence will be accepted. Their probative value is high and they are important evidence in the case against Mr Kadir. The remaining factors under s 138(3) have the same weight in relation to the admissions as to the search warrant evidence. The undesirability of admitting the admissions does not raise the same concerns with respect to condoning vigilantism as does the search warrant evidence. As the Court of Criminal Appeal rightly observed, the obtaining and viewing of the surveillance evidence was a step in the investigation by Animals Australia that led to Ms Lynch speaking with Mr Kadir, but that was all. And as their Honours also observed, Ms Lynch did not make use of any knowledge that she gained from the surveillance evidence in her conversation with Mr Kadir. Their Honours' conclusion, that the bare

connection between the contravention of Australian law and obtaining the admissions is unlikely to convey curial approval or encouragement of the contravention, is apt. The undesirability of admitting evidence obtained in the way the admissions were is outweighed by the desirability of the evidence being admitted in support of the prosecution case.

Evidence - Right to Silence – Silence in Court in Sentencing Proceedings with Disputed Facts

Strbak v R [2020] HCA 10

S pleaded guilty to one count of manslaughter. Of her 4-year-old son. There was a dispute as to whether or not she caused the injuries that led to death. The Crown asserted she was responsible for the injuries. The appellant's position was that she did not do so, but acknowledged she failed to provide the necessaries of life and failed to seek medical assistance. S did not give evidence in the disputed facts hearing. The sentencing Judge made a number of findings adverse to S, and took into account that she had failed to give evidence.

Held, per Kiefel CJ, Bell, Keane, Nettle and Edelman JJ:

[1] Under the common law of Australia, on the trial of a criminal allegation (save in rare and exceptional circumstances), no adverse inference should be drawn by the jury (or the judge in a trial without a jury) from the fact that the accused did not give evidence. The question raised by the appeal is whether the same stricture applies to the resolution of a dispute as to the facts constituting the offence in sentencing. …

[13] When sentencing an offender where there is a dispute as to the facts constituting the offence, the judge should not draw an adverse inference by reason of the offender's failure to give evidence save in the rare and exceptional circumstances explained in the joint reasons in Azzopardi v R. It follows that the appeal must be allowed, the appellant's sentence quashed and the matter remitted to the Trial Division of the Supreme Court of Queensland for the appellant to be sentenced according to law.

Evidence - Right to silence – special caution pursuant to section 89A of the *Evidence Act 1995 (NSW)*

Hogg v R [2019] NSWCCA 323

H was convicted of an historical account of sexual intercourse without consent, said to have occurred in 1988. He was questioned by police in 2016 in the presence of his solicitor. He was given the special caution. After speaking with his solicitor, the accused informed police that he did not wished to exercise his right to silence.

H gave evidence at his trial denying the offence. He said that he exercised his right to silence as a result of advice of his solicitor. H was not cross-examined about this aspect of his evidence.

The Crown contended that an adverse inference could be drawn Trial directions were given concerning the accused's refusal to answer questions in light of the special caution.

White JA held (with other members of the court agreeing):

> *[109] Grounds 2 and 3 assert in substance that because the Crown did not cross-examine the appellant on that evidence it was not open to the Crown to contend that any adverse inference should have been drawn under s 89A from the appellant's refusal to answer questions and that the jury should have been directed accordingly.*
>
> *[110] No such submission was made to the trial judge. But in my view the appellant's contention is correct. I am also of the view that because the jury was not directed that it was not open to them to draw an adverse inference against the appellant because he refused to answer questions, that the appellant lost a real chance of being acquitted. As noted above, the jury asked for an elaboration of the direction under s 89A. Although they were not given an elaboration (as distinct from a repetition) of that direction, it can be inferred that the jury regarded the direction given as material to their assessment of the credibility of the appellant.*
>
> *[111] The judgments of the Court of Appeal of England and Wales in R v Hoare and R v Beckles accept that if the true reason for an accused's silence is that he genuinely relied on legal advice to maintain silence, then no adverse inference should be drawn against the accused (R v Hoare at [51] , [54] and [55]; R v Beckles at [46]).*
>
> *[112] Those decisions also raise a question as to whether it was reasonable for the accused to rely on the advice. Although this latter question was not the subject of submissions, I respectfully doubt whether the reasonableness of reliance on the solicitor's advice, as distinct from the genuineness of reliance on that advice, is the relevant question; although of course an asserted reliance on a solicitor's advice that is unreasonable would raise the question as to whether reliance on the advice as the reason for not answering questions was genuine. It is in that sense that the jury was to be asked whether in the exercise of their collective common sense it was reasonable for the accused to respond to questions or whether the accused's true reason for not doing so was that he had no adequate explanation to give (R v Hoare at [52]).*
>
> *[113] The appellant gave as his reason for maintaining silence that he had been advised to do so. There was no issue that he had been so advised. It was therefore for the Crown to establish that his true reason for maintaining silence was not because he had been advised to do so, but because he had no satisfactory explanation to give consistent with innocence. The Crown did not assay that task. No issue should have been left to the jury as to whether an adverse inference could be drawn against the appellant for his refusal to answer questions. The jury should have been directed that because the Crown did not challenge the appellant's explanation that his reason for*

not responding to questions from the police was that he had been advised not to do so, no adverse inference should be drawn against him.

[114] At trial the trial advocate for the Crown and counsel for the appellant, in the absence of the jury, debated what directions might be given in relation to s 89A. Counsel for the appellant stated that the accused was not challenged as to his reasons. The parties noted that the appropriate directions had not been considered either in the Supreme Court or the Court of Appeal. The trial advocate stated that "[i]t really comes to a matter of whether or not there's some recent invention to the alibi".

[115] Counsel for the appellant did not ask for a direction that no adverse inference could be drawn from the appellant's refusal to answer questions. That direction should have been sought both by the appellant and the Crown (having regard to the Crown's failure to cross-examine the appellant on his evidence as to his reason for not responding to questions). The appellant's evidence as to his reason was unchallenged. The rule in Browne v Dunn required the Crown to challenge his evidence if it were to be contested (MWJ v R [2005] HCA 74; ; (2005) 80 ALJR 329).

Evidence – s.293 of the Criminal Procedure Act 1986 (NSW) – Sexual Assault – History of False Complaints

Jackmain (a pseudonym) v R [2020] NSWCCA 150

J was charged with a number of sexual offences. J wished to lead evidence to the effect that the complainant had on 12 previous occasions made false allegations of sexual assault. The trial judge ruled the evidence to be inadmissible pursuant to section 293 of the Criminal Procedure Act 1986 (NSW). J appealed to the NSWCCA hwo held that he evidence was inadmissible.

Bathurst CJ:

[18] In considering the extent of the prohibition it must first be remembered that the section only applies to evidence which is relevant; that is, evidence which could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue (Evidence Act 1995 (NSW) s 55). That must be borne in mind in considering some of the more extreme examples of its suggested operation.

[19] Second, the chapeau of s 293(3) refers to evidence that "discloses or implies". The width of these words was considered by this Court (Gleeson CJ, Carruthers J and Badgery — Parker J) in R v White (1989) 18 NSWLR 332 (the case which preceded M v R). The evidence sought to be led in that case was that the complainant told the accused that a former boyfriend broke off their relationship as a result of finding her in bed with another man. In upholding the trial judge's refusal to admit the evidence, the Court made the following remarks (at 340):

> *In our view the case falls within the opening, or exclusionary, words of s 409B(3). The evidence in question disclosed that the complainant had taken part in certain sexual activity. The word 'disclose' means to make a statement which reveals or makes apparent some fact which was previously unknown to someone who hears or reads the statement: Foster v Federal Cmr of Taxation (1951) 82 CLR 606. The evident purpose of the legislation is to limit the circumstances in which complainants in sexual assault cases will have to endure having what might otherwise be personal and sensitive matters made public knowledge by virtue of evidence given in court. The width of the expression 'discloses or implies' and the use of the phrase 'has or may have had' demonstrate that what attracts the prima facie exclusion is the information or imputation which the evidence conveys to someone who hears or reads it. If the complainant in the present case had given evidence that she told the appellant that she had engaged in sexual activity with the body-builder that evidence would not, of itself, prove as between the Crown and the appellant the truth of the fact that she had engaged in that activity, although if she had been asked whether what she said was true, and had agreed that it was, and that evidence were accepted, a different result would follow. That, however, does not have the result that the subsection does not apply. The expression 'discloses or implies' does not mean 'proves'. Disclosure and implication frequently occur by means of hearsay. For a woman to state, in public, that she told somebody that her former boyfriend broke off their relationship as a result of finding her in bed with another man discloses or implies that she has or may have taken part in sexual activity.*

[20] Similarly for example, a plea of guilty to making a false statement that "Leon" raped her (incident 12) may be taken to imply that there was a lack of sexual activity between the complainant and "Leon" (see Leeming JA at [58] below).

[21] Both ss 293(3)(a) and 293(3)(b) are cast widely. Use of the disjunctive "or" in each subsection and between them demonstrates the wide range of circumstances to which the subsection can apply. Whilst I do not think that s 293(3)(a) has any application in the present case, s 293(3)(b) can apply to four categories of evidence that discloses or implies:

- *(i)that the complainant has taken part in any sexual activity;*
- *(ii)that the complainant may have taken part in any sexual activity;*
- *(iii)that the complainant has not taken part in any sexual activity;*
- *(iv)that the complainant may have not taken part in any sexual activity.*

[22] In the present case the evidence sought to be led would imply that the complainant had not taken part in sexual activity which she claimed occurred. On its face the evidence falls within s 293(3)(b). It does not seem to me to the point that the purpose of leading the evidence was to establish that the complainant was a person who made false complaints of sexual assault, as the section rather looks to what the evidence is taken to disclose or imply, not the reason it was led.

Evidence - Tendency Evidence – Standard of Proof Where There Are Multiple Complainants

Jackson v R [2020] NSWCCA 5

J stood trial with respect to counts concerning child sexual assault involving two complainants. A third complainant (JW) alleged that J had sexually assaulted her as a child in Victoria. JW's evidence was only relevant as to tendency. The Crown asserted that the tendency evidence was cross-admissible as to all counts.

The judge directed the jury that before using any evidence with respect to an individual complainant as tendency evidence they had to be satisfied beyond reasonable doubt that firstly the acts had occurred and secondly if so whether they established the tendency asserted.

The jury returned verdicts of guilty in respect of two of the four counts concerning the first child but not guilty in respect of all the other counts.

On appeal J asserted that the judge was in error in directing that tendency evidence had to be proven beyond a reasonable doubt, and that this created a risk that the evidence of JW's evidence would be given significant or substantial undue weight.

Held, per Price J, with whom the other members of the court agreed (dismissing the appeal): there was no risk that WC's evidence would be accorded significant or substantial undue weight.

Price J reviewed relevant authority from the HCA and NSWCCA prior to *R v Bauer* (2018) 359 ALR 359; 271 A Crim R 558 including:

- *HML v R* (2008) 235 CLR 334; 245 ALR 204;
- *DJV v R* (2008) 200 A Crim R 206; [2008] NSWCCA 272;
- *Doyle v R* [2014] NSWCCA 4

The effect of those authorities was that before reliance was placed on uncharged sexual conduct in establishing a tendency, that conduct had to be proved beyond reasonable doubt. His Honour continued:

> *[64] In Bauer the High Court (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) considered in single complainant sexual offences cases that the jury should not ordinarily be directed that the standard of proof of uncharged acts is beyond reasonable doubt.*
>
> *[65] Bauer involved a single complainant. In considering the criterion of significant probative value under s 97 of the Evidence Act, the High Court drew a distinction*

between an accused charged with a number of sexual offences committed against a multiplicity of complainants and an accused charged with a number of sexual offences against a single complainant.

[66] Notwithstanding that consideration, the passage in the judgment upon which the applicant founds his complaint appears under a heading of directions in single complainant sexual offences cases and further reference is made to "directions ordinarily to be given … in a single complainant sexual offences case." It is appropriate to quote all of what was said by the High Court at [86]:

- *(vii)**Jury directions in single complainant sexual offences cases***
  Before departing from Ground 2, however, it is appropriate to say something further of the directions ordinarily to be given to a jury in a single complainant sexual offences case where the Crown is permitted to adduce evidence of uncharged acts as evidence of the accused having a sexual interest in the complainant and a tendency to act upon it. … Contrary to the practice which has operated for some time in New South Wales, trial judges in that State should not ordinarily direct a jury that, before they may act on evidence of uncharged acts, they must be satisfied of the proof of the uncharged acts beyond reasonable doubt. Such a direction should not be necessary or desirable unless it is apprehended that, in the particular circumstances of the case, there is a significant possibility of the jury treating the uncharged acts as an indispensable link in their chain of reasoning to guilt. …

[67] It is not entirely clear whether the High Court's statement as to the standard of proof was intended to be confined to single complainant sexual assault trials. In the present case, there were two complainants. However, there appears to me to be no logical basis for different standards of proof that are dependent upon the number of complainants.

[68] In my opinion, this case is not an appropriate vehicle to finally determine this issue. It is ordinarily the case that an accused person favours the application of the criminal standard of proof and not the Crown. In the present case, the usual argumentation has been inverted.

[69] In any event, should it be accepted that the trial judge misdirected the jury as to the standard of proof required before they could use WC's evidence, the jury could neither have understood that WC's evidence was an essential intermediate fact which constituted an indispensable link in the chain of reasoning towards a finding of guilt in counts 1 and 2 nor elevated the weight to be given to that evidence.

[70] The trial judge gave comprehensive instructions to the jury as to how WC's evidence must not be used. …

[71] Her Honour's directions made it plain to the jury the limits on which WC's evidence could be put to use and that the weight to be given to that evidence was a matter for them. As was said in Gilbert v R, by McHugh J at 425 [31]:

> *The criminal trial on indictment proceeds on the assumption that jurors are true to their oath, that, in the quaint words of the ancient oath, they hearken to the evidence and that they obey the trial judge's directions.*
>
> *[72] I am not persuaded there was a risk that WC's evidence would be accorded significant or substantial undue weight.*

[73] It is evident that the jury paid careful attention to her Honour's directions. The jury found the applicant not guilty of four of the six counts on the indictment.

Evidence - Tendency Evidence - "Anti-tendency direction" not required where the risk that the jury might have engaged in impermissible tendency reasoning is remote

Hamilton (a pseudonym) v R [2020] NSWCCA 80

H was charged with a number of child sex offences involving a number of complainants. H did not seek separate trials for tactical reasons. The Crown sought that some but not all of the available evidence be regarded as tendency evidence. The trial judge ruled against the Crown.

The judge directed the jury that the 10 counts in the indictment were to be considered separately and warned them against using uncharged acts in support of tendency reasoning. He also directed the jury that they should exercise caution before convicting on any count because the Crown relied largely on a single witness. However, the trial judge did not give an "anti-tendency direction" concerning the evidence of the charged acts. It was the judge's failure to do this that was the subject of a ground of appeal to the Court of Criminal Appeal following H's conviction.

Held, per Beech-Jones J, with whom Adamson J agreed, Macfarlan JA contra (refusing leave to raise this ground of appeal): the risk that the jury might have engaged in impermissible tendency reasoning was remote. Further, per Adamson J, summing up is not a function that can be delegated to the parties.

Per Beech-Jones J:

> *[113] … notwithstanding the statements of McHugh J in KRM, there is neither a requirement or even a presumption that in all cases in which multiple counts of sexual assault involving different victims are tried together then, unless the evidence in respect of the counts is admissible as tendency evidence on the other counts, an anti-tendency direction must be given such that a failure to do so will amount to a miscarriage of justice for the purposes of applying rule 4 or satisfying the third limb of s 6(1)of the Criminal Appeal Act. Instead, whether such a direction is required and*

whether a miscarriage of justice is occasioned by reason of the failure to give such a direction requires an assessment of the likelihood or risk of the jury having engaged in tendency reasoning (Toalepai; Jiang; Lyndon). Ultimately, whether a miscarriage of justice has occurred will depend on whether there was a "real chance" (BRS at 306), "it was likely that" (Lyndon at [65]) or there was a "significant risk" (Toalepai at [49]) that "forbidden reasoning" would be or was employed (BRS at 306). The assessment of that risk will be undertaken by reference to, inter alia, an analysis of how the respective cases were conducted and the effect of other directions given by the trial judge such as the separate consideration direction referred to in the above passage from Lyndon (at [66]) and by Hayne J in KRM (at [133]) (Lyndon; Toalepai). Further, in making an assessment of the risk that the jury might engage in tendency reasoning in the absence of an anti-tendency direction, the failure of counsel for the applicant at the trial to seek such a direction can affect an assessment of the likelihood that the jury would reason impermissibly in the absence of an anti-tendency direction (Lyndon at [66]; Erohin at [68]; and see generally ARS v R [2011] NSWCCA 266 at [148]).

No Necessity for a Direction and No Miscarriage of Justice

[114] The effect of ground 1 is that the trial judge should have directed the jury that, in respect of the counts on the indictment concerning a particular child, the jury could not use the evidence of another child supporting the counts in respect of that other child as establishing a tendency on the part of the accused to commit offences of the type charged and they could not reason that the applicant is the type of person who would commit the offences with which he has been charged. In this Court, counsel for the applicant submitted that, in the absence of such a direction, there was an unacceptable likelihood of the jury using tendency reasoning especially given the broadly similar nature of the allegations made by the Third Child and the Fifth Child against the applicant.

[115] I do not accept that contention. In light of the separate evidence direction and the Murray direction, I consider that the potential for that reasoning to have been engaged in was much diminished. The jury was told to give separate consideration to each count. Most importantly they were told that each of the First, Third and Fifth children were the "only witness[es]" to the events concerning the counts for that child and the jury had to be satisfied of the honesty and accuracy of the evidence of each of those children in relation to the counts that concerned them before they could convict the applicant on those counts. This very much limited the evidence that the jury could consider in relation to each count to evidence that directly supported the honesty and reliability of the alleged victim of that count.

[116] Counsel for the applicant submitted that both the separate consideration direction and the Murray direction given in this case were not sufficient to ameliorate the risk of the jury engaging in tendency reasoning. It was submitted that the separate consideration direction did not explain what evidence was admitted in relation to the "ten separate counts" and the Murray direction did not make it clear to the jury that

"no kind of tendency or propensity reasoning could form part of their 'careful and cautious' assessment of a particular complainant's credibility". It was submitted that the nature of the defence case, being that the children were participants in an orchestrated campaign of lying, made it more likely that the jury would use tendency reasoning.

[117] I disagree. Along with the separate consideration direction the jury was given a written document that set out the specified elements of the offence and the act said to constitute the offence, which corresponded with the evidence of the child said to be the victim of that offence. Most significantly, the Murray direction precluded a juror from reasoning that they could convict the accused on any count concerning a particular child even though they had doubts about the honesty and accuracy of the evidence of that child because of their acceptance of the evidence of another child and what that evidence might demonstrate about the applicant's tendencies or propensity. The effect of the Murray direction was that, unless the jury were positively satisfied that the relevant child was an honest and accurate witness, then they could not convict the applicant on the counts that related to that child.

[118] Nevertheless, there remained at least a theoretical risk that the jury might reason from, say, its acceptance of the evidence of the Third Child that they should conclude that the Fifth Child's evidence was honest and accurate because the former's evidence suggested that the applicant is the type of person who would commit the offences with which he is charged and that might support a conclusion that the Fifth Child's evidence that the applicant committed offences against him was honest and accurate. However, in the context of the applicant's trial, I do not regard that risk as sufficiently material to give rise to any obligation on the part of the trial judge to give the anti-tendency direction or that any failure to do so was a miscarriage of justice. To use the language of Basten JA in Lyndon, "[t]his was not a case in which the jury was likely to reason impermissibly on the basis of a tendency [of the applicant] to act in a particular way" (at [65]).

[119] Of relevance to that assessment is the conduct of counsel for the applicant at this trial (Lyndon at [66]; Erohin at [68]). I consider it clear that counsel for the applicant's failure to seek an anti-tendency direction in relation to the evidence supporting the charged acts was deliberate in the sense that he did not consider that such a direction was necessary given the Murray direction and the manner in which the defence case was put. Counsel's position from the outset was that he did not want separate trials for his client and was content for all the evidence to go in and the jury be left to "take it at what you will", provided that the Crown did not obtain a tendency direction. He wanted all the evidence admitted and a joint trial on all counts so that he could invite the jury to "join the dots". It is true that the Crown included an anti-tendency direction in relation to the evidence of the uncharged acts and he acquiesced. However, that direction was of particular importance in this case because, absent an explanation of what that evidence could and could not be used for, the jury would have been left to speculate as to what the purpose of that evidence was. However, that concern did not apply to the evidence of the charged acts. It was clearly led to prove

the counts on the indictment and that was reinforced by the separate consideration direction (KRM at [66] per Hayne J).

[120] The combined effect of the Murray direction and the absence of a tendency direction meant that the Crown case in respect of each count was confined to having the jury being required to accept that the relevant child was honest and accurate in their evidence and to scrutinise each of their evidence carefully. In contrast, counsel for the applicant was free to, and did, invite the jury to "join the dots" and conclude that each of them (and their mother) were lying. In that context, the risk that the jury might, consistently with the Murray direction, reason from their acceptance of the honesty and accuracy of one child's evidence, that the applicant is the type of person who would commit the offences with which he is charged and use that conclusion to support a finding that the Fifth Child was honest and accurate was remote. As stated, the deliberate failure of the applicant's counsel to seek an anti-tendency direction in relation to the evidence supporting the charged acts supports that conclusion (Lyndon supra). Given the defence case that the children were party to an orchestrated campaign of lies, the most likely paths of reasoning that were adverse to the applicant and consistent with the directions given to the jury did not involve tendency reasoning. These paths of reasoning were a rejection of the existence of any such manipulation by the applicant's ex-wife and a separate assessment of each child's evidence to the effect that they were honest and reliable, or an acceptance of the honesty and reliability of the evidence of one child as a basis for rejecting the applicant's evidence which might then impact on an assessment of the honesty and reliability of the evidence of the other children. Neither of those paths of reasoning involves tendency reasoning.

[121] In addition, in this Court counsel for the applicant submitted that the fact that the trial judge rejected the Crown's application to rely on tendency evidence on the basis of the prejudicial effect of the evidence provided "important context in considering the magnitude of the risk of miscarriage attached to the jury subsequently embarking on an impermissible process of tendency reasoning" unless they were instructed to the contrary. I disagree. The prejudice identified by the trial judge was some alleged confusion that might arise from having to "attempt to have the jury compartmentalise" the evidence, that is use it in different ways. With respect to the trial judge that is not a relevant form of prejudice. In any event, that form of "prejudice" is irrelevant to any assessment of the likelihood of the jury applying tendency reasoning to evidence of the charged acts when they also received a separate consideration direction and a Murray direction.

[122] Finally, I note that the Crown submitted that the failure on the part of counsel for the applicant to seek an anti-tendency direction secured the applicant two particular forensic advantages. The first was that it avoided the possibility that an anti-tendency direction might have discouraged the jury from treating a finding that one complainant was lying, at the behest of their mother, as a basis for concluding that another child was lying, at the behest of their mother, that being the essence of the defence case. I doubt that explains the approach of counsel for the applicant at the trial. If it did then it can be expected that counsel would have resisted the anti-tendency

direction that was given in relation to the uncharged acts, which he did not. The second forensic advantage was that it was contended that, if an anti-tendency direction was given, it might have had to have been qualified by a direction to the effect that the jury could treat the evidence of one or more children in support of the charged acts as affecting their treatment of the accused's good character evidence. Again, I do not accept that. As noted, even though in the submissions in support of the Crown's tendency application, the Crown Prosecutor referred to the uncharged acts as undermining the applicant's reliance on good character, the character direction that was drafted by both counsel made no reference to the uncharged acts. Notwithstanding these conclusions, for the reasons set out above, I am satisfied that the failure of counsel for the applicant to seek an anti-tendency direction was deliberate. The significance of that finding to the ground of appeal has already been explained.

Conclusion on Ground 1

[123] It follows from the above that I do not consider that it was necessary for the trial judge to give an anti-tendency direction and I am not satisfied that a miscarriage of justice was occasioned by the failure to give any such direction. It further follows that, in the absence of such a direction being sought at the trial, that rule 4 of the Criminal Appeal Rules applies and leave to raise this ground should be refused (Papakosmas v R (1999) 196 CLR 297; [1999] HCA 37 at [72]).

Per Adamson J:

[84] Summing up is not a function that can be delegated to the parties. There are both practical and juridical reasons for this. The legal responsibility of preparing the summing up is the trial judge's and the trial judge's alone. Although trial judges are entitled to expect to be assisted by trial counsel in determining what directions are appropriate or the form of such directions, the content of the summing up is determined by the trial judge. There are also practical reasons for not burdening the parties' representatives with the task of preparing the summing up. The summing up is delivered immediately after the conclusion of counsel's addresses. It is to be expected that counsel will be fully occupied in the preparation of the closing address for the party for which each appears. They should not be deflected from that task by having to devote time and energy to the preparation of the summing up for the trial judge.

Evidence – Tendency Evidence - Tendency evidence relevant to the identity of the offender and also to the commission of the offences

***Vagg v R* [2020] NSWCCA 134**

V was charged with sexual offences against a child under 10. Evidence of another chil d of similar age was admitted as tendency evidence. This evidence concerned incidents said to

have occurred 3 – 4 years later. V appealed on the basis that the tendency evidence should not have been admitted.

The Crown contended that the subsequent two incidents proved that V had a particular state of mind namely an interest in young girls under the age of 10 as well as a tendency to act on that sexual interest by opportunistically luring young girls to secluded locations so he could engage in sexual activities with them. V's sole ground of appeal against conviction was that the trial judge erred in admitting the tendency evidence.

It was held that the evidence was properly admitted as it supported the existence of a tendency to have a sexual interest in children under the age of 10, and a tendency to act on that interest.

Simpson JA:

> *[45] Although the ground of appeal is framed in terms of asserted error in the trial judge's decision to admit the evidence, and although submissions of both parties were directed to whether or not specific error could be or were identified in the trial judge's reasons, resolution of the ground is concerned with the use made of the evidence in the trial: R v Bauer (a pseudonym) [2018] HCA 40; ; (2018) ALJR 846 at [61]; McPhillamy v R [2018] HCA 52; ; (2018) 92 ALJR 1045 at [11]. It is for this court to determine whether the evidence had significant probative value. It may be taken that it is also for this court to determine whether the probative value of the evidence substantially outweighed its prejudicial effect. (Leeming JA appears to have accepted that that is the case in BC v R [2019] NSWCCA 111 at [60]; see also Director of Public Prosecutions (NSW) v RDT [2018] NSWCCA 293 at [37]). That probative value is to be assessed by reference to what the evidence is capable of proving, taking it at its highest: IMM v R (2016) 257 CLR 300; [2016] HCA 14 at [49]–[54] (per French CJ, Kiefel, Bell and Keane JJ); Bauer at [69].*
>
> *[46] The assessment of the probative value of the evidence must take place in the context of the disputed factual issues litigated in the trial. Commonly, in cases of sexual offences, the dispute lies either in the identity of the offender or in the fact of the occurrence of the offending. Different considerations may apply to the assessment of probative value of the proposed evidence, depending upon which of those two issues arises. In this case, the lines were not clearly drawn. The complainant's evidence was that the offences were committed by a window cleaner. There was no dispute that the applicant had been engaged as a window cleaner at the complainant's home, and had been so engaged at about the relevant time. (Some definition of the time could be made because the complainant said that the offences occurred not long after the family had moved into the house, which occurred in 2010). Unlike the offender in Hughes v R (2017) 263 CLR 338; [2017] HCA 20, the applicant was not previously known to the complainant, and the lapse of five years between the date on which the offences were alleged to have been committed, and the date of report, left some room for doubt concerning whether he was the person who perpetrated the acts alleged by the complainant, assuming that they had in fact been committed, and even assuming that they had been committed by a window cleaner. (There was evidence from the*

complainant's mother that no other window cleaner had been engaged in 2010 or 2011).

[47] In the course of the appeal a significant debate arose concerning the extent to which the identity of the offender was a, or the, principal issue in the trial. The issue was important because in Hughes the majority in the High Court (Kiefel CJ and Bell, Keane and Edelman JJ) said that where the issue is the identity of the perpetrator of a known offence, the probative value of the evidence:

- *39.…will almost certainly depend upon close similarity between the conduct evidencing the tendency and the offence.*

Their Honours added that different issues might arise where the issue is the fact of the occurrence or the offences.

[48] On behalf of the applicant it was contended that identity was the principal issue and that the applicant did not in any concerted way contest the occurrence of the offences. The Crown maintained that the applicant had also disputed the fact of the occurrence of the offences and did so by the manner in which the complainant was cross-examined.

[49] The truth lies somewhere in between the two positions. The proven proximity of the applicant to the complainant's home at about the relevant time and his occupation as a window cleaner meant that, while the possibility remained open that the offences (assuming they had been committed) had been committed by somebody else, the fact of the occurrence of the offences was also in play. The applicant made no concession that the acts had been committed (neither, given his denials, could he have been expected to) and the cross-examination of the complainant, though not searching on this topic, nevertheless opened the possibility that she was, at least, mistaken.

[50] The applicant's position essentially was that if he were the window cleaner to whom the complainant attributed the offences, the offences had not been committed. Thus, perhaps unusually, both identity and the fact of the commission of the offences were in issue.
[51] In Hughes (at [41]) it was held that the assessment of whether the tendency evidence has significant probative value involves consideration of two "interrelated but separate" matters:

- *(i)the extent to which the evidence supports the tendency asserted by the Crown;*
- *(ii)the extent to which the tendency makes more likely the facts making up the offences.*

[52] Where the question is not identity, but whether the offence was committed, it is necessary to consider both matters. Their Honours concluded:

- *41.…In summary, there is likely to be a high degree of probative value where (i) the evidence, by itself or together with other evidence, strongly*

supports proof of a tendency, and (ii) the tendency strongly supports the proof of a fact that makes up the offence charged.

…

(i) Did the evidence of MF support the existence of a tendency in the applicant to have a sexual interest in young girls under the age of 10?

[54] The first incident of which MF gave evidence, while distinctly unsavoury, was not clearly overtly sexual. Taken alone, the most it could do was raise a question about the applicant's motivation in engaging MF as he did.

[55] But s 97(1)(b) makes it clear that the tendency evidence is not to be looked at in isolation and, plainly, if the Crown relies on evidence of more than one incident as tendency evidence, those incidents are not to be considered in isolation from one another. The second incident recounted by MF had a more overtly sexual connotation, culminating in the applicant's exposing his penis to her. The evidence of that incident casts some light on the applicant's motivation in the first incident.

…

[57] Notwithstanding all of these circumstances, alone this evidence would not, to any sufficient extent, support the existence of a tendency in the applicant to have a sexual interest in young girls (much less a tendency to act on such an interest).

[58] But when that incident is considered in conjunction with the second a different picture emerges. Again the applicant sought out MF with the intention that she would escort him to the outside bathroom, telling her (wrongly) that he did not know the way there; he asked her not to leave; after using the toilet, he asked MF to flush it for him because he did not know how to (another dubious proposition). He then exposed his penis.

[59] In my opinion the exposure of the applicant's penis is an unmistakable indication that his motivation in the whole of that incident was sexual. It is a short step to conclude that his motivation in relation to the first incident also was sexual, although it was not so clearly manifested.

[60] MF's evidence, in my opinion, supports the existence of a tendency, as asserted by the Crown, in the applicant to have a particular state of mind that is, a sexual interest in young girls.

(ii) Did the evidence of MF suggest the existence of a tendency in the applicant to act on his sexual interest in young girls?

[61] It is then necessary to consider whether the evidence supports the second asserted tendency, that is a tendency in the applicant to act on his sexual interest. In McPhillamy the plurality in the High Court said:

- *27… Generally, it is the tendency to act on the sexual interest that gives tendency evidence in sexual cases its probative value. (italics in original)*

[62] It may be accepted that the conduct alleged by MF was in many respects quite different from the conduct alleged by the complainant.

…

[65] Evidence supporting a tendency to have a particular state of mind, such as a sexual interest in young girls, and evidence supporting a tendency to act on that interest are necessarily intertwined, and may be co-extensive. That is, the evidence establishing a tendency to have a particular state of mind may be, and often is, the same evidence that supports a tendency to act on that that state of mind. Very often the evidence of the conduct that establishes the tendency to act in a particular way is the evidence that provides the foundation for finding a tendency to have a particular state of mind.

[66] In this case, the applicant's sexual interest in young girls was said by the Crown to have been manifested in his conduct, on two occasions, in taking advantage of a social situation to seek out MF and engage her in escorting him to a secluded bathroom, the location of which, at least on the second occasion, he knew. And it was also manifested, although opportunistically, in his conduct towards the complainant, in taking advantage of a situation when he was alone with her and in which, on the second occasion at least, he was not subject to any observation. There were relevant similarities.

…
[73] This was an unusual case of tendency evidence. The tendency evidence related to events that took place three or four years after the events the subject of the charges on the indictment. They involved a different child, although one of the same sex and comparable age to the complainant. Most importantly, the allegations were of conduct in some respects substantially different in nature from the conduct the subject of the allegations made by the complainant. That last fact, having regard to what was said in [39] of Hughes, has given me considerable pause for thought, notwithstanding that similarity of conduct is not a precondition of admissibility.

[74] I have nevertheless concluded that there was sufficient in the evidence of MF to warrant the conclusion that the applicant did have a tendency to have a sexual interest in young girls, and, further, that he had a tendency to act on that interest in ways which were both different and had common features.

(iii) Did the evidence have significant probative value?

[75] That does not conclude the matters in issue on this appeal. Two questions remain. That the applicant had been shown to have had the tendencies in question does not carry as a necessary consequence that the evidence has significant probative value. That question is to be decided by asking whether the tendency evidence, together with other evidence in the trial, makes more likely, to a significant extent, the facts that make up the elements of the offences charged: Hughes at [40], R v Ford (2009) NSWCCA 306; (2009) 201 A Crim R 451. In Hughes the majority said:

- *40.In the trial of child sexual offences, it is common for the complainant's account to be challenged on the basis that it has been fabricated or that anodyne conduct has been misinterpreted. Logic and human experience suggest proof that the accused is a person who is sexually interested in children and who has a tendency to act on that interest is likely to be influential to the determination of whether the reasonable possibility that the complainant has misconstrued innocent conduct or fabricated his or her account has been excluded.*

[76] I have come to the further conclusion that the evidence did have significant probative value. In circumstances that allow for some doubt whether the person to whom the complainant attributed the offending behaviour was in fact the applicant, evidence that showed that he was a person who had a sexual interest in young girls (however that interest was manifested) was likely to be influential in the determination of whether he was the person who committed the offences against the complainant (assuming, of course, that the jury was satisfied that those offences had been committed).

Procedure - Whether legitimate forensic purpose behind subpoenas issued for production of criminal records of prosecution witnesses

Mann v Commissioner of Police [2020] NSWSC 369

M was charged with matters in the Local Court. M issue subpoena seeking the criminal histories of 3 prosecution witnesses. The Magistrate set aside the subpoena on the basis that it had not been demonstrated that it was "on the cards" that the subpoena would produce anything of assistance to M. M appealed ot the Supreme Court Common Law Division.

Adamson J:

[24] The outcome of this appeal turns on the application of the general principles to the present case and the effect, if any, of the judgment of Hamill J in Jenkin in the present context.

[25] The general principles are not in issue. Once the ambit of a subpoena is put in issue, the issuing party is obliged to identify a legitimate forensic purpose for which the documents are sought. It is not sufficient that the documents falling within the

ambit of the subpoena could, or might be, relevant, it must actually be "on the cards". Subpoenas are not to be used for the purposes of "fishing expeditions".

…

[28] The Court of Criminal Appeal in Chidgey expressly disapproved of Adams J's formulation of the test of legitimate forensic purpose in Roads & Traffic Authority of NSW v Conolly (2003) 57 NSWLR 310; [2003] NSWSC 327 (Conolly) at [12] where his Honour said, after considering the phrase "on the cards":

> *… [I]t seems to me that the relevant "range" is therefore between the barely probable and highly probable. With respect, it seems to me that this area of the law is bedevilled with metaphors. I think the essential notion is that there is a reasonable chance that the material sought will assist the defence. If it is reasonable to infer that the material sought exists, and that it is relevant to an issue, though its content is unknown, it will almost invariably be logically the case (as it seems to me) that such a chance exists, even though it might be thought to be unlikely. Seeking that material therefore seems to me to be a legitimate forensic purpose, providing of course that the factual issues and the character of the material sought are precisely identified. Thus, subpoenas issued for the production of criminal records of witnesses whose credit is in issue in a trial will almost invariably be liable to production, even if the defendant is unable to say, one way or another, whether the person has such a record and, if so, whether it might reasonably be regarded as reflecting on his or her credit.*
>
> *[Emphasis added.]*

[29] Beazley JA rejected this approach at [79] in the following terms:

> *The likely effect of his Honour's approach is to create a situation whereby, provided relevance is established, there will almost always be a "reasonable chance" that the material will assist an applicant seeking production of documents to establish the case proposed be made at the trial. As is apparent from Alister, Carroll and R v Saleam [1999], something more than that is required and in my opinion the approach of Adams J should not be followed.*

[30] Applications to set aside subpoenas for the production of the criminal histories of prosecution witnesses have been considered in the authorities although, in the main, the issues have been resolved by agreement prior to or during the course of the hearing (see, for example, Jenkin and Bradley v Senior Constable Chilby [2020] NSWSC 145 (Bradley)) or have related to the prosecutor's duty of disclosure (as in R v Thompson [1971] 2 NSWLR 213).

[31] Further, the identification of "legitimate forensic purpose" is a matter which is peculiarly contextual. Thus it is not productive to seek to draw conclusions from the authorities beyond the statements of general principle expressed in cases such as Chidgey.

…

[49] … [H]er Honour expressly accepted Mr Coffey's submission that if the criminal histories of these prosecution witnesses were amenable to subpoena, the criminal histories of all prosecution witnesses would be amenable to subpoena. In substance, Mr Coffey submitted that there was nothing to take the present case out of the ordinary case where there was no particular feature which gave the accused person a legitimate forensic purpose in obtaining part or all of the criminal record of prosecution witnesses.

[50] It is a time-honoured feature of legal rhetoric and reasoning to use an argument, as Mr Coffey's was, based on the device known as reductio ad absurdum. Her Honour accepted the argument, in effect, because she was not satisfied either that there was any forensic purpose beyond that which would exist in any criminal case or that it was on the cards that the documents would materially assist the plaintiff's case. Her Honour was entitled to accept the argument on the basis of the disapproval of Conolly in Chidgey.

…
[54] Her Honour was referred to Chidgey and applied the test stated in that case to the present case. Although her Honour was concerned about the consequences for other cases of not setting aside the subpoena, I am not persuaded that her Honour's decision was other than on the basis of the application of the test.

…
Ground 4: alleged erroneous distinction of Jenkin by the magistrate

[55] The plaintiff submitted that Jenkin ought to have been applied by the magistrate and that, had her Honour applied it, the subpoena would not have been set aside. Because of the importance of Jenkin to ground 4, it is necessary to examine what Jenkin decided in some detail.

[56] In Jenkin, the accused, who was charged with murder, arranged for a subpoena to be issued to the Commissioner for the criminal histories of prosecution witnesses. The Commissioner sought to have the subpoena set aside on the basis that the legitimate forensic purpose had not been identified. Subsequently, the accused's representatives provided a schedule which identified the submission as to legitimate forensic purpose. Further documents were produced by the Commissioner to the court, including in relation to three of the witnesses who had already been called. In these circumstances, the Commissioner can be taken not to have pressed the application to have the subpoena set aside.

…

[60] Although his Honour purported to decide that the accused had a legitimate forensic interest in the documents, the only issue that remained between the parties for determination was the issue of access. The only orders made by Hamill J were:

- *(1)Note that documents produced under subpoena.*

- *(2)Access granted to both parties.*

[61] Thus, all that Hamill J actually decided was that there was no such claim for privacy recognised by the law and that, access to the documents which had been accepted to be within an identified forensic purpose and which had been produced to the court in answer to a subpoena, was required to be given. In this context, Hamill J's review of the principles relating to subpoenas and to the prosecutor's duty of disclosure were purely obiter and do not appear to have been the subject of detailed argument. Nothing which his Honour said in Jenkin could reasonably be read as deviating from the "on the cards" test. Indeed, his Honour expressly referred to it.

…
[68] I am not persuaded that what Hamill J said ought be read as an endorsement of Conolly, which, since Chidgey, is no longer good law. His Honour ought be taken to have been doing no more than emphasising the significance to the defence case of the documents which the Commissioner had already produced in answer to a subpoena which was no longer sought to be set aside. Further, although Hamill J referred, in Jenkin, to the "on the cards test", his Honour did not cite Chidgey and may not have been alerted in the course of argument either to its significance as authority which was binding on him or to its express disapproval of Conolly.

[69] That the criminal histories of certain prosecution witnesses were accepted to be amenable to subpoena in Jenkin and Bradley does not mean that they are amenable to subpoena in every case. There were features of Jenkin and Bradley which persuaded the Commissioner in those cases not to make (in Bradley) or press (in Jenkin) an application to set aside a subpoena for the criminal histories. In the present case her Honour was not satisfied that there was any such feature here. I am not persuaded that ground 4 has been made out.

Sentencing - Aggregate Sentences - Discounts for pleading guilty should be applied to indicative sentences where aggregate sentence imposed

Ibbotson (A Pseudonym) v R [2020] NSWCCA 92

I pleaded guilty to a number of child sex offences. The sentencing judge applied only discounted the aggregate sentence to reflect the pleas of guilty and not the indicative sentences for each offence. This was held to be in error,. The correct approach is to discount each of the indicative sentences and then impose the aggregate sentence.

Per Leeming JA:

[9] … First, the imposition of an aggregate sentence is unavoidably less transparent than the imposition of individual sentences for each offence. Even when s 53A(2) is complied with, so that it is clear what the actual individual sentences would have been, an aggregate sentence will not in any case where there are more than two offences expose precisely how the individual sentences have been accumulated. The position

would be much more opaque in the absence of s 53A(2). Secondly, the court's decision to exercise the power to impose an aggregate sentence should not alter the outcome. Offenders should be treated neither more severely nor more leniently by the decision to use the power conferred by s 53A. The aggregate sentence ought to be the same as the total effective sentence resulting from the imposition of individual sentences.
[10] Failing to apply the discount for the guilty plea to the indicative sentences is apt to make the sentencing process less transparent. As RA Hulme J said in JM v R at [39(6)]:

> *One reason why it is important to assess individually the indicative sentences is that it assists in the application of the principle of totality. Another is that it allows victims of crime and the public at large to understand the level of seriousness with which a court has regarded an individual offence … A further advantage is that it assists when questions of parity of sentencing as between co-offenders arise (citations omitted).*

…
[12] It may be helpful to elaborate upon the first point made by RA Hulme J in JM, namely, the fact that it assists in the application of the principle of totality. The imposition of an aggregate sentence is not a merely arithmetical process. Of course it is true as a matter of arithmetic that it does not matter whether the same fraction is applied to the individual summands which are then added, together, or whether the summands are added and the fraction applied to the sum. (A x 90%) + (B x 90%) + (C x 90%) = (A + B + C) x 90%. But the determination of an aggregate sentence is not merely the sum of its parts.

[13] In every aggregate sentence, there will be an implicit assessment of notional accumulation or concurrency. When that occurs, the sentencing judge does so by reference to the actual individual sentences which would have been imposed for each offence. Take an artificially simple example. Suppose an aggregate sentence is to be imposed following an early plea for three offences, for which undiscounted sentences of imprisonment for 6 years, 4 years and 1 year respectively would have been imposed. The sentencing judge should bear in mind the actual sentences which would have been imposed for the individual offences, namely, of 4½ years, 3 years and 9 months, when applying the principle of totality, not merely so as to comply with s 54A, but also so as to assess the extent to which the "sentence for one offence [can] comprehend and reflect the criminality for the other offence". The words are those of Howie J in Cahyadi v R [2007] NSWCCA 1; ; 168 A Crim R 41 at [27]. His Honour continued:

> *If it can, the sentences ought to be concurrent otherwise there is a risk that the combined sentences will exceed that which is warranted to reflect the total criminality of the two offences. If not, the sentences should be at least partly cumulative otherwise there is a risk that the total sentence will fail to reflect the total criminality of the two offences. This is so regardless of whether the two offences represent two discrete acts of criminality or can be regarded as part of a single episode of criminality. Of course it is more likely that, where the offences are discrete and independent criminal acts, the sentence for one offence cannot comprehend the criminality of the other. Similarly, where they*

are part of a single episode of criminality with common factors, it is more likely that the sentence for one of the offences will reflect the criminality of both.

[14] Thus in the example in the previous paragraph, the sentencing judge would need to assess the extent to which the 4½ year sentence for the first offence should comprehend and reflect the criminality of the second and third offences.

[15] This is a reflection of the fact that the question of totality should ordinarily come last in the sentencing process. That reflected the position before the enactment of s 53A. The joint judgment in Mill v R (1988) 166 CLR 59 at 62–63; ; [1988] HCA 70 said that it was a recognised principle of sentencing and endorsed the following formulation:

when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong.

[16] Likewise, in Pearce v R (1998) 194 CLR 610; [1998] HCA 57 at [45]:

> *A judge sentencing an offender for more than one offence must fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence, as well, of course, as questions of totality.*

> *[17] It will be seen that the statutory regime, which requires indicating the actual sentence which would be imposed taking into account all relevant matters (including the discount for a plea) corresponds with the approach stated in Pearce. While the statements of principle by Howie J in Cahyadi reproduced above predate s 53A, they have been applied to aggregate sentences: see for example Galvin v R [2015] NSWCCA 88 at [50]; Taitoko v R [2020] NSWCCA 43 at [130]–[133]. I acknowledge that s 53A was at least in part a response to aspects of Pearce, but I nonetheless see no reason to conclude that it displaces the approach stated in Cahyadi, Mill and Pearce extracted above.*

> *[18] In contrast with the above, the failure to specify a non-parole period for the "indicative" sentences can have no effect upon the ultimate aggregate sentence which was imposed in the present case. Indeed, I struggle to think of any case where it is at all likely that the power to impose an aggregate sentence would be exercised where it could make any difference.*

Per Rothman J:

> *[65] The submission of the Applicant on this issue is that the correct manner in which to apply the discount is to each indicative sentence and error has been disclosed. Given the state of the authorities, there can be no doubt as to the correctness of that proposition.*

[66] As to the effect of such an error, the Applicant submits that, if a sentencing judge were examining all of the indicative sentences, each of which has been discounted for the plea of guilty, then the psychological effect on the sentencing judge would be to impress upon the judge a lower criminality, whether consciously or subconsciously. The possibility of that proposition is, in my view, remote, but it is possible.

[67] Nevertheless, the submission of the Applicant, namely, that the correct approach to applying the discount is to apply the discount to each indicative sentence and then to assess and impose an aggregate sentence, has been accepted by the Crown in this case, and by the Court in previous cases, as an error: PG v R at [71]–[92], which recites and reaffirms the statement by the Court (Hoeben CJ at CL, Bathurst CJ and McCallum J agreeing) in Elsaj v R at [56]. In Elsaj, Hoeben CJ at CL said:

> *Section 53A of the Crimes (Sentencing Procedure) Act 1999 (NSW) makes it clear that discounts for a guilty plea are to be applied to the indicative sentences, not the aggregate sentence. To the extent that there is any doubt on that issue, it has been resolved by such cases as R v Nykolyn [2012] NSWCCA 219, Subramaniam v R [2013] NSWCCA 159, JM v R [2014] NSWCCA 297 and R v Cahill [2015] NSWCCA 53.*

Per N Adams J:

[138] It was common ground that the sentencing judge applied the discount for the applicant's plea of guilty to the aggregate sentence imposed rather than the indicative sentences as required by s 53A(2)(b) of the Crimes (Sentencing Procedure) Act 1999 (NSW) ("the Sentencing Act"). It was also accepted by the Crown that a number of decisions of this Court have held that this was an error, citing Berryman v R [2017] NSWCCA 297 at [29]; PG v R [2017] NSWCCA 179 at [74]–[94]; Elsaj v R [2017] NSWCCA 124 at [56] and Vaughan v R [2020] NSWCCA 3 at [92].

[139] Despite these decisions, the Crown did not accept that this Ground should be upheld, arguing that a failure of this type "does not necessarily mean that the sentencing discretion has miscarried". The only decision cited as authority for this proposition was SHR v R [2014] NSWCCA 92 at [40]–[43] per Fullerton J, (Basten JA and Davies J agreeing). Those passages in SHR v R do not stand as authority for the principle relied upon by the Crown.

Sentencing – Aggregate sentence – errors in aggregate sentencing

Taitoko v R [2020] NSWCCA 43

T committed five offences in a period of just over an hour. He pleaded guilty and received an aggregate sentence of 5 years 4 months with a non-parole period of 2 years and 8 months.

The sentencing Judge first announced the aggregate sentence and then discounted it by 25% for the pleas of guilty. He then indicated the individual sentences he would have imposed if an aggregate sentence had not been imposed. T appealed, asserting manifest excess, amongst other grounds.

Held, per Leeming JA, with whom Hoeben CJ at CL and Lonergan J agreed (allowing the appeal): the undiscounted head sentence of imprisonment for 5 years, 4 months for a young man of good character with a clean criminal record and who had never previously been sentenced to imprisonment and who gave evidence of remorse and had fair prospects of rehabilitation was too high.

> *[128] The sentencing judge provided indicative sentences of 9 months for the intimidation, 2 years for each of the two woundings, 6 months for the common assault and 3 months for the destruction of property. The sentencing judge was conscious that there needed to be a deal of notional concurrency, having regard to the need for totality. His Honour also said:*
>
> > *The Court has discretion to aggregate sentences when sentencing for multiple offences, that is, the sentence can be partly concurrent and party cumulative. The purposes of aggregate sentencing is to avoid the imposition of a sentence for two or more offences which, when viewed as a total sentence, is not crushing. Some offences, for example, those involving a substantial temporal disconnect or of a completely different nature, may not permit an aggregate sentence.*
>
> *I respectfully disagree.*
>
> *[129] Less importantly, I respectfully do not agree that there are cases where there is a substantial temporal disconnect or a difference in nature which preclude the power conferred by s 53A, although of course a sentencing judge may choose not to deploy that power. The only prerequisite to the exercise of the power conferred by s 53A is that an offender is being sentenced for more than one offence.*
>
> *[130] More importantly, I respectfully disagree with the second sentence from the passage reproduced above. In principle, precisely the same effective sentence may be imposed whether or not an aggregate sentence is employed. The purpose of aggregate sentence is not to achieve a lesser effective sentence than would have been imposed by a traditional individual sentence structure. The purpose may be seen in what has recently been referred to as the "seminal explanation of the aggregate sentencing provisions" in JM v R [2014] NSWCCA 297; ; 246 A Crim R 528 at [39]–[40] (cited in Vaughan v R [2020] NSWCCA 3 at [92]). It is not necessary to reproduce the entirety of that passage. It is sufficient to note that the purpose was not to enable a sentence to be imposed which was not crushing, and that the statement of principle commences with the observation that:*
>
> > *Section 53A was introduced in order to ameliorate the difficulties of applying the decision in Pearce v R [1998] HCA 57; ; 194 CLR 610; in sentencing for*

> *multiple offences: R v Nykolyn [2012] NSWCCA 219 at [31]. It offers the benefit when sentencing for multiple offences of obviating the need to engage in the laborious and sometimes complicated task of creating a "cascading or 'stairway' sentencing structure" when the principle of totality requires some accumulation of sentences: R v Rae [2013] NSWCCA 9 at [43]; Truong v R; R v Le; Nguyen v R; R v Nguyen [2013] NSWCCA 36 at [231]; Behman v R [2014] NSWCCA 239; R v MJB [2014] NSWCCA 195 at [55]–[57].*

[131] Later in his reasons, the sentencing judge stated that "the total indicative sentence, after discount, is five years and six months". It is unclear what purpose that statement was intended to serve. However, it does highlight that the effect of the degree of notional concurrency reflected in the indicative sentences and an aggregate sentence of 48 months was that only 18 months of a total of 66 months.

[132] There is no rule that proximity in time necessarily leads to large degrees of concurrency for the sentences imposed for separate offending in a short time period. However, in the present case, the entirety of the offending occurred in slightly more than an hour, all following the applicants sustained drinking from 10 am that morning, and all was of the same general nature, although the harm was directed upon different victims. It is clear that this is a case where a deal of the criminality in each offence is best seen as comprehending and reflecting the criminality of the other offences, in accordance with what was said in Cahyadi v R [2007] NSWCCA 1; ; 168 A Crim R 41 at [27]:

…
[133] The same approach applies when ensuring that an aggregate sentence accords with totality. An example may be seen in this Courts decision in Berryman v R [2017] NSWCCA 297, and indeed the reasoning at [57] is apposite, although in Berryman there were … two, rather than four, victims:

> *Although the sentencing judge referred to Cahyadi, more than the very modest degree of notional accumulation of the offences committed in the afternoon of 12 July reflected in the aggregate sentence is required. The offending conduct was discrete, occurred in two separate places, and with different victims. However, this is plainly a case of a course of conduct within a short time frame. All four offences were committed in what was at most a 90 minute period and in all probability less than 60 minutes. All occurred after the abuse of alcohol and a prescribed drug following the applicant attending the funeral of a family member. That is not to excuse the conduct or to minimise its criminality, but to explain that it is fairly to be seen as a single course of conduct.*

[134] So too here. On any view, the first and fifth counts, which occurred in the hotel, happened within seconds of each other. On any view, so did the third and fourth, the wounding of Mr M and the assault upon Ms A. True it is that there was separate conduct giving rise to the separate offences, but each was part of the same encounter.

[135] More generally, all of the offending, over a period of just over an hour, is fairly seen as a single course of conduct in a short timeframe. When this is borne in mind, the sentence of 4 years imprisonment, after a discount of 25% for the guilty pleas, is manifestly excessive.

Sentencing - Aggregate sentencing — there is no actual accumulation of indicative sentences

Vaughan v R [2020] NSWCCA 3

V was sentenced to an aggregate sentence for two matters of violence.

V appealed, asserting that the sentencing Judge had in the notional accumulation of indicative sentences. There was no assertion of manifest excess.

The Court held that there was no error.

Johnson J held:

[100] The suggested arithmetical or calculation errors contended for by the Applicant are misconceived. It would be wrong to consider the indications of the sentencing Judge and treat them as if they were actual and operative sentences with a view to translating them, in some way, into a total sentence which has been calculated by reference to the principles in Pearce v R.

[101] Further, as the Crown has submitted, a true understanding of the aggregate sentence and the process of notional accumulation which was undertaken by the sentencing Judge in this case must have regard to the actual outcome, whereby a substantial allowance was made following a finding of special circumstances so that the non-parole period comprised 66.6% of the total term of the aggregate sentence, a significantly lower figure than the non-parole periods included in the individual indications.

[102] The sentencing Judge in this case complied with the requirements of ss 53A and 54B. The course taken in this case also served the purposes of the aggregate sentencing provisions as explained in the second reading speech for the 2010 Bill. Sentence indications were given for each offence which complied with s 53A(2)(b). His Honour then applied the totality principle and the special circumstances test in s 44(2B) Crimes (Sentencing Procedure) Act 1999 for the purpose of reaching a discretionary determination as to an appropriate head sentence and non-parole period as components of the aggregate sentence. No more was required by way of a suggested "shadow exercise" in determining sentence.

[103] The short answer to the ground of appeal advanced by the Applicant is that no error is demonstrated so that the ground fails. Accordingly, there is no occasion for the Court to exercise its function under s 6(3) Criminal Appeal Act 1912.

R A Hulme J made the following additional observations:

> *[117] The applicant's argument proceeds on a premise that the indicated sentence for one offence is "accumulated" upon the sentence for another offence. However, in setting an aggregate sentence, a judge does not need to assess a precise degree of accumulation at all. The judge simply determines the aggregate sentence by assessing what is appropriate to reflect the totality of criminality in all of the offending. Quite commonly, there are references to there being "notional accumulation" — but if such a reference is apt at all, sight should not be lost of the fact that it is truly something that is "notional".*
>
> *[118] The fallacy in the applicant's argument as to the intention of Parliament in introducing the regime for aggregate sentencing in 2010 is evident from the fact that a sentencing court is only required to indicate the term of individual sentences that would have been imposed: s 53A(2)(b) of the Crimes (Sentencing Procedure) Act 1999 (NSW) (the Act). It is necessary to also indicate the non-parole component of any such individual sentence only if the offence is one for which a standard non-parole period is prescribed: ss 44(2C) and 54B(4) of the Act. Accordingly, Parliament cannot have intended that the only modification to sentencing for multiple offences was to remove the requirement to include commencement and conclusion dates for individual sentences: Cf the applicant's submissions summarised by Johnson J at [68]–[69].*
>
> *[119] It is notable that this issue has been raised in a case in which each of the offences were ones for which standard non-parole periods are prescribed. If one, or none, of the offences was a standard non-parole period offence, and so there was only a need pursuant to s 53A(2)(b) to indicate the term of the individual sentence(s) that would have been imposed, the applicant would have no argument at all.*
>
> *[120] The majority of cases in which aggregate sentences are imposed do not involve offences where each has a prescribed standard non-parole period. The Table in Pt 4 Div 1A of the Act prescribes standard non-parole periods for the offences listed therein (and they are excluded from applying in certain circumstances listed in s 54D). Standard non-parole periods are not prescribed in respect of the vast majority of criminal offences.*
>
> *[121] During the course of the hearing of the application, Mr Lange readily accepted that the indicative sentences and the aggregate sentence were "okay". He acknowledged that it was his case that "it's a technical aspect in the specification of non-parole periods for the indicative sentences that brings it all undone". (T6.46) A case based solely upon an asserted "error of process" founded upon a highly technical, but specious, argument has taken the time the Court could have been dealing with another case with genuine merit.*

Sentencing - COVID-19

Scott v R [2020] NSWCCA 81

S was sentenced for child ex offences. He appealed against the manifest inadequacy of sentences. He also presented additional material as to the hardship suffered in custody due to COVID-19 restrictions. The appeal was allowed

Hamill J (the other member of the court agreeing):

> *[162] The evidence supports the submission that Mr Scott's age and some of his medical conditions make him more susceptible to complications if he contracts the virus. Ms Allen stated "the patient is a 71 year old man who has a few chronic health conditions" and "he does fall into the category that is most at risk for contracting Covid 19". On the other hand, the evidence establishes that there have been no confirmed cases of COVID-19 in the NSW prison population. There have been three cases in staff members, one at the Long Bay Prison Hospital and two at the Forensic Hospital. The staff members affected and those who had contact with them are (or were) in self-isolation and will undergo testing and monitoring. The evidence suggests that Corrective Services NSW have implemented a range of strategies calculated to minimise the risk that the virus will enter the NSW prison system. Some of those strategies, such as the suspension of all personal visits, make the conditions of incarceration of current inmates more onerous. It must also be accepted that the applicant, due to his age and medical conditions, will "experience a level of stress, anxiety, and even fear at the potentially fatal consequences to him were he to be infected with the COVID-19 virus in prison" that is far greater than a younger, healthier, inmate: see RC v R; R v RC at [254].*
>
> *…*
>
> *[166] As to the new material arising out of the COVID-19 pandemic, of particular relevance is the applicant's advanced age (he is now 71) and the fact that he has asthma and other medical conditions that make him more vulnerable to potentially grave complications should he contract the virus. Custodial institutions have particular problems in controlling the spread of a virus such as COVID-19. However, to this point no inmate has tested positive in any Corrective Services facility in New South Wales and, it seems, any cases amongst staff at the hospitals have been contained. There is no evidence that the virus has spread further or made its way into the general prison population. The Department says it has taken steps to minimise the risk of the virus entering the prisons. One of those steps has been to suspend all social and family visits, a matter that makes the conditions of incarceration of most inmates more onerous. I have taken these matters into account in re-sentencing.*
>
> *[167] An offender's advanced age and ill-health are always relevant to the length of a custodial sentence, particularly where those matters make a gaol term "significantly harder" for the particular individual: see, for example, R v Simon [2003] NSWCCA 147; ; 142 A Crim R 166 at [33]. Further, for an elderly person "[e]ach year spent in prison represents a substantial portion of the remaining years of life which [he or she] may expect": R v DB [2001] NSWCCA 320 citing R v Hunter (1984) 36 SASR 101.*

Sentencing – Form 1 - Can federal offences be taken into account on a Form 1 when sentencing for a New South Wales offence?

Ilic v R [2020] NSWCCA 300

I was committed for sentence to the District Court. He had pleaded guilty to two State offences of knowingly dealing with proceeds of crime. He asked that 6 further offences be takin into account on a Form 1. Two of the six offense were Commonwealth offences. I appealed asserting that the sentencing Judge did not have the power to take into account Commonwealth matters on a Form 1 that attached to State offences. The appeal was upheld.

McCallum J:

> *[1] Offenders in New South Wales can be undiscriminating as to whether they commit State or federal offences. Sometimes they do both, which complicates the sentencing task. The applicant in the present case provides a good example. On a day when he was found dealing with proceeds of crime (a State offence), he was in possession of a prohibited weapon, prohibited drugs and false identification (all State offences) but also two signal jammers (a federal offence). This appeal raises a difficult question concerning the sentencing procedures available for such an offender.*
>
> *[2] There is a sentencing procedure available under the law of New South Wales that allows the court, in dealing with an offender facing multiple charges, to sentence the offender for a selected offence (usually the most serious) on the basis that additional offences admitted by the offender will be "taken into account": Pt 3 Div 3 of the Crimes (Sentencing Procedure) Act 1999 (NSW). The additional offences to be taken into account are listed on a form known as a "Form 1". The applicant pleaded guilty to and was sentenced for two State offences. At his request, he had six additional offences taken into account on a Form 1 in respect of one of those offences, including the two federal offences arising from his possession of the two signal jammers. He now contends that the sentencing judge had no authority to sentence him on that basis.*
>
> *[3] The sole ground of appeal specified in the notice of appeal as filed is that the sentencing judge erred in taking into account two Commonwealth offences when sentencing the offender in respect of a New South Wales offence. For practical purposes, the question raised by that ground is whether a federal offence can be included on a Form 1 in respect of a New South Wales offence. …*
>
> *….*
>
> *[33] The more difficult question is whether there is any inconsistency or contrariety with a law of the Commonwealth that precludes the application of the Form 1 provisions as surrogate federal law.*
>
> *[34] Section 68(1) of the Judiciary Act provides that State procedural laws shall "subject to this section, apply and be applied so far as they are applicable to persons*

who are charged with offences against the laws of the Commonwealth". Section 79 is qualified by the words "except as otherwise provided by the Constitution or the laws of the Commonwealth".

[35] In Putland, Gleeson CJ explained at [7] that there is little if any functional difference between those two formulations. The question in each case is whether a Commonwealth law "expressly or by implication made contrary provision" or if there was a Commonwealth legislative scheme relating to sentencing which was "complete upon its face" and can "be seen to have left no room" for the operation of the State law.

[36] The proposition that the federal sentencing regime in Pt 1B of the Crimes Act 1914 (Cth) covers the field or is "complete upon its face" was rejected in Putland. However, there remains the question of inconsistency.

[37] The parties identified three potential inconsistencies. The first focussed on the prohibition under the Commonwealth law on fixing a single non-parole period or making a recognizance release order in respect of both federal and State sentences of imprisonment. Section 19AJ of the Commonwealth Crimes Act provides:

> ***Court may only fix non-parole periods or make recognizance release orders for federal sentences of imprisonment.***
>
> *This Division does not authorise a court to fix a single non-parole period, or make a recognizance release order, in respect both of federal sentences of imprisonment and State or Territory sentences of imprisonment.*

[38] The Crown noted that that prohibition does not give rise to any direct inconsistency with the Form 1 provisions because no non-parole period is fixed in respect of offences taken into account on a Form 1. However, it was submitted that the section evinces an intention that a federal sentence of imprisonment should not be intermixed with a State sentence of imprisonment. In that context, the Crown noted that, while in both Beattie and Woods, this Court accepted that State aggregate sentencing provisions may be picked up and applied by s 68(1) of the Judiciary Act, it was not held that those provisions would authorise the aggregation of federal offences and State offences. In the case of a court sentencing for both State and federal offences, separate aggregate sentences have been imposed for each category of offence: Woods at [87]–[88] (Wright J; Bathurst CJ and Garling J agreeing at [1] and [2]).

[39] The Crown's submission concerning s 19AJ raises a broader question as to whether federal sentences and State sentences can sensibly be mixed having regard to the different regimes by which they are governed. While it has been accepted that Pt 1B of the Crimes Act 1914 (Cth) does not cover the field of federal sentencing, it does mandate a highly specific approach to the task of determining the appropriate sentence for a federal offence. The Crimes (Sentencing Procedure) Act 1999 (NSW) is similarly prescriptive. Just how the two tasks could be mixed in a single sentencing exercise is difficult to conceive. In saying so, I accept that an offence taken into account on a Form 1 is not the subject of a separate sentence but if anything that emphasises the complexity of the task posited.

[40] Separately, it may be noted that the Crimes Act 1914 (Cth) makes its own provision in s 16BA for federal offences (and only federal offences) to be taken into account on a document in the nature of a Form 1. Where that occurs, the document must be signed by the Commonwealth Director of Public Prosecutions or on her behalf by a person authorised by her or a person appointed under s 69 of the Judiciary Act 1903 (Cth) to prosecute indictable federal offences.

[41] Those considerations reinforce my conclusion that the Crown's submission on this issue must be accepted. In my view, the existence of a prohibition under the Commonwealth law on fixing a single non-parole period in respect of both federal and State sentences must be understood as a prohibition on "mixing" federal and State sentences of imprisonment, whether in an aggregate sentence or by taking offences into account on a Form 1. Of course, in practical terms, the inconsistency only arises in relation to the laws concerning sentencing for offences punishable by imprisonment. The parties did not address the implications of the Crown's discovery (embraced by the applicant as a new ground of appeal only at the conclusion of the hearing) that the federal offences in question here are punishable only by fine. I think it would be wrong to approach this question in a manner that distinguished between different applications of the Form 1 procedure. The inconsistency exists and, in my view, stands as an impediment to the application of the Form 1 provisions as surrogate federal law.

[42] Secondly, it was submitted that the Form 1 provisions are arguably inconsistent with s 16A(1) of the Commonwealth Crimes Act, which provides:

> *In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.*

[43] I am less confident that that is a relevant inconsistency for two reasons. As already noted, the effect of including an offence in a Form 1 is that no sentence is imposed for that offence. It follows that, when taking matters on a Form 1 into account, the Court is not "determining the sentence to be passed" for that offence so that s 16A(1) does not in terms apply to that procedure. That analysis is fortified by the fact that the Commonwealth sentencing regime also includes a Form 1 kind of procedure. Reading the relevant Commonwealth provisions coherently as a whole, what is indicated is that, when sentencing for a federal offence, the court must comply with s 16A(1) but the court can alternatively proceed under the analogous Form 1 type procedure.

[44] Finally, it was submitted that it would be open to the Court to find that the Commonwealth Crimes Act and the Director of Public Prosecutions Act 1983 (Cth) evince an intention that a Commonwealth offence should not be disposed of contrary to the determination of a Commonwealth prosecutor. That is a relevant inconsistency in my view. Under s 6(1) of the Director of Public Prosecutions Act, the prosecution of indictable offences against the laws of the Commonwealth is a function of the Commonwealth Director of Public Prosecutions. As submitted by the Crown, the inclusion of a federal offence on a Form 1 would have the effect that the offender would have no sentence imposed for such an offence regardless of the attitude of the

federal prosecutor. Again, that conclusion is subject to the qualification that the parties did not address the Court as to the significance, if any, of the fact that (as it transpired) the federal offences on the Form 1 in the present case were not indictable. However, in light of my conclusion as to the intention of the legislation that Commonwealth and State sentences should not be mixed, it is not necessary to consider that issue further.

Sentencing – Objective Seriousness - No denial of procedural fairness for judge to make a finding regarding the objective criminality of offences which was contrary to the submissions of the Crown and the offender

***Brown v R* [2020] NSWCCA 132**

B was being sentenced for two offences of violence. Count 1 was an offence of recklessly inflicting grievous bodily harm in company and involved B stabbing the victim with a pair of scissors causing his lung to collapse. Count 2 was an offence of assault occasioning actual bodily harm in company involving a second victim. During the course of submissions concerning the objective gravity of the offences, B's counsel submitted that Count 1 fell just below the mid-range and Count 2 was well below mid-range. The Crown's submission was that both offences were slightly below the mid-range of objective gravity. When sentencing B the sentencing judge made findings as to the objective seriousness of each count which were contrary to the submissions of the parties, stating expressly that he did not agree with the submissions put to him by the Crown and B's counsel. On appeal it was argued that B was denied procedural fairness.

Held, per Harrison J, with whom the other members of the court agreed (allowing the appeal due to the sentence being manifestly excessive): the sentencing judge was not bound by the submissions of the parties.

[25] In relation to the objective seriousness of the offences, Mr Brown's counsel submitted that Count 1 fell "just below the mid-range" and that Count 2 was "well below mid-range". In reply, the following exchange occurred between the Crown and his Honour:

BAUMGARTEN: In this matter the Crown agrees with my learned friend's assessment that it's below mid-range but not to any great extent.
HIS HONOUR: What about the assault occasioning?
BAUMGARTEN: Approximately mid-range or slightly below, but for a much less serious offence.
HIS HONOUR: Yes, it's a less serious offence, but I still have to assess the objective seriousness of it.
BAUMGARTEN: Yes. So slightly below mid-range.
HIS HONOUR: Is that what you say for the first offence, s 35(1)(a) as well, just below mid-range?
BAUMGARTEN: Yes.
HIS HONOUR: Thank you.

[26] In McClelland v R [2019] NSWCCA 59, Fullerton J said this at [17]:

> *An assessment of objective seriousness necessarily involves the exercise of an evaluative judgment by the sentencing judge. For that reason, usually, although not invariably, the question of the objective seriousness of the offending the subject of a sentencing exercise attracts competing submissions at the sentencing hearing, and necessarily so where the assessment is in contest. On occasions, the Crown concedes that particular offending should or ought be regarded by the sentencing court as reflecting a particular degree of objective seriousness or moral culpability. In those circumstances, a departure from that concession by the sentencing judge, without the offender being given the opportunity of addressing the issue by submissions or evidence, may be productive of a denial of procedural fairness resulting in a miscarriage of justice.*

[27] In McClelland her Honour, in considering this aspect of procedural fairness in sentence proceedings, referred to what the High Court said in DL v R [2018] HCA 32 at [39] and what Basten JA said in Chong v R [2017] NSWCCA 185 at [5]. Her Honour continued at [21]:

> *Having regard to the extracts from DL and Chong above, I accept that were the Crown Prosecutor to have conceded, either expressly or by necessary implication, that the offending the subject of each of Counts 1, 2 and 3 was no higher than low range offending, that would have operated to constrain the exercise of the judge's sentencing discretion such that a finding of objective seriousness contrary to the Crown's concession, without notice to the applicant that she was minded to take a different approach, would have been productive of a procedural unfairness …*

[28] In this case, the Crown submitted below that the objective seriousness of Count 1 fell just below mid-range and that the offending the subject of Count 2 fell slightly below mid-range. Each of these submissions by the Crown was made following submissions made on behalf of Mr Brown, which also put the offending for both counts below the mid-range. In light of those submissions, the parties' joint assessment of the objective seriousness of Count 1 was not in contest. As far as there was a contest in respect of Count 2, it was limited to the extent to which that offence fell below the mid-range.

[29] During the sentencing proceedings, his Honour gave no indication that he was minded to take an approach that was contrary to the Crown's stated position. Mr Brown submitted that this issue was of particular importance in respect of Count 1 because of the application of the standard non-parole period, to which his Honour gave prominence in his remarks. Having not been put on notice of his Honour's disagreement with the Crown's assessment, Mr Brown submitted that his counsel was given no opportunity to address the issue further by way of submissions or evidence. The findings that his Honour made as to the objective seriousness of each Count were ultimately contrary to the submissions of the parties: his Honour stated expressly that

he did not agree with the submissions put to him by the Crown and Mr Brown's counsel. Mr Brown submitted that it follows that his Honour's approach was productive of a procedural unfairness on an issue that was of critical importance to the exercise of the sentencing discretion.

…
[31] … it is clear that a "sentencing judge is not bound to accept the Crown's assessment of the objective gravity of an offence": per Hoeben CJ at CL in Stojanovski v R [2013] NSWCCA 334 at [34]. One important aspect of that observation lies in the fact that there will necessarily, or at least usually, be a distinction between a Crown concession on a matter about the adoption of which the judge will have limited input, such as agreed questions of fact, and matters about the ultimate determination of which the judge retains a discretion. A submission by the Crown that a particular offence is of a particular level of objective seriousness could rarely in that sense qualify as a concession binding a sentencing judge unless the judge expressly indicated that he or she proposed to accept it or otherwise gave an intimation to the parties that he or she would act upon it. In those circumstances, a party might be denied procedural fairness, not as the result of the Crown's "concession", but as the result of the judge's express or implied indication that he or she would adopt it.

[32] I do not consider in this case that the words used by the Crown, that "the Crown agrees with my learned friend's assessment that it's below mid-range but not to any great extent", were on their own or in the context of the proceedings as a whole capable of elevating the Crown's statement to a concession that no other assessment of objective seriousness was open: see McClelland at [29]. The burden of Mr Brown's submission is that because the Crown's assessment of objective seriousness aligned with his own, it was impermissible for the judge for that reason alone to take any course other than to adopt it without giving notice of an intention to do so. However, it could hardly be contended by Mr Brown, if his Honour had said in terms, "Well, I hear what you both say on that topic, but it remains a matter for me to determine", that Mr Brown's counsel would have wanted to say more than he had already said or, more particularly, that he would have been denied procedural fairness if he was given no opportunity to do so. The fact that his Honour did not say anything to that effect is only consistent with what both parties must then have understood to be the position, that is, that the assessment of objective seriousness was and remained at all times a matter for his Honour to decide. Mr Brown's counsel already had made his submission on that issue. A desire to make another or even better submission is not the same as being deprived by judicial silence or other conduct of an opportunity to make any submission.

[33] Nor am I satisfied in any event that his Honour's response to the Crown's submission amounted to an indication that he had accepted the joint position of the parties. It seems clear to me that his Honour did no more than clarify at the sentencing proceedings what each counsel was submitting on the issue of objective seriousness. Nothing either said or left unsaid by his Honour could in my view have given the impression that he had accepted the submissions or that he had foreclosed his discretion to adopt a different assessment.

Sentencing – Intensive Correction Orders

Blanch v R [2019] NSWCCA 304

The appellant was sentenced to a term of imprisonment consisting of a non-parole period of 1 year and six months and a total term od 2 years and 9 months. During the course of submissions on sentence the appellant's counsel sought an intensive correction order. The appellant asserted that the sentencing Judge failed to give paramount importance to community safety pursuant to s.66 of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* and also failed to give reasons why an ICO was not appropriate. Both grounds of appeal were upheld.

Campbell J (other members of the court agreeing):

> *[54] In relation to his Honour's decision not to permit the sentence to be served in the community, Mr Lange of Counsel on behalf of the applicant propounds two grounds … The first is that his Honour failed to give paramount consideration as required by s 66(1) Sentencing Act to the question of the community's safety. The second ground is that his Honour failed to provide reasons for refusing to make an ICO. Counsel accepted that community safety is not decisive or determinative of the question. Counsel submitted that there is nothing in his Honour's reasons to show what weight was afforded the factors referred to, let alone the weight afforded, the paramount consideration of community safety. It was submitted that the reasons did not disclose that the paramount consideration of community safety "was deserving of any greater recognition than any other purpose of sentencing". It was submitted that there was an obligation to explain how the other purposes of sentencing excluded the imposition of an ICO in the light of the approach mandated by s 66. Reference was made to Wan v R; R v Wan [2019] NSWCCA 86 at [105].*
>
> *[55] The applicant submitted that the learned sentencing judge did not directly engage, expressly or by necessary implication, with the provisions of s 66 to consider what mode of serving the sentence was more likely to address the applicant's risk of re-offending, and making a finding specifically directed to that issue.*

…

> *[60] I accept that the passages from his Honour's reasons for sentence I have summarised or extracted at [32], [34], [35] and [37] above, may well have justified the decision to impose a sentence of full-time imprisonment instead of an intensive corrections order. However, I am also of the view that the circumstance that the whole gravamen of the case presented on behalf of the applicant at first instance was that (a) a sentence of imprisonment was inevitable; but (b) it was appropriate to order that it be served in the community by intensive correction order, required his Honour to direct himself as to the applicable principles, specifically s 66, governing the decision whether to make an ICO. The section, whether he referred to it expressly or only by implication, required him to consider as a paramount consideration the requirements*

of community safety by reference to which of an ICO or full-time detention would more likely address the offender's risk of re-offending.

[61] His Honour would also have been required to consider the provisions of s 3A and other relevant principles and matters in accordance with s 66(3). He may well have come to the same conclusion adopting the approach required by the statute. But by by-passing, as his Honour appears to have done, the requirements of ss 66(1) and (2), and, in effect, proceeding directly to s 66(3), his Honour has not applied the relevant principles of law which govern the exercise of the statutory power invoked by the applicant's submissions before him. With great respect to his Honour he did not even refer to an ICO in terms.

[62] I appreciate that, with respect, counsel appearing at first instance (not Mr Lange), from the transcript, did not give his Honour a great deal of assistance in relation to the matter. However, the question was squarely raised and seriously put and should have been considered in terms. On this basis Ground 1, in my opinion, is made out. It was not necessary for his Honour to set out the section, or to refer to it in express terms, but as his reasons make clear his Honour did not direct himself in substance by reference to the principles it establishes which govern the decision whether to make an ICO.

[63] For the purpose of Ground 2, it may be that the same considerations reveal "process error" in the sense discussed by Hayne J in Waterways Authority v Fitzgibbon (2005) 79 ALJR 1816; [2005] HCA 57 at [130]. This may be an aspect of failing to provide adequate reasons for a judicial decision. Hayne J said:

> *… because the primary judge was bound to state the reasons for arriving at the decision* reached, *the reasons actually stated are to be understood as recording the steps that were in fact taken in arriving at that result. Understanding the reasons given at first instance in that way, the error identified in this case is revealed as an error in the process of fact finding. In particular, it is revealed as a failure to examine all of the material relevant to the particular issue. (My emphasis.)*
>
> *I must say on their face, the reasons are careful, thorough and comprehensive. However, again with respect, they fall short by failing to address in accordance with the Sentencing Act what was the critical issue presented for determination in the case. His Honour's reasons indicate that he did not examine "all of the material relevant to the particular issue" because they fail to disclose that, in substance, he applied s 66.*
> *[64] In R v Thomson; R v Houlton (2000) 49 NSWLR 383; [2000] NSWCCA 309 at [42], Spigelman CJ said of the obligation to provide reasons for sentence:*
>
> *Sentencing judges are under an obligation to give reasons for their decisions. Remarks on sentence are no different in this respect from other judgments. This is a manifestation of the fundamental principle of the common law that justice*

must not only be done but must manifestly be seen to be done. The obligation of a court is to publish reasons for its decision, not merely to provide reasons to the parties.
[65] In Karout at [92] Fullerton J pointed out that the result which she proposed, and with which Hoeben CJ at CL agreed, might have been different had a reasons ground been propounded and made good. Her Honour said (at [92]):

The result might have been otherwise (and a different ground of appeal framed) were the sentencing judge to have failed altogether to refer to the written and oral submissions of the applicant's senior counsel that an ICO was an available and appropriate sentencing order.
[66] In Douar v R [2005] NSWCCA 455; (2005) 159 A Crim R 154 (at [62]–[63]), decided when the two stage approach held sway for standard non-parole period offences, Johnson J said:

It has been said that it is unnecessary that a sentencing court expressly state that it has applied the two-stage approach in arriving at the sentence imposed: (citations omitted). The failure of a court to indicate expressly that it has taken the two-stage approach to the determination of a sentence of periodic detention does not, of itself, demonstrate a failure to carry out the sentencing exercise in this manner: (citations omitted).

However, the nature of the sentence imposed, and the failure to record that a two-stage approach has been taken, may lead the Court to examine carefully the findings made by the sentencing Judge to determine whether the sentence is erroneous: (citation omitted).

These observations are apposite in the present case if one replaces the reference to "the two-stage approach" with a reference to s 66 Sentencing Act.
[67] In Paul Campbell v R [2018] NSWCCA 87 Hamill J (Bathurst CJ and Schmidt J agreeing) (at [46]–[48]; [52–[53]) said the following:

It was open to the Judge to decide that such an order was not an appropriate alternative in view of the seriousness of the offences and it is clear that his Honour did so. However, there is nothing in the remarks on sentence to suggest that this alternative was specifically considered, as s 5 required. The conclusion that no penalty other than a sentence of imprisonment was appropriate is clearly implicit in his Honour's remarks on sentence and I would not, by virtue of this matter alone, have concluded that ground 2 was established.

His Honour, having concluded that the term of imprisonment should be one of 2 years or less, also had to give consideration to alternatives other than a full-time custodial sentence. There was at least one alternative available under s 12 of the Crimes (Sentencing Procedure) Act. The outcome urged for the applicant in the court below, which was accepted by the Crown to be a possible lawful outcome, was that a sentence of imprisonment might be imposed, but the sentence be suspended, subject to a conditional bond.

While it is also implicit in Judge Berman's remarks that his Honour rejected a suspended sentence as an appropriate sentencing outcome, the remarks did not explain why his Honour concluded that outcome was not appropriate, even though the law required that the rehabilitation of the applicant should be the primary focus of the proceedings.

…

I am satisfied that the sentencing Judge erred in failing to consider an alternative to full-time custody and that ground 2 should also be upheld.

Before leaving this ground, I should make it clear that a failure to approach the matter in two stages, as may be suggested by the passages from Robertson, Parente and Zamagias to which I have just referred, is not itself indicative of sentencing error. However, compliance with s 5 is a mandatory requirement and, where a sentence of less than 2 years is imposed and there are clear alternatives available, the preferable course is to make it clear that such alternatives have been considered and explain why they are not appropriate.

[68] I wish to stress that I am not suggesting that in every case in which a short sentence of imprisonment is under consideration for an offence not excluded from Part 5 of the legislation by s 67, it is necessary for the sentencing judge to go through this process. For the reasons explained by Basten JA in Fangaloka (at [60]), a sentencing court is not under an obligation in every case to explore this alternative. There must be some relevant material, which could include a cogent argument advanced by counsel, before the court to engage a requirement to consider the matter. Basten JA said:

The basis for the stated obligation was not explained in the passage extracted in the judgment of this Court. However, there was no such express obligation under the provisions introduced in 2010, nor is there such an obligation expressed in the current provisions. If there were such an obligation, the Local Court (where the power to impose imprisonment for an individual offence is limited to 2 years) would be required to consider imposing a sentence by way of ICO in every case in which imprisonment was appropriate.

[69] What enlivened the necessity for his Honour to consider, and in the event explain if he was not persuaded, specifically, that an ICO was appropriate was the argument put by counsel. If the argument was to be rejected, his Honour was required to deal with the matter in accordance with the statutory stipulations governing the power to make such an order.

Sentencing – Parity

Bridge v R [2020] NSWCCA 233

B was sentenced for a number of drug related offences. A co-offender H was also sentenced by a different judge for a number of offences, two of which involved H as a co-offender to B.

B appealed on the grounds of a breach of the parity principle. The appeal was dismissed. The NSWCCA held that whilst B was entitled to invoke the principle of parity, the sentence imposed on H was manifestly inadequate and thus the sense of grievance held by B was not a justifiable sense of grievance.

Price J:

> *[45] It is difficult to apply the parity principle when there is a wide divergence between the nature of the other offences charged against the applicant and a co-offender. In these circumstances, a comparison of the aggregate sentences will do little to inform this Court as to whether there is a justifiable sense of grievance. Such is the present case.*
>
> *[46] This does not mean that the parity principle cannot be applied to aggregate sentences. The indicative sentence for the joint criminal enterprise crime may provide some guidance as to whether there is unjustified disparity. In AMZ v R, Hoeben CJ at CL (Price and Schmidt JJ agreeing) approved the approach of R A Hulme J in considering Pt 7 Div 3 of the Crimes (Appeal and Review) Act 2001 (NSW). Hoeben CJ at CL said at [16]:*
>
> > *R A Hulme J was satisfied that sentences between two co-offenders may be compared for the purposes of determining whether there has been equal justice, despite the fact that one offender received an aggregate sentence (R v Clarke [2013] NSWCCA 260 at [68] and [75] per McCallum J; Prelipceanu v R [2016] NSWCCA 280 at [57] per Button J). R A Hulme J determined that the primary consideration in such an exercise would be considering the indicative sentence for the equivalent offence (R v Clarke at [68]). He noted that one of the functions of requiring judges to provide indicative sentences was to afford an ability to analyse sentence structures and compare sentences imposed on offenders who shared crimes (JM v R [2014] NSWCCA 297 at [39]; Prelipceanu v R at [57]).*
> >
> > *…*
>
> *[55] … Having regard to the differences in the amounts of the drug supplied, assessments of the objective seriousness of the offences and the applicant's more favourable case, the applicant's sense of grievance is understandable.*
>
> *[56] The question remains, however, whether Mr Hassian's indicative sentence was so manifestly inadequate that it does not give rise to a legitimate sense of injustice. In Saraya v R, this Court (Meagher JA, Fullerton and Schmidt JJ) said at [13]–[17]:*

These observations of the majority do not squarely address whether a sentence imposed on a co-offender that is manifestly inadequate can give rise to unjustifiable disparity.
As is noted by Bell J in Green at [106], there is authority in this Court that the inadequacy of the sentence imposed on a co-offender may be of such a degree that any sense of grievance engendered in the offender sentenced more severely cannot be regarded as legitimate. That was also the view of Brennan J in Lowe at 617–618. In R v Diamond (Court of Criminal Appeal (NSW), 18 February 1993, unrep) Hunt CJ at CL said at 5 (James J agreeing):

The sentence imposed … was, as I have said, appropriate and not excessive. That imposed by the Magistrate was, as I have also said, irresponsible. The disparity between them may give rise to a sense of grievance on the part of the applicant, but it was not a justifiable one.

See also per Howie J (McClellan CJ at CL and Simpson J agreeing) in R v Borkowski [2009] NSWCCA 102; 195 A Crim R 1 at [69] and per Howie J (James and Davies JJ agreeing) in Josefski v R [2010] NSWCCA 41; 217 A Crim R 183 at [65].

The decision in Diamond is also cited in support of the proposition that the discretion to mitigate disparity should not be exercised to reduce an otherwise adequate sentence to a level which would be an affront to the proper administration of justice: see Green at [33] fn 96; R v Doan [2000] NSWCCA 317; 50 NSWLR 115 at [19]; R v Chen [2002] NSWCCA 174; 130 A Crim R 300 at [289]; R v Ismunandar and Siregar [2002] NSWCCA 477; 136 A Crim R 206 at [23]–[26].

The relevant principle is stated by R A Hulme J (Beazley JA and Hidden J agreeing) in Youkhana v R [2011] NSWCCA 37 at [49]:

> *… the Court has a discretion and is not bound to intervene if a sentence offends the parity principle. A reason for not intervening is if the sentence imposed upon the co-offender is manifestly inadequate and intervention would "produce a sentence disproportionate to the objective and subjective criminality involved".*

In such a case the necessity to uphold public confidence in the administration of justice continues to prevail for the reasons given by Gleeson CJ in R v Rexhaj (Court of Criminal Appeal (NSW), 29 February 1996, unrep), in the following passage which is extracted in R v Ismunandar at [38]:

> *The principle which underlies … [intervention for disparity] … is that inconsistency in punishment may lead to an erosion of public confidence in the administration of justice … There are, however, other things which may also lead to an erosion of public confidence in the administration of justice, and they include the multiplication of*

manifest errors. That is why numerous judges have stressed the unattractiveness of responding to one wrong decision by making another wrong decision.

[57] In my view, the discounted indicative sentence for Mr Hassian's offence of 5 years with a non-parole period of 2 years and 6 months was erroneously lenient. The legislative guideposts are a maximum penalty of life imprisonment and a standard non-parole period of 15 years. The objective gravity of the offence was above the midrange. Mr Hassian's subjective case did little to assist him on sentence. Furthermore, there were the matters on the Form 1 to be taken into account. The manifest inadequacy of Mr Hassian's sentence is of such a degree that any sense of injustice engendered in the applicant cannot be regarded as legitimate.

Sentencing – Parity – Co-offenders Sentenced in both the Local and District Courts

Greaves v R [2020] NSWCCA 140

G was sentenced in the District Court. Two of his co-offenders had been sentenced in the Local Court. During the course of the sentencing proceedings the Judge regarded parity as irrelevant as the co-offenders had been deal with in the Local Court. The sentencing judge made no mention of parity in remarks on sentence. G appealed asserting error in the failure to consider the issue of parity. The appeal was allowed.

Cavanagh J, (the other members of the Court agreeing):

[64] When the issue of parity was raised with the sentencing judge by the Crown, the following exchange took place:

SCHRUBB: … The issue of parity is one that—
HIS HONOUR: Well, the other ones were dealt with summarily, so that doesn't really raise here at all.
SCHRUBB: Yes, and the offender's level of culpability is much more significant.
HIS HONOUR: Absolutely.

[65] Counsel for the applicant in the Court below did not respond to this exchange either orally or in any written submissions. The question of parity was not raised again and not further considered by the sentencing judge.

[66] The fact that the co-offenders were dealt with summarily and not sentenced by the sentencing judge may explain some differences in the sentences and differences in approach. However, the sentencing principles applicable to the process of sentencing remain the same in the Local and District Courts. The jurisdictional limit of the Local Court was not a factor, having regard to sentences imposed by the learned Magistrates. In any event, the Magistrate was required to assess the appropriate sentence having regard to the prescribed maximum penalty for each offence rather

than any jurisdictional limit. The jurisdictional limit only becomes relevant if the assessment leads to a sentence greater than the limit.

[67] Unlike when differing sentencing regimes might apply, for example, in the Drug Court, the approach of the judicial officer to sentencing should be similar. In circumstances in which there are a number of co-offenders involved in the same series of events, the parity principle remains applicable.

[68] To the extent that the sentencing judge considered that parity was not relevant as the co-offenders were dealt with summarily, his Honour was in error. …

Sentencing - Special Circumstances (Double Counting)

PW v R [2019] NSWCCA 298

The appellant was sentenced for multiple counts of sexual assault against his daughter. The appellant asserted that the sentencing Judge was in error in failing to find special circumstances. This ground of appeal was rejected.

Per Macfarlan JA, with whom the other members of the court agreed (dismissing the appeal):

[29] The sentencing judge's reasons for declining to find special circumstances were as follows:
Submissions were advanced on behalf of the offender that I make a finding of special circumstances. There were three bases advanced for this finding.

- *1.First custodial sentence.*
- *2.Rehabilitation and the need for supervision in the community and,*
- *3.The offender's illness and resulting onerousness of custody.*

I have factored the relevant matters [in] when considering sentence and need to ensure that I do not double count any matter. I decline to make this finding. The only circumstance not addressed previously is the first time in custody. I do not consider this, of itself, to be sufficient to make a finding of special circumstances. I have taken into account the health of the offender in determining the term and I do not consider there is any need for an extended period on parole to address any rehabilitation requirements.

[30] On appeal, the applicant submitted that her Honour erred in not finding special circumstances "by holding that if she did so it would be a form of double counting". In particular, he submitted that "her Honour erred in principle by finding the Applicant's mental health status was double counting and a legal basis for declining to find special circumstances".

[31] Her Honour however gave careful consideration to the three matters that the applicant submitted constituted special circumstances.

[32] First, she found that the fact that this would be the applicant's first time in custody was not of itself sufficient to constitute a special circumstance. On appeal, the applicant did not contest this proposition.

[33] Secondly, her Honour referred to the fact that in earlier determining the length of the head sentence she had taken the applicant's health into account. Contrary to the applicant's submissions on appeal, her Honour did not err in instructing herself in this context that she should avoid double counting. Her approach was consistent with the following observations of Spigelman CJ in R v Simpson (2001) 53 NSWLR 704; [2001] NSWCCA 534 at [67]:
Where a circumstance is taken into account by way of reduction of the head sentence, the application of the statutory proportion will have the result that the circumstance also reduces the non-parole period. Before a sentencing judge further reduces the non-parole period by reason of that circumstance, he or she must undertake a process of analysis which travels beyond that which has been undertaken in the course of determining the head sentence.

[34] His Honour added in R v Fidow [2004] NSWCCA 172 at [18]:
In R v Simpson (2001) 53 NSWLR 704, this Court identified the wide range of factors capable of constituting special circumstances. Nevertheless, on each occasion in which s 44(2) of the Act is invoked, it is necessary for the sentencing judge to make a decision, as noted in Simpson at [68] that the circumstances are sufficiently special for the statutory proportion to be reduced. Section 44(2) requires the 'decision' to be that the statutory proportion of one-third be 'less'. 'Double counting' for matters already taken into account in reducing the head sentence, and therefore already reflected in the non parole period, must be avoided. (See Simpson at [67]). Almost all matters capable of constituting special circumstances have usually been taken into account in determining the head sentence and sentencing judges should ensure that double counting does not occur.

[35] As Beech-Jones J said (with the concurrence of Leeming JA and R A Hulme J) in R v AA [2017] NSWCCA 84 at [74]:

> *This passage [in Simpson at [67]] informs what is meant by the reference to double counting for 'matters already taken into account in reducing the head sentence' in the above extract from Fidow [at [18]]. A sentencing judge may be found not to have engaged in 'double counting' if the analysis of the relevance of a particular circumstance to the non-parole period 'travels beyond' the analysis of its relevance to the head sentence. Thus, for example, matters which are purely subjective to the offender, such as their ill health or the effect of their plea of guilty, do not warrant a reduction in the head sentence and a further reduction in the non-parole period (see Bell v R; Jelisavac v R [2009] NSWCCA 206 — medical condition; and Trindall v R [2013] NSWCCA 229 at [17] — plea of guilty). For such factors the analysis of their relevance to the head sentence and the non-parole period is usually the same.*

[36] On appeal in the present case the applicant did not contend, and certainly did not demonstrate, that there was any respect in which the evidence concerning his health issues went beyond that which her Honour, properly, took into account in determining the head sentence. His health issues did not therefore warrant further recognition by a finding of special circumstances in relation to the fixing of the non-parole period.

[37] The third matter that the applicant submitted at the sentencing hearing justified a finding of special circumstances was a need of the applicant for extended supervision in the community to assist in his rehabilitation. Her Honour considered that submission but found that the applicant did not have a need for an extended period on parole for the purposes of his rehabilitation. The applicant did not criticise this finding on appeal.

Trial Directions – Jury Requests Replay of Pre-recorded police interview of child complainant

JW v R [2019] NSWCCA 311

JW stood trial for child sexual assault. During their deliberations, the jury asked for a portion of the complainant's interview with police to be replayed, which was done.

The appellant contended that the trial judge should have directed the jury in terms that reminded them of the cross-examination of the complainant, and the balance of the evidence of the complainant, and warning them not to misuse the replayed evidence.

The appeal was allowed on the basis that the failure of the trial judge to warn the jury as to the caution with which they should approach the replaying of the complainant's evidence gave rise to a miscarriage of justice.

Bellew J, with whom the other members of the court agreed:

[293] In R v NZ Howie and Johnson JJ said the following:

- *[208] We believe that the judge should give a warning to the jury as to the caution with which they are to approach the replaying of the videotape of the evidence in chief of a witness in the manner suggested by McMurdo P in R v H. The general warning is to the effect that:*

  because they are hearing the evidence in chief of the [witness] repeated for a second time and well after all the evidence, they should guard against giving it disproportionate weight simply for that reason and should bear well in mind the other evidence in the case.

  Of course it does not matter what words the judge uses to express that warning.

- *[209] Again the failure to give such a warning may or may not result in a miscarriage of justice. Much may depend upon the significance of the evidence in the case and what other warnings have been given to the jury about the evidence of the witness whether there is other evidence corroborating the*

witness or otherwise proving the offence and when the request for the replaying of the tape is made. A relevant matter may be whether defence counsel made any request for such a warning.

[294] Their Honours further said:

- *[221] Although rule 4 strictly applies in the present case, we are prepared to deal with the grounds of appeal on the basis that we should set aside the verdicts unless we are persuaded that no miscarriage of justice has occurred by the presence in the jury room of the videotape of the complainant's interview with police. We are so satisfied. It is impossible in our opinion to conclude that the trial was unbalanced by the presence of that material in the jury room when the jury themselves corrected whatever imbalance there might have been by asking for, and being supplied with, the transcript of the cross-examination of the complainant. As there was no defence case, there could be no imbalance in favour of the Crown case. We take into account in coming to this view that the trial judge gave the appropriate warnings and directions as to the way the jury were to approach the evidence of the complainant in a fair and balanced way that was not, and could not have been, the subject of any complaint.*

[295] In Jarrett v R this Court confirmed that no rule of practice or procedure should be laid down as to the circumstances in which a judge might permit evidence of the kind given by the complainant, in the present case to be replayed without any warning, or without reminding the jury of any relevant cross-examination. The determination of whether the failure of a trial judge to direct the jury in such terms will result in a miscarriage of justice will depend on a number of factors, including the nature and extent of the other evidence in the case.

[296] In the present case, there was considerable cross-examination of the complainant. The appellant repeatedly denied, both in his interview and in his sworn evidence, that the alleged offending had ever occurred. There was also a significant case put before the jury as to the appellant's prior good character, not only on the basis of evidence called in the appellant's case, but also on the basis of evidence elicited through the conversation of witnesses called by the Crown. In these circumstances, the failure of the trial judge to warn the jury as to the caution with which they should approach the re-playing of the complainant's evidence gave rise to a miscarriage of justice.

Trial Directions - *Markuleski* direction

R v Keen [2020] NSWCCA 59

K was convicted of a number of counts concerning the supply or manufacture of prohibited drugs. K appealed on the grounds that a *Markuleski* direction should have been given by the trial judge.

The appeal was dismissed as it was held that there was no need for a *Markuleski* direction in the circumstances of the case.

McCallum JA:

> [*58] It is important to be precise as to the principle established by the decision in Markuleski …*
>
> *[61] The principal ground of appeal was that the verdicts of guilty were unreasonable and could not be supported by the evidence. That ground relied on the decision of the High Court in Jones v R (1997) 191 CLR 439 in which, in relevantly similar circumstances, the Court held that the jury's finding of not guilty on one count "damaged the credibility of the complainant with respect to all counts in the indictment" (at [453]).*
>
> *[62] It was noted by Spigelman CJ in Markuleski at [27]–[30] that different approaches had been taken in different states as to the application of the decision in Jones. A bench of five was accordingly convened to consider those different approaches. In explaining the decision to convene an enlarged bench, the Chief Justice listed numerous decisions by courts of criminal appeal in cases where a complete acquittal had been obtained by an appellant who had been found guilty of some, but not all, sexual assault counts at trial.*
>
> *[63] The feature of Markuleski that potentially attracted the approach in Jones was that the case could be characterised as being "in large measure one of word against word": at [2] per Spigelman CJ As submitted by the applicant in the present case, it is important to understand that that characterisation is not exclusive to sexual assault cases. The applicant cited the case of Hajje v R [2006] NSWCCA 23, a malicious wounding case in which there was an issue between adult witnesses as to the possession of a gun. In that case, after noting that the evidence of the complainant and another Crown witness was "inherently suspicious", Simpson J (as her Honour then was) said at [101]:*
>
> > *There is no reason why a person who is a principal Crown witness should be treated any differently in this respect from a person who falls into the category of complainant in a sexual misconduct case.*
> > *[64] However, it is equally important not to be seduced by false syllogism. The fact that a case can be characterised as one of word against word does not of itself mean that a Markuleski direction must be given. In the passage from Hajje cited by the applicant, Simpson J went on to say at [101]–[103] (M Adams and Hoeben JJ agreeing):*
> >
> > - *[101] But that did not necessarily mean that a Markuleski direction was mandated. The jury was given the traditional direction that they may accept all, none, or part of the evidence of any witness. The circumstances in which [the complainant and the witness] made their observations, and*

gave their evidence, was not analogous to the circumstance of a complainant giving evidence of a series of events, each of which constituted an offence the subject of a count on the indictment.

- *[102] Even in such a case, the absence of a direction is not necessarily fatal: Markuleski at [187].*
- *[103] It was perfectly obvious to the jury that the credibility of [the complainant and the witness] was seriously in question and that this in part derived from their evidence of what had happened on the evening preceding the events the subject of the charges. I do not think a Markuleski direction would have done any more to secure the acquittal of the appellant. I would reject this ground of appeal.*

…
[75] The Criminal Trial Courts Bench Book published by the Judicial Commission of New South Wales offers a "suggested" Markuleski direction in the case of "multiple counts" in sexual assault cases (noted as being derived from Markuleski at [188] and [191], both set out above) as follows at [5–1590]:

> *Giving separate consideration to the individual counts means that you are entitled to bring in verdicts of guilty on some counts and not guilty on some other counts if there is a logical reason for that outcome.*
>
> *If you were to find the accused not guilty on any count, particularly if that was because you had doubts about the reliability of the complainant's evidence, you would have to consider how that conclusion affected your consideration of the remaining counts.*

[76] The fact that the direction is suggested in cases involving multiple counts does not mean that it is "crucial" or must be given in every such case. In my view, it is clear from the authorities (including Markuleski) that the decision whether to give a direction in those terms or indeed any direction supplementing the traditional direction as to treating each count separately must ultimately be a matter for the assessment of the trial judge according to the particular circumstances of the specific case. The importance of considering the whole of the relevant circumstances in determining whether to give such a direction at all is emphasised at note 4 to the suggested direction in the Bench Book.

…
[81] … Markuleski does not stand as authority for the proposition that a direction to the effect considered by the Chief Justice at [186] and [191] should be given "as a general rule" in word on word cases involving multiple counts, still less that such direction is "crucial". The proposition I would take from Markuleski is that the trial judge should consider, by reference to all of the particular circumstances of the case, whether a direction in such terms is necessary to ensure a balance of fairness.

Trial Directions - Whether a Murray direction should have been given in a trial for sexual assault and common assault

Neto v R [2020] NSWCCA 128

N was convicted of four counts of sexual intercourse without consent and one count of assault.

N appealed and asserted that the trial judge was in error not to give a *Murray* direction in accordance with *R v Murray* (1987) 11 NSWLR 12; 30 A Crim R 315. The appeal was dismissed. The direction fell short of an emphatic *Murray* direction but was sufficient in the circumstances of the case.

Hidden AJ (with other members of the court agreeing):

> *[40] The familiar Murray direction arises from R v Murray (1987) 11 NSWLR 12, a decision in a sexual assault case where the court considered s 405C(2) of the Crimes Act 1900 (NSW), which had abolished the requirement that a judge warn a jury in such a case that it would be unsafe to convict on the uncorroborated evidence of the complainant. Lee J (with whom Maxwell and Yeldham JJ agreed) observed (at 19) that this did not mean that the judge could not stress upon the jury the necessity to be satisfied beyond reasonable doubt "of the truthfulness of the witness who stands alone as proof of the Crown case". His Honour added:*
> *In all cases of serious crime it is customary for judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in ….*
> *[41] Section 405C of the Crimes Act has since been repealed, and the position is now governed by s 294AA of the Criminal Procedure Act 1986 (NSW), contained within Division 1 of Part 5 of the Act dealing with evidence in sexual offence proceedings. That section provides:*
>
> - ***294AA Warning to be given by Judge in relation to complainants' evidence***
>   - *(1)A judge in any proceedings to which this Division applies must not warn a jury, or make any suggestion to a jury, that complainants as a class are unreliable witnesses.*
>   - *(2)Without limiting subsection (1), that subsection prohibits a warning to a jury of the danger of convicting on the uncorroborated evidence of any complainant.*
>   - *(3)Sections 164 and 165 of the Evidence Act 1995 are subject to this section.*
>
> *[42] The status of the Murray direction in the light of s 294AA was considered by this Court in Ewen v R [2015] NSWCCA 117; ; (2015) 250 A Crim R 544, an appeal from a conviction in a judge alone trial. The matter was addressed by Simpson J (as she then was), with whom Basten JA and Davies J agreed, at [101]–[146] (565–574). Basten JA added some comments of his own at [24]–[35] (553–5).*

[43] Simpson J noted at [104] that the expression "Murray direction" is most commonly used "to refer to a direction that in any case in which the sole evidence of the commission of a crime is that of a single witness, the evidence of that witness must be scrutinised with great care". Her Honour referred to a series of decisions of the High Court about such a direction, in the light of s 405C of the Crimes Act and interstate equivalents, at [107]–[131]. These were Longman v R (1989) 168 CLR 79; [1989] HCA 60; Fleming v R (1998) 197 CLR 250; [1998] HCA 68; Robinson v R (1999) 197 CLR 162; [1999] HCA 42; and Tully v R (2006) 230 CLR 234; [2006] HCA 56.

[44] Her Honour observed at [110] that the effect of the decision in Murray, confirmed in Longman at 87, was to narrow the construction of s 405C so that it applied "to a direction in general terms that there existed a danger of acting on the uncorroborated evidence of alleged victims of sexual offences as a class". It remained open to a trial judge to direct the jury "in the circumstances of a particular case that where there was only one witness asserting the commission of a crime, the evidence of that witness must be scrutinised with great care before the accused person could be convicted".

[45] Her Honour added, however, that the passage from the judgment of Lee J in Murray cited should not be interpreted as "mandating such a direction". At [113] she referred to the "central proposition" emerging from Longman (at 86) that "the general law requires a warning to be given whenever a warning is necessary to avoid a perceptible miscarriage of justice arising from the circumstances of the case …."

[46] While s 405C of the Crimes Act removed the requirement to warn a jury about the danger of convicting on the uncorroborated evidence of a complainant, the effect of s 294AA of the Criminal Procedure Act is to forbid such a direction, as her Honour noted at [136]. Nevertheless, her Honour observed at [143]:

> *None of this has the effect that an appropriate direction, as envisaged in Longman, cannot be given in prosecutions for sexual offences. The emphasis in Longman, and in Robinson and Tully, was that directions appropriate to the circumstances of the individual case are to be given, and were available to be given under s 405C and its equivalent in other jurisdictions. If the evidence in any case is such as to call for a warning, or a specific direction, as to weaknesses or deficiencies in the evidence, particularly if they are weaknesses or deficiencies that are apparent to the judge but might not be so apparent to the jury, then the judge is entitled, and may be obliged, to draw that to the jury's attention.*

[47] In the present case counsel at the trial did not seek a Murray direction, but the matter was raised by the trial judge in discussion before summing up. His Honour referred to Ewen and expressed the view that, in the light of that decision, "one can't give a Murray direction anymore". Presumably, by this his Honour meant a Murray direction based on the lack of corroboration. However, his Honour added that he would point out to the jury "that they do certainly need to consider any

weaknesses that they may see in the evidence from the complainant, and anything else that may be relevant to them" [AB 394].

[48] In summing up, of course, his Honour gave the jury conventional directions about assessment of the honesty and reliability of witnesses and the burden and standard of proof borne by the Crown. He also directed the jury about the need to consider each count separately and, in doing so, gave a Markuleski direction (R v Markuleski (2001) 52 NSWLR 83) in the following terms:

> *Although each count needs to be considered separately, if you have a reasonable doubt concerning the truthfulness or reliability of the complainant's evidence in relation to one or more of the counts, you can take that into account in assessing the truthfulness or reliability of the complainant's evidence generally.*
>
> *In other words, if you have a reasonable doubt in those circumstances, in respect of any one count, bearing in mind there is one witness, a crucial witness in the Crown's case and that is the complainant herself, and issues of credibility have arisen in this trial, and you have heard the address from the bar table about that. But if you have a reasonable doubt in respect of any one of the counts, then you can take that into account in considering the other counts. In other words, when considering the overall credibility of the complainant, then you can take that reasonable doubt in relation to any of the counts that you are considering, in deciding whether or not there was a reasonable doubt about the complainant's evidence in respect of those other counts. (my emphasis) [407–8]*

[49] In summarising the submissions of defence counsel, his Honour referred to a submission that "The Crown's case really rests on what the complainant has told you … you should consider her evidence very closely … can you rely on the evidence of the complainant, in order to be satisfied beyond reasonable doubt?" [419] Later in the summing up he said:

> *When it comes to the assessment of the complainant, as you are the judges of the facts, and I consider you have listened carefully to the evidence, you are entitled to, and should consider if there are any weaknesses or deficiencies in the evidence of the complainant, particularly if they are insofar as you are concerned, relative (sic) to any issues of the reliability or honesty of the evidence of the complainant. So, yes, you need to have a good look at that evidence.*
>
> *So what has loomed large in this trial is a question of honesty and accuracy of the evidence relied upon by the Crown, specifically the complainant herself. The Crown, in his submissions to you, has specifically referred to the evidence upon which the Crown relies, and asked you to draw certain conclusions from that. And effectively [counsel for the applicant] has done the same thing, and has posed a number of questions as well. [423–4]*

[50] No further direction in this regard was sought by counsel for the applicant, either before or after the summing up. In relation to both grounds 1 and 2, this imposes a further requirement to obtain leave under r 4 of the Criminal Appeal Rules.

[51] In this Court the applicant was represented by Mr Chrisopher Parkin of counsel (who had not appeared at the trial). In written submissions, as refined in oral argument, he submitted that a Murray direction should have been given and was not. He acknowledged that no particular form of words is required, but argued that his Honour's direction did not direct the jury "in the terms necessary to address the perceptible risk of a miscarriage of justice that a Murray direction is deployed to rectify".

[52] Mr Parkin contrasted his Honour's directions with the suggested Murray direction in the Criminal Trials Bench Book at [3–610], which emphasises the need for caution when the Crown seeks to establish the guilt of an accused in a case "based largely or exclusively on a single witness", the need to be satisfied beyond reasonable doubt that that witness is both "honest and accurate in the account he or she has given" before the accused could be found guilty, and the need to examine the evidence of that witness "very carefully in order to satisfy yourselves that you can safely act upon that evidence to the high standard required in a criminal trial". He submitted that this was not conveyed by his Honour's directions.

…
[57] In the passage in Ewen at [143] quoted above, Simpson J referred to the need for a warning or a direction which might arise, in particular, if there are weaknesses or deficiencies in the evidence "that are apparent to the judge but might not be so apparent to the jury…." This was derived from the High Court authority to which her Honour referred, affirmed more recently by that court in R v GW (2016) 258 CLR 108; [2016] HCA 6 at [50], (130–1).

[58] Of course, guided by that principle, whether a warning or a direction is required is a matter within the discretion of the trial judge in the light of the issues in the case at hand: AL v R [2017] NSWCCA 34; ; (2017) 266 A Crim R 1 at [85]. In that case, apart from forensic disadvantage attributable to the delay in prosecution, the trial judge had declined to give a warning or direction in the light of other matters raised. The Court concluded that the jury were "readily able to recognise and assess" each of those other matters. The Court added that the jury "saw the complainant give evidence and observed his responses to questions in cross-examination that were directed to the potential unreliability of his evidence", and that the jury "additionally had the advantage of a very comprehensive address from trial counsel in which all of the features which could point to unreliability in the complainant's evidence … were highlighted, with some skill".

[59] As the Crown prosecutor in this Court pointed out, that is a fair comment about the address of defence counsel in the present case.
[60] The inconsistencies and weaknesses in the complainant's evidence asserted by Mr Parkin, either individually or collectively, do not appear to me to be of a kind which

the jury would not have been able to assess without judicial guidance. They are very different from the issues which arose in the High Court cases examined by Simpson J in Ewen, which involved allegations of sexual abuse of complainants who were children at the time and, for the most part, significant delay in complaint (apart from other features).

[61] It is apparent from his Honour's directions referred to above that appropriate emphasis was placed upon the fact that the complainant was the crucial Crown witness, that her credibility had been impugned, and that the jury should carefully assess the weaknesses or deficiencies in her evidence asserted in the defence case. This may have fallen short of the emphatic nature of a Murray direction, but in the circumstances of this case those directions were sufficient. It is significant that in the atmosphere of the trial neither defence counsel nor the Crown prosecutor saw any error or injustice in his Honour's approach: Aravena v R (2015) NSWLR 258; [2015] NSWCCA 288 at [121] (274).