A Selection of Recent Decisions

From the Appellate Courts

March 2022

Reasonable Cause CPD Conference

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Appeals to the District Court

Lunney v DPP (NSW) [2021] NSWCA 186

The applicant appealed to the District Court against conviction in the Local Court for domestic violence offences. The appeal to the District Court was dismissed. The applicant then appealed to the NSW Court of Appeal alleging that the District Court Judge had failed to consider the whole of the evidence from the Local Court and forming his own view about that evidence.

McCallum JA (Meagher and White JA concurring) held:

> *[17] The single ground for review pressed by the applicant in this Court contended that the District Court (Weber SC DCJ):*
>
> > *erred in failing to conduct a rehearing of the plaintiff's appeal on the basis of the evidence in the original Local Court proceedings.*
>
> *[18] That contention focusses on the fact that an appeal against conviction is directed to be "by way of rehearing". The question is what that means in the context of a conviction appeal to the District Court. The word "rehearing" is used in the description of both kinds of appeal under s 11(1) (conviction appeals and sentence appeals): s 17 and 18 of the Act. However, those provisions direct different appellate processes for each kind of appeal. An appeal against sentence is directed to be "by way of a rehearing of the evidence" given in the Local Court proceedings (s 17 of the Act) whereas an appeal against conviction is directed to be "by way of rehearing on the basis of evidence" given in the Local Court (s 18 of the Act). The different wording indicates that, while a sentence appeal requires the appellate court to consider "the evidence", a conviction appeal involves a different task; one in which evidence in the Local Court forms the basis on which the appellate Court's function will be exercised but not one in which the fresh consideration of that evidence is the task.*

Later, her Honour held:

> *[29] The Director of Public Prosecutions contends that, on the proper construction of s 18 and having regard to the issues raised in the appeal in the District Court, the judge was not called upon to undertake a full review of all of the evidence in the present case. The Director submitted that, in a conviction appeal under s 11(1) of the Crimes (Appeal and Review) Act, the District Court is not required to undertake "a free-standing review of the evidence" in the absence of guidance and particular submissions by the parties. He noted that the applicant's argument took issue with two particular aspects of the reasoning process of the magistrate who found him guilty in the Local Court. He submitted that, having rejected the two particular complaints raised, the judge was not obliged to proceed to review the whole of the record with a view to forming his own judgment as to the applicant's guilt.*
>
> *[30] I agree. The applicant's submissions implicitly assume that the term "rehearing" has the same meaning wherever used. It is clear from the authorities to which I have*

> *referred (amongst others) that that is not the case. The guiding principle must always be to go to the statute and examine the statutory incidents of a right of appeal in order to determine what kind of appeal it is.*

Purcell v DPP (NSW) [2021] NSWCA 269

The applicant was convicted and sentenced in the Local Court on 3 September 2020. O 3 December 2020 he lodged a severity appeal to the District Court. The cover of the Registry file noted (incorrectly) 4 December 202 as the date the appeal was lodged.

The District Court Judge dismissed the appeal on the basis that the appeal had not been lodged within 3 months.

It was held by Beech-Jones JA that the date of conviction and sentence (3 September 2020) was excluded from the calculation of the time within which to lodge an appeal. The matter was remitted to the District Court.

Huynh v R [2021] NSWCCA 148

The applicant was charged with aa number of Commonwealth offences. In the Local Court she applied to have the matters dealt with pursuant to s.20BQ of the Crimes Act 1914(Cth) [mental health provisions]. When that application was dismissed, the applicant entered pleas of guilty and asked for the matters be dealt with without conviction pursuant to s.19B of the Crimes Act 1914(Cth). That application was also refused.

The applicant then appealed against the severity of sentence to the District Court, and later sought to appeal against conviction. His Honour Hanley SC DCJ stated a case for the consideration of the NSW Court of Criminal Appeal.

The NSWCCA held:

- In the event of an appeal against sentence The District Court has no power to quash the order decliing to deal with the matters pursuant to the mental health provisions, not to quash the convictions and procced without conviction pursuant to s.19B of the Crimes Act 1914 (Cth).
- However, in the event of an appeal against conviction, the DIsrict Court would have the power to overturn the decision not to del with the matter pursuant to the mental health provisions, or pursuant to s.19B (dismissal without conviction).

Appeals – Incompetence of Solicitor

Momoa (a pseudonym) v R [202] NSWCCA 328

The applicant appealed against his sentence, alleging the incompetence of his solicitor inn failing to obtain evidence pertaining to his assistance ot authorities and his mental illness. The Office of the DPP sought to obtain an affidavit from the solicitor for the purposes of the

appeal. The solicitor did not provide an affidavit but entered into some correspondence. She did not provide any file notes.

McCallum JA (Johnson and R A Hulme JJ concurring) held:

> *[11] Before leaving this topic, however, it is appropriate to record something about the obligations of a legal practitioner in such a case. The solicitor's correspondence indicates that she was uncertain as to whether she should provide an affidavit in response to a request from the Director of Public Prosecutions. To put that issue beyond doubt, she should have. No issue of client legal privilege arose, the client having waived it. Her overriding duty was to the Court. As already explained, her response to the allegations would have been relevant to determining whether a miscarriage of justice had occurred. That is always an important question; it was important in the present case because it involved the liberty of a young man who is barely an adult and who (as is now clearly established by the evidence tendered by his current representatives) suffers from a mental illness for which he was unmedicated at the time of the offences.*
>
> *[12] The correspondence indicates the solicitor may have apprehended that she should be communicating with the new solicitor for the applicant rather than assisting the Crown. That was misconceived. As already explained, it is perfectly proper for the Crown to seek an affidavit in such cases. Indeed, it is arguably more appropriate for such evidence to be presented by the prosecutor, whose primary obligation in such a case is to assist the court, than by the lawyer making the allegation of incompetence. I accept that it might be confronting or uncomfortable for a lawyer to give an account of their conduct of a case in the face of an allegation of incompetence but it should go without saying that such feelings must give way to the interests of justice and the lawyer's higher duty to the Court.*

Criminal Responsibility – Accessorial Liability

Ah Keni v R [2021] NSWCCA 263

Ho Ledinh, a solicitor, was murdered in Bankstown. The principal offender was driven from the scene by the applicant and her husband. The applicant was unaware of the murder either before or during the event. She later assisted her husband to conceal his involvement and also made efforts to assist him to flee the jurisdiction.

The applicant appealed against her sentence on the grounds that the sentencing judge had erred in taking into account that the applicant had failed to go to the police to report the crime. The NSWCCA held that the sentencing judge was in error.

Bathurst CJ (Simpson AJA and Bellew J concurring):

> *[85] The offence as stated in the indictment was to receive, harbour, maintain and assist the principal offenders. That in my view involves taking active steps to assist, and a mere failure to report the offence does not fit within that description.*

[86] That is not to say that silence, when associated with acts of active assistance, could never be taken into account in assessing the objective seriousness of the offence. Further, silence when it has the propensity to mislead the investigator may constitute the offence, provided that the other elements are made out. By contrast, in my opinion a mere failure to report, which does not occur in the context of giving such assistance, does not make out the offence.

[87] … notwithstanding counsel's concession, it did not seem to me appropriate to take into account that she did not go to the police at an early stage to provide assistance. Such failure in my opinion does not hinder an investigation and render the person liable as an accessory.

Bail

***Simpson v R* [2021] NSWCCA 264**

The applicant was in custody awaiting trial. Hr sought bail in the NSWCCA. Both Cth and State DPP relied upon letters from a police officer.

Dhanji J (Harrison and Davies JJ concurring) held

50. *In addition to the material relating to the above matters, there was contained in the bundles relied on by the State and the Commonwealth letters written by a police officer who described himself as one of two principal informants with respect to the State charges. The letter in the State bundle was dated 7 April 2021. Somewhat ironically, the letter of the State police officer in the Commonwealth bundle was more current, with the date of 17 September 2021. Having regard to the more recent letter, the April letter was not pressed by the State prosecutor. Had it been, it would have been of no assistance to me for the reasons which follow with respect to the September letter.*
51. *The September letter contained a total of 11 paragraphs. All but two of those paragraphs contained either a repetition of material found elsewhere, or an opinion in the nature of a submission such as "the brief of evidence subject to the current matters is extremely strong". The repetition of factual material is unhelpful. A police officer's opinion with respect to a matter such as the strength of the case is similarly unhelpful (even if, arguably, it is "evidence or information" with respect to a matter in s 18 of the Act: see* Director of Public Prosecutions (NSW) v Tony Mawad *[2015] NSWCCA 227; cf* Smith v The Queen *(2001) 206 CLR 650; [2001] HCA 50).*
52. *With respect to the two paragraphs that do not fall into this category, matters were asserted without sufficient explication to warrant any weight being attached to them: see* Mawad *at [39]. It is surprising that, six years after this Court gave its decision in* Mawad*, police officers are still preparing letters in this form. It is even more surprising that prosecutors are including them in the* materials relied on by the Crown.

***Fantakis v Director of Public Prosecutions* [2021] NSWCCA 271**

The applicant was convicted of murder and sentenced to a term of imprisonment consisting of a non-parole period of 18 years and a total term of 24 years. The applicant sought bail pending his appeal to the NSWCCA against conviction.

Section 22 of the Bail Act 2013(NSW) stipulates that bail is not to be granted pending appeal unless there are "special or exceptional circumstances". The applicant was refused bail.

Beech-Jones CJ at CL held (R A Hulme and Campbell JJ concurring):

10. *Section 22 was considered by this Court in* El Khouli v R *[2019] NSWCCA 146 at [22] ("El Khouli") where the Court, Hoeben CJ at CL, Walton and Wilson JJ, observed that:*

    > *"… a distinction appears to have been drawn on the authorities, when the grounds of appeal are advanced as a factor demonstrating special or exceptional circumstances, between cases where the strength or merit of an appeal has been relied upon in isolation, and those where the applicant relied upon that factor in combination with other factors* including whether the applicant would have spent a substantial part of his or her sentence in custody by the time of the hearing of the appeal*." (emphasis added)*

11. *Their Honours noted that in the former type of case the applicant must show more than the grounds seem arguable and that it may be necessary to establish that the appeal is "most likely to succeed" (*El Khouli *at [23]).*

12. *I do not take* El Khouli *as specifying different thresholds about the relative strength of the proposed grounds of appeal that must be shown in order to demonstrate special or exceptional circumstances. The above passage from* El Khouli *identifies a particular matter that is often highly relevant to a grant of bail pending an appeal, namely, whether an "applicant would have spent a substantial part of his or her sentence in custody by the time of the hearing of the appeal". That circumstance is relevant to an assessment of whether special or exceptional circumstances have been shown in that the appeal may be rendered futile, or at least of lesser utility, if there is no grant of bail. Often, the interaction between the assessment of the relative strength of the appeal and the utility of the appeal will bear heavily upon whether or not special or exceptional circumstances exist (see* United Mexican States v Cabal *(2001) 209 CLR 165; [2001] HCA 60 at [41]).*

13. *In this case, the Applicant does not solely rely on the relative strength of his grounds of appeal to demonstrate special or exceptional circumstances, although it is a substantial component of his application. Even so, a consideration of the relative strength of his proposed grounds of appeal must be undertaken in combination with an assessment of the appeal's utility, that is, the likelihood that, in the absence of a grant of bail, he may spend a substantial part of his sentence in custody by the time of the hearing of his appeal as well as the period of time between this application and when his appeal will be heard.*

14. The Applicant's appeal was originally listed to commence on the date that this bail application was heard. However, on his application, it was adjourned until May 2022. Hence, the period of delay between this point and the likely hearing of his appeal should bail be refused is six months. By the time his appeal is heard, there will still be over a decade of his non-parole period to be served. In those circumstances, it cannot be said that even if he was to be ultimately successful on his appeal, he would either have spent a substantial part of his non-parole period in custody by the time of the hearing of his appeal, or that his appeal will have been denied utility because he was incarcerated in the meantime. These circumstances mean that the level of persuasion of the relative strength of his grounds of appeal that the Applicant must demonstrate is that much higher.

***Director of Public Prosecutions (Cth) v Saadieh* [2021] NSWSC 1186**

The applicant for bail was charged with terrorism offences. He suffered asthma. His lawyers could not access the Correctional Centre to discuss his matter. The brief was complex with large digital files which represented a significant impediment to the proper preparation of the trial. The Crown submitted that there was nothing exceptional about the impact of COVID-19 on prisoners and that this represented "the new normal".

Hamill J, in dealing with the COPVID-19 aspect fo the matter, held:

43. I accept the applicant's submission, based on the opinions expressed by Mr Borenstein and Mr El-Gashingi, that an extended period on remand will be detrimental to the applicant's mental health, particularly in circumstances where there is likely to be a significant delay before the matter goes to trial, and also in light of the ongoing COVID-19 pandemic. With the current restrictions, the applicant's family will not be able to visit him.

44. His lawyers are also unable to travel to the facility to discuss the matter and the evidence against him, which involves large digital files, and this is a significant impediment to preparing his defence.

45. There is medical evidence that the applicant suffers from asthma. Dr Kennan Ismail provided three short letters noting that the applicant suffers from asthma. [19] *Dr Ismail expressed the opinion that if he contracted the virus "his life would be severely affected" and "his general health will be in danger".*

46. The Prosecutor made the following submission:

> *"The only other matter I wanted to raise that arises from my friend's materials is in respect to the impact of COVID 19 and I think my friend has raised on the material that the applicant suffers from asthma and my friend says he is therefore vulnerable to contract the virus. The Crown accepts, on its face, that that may be right. But again the impact that COVID 19 has or can have on prisoners at present is not exclusively suffered by this applicant. There is nothing extraordinary in what I will call the new normal about the impact that COVID 19 has in prisons. That affects every inmate and there is nothing extraordinary in respect of this applicant in terms of COVID 19."* [20]

47. *I am unable to accept these submissions. For one thing, they proceed on an erroneous understanding of the evidence. Dr Ismail does not suggest that the applicant is more "vulnerable to contract the virus" but rather that, if he does, the impact on his health is likely to be greater than the average person (or inmate). Corrective Services have done a remarkable job in keeping the virus out of the prison system for a long time, but it is well known that there are currently many positive cases in the system. This has caused the re-introduction of lockdowns and restrictions on visits. I reject the idea that the Court should approach the matter on the basis that the current pandemic, and its impact on prisoners, should be treated as "the new normal". Nor can I accept the implication that it is a matter worthy of little weight because all inmates are facing the same problems. The submission is contrary to any number of cases on both bail and sentencing. [21] While I accept that, of itself, this matter would not constitute "exceptional circumstances", especially in the absence of any evidence as to the current situation within the prison system, it is a matter that must be taken into account in assessing the applicant's submission that the combination of factors in his case amount to exceptional circumstances justifying the grant of bail.*

48. *The relevance of the COVID-19 pandemic is multifaceted and includes:*

    1. *The conditions of incarceration (faced by all prisoners) are more onerous as a result of the strict regime established by Corrective Services. There is restricted access to work opportunities, training and education programs as well as mental health services. The procedures adopted also include a restriction on personal (face to face) visits with loved ones as well as more periods of lockdown and isolation. The potential impact on the mental health of inmates is real and well documented. [22] The additional hardship for young, first-time offenders has also been recognised. [23]*

    2. *There is a limitation on lawyers gaining access to their clients. That is a matter affecting remand prisoners more than those serving a sentence. It is particularly acute in a case like the present where the case involves large amounts of electronic data and material.*

    3. *Once the virus is inside the system, as it is now, there are difficulties in controlling its spread and the procedures introduced to do so create more onerous conditions of incarceration.*

    4. *There is likely to be some strain on the resources of Justice Health, potentially creating problems for an inmate, like the applicant, who has a particular health condition like asthma.*

    5. *There is a real concern that if the applicant contracts the virus, he will be more vulnerable because of his pre-existing medical condition.*

    6. *The inability of the District and Supreme Courts to conduct jury trials during the period of the lockdown, will result in additional delay in the matter coming on for trial. [24] I have already taken this into account in attempting to assess the length of the delay in the applicant receiving a trial date; I have not taken it into account twice.*

***Regina v Connor Fontaine (a pseudonym)* [2021] NSWSC 177**

The 10-year-old applicant sought to have the curfew conditions of his bail deleted. The applicant had not committed any offences at night, but had breached curfew conditions on several occasions.

Hamill J held:

5. *I turn to the one document that might be thought to suggest otherwise. This is an email from a Senior Constable of police included in the prosecution bundle where it is asserted that, "[t]he offending has occurred in the early hours of the morning". I take that to be a reference to the offending the subject of the current proceedings. The experienced prosecutor says it is, in fact, or he reads it as, a reference to the alleged breaches of curfew. The email also says that the applicant "is known to commit offences during the night". Again, I am told on the hearing this morning that this must be a reference to the alleged breaches of curfew because, apparently, there is no other evidence that the applicant has ever committed any other offence during the night-time. It then says the "police* want *the POI [person of interest] at home during the night" (my emphasis).*

6. *Ms Melhuish of the Aboriginal Legal Service objected to that document and her objection is well justified and well-founded. However, I admitted it on the basis that I would disregard opinions of police desires. While not gainsaying what the police may "want", the hopes, wishes and desires of the police are not relevant considerations under s 18 of the* Bail Act 2013 *(NSW). Further, if this email means to suggest that the current offences were committed at night - as I first read it, and still believe to be the case - it is false. It is contrary to the court attendance notice and to the facts sheet.*

7. *Bail conditions are calculated to mitigate risk.* [1] *Their imposition does not create an occasion for attempts at social engineering or paternalistic interventions in parenting decisions.*

8. *The applicant's bail will be varied to delete the curfew condition.*

Evidence – rule in *Browne v Dunn*

***Hofer v The Queen* [2021] HCA 136**

The accused at his trial gave evidence with respect to a number of matters that had not been put to prosecution witnesses at his trial. He was cross-examined by the Crown to the effect that matters about which he was giving evidence had not been put in cross-examination. On two occasions the Crown suggested that he was making up his evidence (recent invention).

Kiefel CJ, Keane and Gleeson JJ held:

26 The questions asked by the Crown prosecutor as to matters which had not been put to C1 or C2 for comment are to be understood by reference to the general rule of practice regarding the cross-examination of witnesses of an opposing party. The rule[1] requires that where it is intended that the evidence of the witness on a particular matter should not be accepted, that which is to be relied upon to impugn the witness's testimony should be put to the witness by the cross-examiner for his or her comment or explanation.

27 The rule was stated in Browne v Dunn[2], where the issue was whether a document was genuine or a sham. A number of persons who had signed the document were called to give evidence at trial, but it was not suggested to them in cross-examination that the document was other than genuine. The House of Lords held that those witnesses should have been given the opportunity to respond to any basis for suggesting to the contrary. The rule was described not only as one of professional practice but as essential to fairness[3]. It may be added that adherence to the rule may also be necessary to permit an assessment on the part of the tribunal of fact of differences or inconsistencies in the accounts given and of the credit of witnesses where that is an issue.

28 Browne v Dunn was a civil proceeding, which is adversarial in nature. So too is a criminal proceeding. The rule may be regarded as both appropriate to and an important aspect of the adversarial system of justice[4]. There would seem to be no reason in principle why the requirements of the rule should not be followed in criminal trials. As a general rule, defence counsel should put to witnesses for the Crown for comment any matter of significance which is inconsistent with or contradicts the witness's account and which will be relied upon by the defence. In MWJ v The Queen[5], it was noted that in many jurisdictions the rule has been held to apply in the administration of criminal justice.

29 The difficulty respecting the rule in criminal proceedings arises not so much from adherence to it as from the proper course to be followed when it is not observed. Criminal proceedings are not only adversarial. In our system of criminal justice, they are also accusatorial in nature, which requires that the Crown prove its case and cannot require an accused to assist in doing so[6]. The position of an accused person, who bears no onus of proof, cannot be equated with that of a defendant in civil proceedings[7]. Moreover, fairness in the conduct of a criminal trial may have a different practical content[8] and require more restraint on the part of a prosecutor.

30 The need for consideration to be given to the course to be taken when the rule is not observed is likely to arise more often in criminal proceedings. In modern civil proceedings witness statements for each party are exchanged before trial. As a consequence, there is less likelihood that matters which are to be relied upon will not be addressed in some way. Contrast criminal proceedings, where it is not uncommon for matters which have not been put to the appropriate Crown witness to emerge from the evidence of an accused person[9], including during the course of cross-examination.

31 An obvious course which may be taken is to recall the witness so that the omission can be corrected. This may be preferable and may be undertaken without injustice, depending on the course the trial has taken[10]. But a review of cases decided by the

courts in New South Wales[11] shows that the course sometimes taken by the prosecution is to cross-examine the accused as to the omission. The cross-examination undertaken is not limited to drawing the attention of the accused to the fact of the omission, so as to highlight the matter for the jury. It extends to the reason for the omission. The evident purpose of the cross-examination is to impugn the credit of the accused by suggesting that the matter is of recent invention. As Gleeson CJ observed in R v Birks[12], it is one thing for the cross-examiner to point to the unfairness to a witness who has not had the opportunity to comment, it is quite another to suggest that the result of a failure to observe the rule of practice is that a person should not be believed.

32 The reasoning behind a decision to cross-examine the accused in pursuit of this purpose may readily be inferred. It commences with the fact that a matter is not put by defence counsel; it assumes that the reason for the omission is that counsel was unaware of the matter and that counsel was unaware because the accused had not given an account of it in his or her instructions. The conclusion reached is that the accused must now be making the evidence up.

33 In R v Manunta[13], King CJ observed that an examination of an accused person which proceeds by reference to there being but one reason why a matter has not been put to a witness is "fraught with peril". As his Honour there observed, there may be many explanations for the omission which do not reflect upon the credibility of the accused. His Honour gave as examples defence counsel misunderstanding the accused's instructions or where forensic pressures may have resulted in looseness in the framing of questions. To these may be added the possibility that defence counsel has chosen not to advance certain matters upon which he or she had instructions because they were unlikely to assist the defence.

34 Where there remains a number of possible explanations as to why a matter was not put to a witness, there is no proper basis for a line of questioning directed to impugning the credit of an accused. Except in the clearest of cases, where there are clear indications of recent invention, an accused person should not be subjected to this kind of questioning. The potential for prejudice to an accused is obvious.

35 Proceeding on the basis of a mere assumption as to lack of instructions is likely to be productive of further unfairness in the course of the cross-examination. The assumption will inevitably lead to impermissible questions of the accused, put expressly or arising implicitly, as to the actual instructions he or she gave[14]. An accused person faced with questioning of this kind is likely to feel obliged to attempt to explain by reference to the instructions he or she in fact gave when in reality the accused carries no such onus. Questioning of this kind may result in the need for counsel or the solicitor for the defence having to disclose those instructions. This is a circumstance which should not arise.

36 In most cases, the cross-examination will have a dual purpose. It will be concerned with identifying unfairness to a Crown witness as well as seeking to have the accused's evidence disbelieved. Where it has the sole purpose of impugning the credit of the accused it will be necessary for leave to be sought from the trial judge[15]. The

discussion which will inevitably take place on such an application will point up the risks associated with the course proposed.

37 A trial judge should be alert to the problems associated with cross-examination. They should be raised with counsel at an early point. Where the cross-examination has occurred, it will be necessary for the trial judge to warn the jury about any assumption made by the cross-examiner, to draw attention to the possible reasons why the matter has not been put and to direct the jury as to whether any inferences are available.

Later, their Honours held:

42 The questioning undertaken by the prosecution of the appellant departed from the standards of a trial to which an accused is entitled and the standards of fairness which must attend it[24]. The questioning was such as to imply that the appellant was obliged to provide an explanation as to why matters had not been put to C1 or C2. This suggested he possessed information which he had not given counsel by way of instructions. The unfairness in this regard was compounded when the appellant was not permitted by the trial judge to provide an answer and by defence counsel not informing the court that he had those instructions. The attack upon the appellant's credit by assertions of recent invention was based upon an assumption which was not warranted. All of these matters were highly prejudicial to the appellant.

43 The evidence given by defence counsel before the Court of Criminal Appeal may be seen to confirm what King CJ said in Manunta[25] regarding the possibility of there being alternative explanations as to why a matter was not put to a witness other than recent invention. In relation to the appellant's statements about C1 having had an orgasm, defence counsel said that he decided not to put them to her because not only did he consider them irrelevant, he considered that it was likely to have the effect of turning the jury against the appellant. He had discussed this problem with the appellant.

44 It is a sufficient departure from the process of a criminal trial that a highly prejudicial cross-examination of the accused as to credit proceeded upon an unfounded assumption. In this case, evidence placed before the Court of Criminal Appeal showed that the assumption was in fact wrong. Instructions had in fact been given by the appellant in relation to seven of the eight matters. In relation to the eighth matter, defence counsel had read the appellant's psychiatric report[26].

45 It cannot be inferred that the jury would not attach any importance to what arose from the cross-examination. There were a number of matters which were identified as not having been put to C1 or C2. The persistent requirement that the appellant acknowledge that fact was likely to have suggested to the jury that questions were being asked about more than what defence counsel should have done by way of fairness to the complainants. The questions clearly required the appellant to provide some sort of explanation, a view which would have been confirmed when he attempted to do so. The purpose of the line of questioning, that the appellant should not be believed as to these accounts, was put beyond doubt when, in relation to the sixth and seventh matters, the prosecutor alleged that the appellant had made up his evidence in the course of the cross-examination. It was not necessary for the

prosecution to go further than it did in address in pointing out the process of reasoning in which the jury might engage to cause unfair prejudice to the appellant. The prosecutor had effectively invited the jury to reject the appellant's evidence as not credible.

46 This is not the first occasion upon which cross-examination of this kind has been held to result in a miscarriage of justice. In Birks[27], the accused was cross-examined as to the instructions he had given when his counsel had failed to put certain matters to the complainant. The accused answered that he had given those instructions, a fact confirmed by his counsel after the jury retired. The conduct of the prosecutor, and later the trial judge, in pursuing the omission as a matter of credibility of the accused's evidence, resulted in a miscarriage of justice. In Picker v The Queen[28] the defence was that the complainant initiated sexual intercourse, but defence counsel had left out some of the accused's instructions. The prosecutor pointed out the omissions to the accused and put to him that he had made them up. The cross-examination was held to be impermissible and highly prejudicial to the accused's case[29].

47 The prejudice to the appellant was not addressed by the trial judge, as it should have been. It was necessary that the trial judge put the omissions in perspective, discount any assumption as to why they occurred by reference to other possibilities and warn the jury about drawing any inference on the basis of a mere assumption. Absent such directions there was a real chance that the jury may have assumed that the reason for the omission was that the appellant had changed or more recently made up his story[30].

Offences – Break and Enter

R v BA [2021] NSWCCA 191

The appellant broke into a premises by kicking down the door. The premises was that of his former partner. They were both named as lessees of the premises though the appellant had

B was charged with one count of break, enter and commit serious indictable offence. At trial there was evidence that he forcibly gained entry into the relevant premises by kicking open a locked door. He and the complainant had resided together at the premises, both being named as lessees in the lease. B had moved out of the premises some months before he kicked the door open, but he remained a lessee of them. The complainant continued to occupy the premises.

The trial Judge ordered a verdict of not guilty by direction. The Crown appealed to the NSWCCA

Per Brereton JA:

[14] Two general propositions of relevance to the present case can first be stated.

[15] First, there is no offence of "breaking", or "breaking and entering", a dwelling-house or other building, simpliciter. "Breaking" and "entering" give rise to criminal liability only if preceded or followed by the commission of a serious indictable offence

therein, or if accompanied by an intention to commit such an offence. No offence is committed unless a serious indictable offence is committed, or is intended to be committed, in the dwelling-house (or other building). Thus no offence of "breaking" and/or "entering" is committed by a person entitled to occupy premises who merely forces entry having been locked out; nor by a squatter who does so merely intending to sleep within the dwelling for a night. It is a reflection of this that those offences which involve an entry followed by the commission of a felony, or the commission of a felony followed by a breaking out, are not complete until the last act of the relevant sequence is committed; that for those which involve an entry with intent to commit a felony, that intent must be shown to have been present at the time of entry; and that (as liability depends on the commission, or intention to commit, a serious indictable offence), an honestly held belief of a right to the property stolen is a defence to a charge of break enter and steal.
[16] Secondly, with the exception of Crimes Act, s 109 (which refers to the dwelling house "of another"), these provisions do not exclude liability for breaking, entering, and committing a serious indictable offence in one's own dwelling house. ...

[17] Recognising that principle, the purpose of these provisions is to protect the security of the occupants of dwelling-houses (and other buildings). The fact that liability for breaking into one's own dwelling (or other building) is not excluded is indicative that a right to enter, founded on a proprietary or leasehold interest, does not of itself negate a "break"; that the concern is for the protection of the security of occupants, rather than of owners per se; and that protection is not limited to those with a legal right of possession or occupation. In this respect, the criminal law is concerned to protect any occupant, regardless of whether they have a legal right of possession or occupation: thus protection is not limited to owner-occupiers, but includes tenants, licensees, and even squatters. For example, a former tenant who remains in occupation even after an order for ejectment has been made would still be protected by the criminal law if the owner were to break in and commit a serious indictable offence. Liability depends on whether the entry was achieved by a "break", and followed by the commission of a serious indictable offence. Thus if the sole owner of a house, occupied by his or her child, breaks into it to assault the child's partner, the owner commits the offence. Likewise if an owner breaks into his or her owner-occupied home, in which the owner's child is also resident, to assault the child's partner. It is therefore not correct that a person who has a legal right to enter cannot be guilty of breaking.

…

[20] … In my opinion, there will not be a "break" if the entry is in accordance with the permission — better characterised as consent — of the occupant (unless that consent has been obtained by fraud etc).

[21] For the reasons already given, I do not think that a right of entry derived from a proprietary, leasehold, or contractual interest, independent from the consent of the actual occupant, suffices for that purpose; such a construction would defeat the purpose of the legislation in affording protection to occupants. There are many areas of the criminal law in which consent renders innocent conduct which would otherwise

be criminal, and it is the consent of the victim that is relevant. As this area of the law is concerned with the protection of the security of occupants of dwelling-houses and other buildings (and of their property within them), it is the consent, express or implied, of the relevant occupant that is required.

[22] … In my view, in the context of the relevant provisions of the Crimes Act, it is preferable to see these permissions as relevant not because they derive from a proprietary or possessory right, but because they are given by the occupant for whose protection these offences exist.

…

[28] For those reasons, in my opinion:

- *(1)the preferable explanation of the basis on which a person who is permitted to enter premises may do so without committing a "break" is the consent of the occupant in fact, as distinct from proprietary or contractual rights derived from third parties;*
- *(2)whether or not a forcible entry pursuant to a consent is a break depends on the scope of the consent. A person who, with the occupant's consent, enters the property in a manner within the scope of the consent commits no "break"; and*
- *(3)an entry effected pursuant to a proprietary or contractual right can nonetheless involve a break, if it is made otherwise than in compliance with the consent of the actual occupant.*

[29] In the present case, while their relationship remained on foot, each of the respondent and the complainant undoubtedly had the other's consent to enter the premises. However, on the Crown case, when the respondent moved out, although he retained a legal right derived from the lease to enter the property, the consent of the complainant as actual occupant to him entering the property at all, let alone by force, was implicitly if not explicitly revoked. On the Crown case, on the occasion of the alleged offence, he plainly did not have her consent to enter. Though he would commit no legal wrong by merely entering the property simpliciter — he would not be a trespasser — and (at least arguably) not even by forcibly breaking into it; if he were to do so without the complainant's consent and then commit a serious indictable offence, he would commit an offence against Crimes Act, s 112.

[30] In my opinion, therefore, the trial judge erred in holding that the prosecution had to negative that the respondent had a legal right of entry to the property, although it did have to negative that the respondent had the complainant's consent to do so.

Per Fullerton J:

[39] The question of law raised by the appeal is whether the trial judge erred in holding that, as a pre-condition to proof of the element of "breaking" for the offence pursuant to s 112(2) of the Crimes Act upon which the respondent was arraigned, the prosecution was required to establish that the respondent did not have a pre-existing

right to enter the apartment in which his former partner resided, irrespective of whether he gained entry to the apartment by force.
[40] Limiting myself to that question, and for present purposes limiting myself to the fact that the respondent forcibly broke into and entered an apartment where he was not residing but in respect of which he claimed a contractual right to enter under an extant tenancy agreement, in my view it was not the accused's legal right to enter the apartment which the prosecution was obliged to negative in proof of his guilt. What the prosecution was obliged to establish in the factual context in which it was alleged the offence was committed was that the respondent's entry into the apartment, by breaking through the locked door, occurred without the express or implied permission of his former partner as the person in continuing occupation of the premises as co-tenant under the existing lease. Although the evidence in the trial established that the respondent gained entry by "breaking" through the locked door of the apartment against his former partner's protestations, from which it can be readily inferred that he broke into and entered the premises without her permission, I am of the view that even were he to have broken in by force in her absence and committed the indictable offence of larceny or wilful damage to property once in the apartment, or if he had gained entry by non-forcible means or through a trick or artifice, including by a threat or other inducement before committing a serious indictable offence, his liability for an offence under s 112(2) would be no different. ...

[41] I agree with Brereton JA that in respect of the offences in Part 4, Division 4 of the Crimes Act which involve proof beyond reasonable doubt of a breaking into or out of premises (both the dwelling-house of another under s 109 and any dwelling-house or other building under s 112, including, as his Honour observed, a dwelling-house owned or occupied by an accused) where a right to enter the premises is asserted or raised by the evidence, it is the scope of the permission, express or implied, of those either in occupation of the premises or those entitled to occupy those premises that is the critical focus, irrespective of whether, in the particular circumstances, the "break" involves physical interference with the building's security (such as by opening an unlocked door) or the break is effected by force.

Procedure – Prosecution Duty of Disclosure

***Edwards v The Que*en [2021] HCA 28**

The appellant was convicted of child sexual assault offences. ON appeal it was contended that there was. Miscarriage of justice as the prosecution had failed to provide the defence with a hard drive copy of the contents of the appellant's phone contrary to s.142 of the Criminal Procedure Act 1986 (NSW).

Prior to trial the prosecution had advised the defence of the existence of the evidence but did not serve a copy of it. During the course of the trial th defence asked the prosecution how a particular witness had come to the attention of investigators. Defence were informed that it had been achieved through examining the contents of the appellant's mobile phone.

This led to the defence seeking a copy of the download of the phone at a late stage in the trial. It was provided the day after the appellant was found guilty.

On appeal the specific complaint was that the fact of the prosecution witness having been obtained through examining the download of the phone, and the assertion that a more timely serving of the download may have led to the discovery of witnesses who may have assisted the defence case together represented a miscarriage of justice.

Kiefel CJ Keane and Gleeson JJ: held

> *24 It is well settled that the prosecution's failure to disclose all relevant evidence to an accused may, in some circumstances, require the quashing of a verdict of guilty*[11].
>
> *25 The difficulty for the appellant is that, with the benefit of access to the Cellebrite Download, he has been unable to identify how its contents, either as a whole or in relation to particular data, "would reasonably be regarded as relevant to the prosecution case or the defence case", or are "relevant to the reliability" of the complainant, or any respect in which his entitlement to a fair trial according to law was adversely affected by not being provided with a copy of the Download.*
>
> *26 The appellant's argument as to the forensic value of the Cellebrite Download for his case was put at the level of speculation. Whatever the precise scope of s 142(1)(i), it plainly does not extend to all information in the possession of the prosecutor or to information that does no more than provide a potential avenue for inquiry*[12].

Edelman and Steward held that the material should have been served, however also held that there had been no miscarriage of justice.

Sentencing – Assistance to Authorities

Jones (a pseudonym) v R **[2021] NSWCCA 225**

The applicant was charged with drug offences. Material was provided by the Crown to the sentencing judge regarding the applicant's assistance to authorities, but objected ot the defence seeing the material until further instructions were obtained from relevant authorities. Defence counsel then indicated that the sentencing proceedings could continue without defence counsel having seen the material.

> The NSWCCA held that the applicant had been denied procedural fairness. It applied the decision of *HT v The Queen* [2019] HCA 40. Cavanagh J (Hamill and McCallum JA concurring) held:
>
> > *52. In the end, the outcome of this appeal must depend upon whether, despite what was said in HT, the applicant was not denied procedural fairness in the particular circumstances of this matter.*
> >
> > *53. As agreed during oral submissions, the answer to that question depends on whether it might be said that, unlike the offender in HT, the applicant was given*

a choice as to whether he wished to see the confidential material and elected not to see it.

54. *On the Crown case, having been given that choice, he cannot now complain of a lack of procedural fairness.*

55. *The other point raised by the Crown is that on the Crown case, the applicant had previously told South Australian Police that he did not want his legal representatives to see the content of the confidential information. He says that he was not provided with it. This is said to support the submission that the applicant was provided with a choice (both before and during the sentencing hearing) and elected not to seek access to the confidential information.*

56. *Whatever the earlier discussions between the Police and the applicant, which apparently took place without the benefit of the applicant having legal assistance at the time, it is plain from the exchange during the sentencing hearing to which I have already referred, that, by the time that the assistance material was raised during the sentencing proceedings, the applicant had instructed his legal representatives that he wished Mr Williamson to have access to the documents. This must be so because Mr Williamson specifically said so.*

57. *This is not a case in which the applicant's Counsel was offered the material during the sentencing proceedings but declined to view it. As the transcript reveals, the sentencing judge was in the process of offering it to Mr Williamson (who immediately responded that the applicant was happy for him to see it), when the Crown interrupted in accordance with her instructions suggesting that someone in South Australia would need to be consulted about this.*

58. *At the very least this must have suggested to Mr Williamson that he would not have been able to obtain access to the assistance material at that time, that there may be a risk of an adjournment (this was the 6th day on which the matter had been listed for sentencing) and that what his Honour was suggesting was in effect indicating that it was very favourable to his client. That is, from Counsel's perspective, the judge who would be sentencing had already reviewed it and thought it was very favourable. It is perhaps unsurprising in those circumstances that Mr Williamson indicated that it was not necessary that he see it.*

59. *In my view, Mr Williamson was not faced with a real choice based on a full understanding of the material. As the Court said in HT a party can only be in a position to put his case if he is able to test and respond to the evidence on which an order is sought to be made.*

60. *The reason that the applicant was in the position that he could not make submissions as to the content of the confidential material and not determine whether it was of such significance that it would warrant a substantial discount in penalty is because he was not provided with the material either prior to or during the sentencing hearing. He was thus denied procedural fairness.*

61. *In my view, the very strong statements by the Court in HT are not overcome by pointing to the conduct of Mr Williamson and suggesting that he could have done*

more. I acknowledge that the Crown did not make such a specific submission but the effect of the Crown's argument is that Mr Williamson should have insisted that he be given access to the material, despite the position taken by the Crown and the indication from the sentencing judge that the material was favourable.

62. Of course, whether or not the applicant was denied procedural fairness is not to be determined with reference to the outcome but, on one view, the sentencing judge could not have considered it very favourably because the discount for assistance to the authorities was somewhat on the lower end of what might be considered the general range. In the circumstances which existed the sentencing judge received no submission from either party about the significance of the assistance material.

63. In all the circumstances I am satisfied that the ground of appeal is established.

Sentencing – Ellis factor

***Ahmad v R* [2021] NSWCCA 30**

The applicant was initially charged with murder but pleaded to manslaughter.
Senior counsel for the applicant at sentence submitted that the Crown would have had difficulty proving the case against the applicant and that he had very real prospects of success and that the applicant should therefore be given a discount for assistance to authorities. The sentencing Judge declined to give a specific discount but purported to take the matter into account on the question of remorse.

The NSWCCA held that the sentencing Judge was in error. The Court held:

> *[26] The present case is far removed from the paradigm example of a person who confesses to offending which is entirely unknown to authorities. Images of the applicant participating in an affray and wielding a firearm were captured on CCTV and he had been charged with murder.*
>
> *[27] The present case was also unusual, and gives rise to a substantial difficulty in resolving this appeal, insofar as there is an evidentiary vacuum. The applicant did not provide a statement of his assistance. The Court was told that the applicant made admissions on a without prejudice basis in the course of agreeing to the facts on which he would be sentenced for an offence of manslaughter following his guilty plea. But there was no evidence of what precisely those admissions were, as opposed to what could be established on the Crown case. There was nothing resembling a letter from investigating authorities identifying the nature of the assistance provided or its value to ongoing investigations and prosecutions. Indeed, save for one matter, there is no evidence before this Court (or before the sentencing judge) as to the strength of the Crown case.*
>
> *…..*

[37] The qualification to the absence of evidence as to the strength of the Crown case and the value of the assistance provided by the applicant is what flows from the submissions made to the sentencing judge by the Crown. It is on the basis of those submissions that it may be accepted that the applicant's plea was to an offence which would be difficult for the Crown to establish. The Crown made a written submission to the sentencing judge to that effect:

> *It is accepted by the Crown that the case for Manslaughter was not a particularly strong one. It takes little imagination to see how the offender might have conducted his case in the context of a trial, should he have chosen to do so.*

***Buckley v R* [2021] NSWCCA 6**

The applicant stood for sentence in the District Court. The only evidence against him was his own admissions. The sentencing Judge allowed a combined discount of 40% for the plea of guilty and the assistance to authorities. The sentencing judge held that he was constrained on the authorities to limit the total discount to 40% unless there were circumstances "beyond the norm."

Wright J held:

[84]….the effective constraint upon the extent of any discount for assistance is not a rigid or mechanical sentencing principle that the maximum permissible percentage is 40%, when taken together with the discount applicable for a plea of guilty, in the absence of "circumstances beyond the norm". The actual constraint is established by s 23(3), which provides that any lesser penalty that may be imposed in relation to an offence must not be unreasonably disproportionate to the nature and circumstances of the offence.

[88] In light of the sentencing judge's remarks, I am of the view that he erred by proceeding on the basis that principles of sentencing effectively constrained him not to allow a combined discount for the guilty plea and assistance exceeding 40%, absent circumstances beyond the norm.

Per McCallum JA:

[1] I agree with Wright J. The only observation I wish to add is that, as I sought to emphasise in Z v R in the paragraph following the paragraph Wright J has cited, the proposition that a combined discount will not generally exceed 50% should not be understood as a rigid mathematical rule but merely an expression of the requirement that the sentence reached after allowing any discount must not be unreasonably disproportionate to the nature and circumstances of the offence.

Sentencing – Disputed Facts

***BC v The Queen* [2020] NSWCCA 329**

The applicant was sentenced in the District Court after a disputed facts hearing. The applicant gave evidence in the disputed facts hearing. The sentencing judge held that the applicant had failed to establish a certain matter in mitigation on the balance of probabilities. In doing so, the sentencing Judge noted that the applicant had an interest in the mater.

On appeal, the applicant contended that the judge was in error in taking into account that the applicant had an interest in the matter. Price J held:

> *[77] I do not agree with the applicant's contention that the judge misdirected himself when he said that the applicant had "an interest in the outcome of the resolution of the issue" whereas Ms Partridge did not. His Honour was not directing himself that he should evaluate the evidence "on the basis of the interest" of a witness in the outcome of this case. His Honour was doing no more than including in his assessment of the evidence whether a particular interest would be served by that evidence. As the High Court observed in Robinson at 536:*
>
> *… Thus, in examining the evidence of a witness in a criminal trial — including the evidence of the accused — the jury is entitled to consider whether some particular interest or purpose of the witness will be served or promoted in giving evidence in the proceedings …*

Sentencing – Intensive Correction Orders – the model approach

***Elphick v R* [2021] NSWCCA 167**

The applicant was sentenced in the District Court for offences of drive manner dangerous cause death and cause GBH. He was sentenced to a term of imprisonment, the sentencing judge having rejected a submission to the effect that he be sentenced to an ICO.

On appeal it was contended that the sentencing judge had failed to properly consider the submission regarding ICO. The NSWCCA rejected this argument.

Adamson J held:

> *[27] I am not persuaded that his Honour did not adequately address the application for an ICO. Indeed, his Honour's summary of the applicable law and his application of it to the facts of this case was, in my view, model. This ground has not been made out.*

His Honour Lerve DCJ's discussion of the relevant law can be found at R v Elphick [2021] NSWDC 1 as extracted below:

> ***Intensive Correction Orders***

[88] *Section 66 of the Crimes (Sentencing Procedure) Act provides:*

- *66Community safety and other considerations*
    - *(1)Community safety must be the paramount consideration when the sentencing court is deciding whether to make an intensive correction order in relation to an offender.*
    - *(2)When considering community safety, the sentencing court is to assess whether making the order or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending.*
    - *(3)When deciding whether to make an intensive correction order, the sentencing court must also consider the provisions of section 3A (Purposes of sentencing) and any relevant common law sentencing principles, and may consider any other matters that the court thinks relevant.*

[89] *There has been a considerable amount of litigation on intensive correction orders, the latest decision (at least at the time of the preparation of these reasons) being Wany v DPP [2020] NSWCA 318 . The controversy (for want of a better word) commenced with the decision of R v Pullen [2018] NSWCCA 264 . Thereafter there was R v Fangaloka [2019] NSWCCA 173 , Casella v R [2019] NSWCCA 201 , Karout v R [2019] NSWCCA 253 and Cross v R [2019] NSWCCA 280 . Fangaloka and Karout were subject to applications for Special Leave to the High Court — see [2020] HCASL 12 and [2020] HCASL 56 respectively — with both applications separately being dealt with "on the papers" with Gordon and Edelman JJ concluding in Fangaloka that "…The Application does not give rise to any reason to doubt the correctness of the decision of the Court of Criminal Appeal…". In Karout Gordon and Edelman JJ concluded that "…The proposed grounds…have insufficient prospects of success to warrant a grant of special leave".*

[90] *The doctrine of precedent dictates that judges at first instance should follow Fangaloka and Karout.*

[91] *Basten JA (Johnson & Price JJ agreeing) in Fangaloka said at [65]–[66]:*

The better view is that the legislature has, appropriately, acted upon the available evidence by requiring the court to have regard to a specific consideration, namely the likelihood of a particular form of order addressing the offender's risk of reoffending. That obligation, imposed by s 66(2), is not stated to be in derogation of the more general purposes of sentencing outlined in s 3A, nor in derogation of other relevant matters: s 66(3). Nor does the legislation limit the consideration of community safety to a means more likely to address the risk of reoffending; it merely identifies that as a mandatory element for consideration.

- *[66]There is no doubt that community safety can operate in different ways in different circumstances. It is conventionally accepted that a purpose of punishment, including by way of imprisonment, is to deter the offender from*

further offending; it is also accepted that removal of an offender from the community for a period may have a protective function. The purpose of s 66, on this approach, is merely to ensure that the court does not assume that fulltime detention is more likely to address a risk of reoffending than a community-based program of supervised activity. Consistently with that view, s 66 does not seek to address potentially conflicting demands of community safety in the short term, as opposed to the longer term, and the risk that leniency will be abused. In short, there is nothing in s 66 which favours an ICO over imprisonment by way of fulltime custody. Further, while s 66 expressly referred to s 3A, it did so, not by identifying it as a set of "subordinate" considerations, but as mandatory considerations. It would be wrong for a court to treat every consideration other than the means of addressing the risk of reoffending as a subordinate consideration.

[92] *Hoeben CJ at CL agreed with the judgment of Fullerton J in Karout with Brereton JA dissenting. Fullerton J said at [90]:*

Adopting and applying that analysis (with which I agree), I consider that were the Legislature to have intended to impose on sentencing courts an obligation to give paramount consideration to community supervised programs as a means of ensuring community safety as one of the purposes of sentencing in s 3A(c) of the Sentencing Act, or to impose on a sentencing court a statutory obligation to give reasons for concluding that the other purposes of sentencing in s 3A, alone or in combination, dictate that even where the offender's risk of reoffending is such that community protection can be sufficiently addressed by an ICO, a sentence of full-time custody is the appropriate sentencing outcome, I would have expected the Legislature would have made that plain when the 2018 amending Act was passed.

[93] *Her Honour went on to say at [94]:*

The fact that his Honour made positive findings as to the applicant's good prospects of rehabilitation and that he was unlikely to reoffend, findings which might, in addition to a finding of special circumstances, have supported the exercise of the power in s 66 for the making of an ICO, did not dictate that an ICO was the appropriate sentencing outcome. Consistent with the obligation in s 66(3) that his Honour also take into consideration the purposes of sentencing in s 3A of the Sentencing Act and any relevant common law sentencing principles, it is clear that in declining to make an ICO the objective seriousness of the applicant's offending and the principles of general deterrence (being amongst the mandatory considerations his Honour was obliged to consider under s 66(3) in deciding whether the power to make the ICO should be exercised) overwhelmed other considerations that were in play.

[94] *Wany v DPP involved an appeal to the Court of Appeal from a decision from a Judge of the District Court determining an appeal from the Local Court. The Court found jurisdictional error and remitted the matter to the District Court. McCallum JA (Meagher JA, Simpson AJA agreeing) said at [64]:*

That is not to say that, having reached a conclusion favouring an ICO on that issue, the sentencing court cannot still refuse to make such an order. The weight to be given to the outcome of that determination is then a matter within the discretionary judgment of the sentencing judge. So much is made plain by s 66(3); and see the remarks of Basten JA in Fangaloka at [65]. But the point of the section is to require the sentencing court to consider that question without any preconception in favour of incarceration as the only path to rehabilitation.

[95] *Her Honour went on to say at [68]:*

Mr Game noted that, in Kirk , both the description of the offence and what was regarded as a defence in the relevant legislation were regarded as being jurisdictional, as was the fact that the offence was determined not according to the rules of evidence, because the defendant was called as a witness by the prosecution. In circumstances where Parliament has provided for different ways of serving a custodial sentence and has conferred power on the sentencing court to make the determination as to which should be adopted, I see no reason why the method of serving the sentence to be imposed should not be regarded as jurisdictional. The language of the statute is clear. Community safety must be the paramount consideration. When considering community safety, the sentencing court is to make the assessment specified. As Basten JA explained in Fangaloka , that obligation is not stated to be in derogation of the more general purposes of sentencing outlined in s 3A, nor in derogation of other relevant matters: s 66(3) but it is mandatory.

Sentencing – Quasi-Custodial Bail

La v R **[2021] NSWCCA 116**

The applicant was sentenced for drug offences. He appealed on the grounds that the sentencing judge failed to take into account his quasi-custodial bail conditions. The applicant attended a residential rehabilitation facility. Apart from residing at the facility, the applicant had to attend regular drug and alcohol counselling sessions and submit to drug testing. The applicant was free to come and go from the facility and in the latter stages of the program was free to attend work.

THE NSWCCA held that the sentencing judge was not in error in failing to take these matters into account.

Garling J (Basten JA and Price J concurring) held:

56. *All grants of conditional bail pursuant to s 20 of the Bail Act 2013 involve, or are highly likely to involve, some restriction. It may be noted that s 20A(2) of the Bail Act requires that any condition imposed on a grant of bail relates to the bail concerns which have been found to exist; that the condition is reasonably proportionate to the offence and the bail concern raised and that the bail condition is no more onerous than necessary to address the bail concern in relation to which it is imposed.*

57. *It will also be relevant when considering the issue of quasi-custody, to identify with some precision the length of time over which a person has been on bail, and whether the conditions during that period had changed in any way.*

58. *The mere fact that a grant of conditional bail involves some restriction on a person's liberty does not thereby, without more, constitute quasi-custody of a kind which makes it relevant to the imposition of a sentence.*

59. *Before a grant of conditional bail, and compliance by an offender with that grant can be relevant to sentence, the offender upon whom the onus falls on the balance of probabilities, must establish that such were the restrictions imposed upon the offender by reason of the conditions of bail, that the Court ought conclude that the effect of the conditional bail approached the effect of being held in custody – that is what gives rise to the description "quasi-custody".*

Trial Directions – Pre-recorded evidence

Long (a pseudonym) v R **[2021] NSWCCA 212**

The appellant stood trial for child sexual assault offences in the District Court. He was convicted. On appeal it was contended that the trial Judge had erred in giving the directions pertaining to pre-recorded evidence [pursuant to s.306X of the Criminal Procedure Act 1986 (NSW)] in the Judge's opening remarks but not immediately before the complainant's evidence.

Adamson J held:

> *[73] While ss 306X and 306ZI of the Criminal Procedure Act require the trial judge to warn the jury about the matters covered by the sections, Parliament has not specified when such warnings ought be given. This Court has said, in the passage extracted above, that it is preferable that such warnings be given before the summing up and indeed, before or immediately after the evidence is given.*
>
> *[74] However, the timing of the warnings and whether, and how often, they are to be repeated, remains within the discretion of the trial judge. While one can understand why giving the warning only in the summing up could be thought to be too late, since the jury may already have given the evidence greater or lesser weight, having not been directed to the contrary, the same concern does not arise when it is given in the opening remarks. In the present case, although evidence of non-vulnerable witnesses was given between the opening remarks (where the warnings were given) and the calling of Kate, the time between the warnings and the adducing of Kate's evidence was relatively short. To repeat a warning every time a vulnerable witness is called runs the risk of insulting the collective intelligence of the jury and, perhaps even more importantly, of giving the jurors the impression that they need not listen carefully to what the trial judge is saying because any important direction will be repeated ad nauseum. Further, there is a risk that if a trial judge keeps reminding the jury that they are not to regard pre-recorded interview evidence differently from oral evidence given in the witness box, it will only serve to highlight the difference in form, when the*

purpose of the warning is to the contrary. In any event, the substance of the warning was repeated immediately prior to replaying the recorded evidence. The statement that no inference adverse to the accused should be drawn from the nature of the procedure was not repeated. However, to make too much of that warning is apt to invite the jury to consider why they would think the procedure implied something adverse to the accused.