A Selection of Recent Decisions From the Appellate Courts March 2024

Reasonable Cause CPD Conference

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Sentencing

Note: a reference to the Sentencing Act is the *Crimes (Sentencing Procedure) Act 1999*.

Relevance of Advanced Age in Sentencing

Liu v R [2023] NSWCCA 30 – 24 February 2023

Liu was sentenced to 12 years with a non-parole period of 7 years and 3 months after having entered a plea of guilty to causing grievous bodily harm to his wife with intent to murder her, contrary to s27 of the *Crimes Act 1900*. He was aged 81 years at the time of the offence and 82 at the time of sentence. The sentencing judge had taken into account, among other factors, his age and reduced the non-parole period to just over 60%. He sought leave to appeal against the sentence on the ground that the sentencing judge erred by failing to apply, or properly apply, the principles relating to advanced age in sentencing.

His Honour Campbell J, with whom Adamson JA and McNaughton J agreed, held that there was no error and dismissed the appeal. Campbell J, at [39], noted that the relevant principles are "*accurately and well summarised accurately and well summarised by Steytler P in Gulyas v Western Australia [[2007] WASCA 263] at [54]. I will set out the passage in full:*

> *It seems to me that the following broad general principles might be extracted as being ordinarily applicable in a case such as the present:*
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> *(1) Where moral culpability is reduced by reason of advanced age (which will inevitably mean that the advanced age is coupled with some other factor that is a consequence of it, for example when there is an age related mental impairment), allowance should be made for that factor.*
>
> *(2) Where there is evidence sufficient to justify the conclusion that circumstances associated with advanced age (for example, continuous ill health, or ill health coupled with physical or mental frailty) will make imprisonment more arduous for the offender than is normal, allowance should be made for this.*
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> *(3) Account may also be taken of hardship for the offender arising out of his or her knowledge that a lengthy sentence of imprisonment is likely to destroy any reasonable expectation of useful life after release. However, the punishment must still reflect the crime and the seriousness of the offending behaviour may be such that the offender has forfeited the right to any reasonable expectation of useful life after release.*
>
> *(4) Deterrence and denunciation are important even in the case of an offender of advanced age. However, where there are factors associated with age that justify a more lenient sentence, the general public will understand why the sentence is less severe than might otherwise have been the case and the purposes of deterrence and denunciation will still be served. However, if this is to be achieved, the punishment must still reflect the seriousness of the crime.*

His Honour said, at [40], that "*it is clear from the manner in which Steytler P expressed the principles applicable to the significance of advanced age in sentencing that they are nuanced and not capable of mechanical application. As is obvious, there is no principle that the advanced age of an offender leads automatically to the imposition of a lesser sentence than the objective circumstances of the offending require*".

His Honour went on to note:

> [41] Looking at each of Steytler P's four principles, moral culpability is only reduced on account of advanced age "when there is an age related mental impairment" or the like, of which there was no evidence before the learned sentencing judge. Her Honour rejected

the only evidence of a mental condition put before her in the opinion of Mr Borkowski being the diagnosis of an Adjustment Disorder and no complaint is made about her finding in that regard. It was not age related in any event.

[42] The consideration that advanced age will make imprisonment more arduous for an offender than is normal will usually depend upon “continuous ill health” or some other age related state as explained by Steytler P. There was evidence before the sentencing judge of pre-existing orthopaedic injuries affecting the applicant’s mobility but his overall presentation was that he enjoyed generally good health for his age. There was certainly nothing to suggest anything amounting to “physical or mental frailty” in the evidence led at first instance. To the extent to which Ms Durovic’s affidavit may provide such evidence on the hearing of the application for leave, we are not entitled to receive that evidence. First, error has yet to be established; and secondly it is not evidence of the applicant’s progress towards rehabilitation of the type usually received for the purpose of re-sentencing after error has been established: *Betts v The Queen* (2016) 258 CLR 420; [2016] HCA 25 at [2].

[43] Steytler P’s third principle relating to the effect of an offender’s appreciation that a lengthy sentence is likely to destroy any reasonable expectation of useful life after release, upon which much reliance was placed in the case at hand, is expressly made subject to the principle of proportionality: the punishment must still fit the crime. And this central consideration was obviously at the front of the learned sentencing judge’s mind.

[44] The same consideration applies to Steytler P’s fourth principle. Deterrence and denunciation remain important, as her Honour found. While the general public may understand a degree of leniency where there are factors associated with age justifying it, this consideration also remains subject to proportionality. As I have said, other than age itself, there was no evidence of a specific age related factor affecting the applicant other than the limitation of mobility due to pre-existing physical injury to which I have referred. This was not a factor which, in my judgment, engaged these principles. In any event, the sentencing judge referred to it and may be taken to have had regard to it.

[45] In *Holyoak v R* while discussing the possible ways in which advanced age might be mitigatory for sentencing purposes, Allen J said (at 507):

> “It simply is not the law that it never can be appropriate to impose a minimum term which will have the effect, because of the advanced aged of the offender, that he well may spend the whole of his remaining life in custody.”

This was a case of historical child sexual abuse. Having stated the principles pointing towards possible leniency because of the offender’s age, Allen J concluded however (at 508):

> “So objectively horrendous, however, were the crimes for which the applicant fell to be sentenced, particularly considering the breach of trust which it involved, that I find myself unable to say that, assuming that all other matters he took into account were appropriate to be so taken, the severity of the sentences imposed is indicative that his Honour failed to give due weight to the significance of the plaintiff's age.”

The total effective sentence for the offending and the offender imposed at first instance was one of 8 years with a non-parole period of 7 years, available under the prevailing sentencing regime of the time. This outcome is a clear example of the centrality of proportionality in sentencing.

[46] The sentencing judge was not referred to either *Holyoak v R* or *Gulyas v Western Australia*. The only decision she was referred to concerning the effect of advanced age as a mitigating factor was the Crown appeal in the matter of *R v Mammone* [2006] NSWCCA 138, where James J (with whom McClellan CJ at CL and Hall J agreed), observed (at [45]), "I would be prepared to accept that the advanced age of the respondent entitled him to some discount in sentencing, on the basis that serving a term of imprisonment would be more than usually onerous for him". After observing that care must be taken to avoid double counting of mitigating factors in the determination of the length of the sentence and by finding special circumstances by reference to *R v Simpson* (2001) 53 NSWLR 704 at [63]-[65], his Honour found special circumstances on the basis of the offender's advanced age and a degree of ill health (at [54]) reducing the non-parole period to 60 percent of the head sentence. This was exactly the approach urged upon the learned sentencing judge by the applicant's then counsel (MFI 1, Offender submissions 4-5; Sentence Transcript 9.30T; 10.40T). And it is evident that the sentencing judge acceded to that submission.

[47] In my own judgment, this approach was open to her Honour. I appreciate that the applicant is entitled to be sentenced according to law: *Kentwell v The Queen* (2014) 252 CLR 601; [2014] HCA 37 at [42]–[44]. But what the law required was for her Honour to have regard to the applicant's advanced age as a mitigating factor. This she did, as the passages from her judgment I have set out above illustrate (at [25] and [30] above). As the passage from Mr Game's oral submission I have set out above (at [34]) illustrates, it was not necessary that the sentencing judge's consideration of the factor had a demonstrable effect upon each of the components of the sentence imposed. As in *R v Mammone*, it was permissible for her Honour to have regard to advanced age as a special circumstance serving to reduce the minimum time that the applicant would otherwise have to serve in a measurable way. Treating advanced age, as the sentencing judge was asked to do, as a special circumstance avoided any double counting in his favour but had a real and tangible effect upon the minimum time he will be required to serve. This is entirely consistent with the approach that Mr Game urged upon the Court at the hearing of this appeal.

[48] As the plurality said in *Kentwell* at [42]:

> "As sentencing is a discretionary judgment that does not yield a single correct result, it follows that a range of sentences in a given case may be said to be "warranted in law".

It is only if the Court of Appeal is persuaded of *House v the King* (1936) 55 CLR 499 at 505 error at first instance that it is required to exercise the sentencing discretion afresh to determine whether the sentence passed below is warranted in law. It is, of course, not to the point that another judge, without error, may have taken the applicant's advanced age into account in a manner different from the sentencing judge and arrived at a lesser sentence. This does not suggest her Honour's approach is affected by error. It is merely a necessary incident of the discretionary nature of the sentencing task. Taking the applicant's advanced age into account as a special circumstance, in my view, was not to treat it as a "peripheral" issue. I repeat, her Honour's approach permitted the applicant's advanced age to have a real and direct effect on the time to be served. I am not satisfied that error has been established.

Relevance of Prior Good Character in Child Sexual Offences

Bhatia v R [2023] NSWCCA 12 – 10 February 2023

Bhatia was convicted at trial of an offence of having sexual intercourse with a child under 10 years, contrary to s 66A of the *Crimes Act 1900*. He was sentenced to 10 years with a non-parole period of 6 years. In passing this sentence, the sentencing judge found that the case fell within s21A(5A) of the Sentencing Act and thus did not take into account, as a mitigating factor, the applicant's prior good character. Bhatia appealed against the sentence on the ground, among others, that the sentencing judge erred in applying that subsection.

This ground was upheld and the appeal allowed. Hamill J, with whom Beech-Jones CJ at CL (as his Honour then was) and Adams J agreed, noted that "*the applicant was a family friend for many years before the child was born*" ([141]) but that "*Neither parent gave any evidence that the applicant's character played any role in their decision to allow him to babysit their son. Apart from explaining the length and nature of their relationship, and that he was like a brother to them and an uncle to their child, neither provided any opinion that they thought he was a person of good character. There was no evidence that they were aware he had no prior convictions*" ([143]).

His Honour stated:

> [144] The language of the section is quite broad and is apt to catch a wider range of offenders than those who trade on their trusted position and good reputation to gain access to unsuspecting children because the child or parent is misled into believing the perpetrator is a person of good character. Some obvious examples would include priests and other members of the clergy, politicians, teaches and community leaders. The section would also apply to offenders, with no other connection to the family, who act as babysitters or carers by providing references attesting to their good character and reputation. It may also apply, in some instances, to family friends and relatives, but only where there is evidence going beyond the fact of the relationship and which suggests that the offender's good character or reputation played a role in assisting them to gain access to the child or to commit the offence. As I said at the outset, it would be wrong to be prescriptive and the application of the section turns on the facts of the individual case.
>
> [145] The second reading speech does not cast a great deal of light on the scope of the section. The Attorney-General made the following observations about the provision:
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> > "The bill also makes important changes to the Crimes (Sentencing Procedure) Act 1999 to ensure that when sentencing an offender for a child sexual offence the court is not to take into account the offender's prior good character or lack of previous convictions if that factor was of assistance to the offender in the commission of the offence. The simple fact of a person's clean record and good character may assist an offender to gain the trust of the child, or the child's parents, in order to commit a sexual offence against the child. Any offender who has misused his or her perceived trustworthiness and honesty in this way cannot use his or her good character and clean record as a mitigating factor in sentencing." [footnote omitted]
>
> [146] The reference to an offender "misusing his or her perceived trustworthiness and honesty" suggests there should be some active use of good character. There was no such evidence in the present case.

However, it is worthy of noting that his Honour, at [129], indicated that "*it should be stated emphatically that whether the section attaches to a particular sentencing exercise will turn on the facts and circumstances of the case. It is inappropriate to attempt to lay down prescriptive rules. The terms of the provision mean that, while some cases will clearly be caught by the section, and others clearly will not, there are many cases on the fringes, where the issue may be difficult to resolve*".

Beech-Jones CJ at CL (as his Honour then was), agreeing with Hamill J, added:

> [12] … Section 21A(5A) refers to the "factor concerned", which appears to be a reference either to the offender's "good character" or "lack of previous convictions", both of which are mitigating factors in sentencing (s 21A(3)(e)–(f)).
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> [13] Generally, satisfaction that an offender's good character or lack of previous convictions was "*of [some] assistance* to the offender in the commission of the offence" is not an especially high causal threshold to overcome. However, at the very least, it would involve the former making some material contribution to the latter. Presumably, in most cases in which the provision is invoked, the offender's good character or lack of convictions will have played some material part in the offender having access to the victim(s).
>
> [14] However, for the provision to be engaged, the Court must be "satisfied" of the relevant connection. In the context of an accusatorial system of justice, that places a practical, if not evidential, onus on the Crown to point to evidence of the relevant connection. In some cases, that evidence may have been adduced at the trial, although the fact that it might be relevant to sentence does not make such evidence relevant to proving guilt. Even if it is relevant to proving guilt, circumstances can be readily envisaged where such evidence might not be adduced or might be rejected at a trial, given the risks to all concerned of adducing evidence about character and prior convictions. Regardless, the Crown may seek to adduce evidence that engages s 21A(5A) at the sentence hearing.

EAGP Scheme – Plea of guilty after committal and after being found fit to be tried

Stubbings v R [2023] NSWCCA 69 – 27 March 2023

Stubbings was committed for trial on 18 October 2019. At committal, the Magistrate had noted that the issue of fitness to be tried was yet to be resolved. On 21 April 2020, at the District Court, he was found unfit to be tried but on 8 April 2021, following several reviews, was found to be fit and the trial was later listed on 25 October 2021 and the Mental Health Review Tribunal noted that he intended to pleas guilty. On 8 October 2021, the trial was vacated after the applicant was arraigned and entered pleas of guilty to causing grievous bodily harm with intent to cause grievous bodily harm, contrary to s33(1)(b) of the *Crimes Act 1900*, and a related offence of driving a motor vehicle in a manner dangerous to the public, contrary to s117(2) of the *Road Transport Act 2013*. The sentencing judge applied a 10% discount for the late pleas and sentenced the applicant to 9 years imprisonment with a non-parole period of 6 years for the grievous bodily harm offence and a term of 6 months for the driving offence, which was entirely subsumed with the former sentence.

The applicant appealed the sentence on one ground that the sentencing judge erred in concluding that the plea was not entered as soon as practicable, which occasioned a miscarriage of justice. The applicant argued that there was a procedural irregularity given the

absence of evidence before the sentencing judge of the events that followed the decision of the Tribunal on 8 April 2021. As such, the applicant sought leave to rely on additional evidence, which was not granted.

Gleeson JA, with whom Davies and Wilson JJ agreed, dismissed the appeal. His Honour referred to the relevant sections noting:

> [17] Section 25D(1) provides:
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> > (1) **Mandatory nature of sentencing discount** In determining the sentence for an offence, the court is to apply a sentencing discount for the utilitarian value of a guilty plea in accordance with this section if the offender pleaded guilty to the offence at any time before being sentenced.
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> [18] Section 25D(2) provides, subject to certain exceptions, the applicable sentencing discounts where an offender pleads guilty by reference to the time at which the guilty plea is made, relevantly, 25 per cent if the plea was accepted by the magistrate in committal proceedings for the offence, 10 per cent if the offender was committed for trial and the offender pleaded guilty at least 14 days before the first day of the trial or complied with the pre-trial notice requirements and pleaded guilty at the first available opportunity able to be obtained by the offender, and 5 per cent otherwise.
>
> [19] Section 25D(5) read together with s 25D(6) make provision for the sentencing discount for a guilty plea by an offender who is found fit to be tried after the person is committed for trial and whose matter was not remitted to the Local Court for continued committal proceedings. Sections 25D(5) and (6) provide:
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> > (5) **Discount variations—person found fit to be tried after committal for trial** The discount for a guilty plea by an offender who is found fit to be tried after the offender is committed for trial, and whose matter was not remitted to a Magistrate for continued committal proceedings, is as follows—
> >
> > > (a) a reduction of 25% in any sentence that would otherwise have been imposed, if the offender pleaded guilty as soon as practicable after the offender was found fit to be tried,
> > >
> > > (b) a reduction of 10% in any sentence that would otherwise have been imposed, if paragraph (a) does not apply and the offender—
> > >
> > > > (i) pleaded guilty at least 14 days before the first day of the trial of the offender, or
> > > >
> > > > (ii) complied with the pre-trial notice requirements and pleaded guilty at the first available opportunity able to be obtained by the offender,
> > >
> > > (c) a reduction of 5% in any sentence that would otherwise have been imposed, if paragraph (a) or (b) does not apply.
> >
> > (6) **Opportunities for legal help to be taken into account** For the purpose of determining under subsection (3) or (5) whether the offender pleaded guilty as soon as practicable after an ex officio indictment was filed or the original indictment was amended or after a finding of fitness to be tried, the court is to take into account whether the offender had a reasonable opportunity to obtain legal advice and give instructions to his or her legal representative (if any).

[20] The combined effect of s 25D(5) and (6) is to require an evaluative assessment by the sentencing court of whether the offender pleaded guilty "as soon as practicable" after the offender was found fit to be tried, informed by the mandatory consideration in subs (6) of whether the offender had a reasonable opportunity to obtain legal advice and give instructions to his or her legal representative (if any).

[21] The onus of establishing that grounds exist for a statutory sentencing discount lies on the offender and must be proved on the balance of probabilities: s 25F(5), Sentencing Act.

[22] Section 52 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) (MHCIFP Act) complements s 25D(5)(a) of the Sentencing Act for offenders found fit to be tried after a committal. Section 52, which replaced s 13A of the 1990 *Mental Health (Forensic Provisions) Act* with effect on 23 June 2020, relevantly provides:

> **52 Committal proceedings following finding of fit to be tried**
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> (1) This section applies to a defendant who was committed for trial for an offence under Division 7 of Part 2 of Chapter 3 of the Criminal Procedure Act 1986.
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> (2) The court may, on the application of the defendant or on its own motion, make an order remitting the matter to a Magistrate for the holding of a case conference under Division 5 of Part 2 of Chapter 3 of the Criminal Procedure Act 1986, if the defendant has, following an inquiry, been found fit to be tried for an offence.
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> (3) The court must make the order on the application of the defendant unless it is satisfied that it is not in the interests of justice to do so or that the offence is not an offence in relation to which a case conference is required to be held under that Division.
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> …
>
> (5) If a matter is remitted to a Magistrate, the matter is to be dealt with as if the defendant had not been committed for trial and the proceedings are taken to be a continuation of the original committal proceedings.
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> …

[23] This provision enables the proceedings against an accused person to be remitted to a magistrate for the holding of a case conference as a continuation of committal proceedings for an offence, if the accused person is found fit to be tried for the offence and was committed for trial before a case conference was held. This provision creates a presumption of remittal on application of the accused person, with an exception where "it is not in the interests of justice": s 52(3).

[24] The combined effect of these provisions is as follows.

[25] If an accused person who has been committed for trial and is found fit to be tried takes advantage of the procedural accommodation afforded by s 52 of the MHCIFP Act of remittal of the proceedings to the Local Court for a continuation of the committal proceedings, the applicable sentencing discounts are those prescribed by s 25D(2) of the Sentencing Act. If such an accused person pleads guilty in the Local Court on remitter the prescribed sentencing discount is 25 per cent.

[26] Alternatively, if an accused person who has been committed for trial and is found fit to be tried does not apply for remittal of the proceedings to the Local Court for a continuation of the committal proceedings, the applicable sentencing discounts are those

prescribed by s 25D(5) of the Sentencing Act. In such a case, a sentencing discount of 25 per cent is prescribed if the accused person pleads guilty "as soon as practicable" after the person is found fit to be tried, taking into account the mandatory consideration in s 25D(6) of whether the person had a reasonable opportunity to obtain legal advice and give instructions to his or her legal representative (if any).

Notwithstanding having concluded that the evidence to be relied upon on appeal will be rejected, his Honour considered whether its absence would be a procedural irregularity. His Honour held it was not, and discussed the meaning of the phrases "as soon as practicable" and "reasonable opportunity". His Honour stated:

> [48] It is necessary first to say something about the meaning of the phrase "as soon as practicable" in s 25D(5)(a) of the Sentencing Act. There are two components of this phrase. First, the words "as soon as" supply a temporal element: *Al-Kateb v Godwin* (2004) 219 CLR 562; [2004] HCA 37 at [121] (Gummow J); *Sneddon v Minister for Justice (Cth)* [2014] FCAFC 156; (2014) 145 ALD 273 at [116] (Middleton and Wigney JJ). Second, the word "practicable" identifies that which is able to be put into practice and which can be effected or accomplished: *Al-Kateb v Godwin* at [121]; *Sneddon v Minister for Justice (Cth)* at [116].
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> [49] *R v HC* (2017) 325 FLR 59; [2017] ACTSC 276 involved the phrase "as soon as practicable after the event" in s 79(1)(a) of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT). Burns J said at [67]:
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> > *The expression "as soon as practicable" is imprecise and is flexible in its application: Creely v Ingles [1969] VR 732. The meaning given to the expression will depend on the circumstances: see Tampion v Chiller [1970] VR 361 (Tampion v Chiller) at 364 per Anderson J. The expression does not mean "as soon as possible": Tampion v Chiller at 365; Wills v Whitside, Ex parte Wills (1987) 2 Qd R 284 at 288. In assessing whether an obligation cast upon a police officer to do something "as soon as practicable" has been complied with, a court should allow for normal factors of police practice: Richards v Schutt (1978) 18 SASR 421 at 425, quoted with approval by Duggan J in Magain v Roberts (1991) 14 MVR 313 at 320. Where an obligation cast is upon a person to perform an action "as soon as practicable", the requirement is usually to be assessed from the point of view of the person upon whom the obligation is cast: Martin v Commonwealth of Australia (1975) 7 ACTR 1.*
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> [50] Turning to the phrase "reasonable opportunity" in s 25D(6) of the Sentencing Act, the word "opportunity" connotes an appropriate time or occasion. The qualification "reasonable" limits or qualifies what would otherwise be an appropriate time or occasion. It introduces an assessment or judgment of a period which is appropriate or suitable for the accused person to obtain legal advice and give instructions to his or her legal representatives: *Sneddon v Minister for Justice (Cth)* at [116]. The criterion "reasonable opportunity" is objective. What will constitute a "reasonable opportunity" will, of course, depend on the particular facts and circumstances of each case.
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> [51] Thus, the evaluative assessment required by s 25D(5)(a) of the Sentencing Act of whether an offender pleaded guilty "as soon as practicable" after the offender is found fit to be tried following a committal, is to be made from the point of view of the offender in respect of whom the obligation to do so is cast, taking into account, as required by s 25D(6), a period of time which, viewed objectively, is appropriate or suitable in the circumstances of the particular case for the offender to obtain legal advice and give instructions to his or her legal representative (if any).

No obligation to explain why a finding of special circumstances is not made

R v Pickard [2023] NSWCCA 7 – 8 February 2023

Wayne Pickard, the applicant, was charged with 17 aggravated indecent assaults, contrary to s61M(1) of the *Crimes Act 1900*. The two victims were high school students, whom the applicant tutored. The circumstance of aggravation was that the victims were under his authority at the time of the offences. The applicant had plead guilty to two of the 17 charges and was found guilty of the remaining 15. He received an aggregate sentence of 5 years with a non-parole period of 3 years and 9 months. The appeal was, ultimately, brought under one ground, being that the sentencing judge fell into error by not providing an explanation of why no finding of special circumstances was made.

The applicant had no prior criminal charges or convictions besides one historical matter of high range PCA. The SAR and psychological report tendered on sentence both assessed the applicant as 'being a low risk offender' and 'unlikely to reoffend', respectively. Further, per the psychological report, he did not have any '*psychiatric disorder for which he requires specific psychiatric or psychological treatment*'. In written submissions on behalf of the applicant on sentence, his counsel submitted that the Court could make a finding of special circumstances as he is in his 60s, first time in custody and may require longer period of supervision to assist in his return to the community, and the COVID-19 effects. No oral submissions were made in relation to special circumstances. The material tendered on sentence suggested that the applicant had no remorse, displayed little insight and justified his decision-making leading to the offences. The sentencing judge had taken into account the age of the offender, the fact that this is his first criminal charge and the circumstances of incarceration. But his Honour noted "*I do not, however, find that there are special circumstances"* and gave no further explanation.

Adams J, with whom Garling and Adamson JJ agreed, dismissed the appeal noting, at [73], that "*The decision of a sentencing judge whether or not to vary the statutory ratio under s 44(2) or, in the case of an aggregate sentence under s 44(2B) of the Sentencing Act, is a quintessentially discretionary one*". Her Honour continued:

> An applicant seeking leave to appeal against a sentence on the basis of alleged error arising from such a decision must establish "*House v R*" error: *House v The King* (1936) 55 CLR 499; [1936] HCA 40. A proposed ground of appeal contending that the sentencing judge erred in not finding special circumstances without any identification of error in the process of reasoning amounts to a contention that the rejection of the submission was "unreasonable or plainly unjust": see *Haak v R* [2022] NSWCCA 28 at [30]. It is insufficient to simply contend that the judge should have found special circumstances when he or she did not. As Spigelman CJ observed in *R v Fido* [2004] NSWCCA 172 at [22]:
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> > "Simply because there is present in a case a circumstance which is capable of constituting a 'special circumstance' does not mean that a sentencing judge is obliged to vary the statutory proportion. To repeat what was said in *Simpson* at [68], it is necessary that the circumstances be sufficiently special to justify a variation."

Her Honour noted:

> [80] The decision in *R v Simpson* stands as authority for the proposition that although it would be an error to overlook an argument that special circumstances should be found

error will not be established if it is apparent from the reasons that the matter has not been overlooked

[81] As this court observed in *Rizk v R* [2020] NSWCCA 291 at [133], although s 44(2) and (2B) both require reasons to be given if a finding of special circumstances is made, there is no statutory requirement to give reasons for not making such a finding or for setting a non-parole period that is more than 75% of the total sentence. Despite this, it has been held that it is advisable for a sentencing judge to explain why a ratio in excess of 75% has been imposed so as to avoid an inference that the matter was not considered: see *Calhoun (a pseudonym) v R* [2018] NSWCCA 150 at [30] and *GP v Regina* [2017] NSWCCA 200 at [15].

Her Honour went on to consider a number of authorities that were relied on by the applicant then held:

[90] Having considered the authorities relied upon by the applicant, I am not satisfied that there is any express obligation for a sentencing judge to provide reasons declining to vary the statutory ratio in s 44 (2) or (2B) of the Sentencing Act. Clearly, if the question of special circumstances is raised before the sentencing judge, a failure to avert to that submission in the sentencing reasons may give rise to an inference that it has been overlooked, which, if established, could amount to *House v The King* error. But that is a different proposition to imposing an obligation on sentencing judges in every case to provide reasons when declining to find special circumstances (whether such a finding is sought or not).

[91] I am not satisfied that the sentencing judge overlooked the submission regarding special circumstances in this matter; his Honour expressly referred to the matters that were put to him as being capable of constituting special circumstances. Rather than finding special circumstances and varying the statutory ratio, his Honour had regard to those matters as part of his instinctive synthesis. That approach is consistent with the decision in R v Simpson. In that respect his Honour went well beyond what occurred in *Novakovic v R*.

Totality and Accumulation

Harris v R [2023] NSWCCA 44 – 9 March 2023

Matthew Harris, the applicant, was sentenced after having plead guilty to six counts of dishonestly obtaining a financial advantage by deception, contrary to s 192E(1)(b) of the *Crimes Act 1900*, and two counts of attempting to do the same. He received an aggregate sentence of 3 years, to date from 4 June 2022, with a non-parole period of 2 years, which expires on 3 June 2024. The offences related to false information submitted in support of applications of grants for small business affected by the 2019-20 bushfires. The offences were committed between 1 April and 26 May 2020.

The applicant had a 'fairly lengthy' criminal history, which includes 15 convictions for like offences for which he received an aggregate term of 8 months in 2017. At the time of sentence, he was serving an existing sentence of 4 years, to date from 4 June 2020, with a non-parole period of 2 years and 3 months, which expires on 3 June 2024; a finding of special circumstances was made given the ratio of the non-parole period to the total sentence is 56%.

From his criminal history, it was clear that the offences, the subject of this sentence, were committed between December 2019 and May 2020.

The sentencing judge made a finding of special circumstances based on the fact that the applicant was serving this sentence, reducing the ratio to 66%. "*However, when considered with the applicant's existing sentence, the ratio of the total minimum period the applicant must serve in custody (being the four-year period from 4 June 2020 to 3 June 2024) to the total combined sentence (being the five-year period from 4 June 2020 to 3 June 2025) is 80%*" ([12]). The appeal was on a sole ground that the sentencing judge erred in applying the principle of totality and in his approach to the cumulation of the sentence to the existing sentence being served.

On appeal, the applicant contended that "*the principle of totality is capable of application where an offender is serving an existing sentence and is later sentenced by a different court (citing Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70; "Mill" and Deakin v R [2014] NSWCCA 121 at [94])*" and that the "*application of totality is practically achieved by notionally sentencing an offender as if all the sentences were being imposed at once" (see Mill at 66)*" ([13]).

Beech-Jones CJ at CL, as his Honour was then, in allowing the appeal, accepted these propositions and noted:

> [14] … although the approach in *Mill* is usually directed to the circumstance where a court is imposing a sentence for an offence or set of offences that are related, usually by being similar in nature and close in time, to an offence or set of offences for which the applicant has already been sentenced and which has often been served (see *Haak v R* [2022] NSWCCA 28 at [14]−[20]; *Wu v R* [2011] NSWCCA 102 at [53]). In *Mill*, the offender committed three armed robberies within a six-week period in two different states and was sentenced in one state long after he had been sentenced in another state (*Mill* at 61 and 66). The only course available to the sentencing court in *Mill* was "to adopt a lower head sentence that reflects the long deferment that has taken place during which the offender has been in custody" (*Mill* at 67).
>
> [15] It is doubtful that the approach in *Mill* is applicable in this case as there was nothing to suggest any connection between the two sets of offences, save that it appears that they were committed around the same time. Even so, as the applicant was still serving his existing sentence, the necessity to consider imposing wholly or partially concurrent sentences on account of totality still pertains. This is so because it is necessary to avoid the "risk that the combined sentences will exceed that which is warranted to reflect the total criminality of the two [sets of] offences … regardless of whether the two [sets of] offences represent two discrete acts of criminality or can be regarded as part of a single episode of criminality" (*Cahyadi v R* (2007) 168 A Crim R 41; [2007] NSWCCA 1 at [27] per Howie J). In this case, his Honour had regard to the principle of totality and made the sentence the subject of this application run concurrently with three months of his existing non-parole period for the other offences. Leaving aside any consideration of the proportion that his combined non-parole period bore to his combined sentence, it was not demonstrated that his combined sentence exceeded what is known about the total criminality of the two sets of offences.
>
> [16] The applicant's written submissions also relied on various authorities in this Court concerning the effect of cumulated sentences on the ratio between the total minimum period an offender must serve in custody and the total length of their sentence. Subsection 44(2B) of the *Sentencing Act* provides that the term of the sentence that will remain after the non-parole period set for an aggregate sentence must not exceed one-third of the

non-parole period unless the court decides that there are special circumstances for it being more. The sentencing judge acted consistently with this provision in that his Honour expressly found there were special circumstances and imposed a sentence whereby the term of the sentence after the non-parole period was half of the non-parole period. However, the present focus is the combined effect of the two aggregate sentences (being the existing sentence and sentence the subject of this application) given that the ratio of the combined non-parole period to the combined sentence is 80%.

[17] … The authorities in this Court establish that, if a sentence judge imposes a sentence that cumulates upon an existing sentence such that the ratio of the total minimum period the offender must serve in custody compared to the total length of their sentence exceeds three-quarters to a substantial extent, then they must advert to that circumstance. In *Lonsdale v R* [2020] NSWCCA 267 at [65]−[66], N Adams J and I endeavoured to summarise the effect of these cases as follows:

> "Section 44(2) of the Sentencing Act has no direct application to any analysis of a total effective sentence that results from the operation of two or more sentences. Nevertheless, it is common to make a finding of special circumstances under s 44(2) to ameliorate the effect of accumulating sentences that would otherwise result in the ratio of the 'effective' non parole period exceeding 75% of the effective total term (see *GP v Regina* [2017] NSWCCA 200 at [16]; '*GP v R*'; *CM v R* [2020] NSWCCA 136 at [35]; '*CM v R*'; *R v Simpson* (1992) 61 A Crim R 58 at 60-61.) *Further, it has been accepted that it is incumbent on a sentencing judge to consider or advert to the effect of accumulated sentences they may impose where the ratio of the effective non-parole period exceeds 75% of the total effective term* (*McKittrick v R* [2014] NSWCCA 128 at [154]; *GP v R* at [22]). *In such cases, the question is 'whether the record of proceedings leads to an inference that the matter was considered or adverted to or not'* (*GP v R* at [22]). Thus, in *CM v R* it was concluded that the sentencing judge did not intend 'a result which would require the applicant to spend 87.5% of the "effective" term of imprisonment in custody' (at [40]).
>
> However, these principles are not hard and fast rules. Their application in a given case involves matters of degree. In this case, the ratio of the effective non-parole period to the effective total sentence was 76.47%. The sentencing judge considered questions of both totality and special circumstances at length. In those circumstances, we do not accept that his Honour failed to consider or advert to the very modest amount by which the accumulation of the two sentences meant that the effective non-parole period exceeded 75% of the total effective term. Otherwise, given the trivial amount by which it was exceeded in respect of the accumulated sentences, no obligation to 'flag an intention … to do so' was engaged." (emphasis added)

His Honour was satisfied that the sentencing judge "*did not appreciate that the effect of the sentence imposed was to produce a ratio of the combined non-parole period to the total combined sentence that substantially exceeded three-quarters (i.e. 80%)*" ([19]) and, at [20], concluded "*that his Honour erred either in the fixing of the commencement date, the selection of the non-parole period or both. It is not necessary to determine whether his Honour's error falls within the terms of the ground of appeal because the substantive issue of the proportion between the total minimum period that the applicant must serve in custody and the total length of his sentences was fully debated between the parties*".

In re-sentencing the applicant to 2 years and 10 months, to date from 3 July 2022, with a non-parole period of 18 months, his Honour noted, at [27], "*Under the sentence I propose, the ratio of the non-parole period to the total head sentence is just under 53%. If this sentence is*

imposed then the ratio of the combined non-parole period (43 months) to the combined total sentence (59 months) will be just under 73%. I find special circumstances accordingly".

In agreeing, her Honour Yehia J added, at [30], "*A finding of special circumstances inevitably carries with it an adjustment downwards of the non-parole period. Where the structure of a combined sentence results in a non-parole period that exceeds the statutory ratio, the sentencing judge should clearly advert to the fact that the intended result of accumulating the sentences was that the ratio of the total effective non-parole period exceeded 75% of the total*".

His Honour Weinstein J agreed with both their Honours.

Remorse and Acceptance of Responsibility Distinguished and Explained

Brzozowski v R [2023] NSWCCA 129 – 9 June 2023

Mark Brzozowski, the applicant, pleaded guilty to a series of charges involving unlawful possession of firearms and was sentenced to 4 years and 8 months with a non-parole period of 3 years. There were further offences included on a Form 1 and s166 certificate, the latter having proceeded to sentence as related offences. The sentencing judge accepted that the applicant accepted responsibility but indicated that there is no evidence of remorse and did not take it into account.

The applicant appealed the sentence on the ground that the sentencing judge erred by finding that there was no evidence of remorse. The applicant contended that her Honour's view that accepting responsibility and remorse are separate issues was an error. The applicant relied on s21A(3)(i) of the Sentencing Act, which provides:

> (3) The mitigating factors to be taken into account in determining the appropriate sentence for an offence are as follows—
>
> …
>
> (i) the remorse shown by the offender for the offence, but only if--
>
>> (i) the offender has provided evidence that he or she has accepted responsibility for his or her actions, and
>>
>> (ii) the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both)

He submitted "*that the second limb of s 21A(3)(i) is irrelevant to any circumstance associated with the current offending, as there were no victims or damages occasioned, but that the first limb was satisfied and was expressly so determined by her Honour in the remarks*" ([38]).

Rothman J, with whom Simpson AJA and Cavangh J agreed, in dismissing the appeal, accepted that there was no 'injury, loss or damage' ([53]); however, held that "*acceptance of responsibility is a significantly different concept to remorse. An offender may, for example, have committed an offence, and acknowledge responsibility for it, but take the view that the offender would, if faced with the same circumstances, commit the same offence again and be wholly lacking in contrition for the offence that was committed*" ([55]). His Honour continued:

> [56] Moreover, there is a significant difference in principle between regret for the consequences of conduct and contrition for the conduct. Such a difference has a long

history and derived, initially, from ecclesiastical law. Remorse is contrition or shame at the commission of the offence, not its consequences.

[57] It is contrition or remorse for having committed an offence that is to be taken into account by a court in mitigating a sentence. Remorse may be evidenced by the plea of guilty or cooperation with Police or a number of other factors, but such matters do not necessarily lead to a finding that remorse exists.

[58] Regret, which was expressed by the applicant, may be regret at the commission of the offence or regret as to the consequences of the offence. The kind of regret that is equivalent to remorse is a deep regret at the commission of the offence; not a regret as to its consequences.

[59] Thus, in these proceedings, the applicant expressed regret at taking on board the firearms in the first place, but, that regret was in the context that the applicant "should have … taken more appropriate action [in] … disposing of them". Indeed, the applicant clarified that he grew up around firearms and they were to be used as "tools". The overall impression of the evidence of the applicant was that his regret was directed at the consequences of the possession of the firearms; not the possession of them.

…

[61] Contrition or remorse requires deep regret and shame at the commission of the offence itself, and not merely regret that something was not done that would have avoided prosecution.

[citations omitted]

Simpson AJA added that pursuant to subsection 3(i)(i),

> [6] … Remorse is not established unless there is evidence that the offender accepts responsibility for his or her criminal conduct. Acceptance of responsibility must entail something more than a plea of guilty: *Barbaro v The Queen* [2012] VSCA 288; 226 A Crim R 354 at [34]-[35] (Maxwell P, Harper JA and T Forrest AJA). If that were not so, every offender who pleads guilty would be entitled, not only to the reduction in sentence provided by Pt 3, Div 1A of the Sentencing Procedure Act, but also to extra consideration under s 21A(3)(i). As Brereton JA observed in *Patel v R* [2022] NSWCCA 93 at [41]; 366 FLR 314 (N Adams and Lonergan JJ agreeing):
>
> > "Contrition – or remorse – is concerned with the attitude of an offender after the event to his or her offending. It involves genuine regret. It was explained by the Victorian Court of Appeal in *Barbaro v The Queen*, in the following terms:
> >
> > > '[36] A distinction must be drawn between the anguish of being caught and punished, on the one hand, and — on the other — the determination to change one's behaviour and, to the extent possible, make amends. The first is not remorse at all. The second is.
> > >
> > > …
> > >
> > > [38] It follows, in our view, that a person wishing to rely on remorse as a mitigating factor needs to satisfy the court that there is genuine penitence and contrition and a desire to atone. In many instances, the most compelling evidence of this will come from testimony by the offender. A judge is certainly not bound to accept second-hand evidence of what the offender said to a psychiatrist or psychologist or other

professional, let alone testimonials from family or friends, or statements from the Bar table.'"

A failure to make clear that a discount on sentence to reflect a plea of guilty has been applied will ordinarily attract the intervention of an appellate court

Borri v R [2023] NSWCCA 166 – 30 June 2023

Mark Borri, the applicant, plead guilty to 26 sexual offences committed against four children and was sentenced to an aggregate term of 16 years with a non-parole period of 12 years. The applicant appealed against his sentence on 3 grounds, relevantly, that the sentencing judge failed to take into account the plea of guilty and did not comply with s25F(7) of the Sentencing Act as his Honour did not explain how the discount was applied and, if it was not, why so; Grounds 1 and 1A respectively. Leave to raise ground 1A was granted given the controversy that surrounded the sentencing judgment.

Two versions of the sentencing judgment included in the appeal; the first of which did not include any reference to any discount relating to the early plea of guilty. The second, which was in 'NSW Caselaw' format, included amendments that made reference to a 25% discount being applied. There was no mention of a discount in his Honour's oral delivery of the judgment.

Some relevant timeframes:

- 5 February 2021: the applicant was sentenced,
- 21 May 2021: the judgment was uploaded to Caselaw,
- 1 November 2022: the appeal was filed in the Supreme Court,
- 28 November 2022: the amendment to Caselaw was made.

Hamill J, with whom Simpson AJA and Button J agreed, allowed the appeal on both those grounds. His Honour referred to sections 25D, 25F and 101A of the Sentencing Act. Relevantly, s25F provides:

> (7) Discount information to be given to offender by court. The court must indicate the following to the offender when passing sentence for an offence and must record the matters indicated—
>
> > (a) if the sentencing discount is applied, how the sentence imposed was calculated,
> >
> > (b) if the court determines in accordance with this section not to apply or to reduce the discount, the reasons for the determination.

The applicant contended that his Honour failed to comply with either s25F(7)(a), for not indicating the way the sentence was calculated if the discount was applied, or s25F(7)(b), for not providing reasons if the discount was not applied.

Hamill J noted, at [35], "*… The purpose of the amendments introduced in April 2018 was to provide a prescriptive scale of sentencing discounts and to ensure the extent of the discount was clearly articulated and explained to the offender. This is calculated to encourage "early" and "appropriate" pleas of guilty and assuage any concerns that offenders were not given the benefit of an early plea, a matter discussed as long ago as the guideline judgment on pleas of guilty in the year 2000: R v Thomson & Houlton (2000) 49 NSWLR 383; [2000] NSWCCA 309*

(Thomson & Houlton) at [33], [38]. The timing of the amendment to the judgment did little to diminish any "scepticism" of the kind referred to by the former Chief Justice in the guideline judgment at [38]".

His Honour referred to several authorities:

> [36] At least since the decision in *Thomson & Houlton*, this Court has emphasised the importance of sentencing judges acknowledging and quantifying the discount given for an early plea of guilty: see *Thomson & Houlton* itself at [52]. The policy benefits of acknowledging the discount in a clear and transparent way has been emphasised: *Woodward v R* [2014] NSWCCA 205 ("Woodward") at [11].
>
> [37] In *Zhang v R* [2018] NSWCCA 82 ("Zhang") Hoeben CJ at CL set out at [51] the relevant principles when there was a failure to quantify the discount for an early plea of guilty:
>
>> "Although quantification of the discount for an early plea of guilty is preferable, a failure to do so does not necessarily by itself establish error: *R v Simpson* [2001] NSWCCA 534; 53 NSWLR 704 at [82]-[83]; *R v DF* [2005] NSWCCA 259 at [15]; *R v Henare* [2005] NSWCCA 366 at [26]. Whether a failure to explicitly state that a guilty plea has been taken into account indicates that the plea was not given weight depends on the circumstances of the particular case and the content of the reasons: *Woodward v The Queen* [2014] NSWCCA 205 at [6]. Where there is a real possibility that the plea was not properly considered, failure to refer to the issue in the judgment should be treated as a material error: *Lee v R* [2016] NSWCCA 146 at [37]."
>
> [38] In *Wei v R* [2015] NSWCCA 66, Adamson J (as her Honour then was) said at [26] that "[t]his Court ought not, in my view, lightly infer that a task which is undertaken regularly and under significant time pressure has been undertaken with such obvious omission as to fail to apply a discount for a plea of guilty." On the other hand, in *Edwards v R* [2017] NSWCCA 160 ("Edwards"), Garling J said at [41] "[i]t can be accepted that the sentencing Judge was experienced in the criminal law and that he can be taken to have understood the matters to which a judge is obliged to have regard when imposing a sentence" but that the "failure to attend diligently to his statutory obligation, of which he was well aware, is simply inexplicable unless he determined to give the plea no weight at all".
>
> [39] The approach taken by Basten JA and McCallum J (as their Honours then were) in *Lee*, *Matthew v R* [2016] NSWCCA 146 may be instructive in the applicant's case. Their Honours could not reach a firm conclusion as to whether a discount was applied and said at [20]-[21]:
>
>> "Despite the commendable simplicity of the ground as formulated, it relied upon an inference that the judge did not take the early pleas into account, an inference drawn from the absence of any reference in the judgment on sentence to the pleas, or to the availability of a discount. The ground might have been better formulated in the alternative, namely that the trial judge erred, (a) in failing to take into account the early pleas of guilty, or (b) in failing to explain in the reasons for judgment how such pleas had been taken into account. Despite the fact that the ground was not so expressed, we propose to deal with it on the basis that it was so expressed. Both parties acknowledged that there was no reference to the pleas or the discount in the reasons of the sentencing judge. The Director nevertheless submitted that it should be inferred that they had been taken into account; the applicant submitted that the absence of any reference, taken with other factors, demonstrated that they had not.

It is not possible to reach a firm preference for one view or the other; however, it is that unresolvable uncertainty which demonstrates error in failing to deal with the matter in the judgment. The Director should not succeed on a basis which denies an error of law. For that reason, the appeal should be upheld. That has consequences for resentencing, which will be addressed below."

[40] It was held at [41] that the uncertainty warranted the intervention of the Court and the sentencing discretion was exercised afresh.

[41] On some occasions, the Court has inferred that the discount had been applied.

[42] In *Tran* the sentencing Judge made no mention of applying a quantified discount to the sentence imposed. Nor did the Judge say that he had considered the plea. R A Hulme J (McCallum JA and Button J agreeing) were satisfied that the sentencing Judge sentenced on the basis that Mr Tran was entitled to a 25 per cent reduction of sentence for his plea of guilty for a number of reasons referred to at [24]-[30], including: (i) the sentencing Judge opened his remarks on sentence by observing that Mr Tran pleaded guilty; (ii) it is "elementary" that a plea of guilty in the Local Court will attract a 25 per cent discount; (iii) the prosecution conceded in written submissions that Mr Tran was entitled to the "full discount"; (iv) the sentencing Judge referred to sentencing statistics that had been distilled solely to offenders who had pleaded guilty, suggesting his Honour appreciated that 25 per cent was the highest discount available; (v) his Honour was provided with a schedule of comparable cases which specified the level of discount for a guilty plea; and (vi) his Honour made remarks about the need to impose a sentence in accordance with the range indicated in the statistics and comparable cases, which only included sentences that had been discounted because of the pleas of guilty.

[43] In *Zhang* Hoeben CJ at CL (Fullerton and Davies JJ agreeing) was satisfied that there was no "real possibility" that the sentencing Judge did not properly consider and apply an appropriate discount in respect of Mr Zhang's plea of guilty, despite the fact that his Honour did not refer to a specific discount in his reasons. Hoeben CJ at CL was so satisfied in light of the following matters (i) numerous references in the sentencing proceedings to the early plea of guilty, including four days before the judgment was handed down; (ii) the explicit reference to the fact of the early plea in the sentencing judgment; (iii) the fact that his Honour had already handed down three sentences on Mr Zhang's co-offenders that day, in which he expressly referred to the discount for an early plea of guilty; and (iv) the "mathematical neatness" of the sentence (adding 25 per cent to the figures suggested a starting point of a non-parole period of 9 years with a balance of term of 3 years, i.e., a total sentence of 12 years compared to the total sentence of 9 years actually imposed on Mr Zhang).

[44] This "reverse engineering" argument was held by Garling J to be an inadequate basis in the circumstances of the case for inferring that the sentencing Judge was giving a discount, despite the mathematical neatness of the figures: *Edwards* at [40]. See also *Woodward* at [11].

His Honour held, at [51], "…*The sentencing judgment failed to comply with the requirement under s 25F(7) to indicate to the offender, and to record – "when passing sentence" – whether the sentencing discount was applied and how the sentence imposed was calculated. If the record somehow made it clear that the sentencing discount was applied, this error may not have impacted on the outcome although it would remain an important omission*". His Honour further indicated that the Court should ignore the amendment to the judgment given its timing, at [52].

The applicant was resentenced to an aggregate term of 14 years with a non-parole period of 10 years.

Parity – When offenders are not co-accused for the purposes of the operation of the parity principle

Kiraz v R [2023] NSWCCA 177 – 14 July 2023

Allan Kiraz, the applicant, plead guilty to a number of drug and prohibited weapon offences and was sentenced to an aggregate term of 8 years with a non-parole period of 5 years and 4 months. There were also some offences taken into account on a Form 1. The applicant appealed the sentence on 2 grounds, one of which is that there was a disparity in his sentence and that of his co-offender that gave rise to a justifiable sense of grievance.

The applicant obtained drugs on 10 occasions from a 'dial-a-dealer' supply syndicate, one of which was delivered to him by his 'co-offender', Mr Mehmed, who was sentenced for 2 drug offences only.

R A Hulme AJ, with whom Beech-Jones CJ at CL and Fagan J agreed, in dismissing the appeal, held at [41] that "*There is a fundamental flaw in this ground: the applicant and Mr Mehmed were not co-offenders in the same criminal enterprise*". His Honour noted:

> [42] There is no doubt that the parity principle is concerned with the comparison of sentences imposed upon co-offenders involved in the same criminal enterprise (even if charged with different offences arising therefrom). It has been confirmed by the High Court in *Green v The Queen*; *Quinn v The Queen* (2011) 244 CLR 462; [2011] HCA 49 per French CJ, Crennan and Kiefel JJ at [30] and in *Elias v The Queen*; *Issa v The Queen* (2013) 248 CLR 483; [2013] HCA 31 per French CJ, Hayne, Kiefel, Bell and Keane JJ at [30]. The same was said in *Jimmy v R* (2010) 77 NSWLR 540; [2010] NSWCCA 60 (per Campbell JA at [136]-[137], [202] and per Howie J at [246]).
>
> [43] The parity principle is not, however, concerned with the comparison of sentences imposed upon persons who were not co-offenders: *R v Araya* [2005] NSWCCA 283; (2005) 155 A Crim R 555 at [66] (Johnson J); *Baladjam v R* [2018] NSWCCA 304; (2018) 341 FLR 162 at [148]-[149] (Bathurst CJ).
>
> [44] The applicant's argument is virtually the same as that which was raised unsuccessfully by the applicant in *Meager v R* [2009] NSWCCA 215. Narelle Collier was a supplier of heroin to persons who contacted her by telephone. They were persons who were users of the drug and persons (namely Ms Meager and a man named Patrick McDaid) who in turn supplied to users of it. In explicitly complying with the parity principle the sentencing judge had regard to the sentence he had imposed upon Mr McDaid when sentencing Ms Meager. In applying for leave to appeal Ms Meager raised a parity argument by reference to the sentencing of Ms Collier. Latham J (Young JA and Johnson J agreeing) rejected the contention on the basis that they were not co-offenders so the parity principle had no application.
>
> [45] Other examples of the parity principle not applying to persons who are not co-offenders include:
>
>> *Why v R* [2017] NSWCCA 101: an attempted comparison of sentences passed upon a supplier and his customer where they each had other customers and suppliers.

Malouf v R [2019] NSWCCA 307: a complaint of disparity of sentences imposed upon a drug dealer and the person from whom he was receiving his supplies.

[46] I have earlier (at [9]-[11]) sought to describe the facts of the present applicant's offending in a manner that makes clear that he and Mr Mehmed can in no sense be regarded as "co-offenders"; that is, offenders involved in the same criminal enterprise. The applicant was a supplier of drugs to others. He sourced drugs from Mr Ali-Ahmed and others who were engaged in a separate drug supply enterprise. The agreed facts disclose only one occasion where the applicant's offending intersected with that of Mr Mehmed and that was on 6 April 2020 when the applicant negotiated with Mr Ali-Ahmed to purchase drugs and they were delivered to him by Mr Mehmed.

[47] The offender had no apparent interest or involvement in the drug supply enterprise being conducted by Mr Ali-Ahmed and others apart from being one of its customers and they had no interest or involvement in the drug supply enterprise being conducted by the applicant apart from being his upline supplier.

[48] There was some discussion at the hearing about whether the applicant might alternatively rely upon the sentencing of Mr Mehmed as a comparator for the assessment of the manifest excess contention raised under Ground 1. It was not an approach that was advanced with any enthusiasm by the applicant's counsel. The discussions by Johnson J in *R v Araya* at [65]-[72], and by Latham J in *Meager v R* at [10]-[12], indicate that this would not have been a useful approach in any event. It is rarely useful to assess the severity (or inadequacy) of a sentence by reference to a single comparative case and here there are so many differences, from the offences charged through to the subjective factors that make such an exercise inutile.

Pre-Sentence Custody – The extent to which immigration detention may be considered as pre-sentence time spent in custody for an offence

Marai v R [2023] NSWCCA 224 – 5 September 2023

Freddy Marai was sentenced for one count of using a carriage service to procure a person under 16 years for sexual activity to 3 years with a non-parole period of 1 year and 8 months. Prior to being sentenced, the applicant served sometime in custody before being granted bail; total of 77 days. However, he was held at an immigration detention as his visa got cancelled because of his conviction and sentence to unrelated State offences. He had spent a total of 211 days in immigration detention. Part of this period was as a result of the request made by the Commonwealth DPP on 23 February 2022 that a Criminal Justice Stay Certificate be issued so he is held until he is sentenced. The sentencing judge backdated the sentence to take into account the period of pre-sentence custody but did not take into account any of the time the applicant spent in immigration detention and did not provide reasons for not doing so.

The applicant appealed this sentence and relied on a sole ground; that the sentencing judge erred in failing to take into account the period spent in immigration detention and/or in failing to provide reasons in that regard. The applicant relied on s16E of the Crimes Act 1914 (Cth) and ss 24 and 47 of the Sentencing Act. He acknowledged that there is no obligation on the sentencing judge to backdate the sentence to include the period spent in immigration detention but contented that his Honour did not turn his mind to this discretionary consideration.

The Court, per Kirk JA, Fagan and Sweeney JJ, upheld the appeal concluding that error was shown. Sweeney J noted:

> [91] In failing to provide reasons for not taking into account the period of time the applicant had spent in immigration detention, when that matter had been raised on his behalf in the sentence proceedings as a significant matter to be taken into account, his Honour erred in the exercise of his sentencing discretion.
>
> [92] Further, his Honour not providing reasons and only announcing his decision that he considered the immigration detention "not referable to the sentencing process" after he had delivered his sentencing remarks, strongly suggests that his Honour erred by failing to take into account the period in immigration detention in sentencing the applicant.

Her Honour stated, at [95], that "*The applicant was deprived of his liberty in immigration detention from 9 March 2022 until he was sentenced and entered into Corrective Services custody on 6 October 2022. I take the view that for all of that time he was in immigration detention, deprived of his liberty, because of the request of the Commonwealth made on 23 February 2022 that he remain in Australia for the purpose of the resolution of the prosecution proceedings*". Her Honour added that although he "*was in immigration detention for two reasons for part of the time, the CDPP request was a factor in that detention. I am satisfied his detention was in relation to his offence for sentence*".

Her Honour, in addressing the uncertainty as to whether the provisions intended to encompass immigration detention, noted:

> [101] The question is whether the time the applicant spent in immigration detention at the behest of the CDPP is to be treated as a period of time that he was in custody for or in relation to the offence, for the purposes of s 16E *Crimes Act 1914* and ss 24 and 47(3) of the *Crimes (Sentencing Procedure) Act*, or if it is to not be so treated, whether it can and should be taken into account, in accordance with the general discretion in s 47(2) to backdate the commencement of the sentence, as a feature of Mr Marai's personal circumstances, and in either case, how much of his time in immigration detention he should be given credit for.
>
> [102] It is not clear that the provisions of s 16E and ss 24 and 47(3) which refer to persons being held in custody were intended to encompass immigration detention, although courts have interpreted them to that effect. I do not think it is necessary to resolve the meaning of those provisions to dispose of the applicant's appeal. I acknowledge that Fagan J has taken a different approach.
>
> [103] As a matter of fairness, the period of time the applicant was in immigration detention between 9 March and 5 October 2022 (the day before he was sentenced and entered into Corrective Services custody) should be taken into account as a period he was detained in relation to his prosecution for the Commonwealth offence, and his sentence should be backdated, pursuant to the general discretion in s 47(2) *Crimes (Sentencing Procedure) Act*, by the whole of that period, of 211 days.
>
> [104] I do not consider that evidence of the applicant experiencing hardship, beyond the deprivation of his liberty, while so detained, is necessary for that backdating to occur.

Fagan J dissented in terms of the period, considering the period referrable to these offences to begin from 4 June 2022, which is the date that the certificate was issued.

Domestic Violence Offences and the Inappropriate Use of s10A of the Sentencing Act

R v Sharrouf [2023] NSWCCA 137 – 16 June 2023

Arken Sharrouf, the respondent, was found guilty after trial to eight counts of sexual assault without consent, one count of aggravated sexual intercourse without consent, one count of indecent assault, one count of attempted choke with intent to intimidate, two counts of use offensive weapon with intent to intimidate, five counts of assault occasioning actual bodily harm and six counts of common assault; all of which were committed against his then wife. He was sentenced to an aggregate term of 10 years with a non-parole period of 5 years. For 5 of the common assault counts (counts 1, 8, 10, 28, 38), one count of assault occasioning actual bodily harm (count 36) and one count of indecent assault (count 2), his Honour recorded convictions with no other penalty pursuant to s10A of the Sentencing Act.

The Crown appealed the sentence relying on three grounds, one of which is that the sentencing judge erred in imposing convictions with no other penalties in relation to counts 2, 10, 36 and 38 as they were serious domestic violence offences. The Crown further contended that his Honour had overlooked the requirement of s4A of the Sentencing Act and did not provide reasons.

The respondent accepted this ground had been made out; however, the submissions focussed on whether the Court should exercise its discretion to intervene and re-sentence him.

All three grounds were upheld by the Court.

In upholding ground 2, Price J, with whom Wilson and Dhanji JJ agreed, referred to several authorities, which emphasised the gravity of domestic violence. His Honour noted:

> [187] Section 10A of the CSP Act enables a court that convicts an offender to dispose of the proceedings without imposing any other penalty. The section was inserted by the *Crimes and Courts Legislation Amendment Act 2006* (NSW), which commenced on 29 November 2006. According to the explanatory note to the Crimes and Courts Legislation Amendment Bill, s 10A had been added for circumstances where a court considers a s 10 bond is inappropriate because the offence is not trivial and it is inconvenient to impose any further penalty.
>
> [188] I recognise that the recording of a conviction may have serious consequences for an offender. However, general sentencing principles apply to the operation of the section. Where an offence is objectively serious and general deterrence, denunciation, and the protection of the community are of importance, the scope for the use of the section must necessarily be substantially diminished. I acknowledge that current sentencing legislation does not prohibit the application of s 10A to a domestic violence offence. Nevertheless, the appropriate use of s 10A in a domestic violence offence must be rare.

His Honour then referred to ss 4A and 4B of the Sentencing Act and stated, at [190], "*Both sections emphasise the seriousness of domestic violence offences. For present purposes it is only necessary to refer to s 4A which was drawn to the judge's attention during the proceedings on sentence. Section 4A(2) requires reasons for departing from a sentence of full-time detention or a supervised order. Unfortunately, reasons were not provided by his Honour for the application of s 10A*".

His Honour concluded at [194] "I*n my respectful opinion, it was an error for his Honour to apply s 10A to counts 2, 10, 36 and 38. Ground 2 has been established*".

Community Safety and Intensive Correction Orders (ICOs)

Stanley v Director of Public Prosecutions (NSW) [2023] HCA 3 – 15 February 2023

Stanley pleaded guilty in the Local Court to multiple offences against the *Firearms Act 1996* and was sentenced to an aggregate term of three years with a non-parole period of two years. On appeal to the District Court, the applicant conceded that the s5 threshold has been crossed, but that the sentence should be served by way of an ICO. S66(1) of the Sentencing Act provides that community safety is the paramount consideration when deciding to make an ICO. S66(2) provides that when considering the safety of the community, the Court has 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. Her appeal was dismissed.

The applicant then applied for judicial review on the basis that the judge failed to undertake the assessment under s66(2) and that his failure amounts to jurisdictional error. The Court of Appeal dismissed the application, holding that non-compliance with the subsection is not a jurisdictional error of law.

She then sought leave to appeal to the High Court on the ground that the Court of Appeal erred in failing to hold that the District Court's decision was affected by jurisdictional error.

The High Court, by majority (Gordon, Edelman, Steward and Gleeson JJ), allowed the appeal holding that the District Court had fallen into jurisdictional error.

The Court noted:

> [54] … In failing to undertake that assessment, the District Court Judge misconstrued s 66 and thereby both misconceived the nature of her function under s 7 of that Act and disregarded a matter that the *Sentencing Procedure Act* required to be taken into account as a condition or limit of jurisdiction. Where the power to make an ICO is enlivened, a sentencing court does not have jurisdiction to decide that a sentence of imprisonment is to be served by full-time detention without assessing the comparative merits of full-time detention and intensive correction for reducing the offender's particular risk of reoffending. The District Court Judge's error of law can be understood as an instance of both the second and third examples of jurisdictional error on the part of an inferior court identified in *Kirk v Industrial Court (NSW)*. It was properly conceded by counsel for the first respondent, in her clear and comprehensive written and oral submissions, that, s 66 aside, every other provision in Div 2 of Pt 5 of the Sentencing Procedure Act, headed "Restrictions on power to make intensive correction orders", contains one or more jurisdictional conditions. On a proper construction of s 66, that provision is no exception.
>
> [59] There are three steps to be undertaken by a sentencing court prior to the final order by which a sentence of imprisonment is imposed under the Sentencing Procedure Act, or confirmed or varied on a sentencing appeal: first, a determination that the threshold in s 5(1), described below, is met; second, determination of the appropriate term of the sentence of imprisonment; and third, where the issue arises, consideration of whether or not to make an ICO. The identification of these steps does not conflict with the principle, stated in *Markarian v The Queen*, that sentencing does not involve a mathematical approach of increments to and decrements from a predetermined range of sentences. The sentencing court must engage in a process of instinctive synthesis of multiple factors at each stage of the sentencing process.

[60] The first step requires the court to be satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate. The possible alternative penalties include a community correction order, a conditional release order, conviction with no other penalty and a fine. An ICO is not an alternative penalty.

[61] ICOs are of a different kind – an ICO is a sentence of imprisonment (for the purposes of s 5) that is directed, under s 7, to be served by way of intensive correction in the community rather than full-time detention. …

Power arises after sentence of imprisonment imposed

[62] There was no dispute that the power to order or decline to order an ICO under s 7(1) is a discrete function that arises *after* the sentencing court has imposed a sentence of imprisonment. That is clear from the words of s 7(1). The possibility of an ICO does not arise unless and until the sentencing court has first determined that no penalty other than imprisonment is appropriate and has sentenced an offender to imprisonment.

…

Discretionary power, corresponding duty

[65] The power to make, or refuse to make, an ICO is discretionary. However, as the parties accepted, that conferral of power comes with a corresponding duty. The court will come under a duty to consider whether to make an ICO where that matter is properly raised in the circumstances of the case, and where the disentitling provisions identified below are not engaged. This is consistent with the general principle that, where a jurisdiction is conferred and "created for the public benefit or for the purpose of conferring rights or benefits upon persons the court upon an application properly made is under a duty to exercise its jurisdiction and is not at liberty to refuse to deal with the matter".

Provisions defining the jurisdiction to make an ICO

[66] Once the power to make an ICO is enlivened, the sentencing court must address the requirements in the *Sentencing Procedure Act* relevant to the imposition of such an order.

[footnotes omitted]

Their Honours then went on to examine those requirements, referring to the relevant sections in the Sentencing Act, and noted, regarding s66:

[75] The assessment required by s 66(2) is not determinative of whether an ICO may or should be made. To the contrary, as is plain from s 66(3), the assessment is required for the purpose of addressing community safety as the paramount, but not the sole, consideration in deciding whether or not to make an ICO. Thus, the power to make an ICO requires an evaluative exercise that treats community safety as the paramount consideration, with the benefit of the assessment mandated by s 66(2). In that respect, the nature and content of the conditions that might be imposed by an ICO will be important in measuring the risk of reoffending.

…

[77] While aspects of community safety underpin some of the general purposes of sentencing, such as specific and general deterrence and protection of the community from the offender, those aspects will have been considered in deciding whether to impose a sentence of imprisonment (ie, before considering an ICO). Community safety is required to be considered *again* and in a different manner under s 66 when considering whether

to make an ICO. At this third step, community safety in s 66(1) is given its principal content by s 66(2), namely, the safety of the community from harms that might result if the offender reoffends, whether while serving the term of imprisonment that has been imposed or after serving that term of imprisonment.

[footnotes omitted]

In concluding that failure to undertake the assessment in s66(2) is a jurisdictional error, the Court stated:

[79] The inclusion of s 66 in Div 2 of Pt 5, which, as has been observed, is headed "Restrictions on power to make intensive correction orders", is an indication that the legislature intended s 66 to operate as an enforceable limit upon power. The Division heading is taken as part of the Act. As identified above, Div 2 contains several restrictions on the power to make ICOs. As a general proposition, Div 2 reveals a clear legislative intention that sentencing courts are not "islands of power immune from supervision and restraint" in respect of compliance with Div 2. The requirement for the assessment under s 66 is a limit that operates at the third step in the sentencing process, that is, the limit affects the power to decide whether or not to make an ICO under s 7; it does not operate at the first and second steps of deciding whether to impose a sentence of imprisonment and, if so, the term of the sentence.

[80] A failure to undertake the assessment required by s 66(2) does not merely involve a mistake in the identification of relevant issues, the formulation of relevant questions or the determination of what was or was not relevant evidence. Rather, it is a failure to undertake a task that is mandated for the purpose of deciding whether to make an ICO by reference to community safety as the paramount consideration. Such an error tends to defeat the evident statutory aim of improving community safety through provision of an alternative way to serve sentences of imprisonment by way of intensive correction in the community. The legislative importance of that aim is reinforced both by the characterisation of community safety as a "paramount" consideration and by the stipulation of the assessment task in s 66(2) to inform the consideration of community safety.

[81] The jurisdiction conferred by s 7 is thus to decide whether community safety as a paramount consideration together with the subordinate considerations in s 66(3) warrant full-time detention or intensive correction in the community. The s 66(2) assessment is integral to the function of choosing between full-time detention and intensive correction in the community in compliance with the requirement in s 66(1) to treat community safety as the paramount consideration.

[82] The question raised by this appeal is whether an error in undertaking this discrete task at the third step of the sentencing process can be characterised as one going to the jurisdiction of the sentencing court. There is no basis to assume that an error at that step is "necessarily" an error within the sentencing court's jurisdiction simply because it follows the imposition of a sentence of imprisonment. As explained, the jurisdiction to grant an ICO calls for a subsequent and separate decision to be made *after* a sentence of imprisonment is imposed. The fact that the sentencing court may have acted within jurisdiction at the first and second steps in imposing the sentence of imprisonment does not mean that the sentencing court will necessarily remain within jurisdiction when making the separate decision whether to order an ICO. Section 7 is not an inconsequential subsequent power after the sentencing process is complete. Section 66 is "more than one evaluative step amongst many" that the Act requires to be carried out after a sentence of imprisonment is imposed. Section 7 is itself a sentencing function that is to be exercised

by reference to the paramount consideration in s 66(1). It is a discretionary power – which, when enlivened, comes with a corresponding duty – that fundamentally changes the nature of the sentence of imprisonment imposed from full-time detention to one of intensive correction in the community. The sentencing court may bring itself outside of jurisdiction if it misconceives the nature of that function or fails to comply with a condition on the jurisdiction when exercising the power. And, as will be seen, that is what the District Court did in this case.

[footnotes omitted]

The Court referred to the District Court judge's remarks and noted:

> [112] Her Honour purported to address the third step of the sentencing process, which required consideration of whether or not an ICO should be made, saying:
>
> > "The third and final task that the Court must do in assessing whether or not an ICO is an appropriate term of imprisonment is to determine whether or not an ICO is an appropriate sentence taking into account all of the factors including community safety and rehabilitation. I have as I said given very close consideration to this. In my view community safety is of paramount consideration. There are a substantial number of firearms. The firearms in my view pose a significant risk to the people of Dubbo.
> >
> > Taking into account all of those matters I am not of the view that it is appropriate for the matter, for this sentence to be served by way of an Intensive Corrections Order."
>
> [113] In addressing the appellant's application for an ICO, the District Court Judge did not refer to s 66 of the *Sentencing Procedure Act* specifically or in substance, although her reference to community safety as the paramount consideration indicated an awareness of the provision. Her Honour did not record any findings about whether an ICO or full-time detention was more likely to address the appellant's risk of reoffending. Nor did her Honour refer in any way to the conditions that might be suitably imposed in an ICO on the facts in this case. Without contemplating conditions of this kind, the risk of reoffending cannot have been measured.
>
> [114] The District Court Judge's reasons reveal no assessment of community safety based on whether the risk of reoffending by the specific offender – the appellant – would be better reduced by full-time imprisonment or by an ICO, giving consideration to the appellant's personal circumstances. It cannot be inferred from the reasons that she undertook any such assessment. Her Honour's statement that "[t]here are a substantial number of firearms. The firearms in my view pose a significant risk to the people of Dubbo" does not reveal a consideration of community safety in a forward-looking manner having regard to the appellant's risk of reoffending. In fact, the firearms posed no ongoing risk to community safety whether by future offending conduct on the part of the appellant or anyone else, as they had been seized. As is apparent, the District Court Judge purported to address community safety at the third step in the same manner that it might have been considered in step one or two by observing the safety risk posed by the offending conduct.
>
> [115] The inescapable conclusion is that the District Court Judge failed to undertake the assessment in s 66(2). A further conclusion is that the District Court Judge failed to apprehend that her function at the third stage of the sentencing process required her to assess the risks that the appellant would reoffend, in a manner that might affect community safety, depending upon whether she served her sentence of imprisonment by full-time detention or intensive correction in the community.

[116] A further matter that supports the conclusion that the District Court Judge failed to undertake the assessment in s 66(2), identified by Beech-Jones JA, is the lack of any reference to the circumstances of the offending as a matter bearing upon the appellant's risk of future reoffending. As his Honour put it, the District Court Judge failed to address "whether the [appellant] was a dedicated gun runner or someone caring for five children who just wanted the guns out of her house". As earlier noted, the s 66(2) assessment required consideration, not merely of the appellant's risk of reoffending, but of her risk of reoffending in a manner that might affect community safety. That was a matter that almost certainly required consideration of the likelihood that the appellant would repeat offences of the kind for which she had been convicted. That assessment was not done.

[117] Given the invalidity, there has been no decision on the issue of an ICO at all. As there is a duty to consider whether to grant an ICO in cases where the power is engaged (as it clearly was in this case), this duty remains unperformed. Therefore, the District Court failed to perform its duty and did not determine the appellant's appeal according to law. It was therefore appropriate to set aside the order of the District Court dismissing the appellant's appeal, and order the Court to determine her appeal according to law.

[footnotes omitted].

Post-*Stanley* Consideration of Imposing an ICO

Zheng v R [2023] NSWCCA 64 – 22 March 2023

Biyun Zheng, the applicant, was found guilty of reckless wounding and was sentenced to 2 years and 6 months with a non-parole period of 10 months. She appealed against her conviction and, in the alternative, against the sentence contending it was manifestly excessive.

Gleeson JA, with whom Hamill and Ierace JJ agreed, allowed the appeal against the sentence noting:

[261] The claim of manifest excess is not available because this Court is of the view that it would have given less weight to general deterrence and greater weight to the applicant's favourable subjective case: *Bugmy v The Queen* (2013) 249 CLR 571; [2013] HCA 37 at [24]. Nevertheless, I am persuaded that in the particular circumstances of this offending, and this offender, the sentence was manifestly excessive. The chief considerations which point to manifest excess are the reasons and circumstances of the offending, the role of general deterrence in this case, and the applicant's compelling subjective case.

In re-sentencing the applicant, his Honour went through all the relevant considerations and determined that a sentence of 2 years imprisonment is appropriate in the circumstances. Given this, his Honour then went on to consider whether an ICO should be made. His Honour noted:

[276] The applicant submitted that this Court should make a direction under s 7 of the Sentencing Act that the sentence of imprisonment be served by way of an ICO. This mode of sentence is available where the sentence of imprisonment in respect of a single offence does not exceed two years: Sentencing Act, s 68(1).

[277] The Court is required by s 66(1) of the Sentencing Act to have regard to community safety as the "paramount consideration" when deciding whether to make an ICO in relation to an offender, and by s 66(2) is obliged to assess whether making an ICO or

serving the sentence by way of fulltime detention is more likely to address the offender's risk of reoffending. By s 66(3) the Court is also required to consider the purposes of sentencing under s 3A, any common law sentencing principles, and may consider any other matters that the Court thinks relevant.

[278] There is a prohibition on the power to make an ICO in respect of, relevantly, domestic violence offences (s 4B), which includes reckless wounding in the context of this case. This is addressed separately below.

[279] In *R v Pullen* [2018] NSWCCA 264 at [84], Harrison J (Johnson and Schmidt JJ agreeing), said of the concept of "community safety" in s 66:

> The concept of "community safety" as it is used in the Act is broad. As s 66(2) makes plain, community safety is not achieved simply by incarcerating someone. It recognises that in many cases, incarceration may have the opposite effect. It requires the Court to consider whether an ICO or a full-time custodial sentence is more likely to address the offender's risk of re-offending. The concept of community safety as it is used in the Act is therefore inextricably linked with considerations of rehabilitation.

[280] Recently, in *Stanley*, the joint judgment held that the failure to consider the paramount consideration of community safety in s 66(1), by reference to the assessment required by s 66(2), constituted jurisdictional error: *Stanley* at [88], [115] (Gordon, Edelman, Steward and Gleeson JJ); cf in dissent Kiefel CJ at [12], Gageler J at [20]-[33] and Jagot J at [240]-[241]. Addressing the construction of the power to make an ICO, the joint judgment said at [72]-[77]:

> [72] There was no dispute before this Court that s 66 imposes specific mandatory considerations upon the decision maker to make, or refuse to make, an ICO. Section 66(1) requires the court to treat community safety as the "paramount consideration". In the context of s 66(2), community safety principally concerns the possible harms to the community that might occur in the future from the risk of reoffending by the offender. The issue is not merely the offender's risk of reoffending, but the narrower risk of reoffending in a manner that may adversely affect community safety.
>
> [73] The identification of community safety in s 66(1) as the "paramount" consideration also indicates that s 66 is concerned with an aspect of the sentencing task that requires the sentencing court to have a particular and different focus at the third stage of the three-step process described earlier. When the court is deciding the discrete question whether or not to make an ICO, community safety is the consideration to which other considerations are to be subordinated, although other considerations must or may be taken into account as prescribed by s 66(3).
>
> [74] Section 66(2) explains how the sentencing court must engage with the paramount consideration of community safety. For the purpose of addressing community safety, s 66(2) requires the sentencing court to undertake a task of assessing the possible impacts of an ICO or full-time detention on the offender's risk of reoffending. Section 66(2) gives effect to Parliament's recognition that, in some cases, community safety will be better promoted by a term of imprisonment served in the community than by full-time detention. Section 66(2) is premised upon the view that an offender's risk of reoffending may be different depending upon how their sentence of imprisonment is served, and implicitly rejects any assumption that full-time detention of the offender will most effectively promote community safety. Thus, s 66(2) requires the sentencing court to look forward to the future possible impacts of the sentence of imprisonment, depending upon whether the sentence is served by way of full-time detention or by way of intensive correction in the community.

[75] The assessment required by s 66(2) is not determinative of whether an ICO may or should be made. To the contrary, as is plain from s 66(3), the assessment is required for the purpose of addressing community safety as the paramount, but not the sole, consideration in deciding whether or not to make an ICO. Thus, the power to make an ICO requires an evaluative exercise that treats community safety as the paramount consideration, with the benefit of the assessment mandated by s 66(2). In that respect, the nature and content of the conditions that might be imposed by an ICO will be important in measuring the risk of reoffending.

[76] That said, community safety will usually have a decisive effect on the decision to make, or refuse to make, an ICO, unless the relevant evidence is inconclusive. There may be cases where a court cannot be satisfied whether serving a sentence by way of intensive correction in the community or serving a sentence in full-time custody would be more likely to address reoffending. In those cases, other factors will assume significance and will be determinative. On the other hand, there will be cases where a court concludes that serving the sentence by way of intensive correction in the community is more likely to address reoffending.

[77] While aspects of community safety underpin some of the general purposes of sentencing, such as specific and general deterrence and protection of the community from the offender, those aspects will have been considered in deciding whether to impose a sentence of imprisonment (ie, before considering an ICO). Community safety is required to be considered again and in a different manner under s 66 when considering whether to make an ICO. At this third step, community safety in s 66(1) is given its principal content by s 66(2), namely, the safety of the community from harms that might result if the offender reoffends, whether while serving the term of imprisonment that has been imposed or after serving that term of imprisonment. (Citations omitted.)

[281] Five points emerge from the joint judgment in *Stanley*.

[282] First, the power to make an ICO requires an evaluative exercise that treats community safety as the paramount consideration, with the benefit of the assessment mandated by s 66(2). The issue is not merely the offender's risk of reoffending, but the narrower risk of reoffending in a manner that may affect community safety: at [72], [75].

[283] Second, s 66(2) is premised upon the view that an offender's risk of reoffending may be different depending upon how their sentence of imprisonment is served, and implicitly rejects any assumption that full-time detention of the offender will most effectively promote community safety: at [74].

[284] Third, the nature and content of the conditions that might be imposed by an ICO will be important in measuring the risk of reoffending: at [75].

[285] Fourth, the consideration of community safety required by s 66(2) is to be undertaken in a forward-looking manner having regard to the offender's risk of reoffending: at [74].

[286] Fifth, while community safety is not the sole consideration in the decision to make, or refuse to make, an ICO, it will usually have a decisive effect unless the evidence is inconclusive: at [76].

In applying *Stanley*, his Honour held:

> [291] Applying the forward-looking approach referred to in the joint judgment in *Stanley* to the evaluative exercise of whether community safety as the paramount consideration, together with the subordinate considerations in s 66(3), warrant full-time detention or an ICO, I am satisfied that the risk of the applicant reoffending in a manner that may affect community safety would be better reduced by an ICO than full-time imprisonment for the following reasons:
>
> (1) the assessment report assessed the applicant's risk of reoffending as "Medium-Low";
>
> (2) her Honour found that the applicant was not a violent or anti-social person by nature and assessed the applicant's prospects of rehabilitation as good;
>
> (3) the applicant has complied with her onerous bail conditions over four years, including the non-contact condition with the complainant; and
>
> (4) the standard supervision condition of an ICO (s 72(2)(a)) is more likely to promote the applicant's rehabilitation, given her major depressive disorder.

Procedure for Consideration of an ICO following *Stanley*

Tonga v R [2023] NSWCCA 120 – 29 May 2023

Samuel Tonga, the applicant, plead guilty to recklessly causing grievous bodily harm and failing to disclose the identity of the driver and other passenger in a car in which he had been travelling. The sentencing judge imposed a sentence of 22 months but declined to order that it be served by way of an ICO and set the non-parole period to 13 months. the applicant appealed the sentence on a number of grounds, one of which was that the sentencing judge erred in characterising the grant of an ICO as an 'act of leniency'.

Basten AJA, with whom Walton and Hamill JJ agreed, dismissed the appeal. On the issue of use of the word 'leninecy' in describing the effect of ICOs, his Honour noted:

> [21] This description has been adopted by this Court on numerous occasions. As Johnson J stated in *R v Cahill*, "[t]his Court has emphasised the significant degree of leniency involved in the use of an ICO as a sentence". To similar effect Gleeson JA held in *Zheng v R:*
>
> > "296 Accepting that the imposition of an ICO represents some degree of leniency, I am satisfied that in this case it still incorporates a substantial degree of punishment having regard to the length of the ICO and the obligations which attach to the mandatory conditions in s 73(2) of the Sentencing Act, as prescribed by the regulations, specifically the supervision condition under reg 187 of the Crimes (Administration of Sentences) Regulation 2014 (NSW)."
>
> [footnotes omitted].

His Honour then went on to explore the procedure to be adopted when considering an ICO in light of the recent decision in *Stanley*. His Honour noted:

> [26] The operation of s 66 was the subject of the High Court's consideration in *Stanley*, the question being whether a District Court judge had so misconceived the operation of s 66 that she had failed to exercise her sentencing function.

[27] The nature of an "intensive correction order" is explained by three aspects of the statutory scheme. First, the sentence of imprisonment is to be served "by way of intensive correction in the community", rather than in custody: see s 7(1). Secondly, it follows that no purpose is served by a non-parole order which limits the period of a sentence of imprisonment which must be served in custody before release into the community, and one is not to be fixed: see s 7(2).

[28] Thirdly, the nature of the "intensive correction" which the offender is to undergo turns on the conditions under which he or she is released into the community. As provided by s 72, there are "standard conditions", "additional conditions" and "further conditions". …

…

[39] Apart from the categorisation of an ICO as an element of "leniency", which has been addressed above, the applicant focused his submissions on the appeal on two aspects of this reasoning. The first was the finding that serving the sentence in full-time custody "is not more likely to address his risk of reoffending". That was in substance an inconclusive finding as to the factor identified in s 66(2), determining, in effect, that the comparative process could not be resolved on the evidence. What the judge did not say expressly was that serving the sentence in the community would be more likely to address his risk of reoffending. However, having correctly identified the matter to be addressed under s 66(2) as "whether the making of such an order *or* serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending" (emphasis added), the neutral finding should be understood as leaving the weighing process unresolved. Such an outcome was expressly envisaged by *Stanley* at [76]. Although it may be implicit in *Stanley* that such an outcome will be the exception rather than the rule, the assessment will often be highly speculative. In this case no sufficient basis has been established to overturn that finding.

[40] By way of an aside, it may be noted that the joint reasons in *Stanley* also observed that "[t]he issue is not merely the offender's risk of reoffending, but the narrower risk of reoffending in a manner that may adversely affect community safety". The applicant did not rely on that matter because he emphasised what he identified as an over-reliance by the judge on the violence involved in the attack. There is no doubt that that was the relevant risk to community safety.

[41] As *Stanley* explained, the s 66(2) evaluation is not decisive and was not treated by the sentencing judge as decisive, or as the end of the process. Consistently with *Mandranis* (and *Stanley*), had the judge considered that serving a sentence in full-time custody was more likely to benefit community safety than serving the sentence in the community, that finding would not have foreclosed the possibility of an ICO. However, because it was not made, that issue did not arise. On the other hand, if the judge had been satisfied of a contrary position, namely that serving a sentence by way of an ICO was more likely to address the risk of reoffending, that would have been a powerful consideration in favour of an ICO. However, as that finding was not made either, any further question which would have flowed from that finding did not arise.

…

[49] Accepting that the judge did indeed give weight to general deterrence in declining to impose an ICO, the applicant's submission seeks to draw a bright line between community safety and other purposes of criminal sentencing. Of the seven purposes identified in s 3A of the Sentencing Act, there may be tensions between some, or between some in some circumstances, but often they will militate in favour of the same outcome. While it is

> true that s 66(2) addresses that element of community safety which concerns the individual offender's risk of reoffending (in a particular way), as *Stanley* recognised, that is not to exclude other aspects of sentencing which may affect community safety, nor purposes such as general deterrence which do not focus upon the individual but may tend to protect community safety. It was not an error to take general deterrence into account: s 66(3) permitted that course. The decision as to whether or not to impose an ICO is not to be determined solely by reference to an assessment of the course more likely to address the offender's risk of reoffending; and when that course cannot be identified, other mandatory considerations will become significant and possibly decisive.
>
> [footnote omitted]

His Honour then concluded:

> [50] To reiterate what was said in *Stanley* at [76]:
>
> > "There may be cases where a court cannot be satisfied whether serving a sentence by way of intensive correction in the community or serving a sentence in full-time custody would be more likely to address reoffending. In those cases, other factors will assume significance and will be determinative."
>
> That was what occurred in the present case: the judge did not err in identifying general deterrence as ultimately the determinative factor.

Procedure when an ICO is considered for a Federal offence

Chan v R [2023] NSWCCA 206 – 23 August 2023

Felix Chan, the applicant, plead guilty to three offences under s 103(5)(g) of the National Health Act 1953 (Cth) for making false claims on the Pharmaceutical Benefits Scheme for prescriptions that he had not dispensed. He was sentenced to 2 years imprisonment, to be released on a Recognizance Release Order after serving 14 months of his sentence. The sentencing judge declined to impose an ICO.

The applicant appealed on three grounds; the first two being that her Honour erred in not considering the provisions of 3A of the Sentencing Act and that, in determining whether to impose an ICO, did not take into account community safety as the paramount consideration.

N Adams J, with whom Kirk JA and Rothman J agreed, allowing the appeal, noted in relation to the first ground:

> [92] Although the sentencing judge was required to sentence the applicant under the *Crimes Act* (and to have regard to s 16A in doing so), she was also asked to impose an aggregate sentence on the applicant *and* to consider the imposition of an ICO, both of which required her Honour to apply NSW law.
>
> [93] Her Honour imposed an aggregate sentence under s 53A of the Sentencing Act. That provision was picked up and applied as federal law in relation to the applicant's sentence only insofar as it was "applicable": s 68(1) of the *Judiciary Act 1903* (Cth). As Beech-Jones J (as his Honour then was), with whom Bathurst CJ and I agreed, observed in *Huynh v R* (2021) 105 NSWLR 384; [2021] NSWCCA 148 regarding the meaning of the words "so far as they are applicable" in s 68(1) (at [39]):

> "In relation to the exercise of powers conferred by State law, although s 68(1) and s 79(1) of the *Judiciary Act 1903* contain different phrases concerning what State laws are picked up and applied in that s 68(1) refers to such laws 'so far as they are applicable' and s 79 refers to such laws as 'are applicable' but 'except as otherwise provided', in *Putland* at [7], it was observed that there exists 'little, if any, functional difference' between these two forms of qualification."

[94] The application of s 68(1) of the *Judiciary Act* was recently considered by the High Court in *Attorney-General (Cth) v Huynh* (2023) 97 ALJR 298; [2023] HCA 13. As for the similarity between s 68(1) and s 79(1), Kiefel CJ, Gageler and Gleeson JJ observed the following at [41] (footnote omitted):

> "Section 68(1)'s application of certain State and Territory laws 'so far as they are applicable' to persons charged with offences against Commonwealth laws in respect of whom jurisdiction is invested in State and Territory courts under s 68(2) has features in common with the prescription in s 79(1) of the Judiciary Act that certain State and Territory laws are binding on courts exercising federal jurisdiction 'except as otherwise provided by the Constitution or the laws of the Commonwealth ... in all cases to which they are applicable'. There is a substantial degree of overlap in the purposes and operations of the two provisions in so far as both 'enable State [and Territory] courts in the exercise of federal jurisdiction to apply federal laws according to a common procedure in one judicial system'."
>
> (Although t heir Honours went on at [42] to observe there are important differences between ss 68(1) and 79(1), those differences are not presently relevant).

[95] There is no provision for imposing an "aggregate sentence" in the *Crimes Act* which means that it is not "otherwise provided" for in that Act. As I observed in *Waterstone v R* [2020] NSWCCA 117 at [123] and *Patel v R* (2022) 366 FLR 314; [2022] NSWCCA 93 at [83] ("*Patel*"), the Commonwealth DPP's position is that a court sentencing a federal offender can impose an aggregate sentence (under the Sentencing Act) for federal offences: *Putland v The Queen* (2014) 218 CLR 174; [2014] HCA 8; *Director of Public Prosecutions (Cth) v Beattie* (2017) 270 A Crim R 556; [2017] NSWCCA 301. Although I expressed some doubt about that in Patel at [85], no issue was raised in that regard on this appeal, and this appeal proceeded on the basis that such a course was open to her Honour.

[96] Similarly, the provisions of the Sentencing Act concerned with ICOs, including ss 7 and 66, could only operate in relation to the applicant insofar as federal law picked them up and applied them. Section 20AB of the Crimes Act provides for "additional sentencing alternatives" and s 20AB(1AA)(a)(ix) expressly provides for "an intensive correction order". There is no other facilitative provision in the *Crimes Act* analogous to s 66 of the Sentencing Act but, as Basten JA observed in *Mourtada* at [20] in picking up the power under State law to impose an ICO, s 20AB also picks up the procedural steps governing the operation of the State provision. In the same case, Adamson J said this at [35]:

> "I would prefer not to express a view as to the wider topic of the extent to which State laws are picked up when State Courts are imposing sentences for Federal offences since, as Basten JA has noted, specific provision is made for intensive correction orders (ICOs) in s 20AB(1AA)(a)(ix) of the *Crimes Act 1914* (Cth)."

[97] Beech-Jones CJ at CL recently observed the following in the context of the availability of ICOs for federal offenders in *Homewood v R* [2023] NSWCCA 159 at [4]:

“The provisions of s 20AB make it clear that the various sentencing options specified in s 20AB(1AA) take their colour and meaning from the provisions of the relevant ‘law of the State or Territory’ (s 20AB(1)(b)).”

[98] Although it is well settled that a federal offender can be placed on an ICO under the Sentencing Act, it is the *extent* to which that State law is picked up that is the focus of ground 1. After extracting s 66 in its terms, her Honour stated: “I note that because I am dealing with a Commonwealth offence, I have taken into account the s 16A matters rather than the s 3A matters”. This ground turns on whether her Honour erred in taking that approach.

[99] Putting the ICO regime to one side, it is clear that s 3A of the Sentencing Act is not otherwise picked up and applied as federal law: s 16A(2) of the *Crimes Act* already provides for mandatory factors relevantly similar to those in s 3A. Despite this, s 66(3) of the Sentencing Act *required* the sentencing judge to have regard to s 3A when considering whether to impose an ICO, even though her Honour was also required to have regard to s 16A for the purposes of the first two steps.

[100] The Crown did not contend that only *part* of s 66 of the Sentencing Act (that is, everything except for the reference to s 3A) was picked up and applied as federal law in this matter. Rather, the Crown’s position was that when considering whether to impose an ICO, s 66(3) of the Sentencing Act requires the court to have regard to the purposes of sentencing in s 3A of *that* Act, even when sentencing a federal offender. This position is consistent with *Stanley* and the language of s 66: there are *mandatory* considerations in s 66 of the Sentencing Act, one of which is that the sentencing judge must have regard to the s 3A factors (s 66(3)). In circumstances where the statutory language of s 66(3) is clear and neither party suggested that s 66(3) should somehow be read subject to s 16A, I am prepared to proceed on the basis that the sentencing judge was required to have regard to s 16A of the *Crimes Act* for the purposes of the first two steps: determining whether a sentence of imprisonment is required, and if so the length of that term, but then have regard to s 3A when considering whether to impose an ICO.

Evidence

Expert as to the behaviour and responses of children who have been sexually assaulted is admissible in a trial for child sexual assault charges

BQ v R [2023] NSWCCA 34 – 3 March 2023

BQ, the applicant, was found guilty at trial of nine child sexual assault offences and acquitted of two others counts. The two complainants were his nieces, who were aged 5–8 years and 10–13 years at the times.

As part of its case, the Crown sought to call expert evidence from A/Prof Shackel about how child victims of sexual assault respond and disclose offending, which was allowed over objection, but not the responses of the complainants. The applicant appealed on a number of grounds, one of which is that the trial miscarried on the account of the evidence of the expert.

The Court, per Davies, McNaughton JJ and R A Hulme AJ, dismissed the appeal on this ground and held that the trial judge correctly admitted the evidence under s79 of the *Evidence Act 1995*.

The Court went through the history of the section and A/Prof Shackel's qualifications and explored several authorities that had previously dealt with the admission of A/Prof Shackel's evidence. The Court then noted:

> [214] A voir dire was heard concerning the admissibility of Professor Shackel's report. In his judgment, the trial judge said this:
>
> > The opinion expressed in such report relates, in essence, to two topics:
> >
> > > Firstly, the associate professor discusses at length the literature surrounding show how victims of childhood sexual assault as a class respond to and disclose their victimisation and expresses various generic conclusions as to the same. Secondly, she quite briefly addresses "matters relevant to the complainants' conduct during and after the alleged assaults" at issue in the current trial and expresses opinions as to whether such conduct is consistent with the earlier expressed generic reservations.
> >
> > Defence counsel, Mr Wallach, opposed the admission of any part of the Associate Professor's opinion. After hearing from him and the Crown I ruled that the Associate Professor could give evidence as to the first topic covered in her report as described but not the second, …
>
> [215] In his reasons, the trial judge made reference to s 79 permitting opinion evidence as to the development and behaviour of children who have been sexually assaulted.
>
> [216] This Court's decision in *Aziz*, given on 13 April 2022, vindicated the present trial judge's judgment in admitting Professor Shackel's report on the first of the topics identified. At the time the notice of appeal was filed in the present matter, the decision of *Aziz* had not been delivered. The submissions prepared on behalf of the applicant were prepared without the benefit of the decision in *Aziz*.
>
> [217] Subsequently, this Court gave judgment in *AJ* on 24 June 2022. In that case there had also been a challenge to the admissibility of Professor Shackel's opinion on the behavioural responses of victims of child sexual abuse, but there had also been a challenge to her evidence concerning the patterns of offending behaviour by perpetrators.
>
> [218] The Court in *AJ* followed *Aziz* in relation to Professor Shackel's evidence about the responses and behaviour of children but rejected the evidence of Professor Shackel concerning the offending patterns of perpetrators as evidence which did not fall within s 79(2) or s 108C in that it did not concern "child development", "child behaviour" or the "development and behaviour of children". Further, Professor Shackel was held not to be an expert on the behaviour of perpetrators.
>
> [219] Significantly, in that regard, Beech-Jones CJ at CL said at [83]:
>
> > However, contrary to the Crown's submissions, I do not accept that the evidence concerning the offending patterns of perpetrators of child sexual abuse is simply an aspect of evidence of the response of victims to trauma in the form of child abuse. The topics of response to trauma and patterns of sexually deviant behaviour are distinct (or at least the contrary was not shown).

The Court, after having considered the evidence given at trial, held, at [239], that the evidence, which was mainly concerned with the response and behaviour of children during and after abuse, was well within A/Prof Shackel's expertise. As to the evidence that may have fallen outside her expertise, the Court said, at [240], that "*…on one level, be thought to be outside*

the Professor's expertise, but they followed on, and were seemingly triggered by the Professor's answer that abuse often takes place within the home and in the context of everyday activities. In any event, her knowledge of what is contained in those two answers is very likely to have been obtained by her study of the cases which are the basis of the research. In our opinion, the questions and answers in italics were so closely related to the general discussion of the reactions and behaviour of children, that the evidence was not objectionable. Even if the questions and answers were inadmissible, the answers could not have given rise to a miscarriage of justice".

In relation to the complaint of the lack of warning of the jury by the trial judge about how the evidence could not be used, the Court said:

> [268] The particular concern of the applicant was said to be that the jury might misuse the evidence in the way set out in the New Zealand Court of Appeal's decision in *M v The Queen* at [32] (set out in *Jacobs* at [60]) as follows:
>
> > …[T]he judge must take care to instruct the jury as to the purpose for which the expert evidence has been led and that the evidence says nothing about the credibility of the *particular* complainant. This is because there may be a tendency for the jury to reason that:
> >
> > • Delayed reporting (for example) is common where children have been sexually abused;
> >
> > • This is a case where there was delayed reporting by a child alleging sexual abuse;
> >
> > • Given that there was delayed reporting, the child must have been sexually abused. (Emphasis in original.)
>
> [269] A reading of the whole of the summing-up satisfies us that the trial judge clearly outlined the relevance of Professor Shackel's evidence to the reactions, responses and behaviour of the complainants, particularly as to delay in making complaint. We do not consider that what was said by the New Zealand Court of Appeal in *M v The Queen* should be adopted as laying down an invariable prescription where this type of evidence is led. The need for a warning or direction about how the evidence may not be used will frequently depend on the way the evidence is led, whether the evidence is challenged in cross-examination, how the Crown uses the evidence in closing address, and the approach taken by defence counsel at the trial.

Tendency Evidence – A tribunal of fact should not be directed that tendency evidence must be proved beyond reasonable doubt before it may be used as some proof of a charge

Gardiner v R [2023] NSWCCA 89 – 24 April 2023

Leonard Gardiner, the applicant, was found guilty after a judge alone trial of two child sexual assault offences against two students, TR and PS, while he was a mathematics teacher. As part of its case, the Crown relied on tendency evidence from former students, JT, KZ, and AR, who had similar experiences with the applicant, which was allowed over objection and accepted by the trial judge.

The applicant appealed on a number of grounds, one of which was the treatment and use of the tendency evidence by the trial judge, as a tribunal of fact. The applicant contended "*that it was erroneous for the trial judge to use the evidence of, say, TR, in respect of a particular count as tendency evidence in support of count 6 in respect of PS, without first finding that the count against TR sought to be used in that way had been proved beyond reasonable doubt. He contended that the only way the evidence of the counts could be cross-admissible was if the trial judge started with one count and found that count established beyond reasonable doubt without reference to the other counts*" ([190]).

Adamson JA, with whom Button and McNaughton JJ agreed, in disallowing this ground, held that the trial judge did not err in not requiring that each count be proved beyond reasonable doubt before it can be used as tendency evidence. The Court noted:

> [192] One of the difficulties with Mr Game's submission is that, if accepted, it would deprive tendency evidence of the forensic force which long-standing authority has established that it has. Suppose ten children said that each had been sexually assaulted in similar circumstances by a particular accused and the accused was charged with all ten counts on a single indictment. On Mr Game's argument, the evidence of one child could not be used as tendency evidence in respect of the charges concerning any of the other children if none of the children's evidence, by itself, could prove the charge beyond reasonable doubt. If the accused's indictment contained only five counts and the remainder were relied on as tendency evidence, the remainder would not need to be proved beyond reasonable doubt to be used as tendency evidence (in accordance with *The Queen v Bauer (a pseudonym)* (2018) 266 CLR 56; [2018] HCA 40 (*Bauer*) – see the discussion below) but none of the evidence of any of the five counts could be used in support of the other counts unless it established the accused's guilt beyond reasonable doubt.
>
> [193] This Court addressed this question in *JS v R* [2022] NSWCCA 145 (*JS*), where the applicant challenged the trial judge's direction to the jury regarding tendency evidence. …
>
> …
>
> [195] Justice Basten referred to Bauer in which the High Court confirmed that a jury ought not be directed that uncharged acts which were relied on for a tendency purpose needed to be proved beyond reasonable doubt. His Honour explained why it did not follow from this that charged acts needed to be proved beyond reasonable doubt before they could be relied on as tendency evidence. …
>
> [196] Further, as Basten JA noted in *JS*, s 161A of the *Criminal Procedure Act* is to the same effect as the conclusion to which his Honour came. …
>
> …
>
> [198] Although this provision was not referred to in the course of the trial, the approach taken by the trial judge, in so far as her Honour did not require that each charge be proved beyond reasonable doubt before it could be used for a tendency purpose, conformed to the requirements of s 161A of the *Criminal Procedure Act* and was in accordance with the decision of this Court in *JS*.

Tendency evidence – proper construction and application of s 97A of the *Evidence Act 1995*

R v Clarke [2023] NSWCCA 123 – 7 June 2023

Brett Clarke, the respondent, was charged with 13 counts of sexual offences committed against three child complainants. The applicant sought to rely on evidence of tendency of the respondent to have sexual interest in children aged 6-15 years and act on that interest. The trial judge refused to allow the evidence after holding that it lacked probative value and that requirements of s97A were not met. The Crown appealed on a number of grounds, one of which is that the trial judge erred in his interpretation and application of s97A.

The Court, per Davies, Fagan and Yehia JJ, allowed the appeal and held that the trial judge erred in his interpretation. The Court noted:

> [34] Paragraphs [60] and [68]-[69] contain his Honour's reasons for concluding, under sub-s(4) of s 97A, that the Crown's proposed tendency evidence lacks significant probative value, in rebuttal of the presumption in sub-s (2). The reasoning is based upon considerations that fall directly within par (a) of sub-s (5) of s 97A and, less obviously but nevertheless substantively, within pars (b) and (f). With respect, his Honour was in error to have relied upon those considerations without having first determined whether there are "exceptional circumstances" that would warrant taking them into account, as required by s 97A(5). His Honour gave no reasoned justification for the statement at the end of [69] that "this is not a matter caught by s 97A(5)". We do not consider that statement to be supportable in the circumstances of this case.
>
> [35] In par [70] his Honour addressed the position on the assumption, contrary to his own view, that s 97A(5) is engaged. However, the reasoning his Honour then applied is circular. Paragraphs (a)-(f) of sub-s (5) are potential points of comparison between the "tendency sexual acts" and the "alleged sexual acts" (as those terms are used in sub-s (5)(a)). The question raised by sub-s (5) is whether there exist "exceptional circumstances" that would warrant taking all or any of those points of comparison into account in assessing "significant probative value" of the "tendency sexual acts". The purported "exceptional circumstances" nominated by his Honour at [70] are merely three of the very points of comparison whose utilisation is in question, namely, pars (a), (b) and (f) of sub-s (5).
>
> [36] Those matters will not suffice as "exceptional circumstances" to disengage sub-s (5). For that purpose a court would have to find something beyond a mere difference between the "tendency sexual acts" and the "alleged sexual acts" (par (a)), or a mere difference in circumstances in which the "tendency sexual acts" and the "alleged sexual acts" occurred (par (b)), or a mere absence of shared distinctive or unusual features (par (f)). Either the court would have to find one or more of those features, or some other feature listed in sub-s (5), present in an exceptional degree, or some other exceptional circumstance different altogether from anything in pars (a)-(f). The legislature has provided no guidance as to the criteria by which "exceptional circumstances" might be discerned. It is sufficient for the determination of this appeal to say that, in order to be "exceptional", the circumstances must be more than just sufficient to enliven some of the points of comparison in pars (a)-(f).
>
> [37] Undoubtedly s 97A effects a very significant departure from the previous state of the law. The features described in pars (a)-(f) of sub-s (5), which the courts are now forbidden from taking into account in the assessment of whether putative tendency evidence has significant probative value, comprise substantially all of the criteria that, under the pre-

existing law, were regarded as the basis in logic and common sense for comparing the sexual acts said to prove the tendency with the sexual acts charged.

[38] It is clear from the language of s 97A that Parliament intended by enactment of this section that evidence that an accused person has exhibited a sexual interest in children, or has acted on such a sexual interest, should be deemed probative of any child sexual offence with which the person may be charged, in a very broad field of circumstances. Parliament also clearly intended that the courts should be constrained not even to consider countervailing indicia, tending against a conclusion of significant probative value, in any but exceptional circumstances. Those manifest intentions are reinforced by the Attorney General's second reading speech upon introduction of the Bill for the amendment.

[39] We accept the Director's submission that the question of admissibility of evidence to establish tendency (ii) must be redetermined by this Court under s 5F(5) of the Criminal Appeal Act, whichever standard of review should be considered applicable. His Honour erred in principle by failing to apply correctly the relevant legislation. Therefore, if the *House v The King* standard should be applied, the Court must make its own determination of whether the Crown's putative tendency evidence "does not have significant probative value" pursuant to s 97A(4) of the *Evidence Act*. If the appeal is to be determined upon application of the correctness test, then, again, the Court must form its own view under s 97A(4). We also accept that the exclusion of the evidence of KB and BB as tendency evidence on counts 1-10 concerning LB substantially weakens the Crown's case on those counts because it deprives the Crown of the only evidence independent of LB that would be capable of supporting his allegations. Accordingly, the precondition to allowing the Director's appeal, as prescribed in sub-s 3A of s 5F, is satisfied.

[40] We do not find any circumstances of the case that would justify the characterisation of "exceptional", thereby to permit consideration of the factors in s 97A(5)(a)-(f). Neither the degree to which some of those factors are exhibited in the evidence nor any other circumstance outside the range of those matters could be said to be exceptional. Hence, in its determination of whether the proposed tendency evidence lacks significant probative value, the Court is denied consideration of, or the opportunity to evaluate and weigh, any of the matters that could inform a reasoned finding, one way or the other, about significant probative value. Accordingly, the presumption in sub-s (2) of s 97A is not rebutted.

Tendency evidence – directions concerning evidence relied upon by defence

Waldron v R [2023] NSWCCA 128 – 9 June 2023

Lauren Waldron, the applicant, was found guilty after trial of wounding her ex-partner with intent to cause grievous bodily harm. Her case at trial was that of self-defence and she relied on tendency evidence about the complainant by way of agreed facts. The trial judge gave direction to the jury regarding the use of this evidence, which was the basis of both grounds of appeal. On appeal, the applicant contended that the trial judge erred in directing the jury that they should not draw the inference that the complainant had a tendency to act in a particular way unless it was the only rational inference in the circumstances and that the tendency could be taken into account in considering whether it is more likely than not that he acted in the alleged way.

Hamill J, with whom Button and Sweeney JJ agreed, allowed the appeal and held:

> [44] It is, by now, well established that tendency evidence is a species of circumstantial evidence and there is no requirement that it be proved to any particular standard, let alone (as these directions were want to suggest) that it must be proved beyond reasonable doubt: see, for example, *The Queen v Dennis Bauer (a pseudonym)* (2018) 266 CLR 56; [2018] HCA 40 ("*Bauer*") at [86]. Bauer was concerned with tendency evidence adduced against an accused person. In the present case, the evidence was adduced on behalf of the accused. It was wrong to suggest that she bore an onus of proof on this or any other issue in the trial.
>
> [45] As Simpson AJA said in *Basanovic v R* (2018) 100 NSWLR 840; [2018] NSWCCA 246 ("*Basanovic*") at [62]:
>
> > "There is no onus of proof on an accused person, and there is no standard of proof applicable to evidence called by an accused. The direction was erroneous."
>
> [46] *Basanovic* was a case where the accused relied on tendency evidence concerning the state of mind and behaviour of the alleged victim. The Basanovic brothers were charged with the murder of a man called Mr Mitrovic. Evidence was led to suggest that Mr Mitrovic had a tendency to become angry and violent when his commercial interests were threatened. Evidence of a number of incidents was led to establish the tendency. The trial Judge directed the jury:
>
> > "The evidence suggesting that Mr Mitrovic had that tendency can only be used by you in the way that the accused persons ask you to use it if you make two findings. The first finding is that you are satisfied that one or more of those acts occurred, that is the acts that you have heard evidence about. In making that finding you do not consider each of the acts in isolation, but consider all the evidence and ask yourself whether you find that a particular act or acts relied upon actually took place. *If you find that none of the acts are proved on the balance of probabilities then you must put aside any suggestion that Mr Mitrovic has the tendency that the accused persons say he does*."
> >
> > [Emphasis in original.]
>
> [47] That direction was held to be erroneous. In the case of Michael Basanovic, where self-defence was an arguable issue in the trial, the Court quashed the conviction and ordered a new trial.
>
> [48] The misdirections in the applicant's case were of a somewhat different kind. However, the combination of them was just as likely, perhaps more likely, to lead the jury to adopt an erroneous reasoning process. The jury should not have been warned to exercise caution before drawing inferences based on the tendency evidence and the tendency directions should not have been tied to circumstantial evidence directions requiring that all other rational inferences need to be excluded. Perhaps most significantly, the directions cast an onus on the applicant on one of the central issues in the trial: that is, who was the aggressor in the incident? As it was put by Mr Lange in his written submissions:
>
> > "In the factual circumstances of the case, the question was, of course, not whether it was more likely than not that the complainant had been the aggressor, but rather whether the [prosecution] had proven beyond reasonable doubt that he was not the aggressor."

Admissions – Exclusion of admissions in a police interview for impropriety

Mann v R [2023] NSWCCA 256 – 11 October 2023

Beau Mann, the applicant, is an Indigenous man who had an intellectual disability, making him a vulnerable person and was thus entitled to the protections provided in the *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW) (LEPRA). He was suspected of having committed several child sexual abuse offences. After the arrest, and despite being told that the applicant received and accepted advice not to agree to be interviewed and not to enter an interview room, the detective took the applicant to an interview room and conducted an ERISP. During this interview, the applicant made several admissions, which formed as the only evidence for a number of the charges against him. The applicant challenged the admissibility of the ERISP arguing it was improperly obtained pursuant to s138 of the Evidence Act. The trial judge agreed it was improperly obtained; however, held that its desirability of admitting it outweighed the undesirability and allowed the evidence.

The applicant appealed against his convictions on the basis that the ERSIP should not have been admitted into evidence. Kirk JA, with whom N Adams J and R A Hulme AJ agreed, allowed the appeal.

His Honour indicated that the process is a three step one:

> [10] When objection is taken under this section to the admissibility of evidence, the following steps are involved in resolving the issue:
>
> > (1) The judicial officer must find the relevant facts (if not agreed) with respect to how the evidence was obtained.
> >
> > (2) It is then necessary to reach a conclusion as to whether the evidence was obtained improperly or in contravention of an Australian law, or in consequence of such. Whether evidence was obtained as a result of a contravention of an Australian law involves a legal conclusion. Whether evidence was obtained as a result of impropriety involves a question of characterisation. If it was obtained by Police, then that issue is determined by reference to “minimum standards of acceptable police conduct”: *Kadir v The Queen* (2020) 267 CLR 109; [2020] HCA 1 at [14], quoting *Ridgeway v The Queen* (1995) 184 CLR 19 at 37; [1995] HCA 66. Section 138(2) and s 139 may also be relevant to finding impropriety.
> >
> > (3) If the judicial officer concludes that the evidence was obtained improperly or in contravention of an Australian law then the evidence is not admissible *unless* the judicial officer concludes that the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained. Once impropriety or illegality is established, the onus of proof and persuasion is on the party seeking that the evidence be admitted: note *Kadir* at [47]; *R v Riley* [2020] NSWCCA 283 at [36]. The conclusion involves the evaluative weighing up of those factors listed in s 138(3) which are relevant in the particular case. That list is not exhaustive; the judicial officer may also take into account any other relevant matters. The factors listed in s 138(3) may themselves involve issues of evaluation, such as consideration of the probative value of the evidence (par (a)), its importance in the proceeding (par (b)) and the gravity of the impropriety or contravention (par (c)).

His Honour noted:

[98] The applicant contends that Madgwick ADCJ erred, amongst other things, by failing to take into account two mandatory considerations in the balancing exercise: whether any other proceeding has been or is likely to be taken in relation to the impropriety or contravention (s 138(3)(g)) and the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law (s 138(3)(h)).

[99] The High Court explained the significance of s 138(3)(g) in relation to Police misconduct in *Kadir* at [16] (citations omitted):

> The ALRC identified the deterrence of police misconduct as a consideration informing the public interest in not admitting evidence that has been improperly or illegally obtained. It proposed that the availability of alternatives to the exclusion of evidence, such as civil actions, criminal prosecutions and internal and external disciplinary procedures, should be an important factor in the exercise of the discretion. Where an officer is likely to be dealt with in another forum for his or her misconduct, the need to exclude evidence as a deterrent is reduced. ... Here, the trial judge appears, correctly, to have treated the fact that no proceedings are likely to be taken against any person in relation to the contravention of the SDA as a neutral factor.

[100] The applicant argued that the onus was on the Crown to establish whether any other proceeding was likely to be taken in relation to the improprieties, it had not done so, and that meant "the full need for deterrence is there", which the judge did not take into account. The argument is unconvincing. If the Crown had established that some other action would have been taken against the improprieties then, as the High Court indicated, the need for deterrence is reduced. But there is nothing in the judgment to suggest that this factor was relevant here or acted to reduce the need for deterrence. It is simply not mentioned, no doubt because it was not raised by either side. Madgwick ADCJ did not err by not referring to a factor not raised and which, if made out, would have reduced the force of the considerations in favour of excluding the ERISP. Here, as in *Kadir*, par (g) was a neutral factor.

[101] The argument as to s 138(3)(h) has more force. Madgwick ADCJ identified three considerations weighing in favour of admissibility (see the quotation above at [73]): that much of the interview is true and highly reliable; that the ERISP was of great importance to the Crown case; and that it "is notoriously difficult for investigating officials to get the full story from a young child in cases of suspected sexual assault of them, even when specially trained people are trying to do it". As regards the third consideration, although his Honour does not refer in terms to the difficulty of obtaining *the* evidence – ie the admissions in the ERISP – by using the language of difficulty of obtaining evidence in such cases his Honour invokes either s 138(3)(h) itself or a closely analogous factor (recalling that the list of factors in s 138(3) is not exhaustive). The High Court in *Kadir* at [37] similarly referred not only to the difficulty of obtaining the particular surveillance footage being considered there but also to the difficulty of lawfully obtaining evidence of the illegal activity in question.

[102] Judge Madgwick's judgment was delivered on 23 November 2018. The High Court's judgment in *Kadir* was handed down just over a year later, in February 2020. The High Court said the following at [20] (citations omitted, emphasis added):

> 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.

[103] The current case is not one where there were circumstances of urgency. And it is evident that Madgwick ADCJ considered the impropriety of Detective Gibson to have been deliberate. Thus in this case, contrary to his Honour's conclusion, the difficulty of obtaining the evidence legally was one which weighed *against* admission. And the same is true insofar as the issue is considered at a somewhat higher level relating to the difficulty of obtaining inculpatory evidence generally in cases of this kind. Such a general difficulty may give an incentive for a deliberate "cutting of corners" by those gathering evidence (as referred to in the Australian Law Reform Commission report quoted in *Kadir* at [19]). It is important that any willingness by Police to give into that temptation be deterred.

[104] The Crown submitted that his Honour's statement "was not merely a general observation" but rather "was an observation directed to the particular circumstances of the present matter where, as his Honour had earlier observed, MS had described just two of the 44 offences with which the applicant has been charged". That characterisation is unpersuasive. The consideration identified by his Honour is a general one, as indicated by his reference to the notorious difficulty of obtaining a full account from a young child in cases of the identified kind. Even if the reason was understood to relate to the particular facts of this case, it nevertheless involves viewing a par (h) type factor as one militating in favour of admission of the ERISP, where the contrary view should have been taken.

[105] In light of the subsequent decision in *Kadir*, his Honour erred in treating the difficulty of obtaining evidence as a factor militating in favour of admission rather than as a factor going the other way. As the factor was one of three relied upon, and as his Honour indicated that he had not come to his conclusion easily, there is no doubt that it played a material role in his balancing assessment. The error here was of a *House v The King* kind, just as it was in *Kadir*, as his Honour acted upon a wrong principle.

[106] This conclusion suffices to find that the decision to admit the critical evidence in the ERISP was legally flawed. It is not necessary to address the applicant's other arguments in support of that conclusion.

In considering the admissibility of the ERISP under s138, his Honour assessed the conduct of the police officer, the second step, and held:

[109] The second step is consider whether or not his conduct in obtaining the evidence should, in context, be characterised as improper in the relevant sense. That is an issue of characterisation, not merely fact. I consider that Detective Gibson's conduct was improper in the sense of being a significant departure from minimum standards of acceptable Police conduct as follows.

[110] The conduct of Detective Gibson acted to nullify the protective effect of cll 31, 34, 36 and 37 of the LEPRA Regulation. The applicant was a vulnerable person in the sense employed in the LEPRA regulation both as an Aboriginal person and because he has an

> intellectual impairment. Detective Gibson was aware of those matters, having been told by Senior Constable McSweeney. Clause 37 of the LEPRA Regulation is directed towards facilitating Indigenous individuals having access to legal advice following their detention, and that was availed of here. Yet Detective Gibson ignored the fact, which had been communicated to him, that the applicant and his mother had accepted the advice of the ALS and had expressed that they did not want to be interviewed.
>
> [111] Clause 36 of the LEPRA Regulation requires that the person responsible for the welfare of a detained person with impaired functioning be notified, and that occurred. Clause 31 entitles a vulnerable person to have a support person present during an investigative procedure. Ms Mann attended the Police station in that context. Detective Gibson sought to persuade her to let the applicant be interviewed, thus recognising that in practice she was the responsible decision-maker on the issue. She said no.
>
> [112] Despite his knowledge of what had been communicated to ALS, and despite what he had been told by the applicant's mother, he took the applicant into an interview room and commenced an interview without explanation, and without asking either Ms Mann or the applicant if they wished to do the interview. No doubt Detective Gibson considered – correctly – that given the applicant's earlier admissions, the applicant would likely respond to questioning in frank terms. The motivation of an investigator to try to get the applicant talking on the record is understandable. It does not justify undermining the legal protections of vulnerable people.
>
> [113] It would have been reasonable for Detective Gibson to confirm with Ms Mann that the applicant was not to be interviewed. But having done so, and been told no, it was quite improper to commence the interview anyway, without explanation or further checking, in order to get the applicant talking. In so doing Detective Gibson undermined the operation of cll 31, 36 and 37 of the LEPRA Regulations.

His Honour further held:

> [115] There was further impropriety in the way the interview was conducted. Detective Gibson did not properly facilitate Ms Mann's role as support person during the interview. She was given information as to her role. However, cl 34(1) of the LEPRA Regulations provides that a support person may assist and support the suspected person, observe whether the interview is being conducted properly and fairly, and identify communication problems. These protections were undermined as she was effectively sidelined in the interview process, in particular by being "placed in the room in a way that would indicate she was not on an equal footing with the other people in the room" (to quote Madgwick ADCJ).
>
> [116] Taken as a whole, the conduct of Detective Gibson involved impropriety in the sense employed in s 138. Indeed, here the conduct is appropriately characterised as being substantially improper.

His Honour then went on to step three of the process and noted:

> [119] The third step of the process is to consider whether the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained, taking account of the factors listed in s 138(3). The burden of persuasion falls on the Crown.

After exploring the factors listed in s138(3), and in concluding to exclude the evidence, his Honour held:

> [126] In sum, there are significant factors militating in favour of admitting the ERISP. But where the impropriety directed to a vulnerable person was deliberate and very serious, and in circumstances where obtaining such evidence without impropriety or illegality was likely to be difficult, I consider it clear that the desirability of admitting the evidence does not outweigh undesirability of admitting it in light of the manner in which it was obtained. My view, thus, is that the evidence is inadmissible pursuant to s 138 of the *Evidence Act*.

A co-accused is “a party” for the purposes of s 135(a) of the Evidence Act 1995 and once admitted evidence against one co-accused can be used for or against another co-accused

McNamara v R [2023] HCA 36 – 15 November 2023

Glen McNamara, the applicant, and his co-accused, Mr Rogerson, were charged with one count of murder and one count of supplying a large commercial quantity of methylamphetamine. The Crown case was that both accused had engaged in a joint criminal enterprise. The applicant’s case at trial was that he was not party to a joint criminal enterprise with his co-accused to dispossess the deceased of the drugs or to kill him. The applicant’s case was that his co-accused had shot the deceased after an altercation using a gun that the applicant until that point was unaware of. The applicant intended to give evidence during the trial about the co-accused having told him that he had murdered a number of people in the last years, which the co-accused objected to, relying on s135(a) of the Evidence Act. Mr Rogerson argued that probative value of the proposed evidence was substantially outweighed by the danger of its prejudicial effect on him. The trial judge upheld the objection and did not allow the evidence.

The applicant appealed and the question for the Court was whether ‘a party’ includes a co-accused in a joint criminal trial. The majority, per Gageler CJ, Gleeson and Jagot JJ, dismissed the appeal holding that ‘a party’ in s135(a) extends to and includes a co-accused in a joint trial. The Court held:

> Given that it is in the nature of a joint trial that evidence adverse to one or more co-accused can become known to the jury which would not be known to separate juries were separate trials of each co-accused to be conducted, the existence of some risk of forensic prejudice to an accused arising from the admission of such evidence is inherent in any joint trial and is not of itself inconsistent with the overall interests of justice supporting the conduct or continuation of the joint trial. Prejudice to a co-accused will not result in the ordering of a separate trial if it is amenable to nullification by judicial direction to the jury. Having regard to the strength of the reasons of principle and policy which ordinarily weigh in favour of a joint trial, however, even substantial prejudice to a co-accused of a kind not really amenable to nullification by judicial direction will not result in the ordering of a separate trial "as a matter of course". To justify the ordering of a separate trial, the particular prejudice to a co-accused must rather be shown to be such as would occasion "positive injustice". In a joint trial, as in any other trial, "[a] fair trial according to law does not mean a perfect trial, free from possible detriment or disadvantage of any kind or degree to the accused".
>
> [footnotes omitted].

The Court then discussed the operation of s135(a) in joint criminal trials and noted:

> [58] The upshot is that the construction of s 135(a) turns on the meaning properly to be attributed to the text of that provision purposively construed in the context of the Evidence Act. Section 9(1) would not require any modification of a purposive and contextual construction of the text of s 135(a) even if it were assumed that the principle for which McNamara contends was at the time of enactment of the Uniform Evidence Acts, or has since become, a principle of the common law of Australia.
>
> [59] Critical to a purposive and contextual construction of the text of s 135(a) is understanding how the Evidence Act applies to a joint criminal trial. And key to understanding how the Evidence Act applies to a joint criminal trial is an appreciation of two ubiquitous and generic undefined statutory terms. The foundational term is "proceeding". The other inherently related term is "party".
>
> [60] The Evidence Act uses the plural in expressing itself to apply to "all proceedings" in a designated court. For some purposes, it draws a distinction between "a criminal proceeding" and "a civil proceeding", defining "civil proceeding" to mean "a proceeding other than a criminal proceeding" and "criminal proceeding" to mean "a prosecution for an offence". The latter definition encompasses what it describes for more particular purposes as "a criminal proceeding for an indictable offence". To the extent that it refers to "a proceeding" that is "a criminal proceeding", it therefore encompasses a trial by jury on an indictment.
>
> [61] Throughout the Evidence Act, the term "party" is used in provisions applicable to a criminal proceeding and to a civil proceeding alike. In that context, as the Court of Criminal Appeal correctly observed in the decision under appeal, the term is apt to describe a participant in a proceeding whose rights or liabilities might be affected by evidence adduced in that proceeding and is apt to describe all and each of those participants. More specifically, in its application to a criminal proceeding, including a proceeding on an indictment, the term is apt to describe both a participant whom other provisions refer to as "the prosecutor" and a participant whom those same provisions refer to as "a defendant".
>
> [62] Applying the terminology of the Evidence Act to the one joint trial which must be had on the one joint indictment, it is therefore apparent that the joint trial is "a proceeding" to which the Crown ("the prosecutor") is "a party" and to which each co-accused ("a defendant") is also "a party". Once that is accepted, the coherent scheme of the Evidence Act in its application to a joint trial on a joint indictment readily unfolds.
>
> [footnotes omitted]

The further noted:

> [69] The combined operation of ss 55(1) and 56(1) can be no different in their application to a multi-party criminal proceeding. For the purposes of s 55(1), the facts in issue in a criminal proceeding are the ultimate facts which establish the elements of the offence or offences charged together with such other facts the existence of which may be probative of the existence of those ultimate facts Applied to a criminal proceeding constituted by a joint trial on a joint indictment, ss 55(1) and 56(1) produce the result that any evidence adduced on the basis that it is probative of the existence of a fact in issue between the Crown and a co-accused is available to be used by the jury in assessing the probability of the existence of any other fact in issue between the Crown and that co-accused or between the Crown and any other co-accused, unless and to the extent that the admission

of the evidence is excluded, or the use of the evidence is limited, by or under some other section. That is so for all evidence adduced in the joint trial, whether by the Crown or any co-accused and whether in examination in chief or in cross-examination.

70 Within the framework so set by s 55(1) and s 56(1), ss 135, 136 and 137 use similar terminology to provide for a complementary set of exclusions and limitations. In particular, s 135(a)'s provision that "[t]he court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might ... be unfairly prejudicial to a party" is mirrored by s 136(a)'s provision that "[t]he court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might ... be unfairly prejudicial to a party". Each of those discretionary provisions is applicable in a criminal proceeding as it is in a civil proceeding. Section 137 then adds that "[i]n a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant".

Other Issues

BAIL – The proper construction of s 77 of the *Bail Act 2013* considered

Bugmy v DPP (NSW) [2023] NSWSC 862 – 25 July 2023

Bugmy was charged, and convicted, of resisting a police officer in the execution of duty contrary to s 58 of the *Crimes Act 1900*, as it was at the time. At the time of the commission of the offence, the appellant was on conditional bail. Having determined that she was in breach of a condition of her bail, not in dispute, a police officer attempted to arrest her, which she resisted.

She appealed against her conviction to the Supreme Court pursuant to s 52(1) of the *Crimes (Appeal and Review) Act 2001* arguing that the officer's exercise of his arrest power under s77 of the *Bail Act 2013* was unlawful and thus not acting in '*the execution of his or her duty'*. The appeal concerned a question of law alone and was brought as of right.

On appeal, she argued that the Magistrate had wrongly construed s77 and that the officer, in arresting her under s77(1), failed to adhere to the terms of s77(3), which is expressed in mandatory terms and provides for qualifications in considering what, if any, action if to be taken under s77(1).

Section 77 (relevantly) provides:

77 Police officers may take actions to enforce bail requirements

(1) Unless section 77A applies, a police officer who believes, on reasonable grounds, that a person has failed to comply with, or is about to fail to comply with, a bail acknowledgment or a bail condition, may—

(a) decide to take no action in respect of the failure or threatened failure, or

(b) issue a warning to the person, or

(c) issue a notice to the person (an application notice) that requires the person to appear before a court or authorised justice, or

(d) issue a court attendance notice to the person (if the police officer believes the failure is an offence), or

(e) arrest the person, without warrant, and take the person as soon as practicable before a court or authorised justice, or

(f) apply to an authorised justice for a warrant to arrest the person.

(2) However, if a police officer arrests a person, without warrant, because of a failure or threatened failure to comply with a bail acknowledgment or a bail condition, the police officer may decide to discontinue the arrest and release the person (with or without issuing a warning or notice).

(3) The following matters are to be considered by a police officer in deciding whether to take action, and what action to take (but do not limit the matters that can be considered)—

(a) the relative seriousness or triviality of the failure or threatened failure,

(b) whether the person has a reasonable excuse for the failure or threatened failure,

(c) the personal attributes and circumstances of the person, to the extent known to the police officer,

(d) whether an alternative course of action to arrest is appropriate in the circumstances.

Wilson J, dismissing the appeal, held, at [33], that s77(3) "*does not impose a mandatory requirement upon police officers that limits the power to arrest for breach of bail. The only limitations or pre-conditions upon that power are those which appear in s 77(1) itself; that is, that s 77A does not apply; and that the power may be exercised only where an officer "believes, on reasonable grounds, that a person has failed to comply with, or is about to fail to comply with, a bail acknowledgment or a bail condition"*".

With respect to the construction of s 77, her Honour noted:

[47] *Once a person is admitted to conditional bail, Part 8 of the Act regulates the "Enforcement of bail requirements". The construction of that Part must be carried out by reference to the text, in the context of the Act, and ensuring that the purpose of the legislation is achieved*.

[48] *The power available to a police officer provided by s 77 of the Act must be construed by reference to those same considerations*.

[49] *The text of s 77 is set out above. It is of some relevance to note the wording of the heading to the section: "Police officers may take actions to enforce bail requirements" (emphasis added). The use of the word "may" points to a discretion to take actions and, implicitly, what action to take*.

[50] *What might otherwise be immediately observed is that the power provided by s 77(1) is qualified by two stated pre-conditions or considerations, both of which are in the sub-section itself. The first limitation is found in the opening words of the sub-section: "Unless s 77A applies ...". Section 77A applies to persons subject to arrest by warrant, a sentence of imprisonment having been imposed, but stayed pending apprehension. Section 77A is of no relevance in the present context, other than to draw attention to the fact that the opening words of s 77(1) themselves qualify the operation of the powers provided under the sub-section*.

[51] *The second qualification on the power provided by s 77(1) is also found in the words of the subs-section, by stating that action enumerated in s77(1)(a)–(f) may only be taken where "a police officer … believes, on reasonable grounds, that a person has failed to comply with, or is about to fail to comply with, a bail acknowledgment or a bail condition". Those are the only limitations upon the decision to take action pursuant to s 77(1)(a)–(f). On the basis that s 77A does not apply, and where a police officer has formed the relevant belief on reasonable grounds, the officer may take any of the actions listed in the provision. Which of them to take, if any, is a discretionary matter for the officer*.

OFFENCES – Break and enter offences require a trespass

BA v R [2023] HCA 14 – 10 May 2023

BA, the applicant, was charged and acquitted by directed verdict direction of aggravated break and enter. The applicant and the complainant were in a domestic relationship and were co-tenants of an apartment. After the relationship broke down, he moved out and removed most of his possession. He ceased paying rent; however, remained on the lease as a co-tenant. In July 2019, he demanded to be let in but when the complainant refused him entry, he kicked the door in and entered. On trial, the trail judge directed that a verdict of not guilty be made given that the applicant had a right to enter and could not be found guilty of breaking into his own premises. The Crown appealed against that acquittal and the Court of Criminal Appeal allowed the appeal. The applicant then appealed to the High Court. By majority, per Gordon, Edelman, Steward and Gleeson JJ, the appeal was allowed and the Court held that 'break and enter' required an entry into premises without lawful authority; trespass. The Court noted:

> [36] This difficult case illustrates the complexities of the concept of "break and entry", the meaning of which was established in historical circumstances quite different from contemporary society, including when domestic and family violence was generally not treated as criminal. In other jurisdictions, "breaking and entering" as an element of housebreaking and burglary offences has been replaced with trespass or unlawful or unauthorised entry in response to these complexities, while avoiding the extension of those offences to lawful entries.
>
> 37 No such amendment or replacement of the older concepts has been undertaken by the New South Wales Parliament in respect of s 112 of the *Crimes Act 1900* (NSW). That section, which, as will be explained below, instantiates the long common law and statutory history of "breaking and entering", relevantly provides:
>
> > "(1) A person who:
> >
> > > (a) breaks and enters any dwelling-house or other building and commits any serious indictable offence therein ...
> >
> > is guilty of an offence and liable to imprisonment for 14 years.
> >
> > (2) **Aggravated offence** A person is guilty of an offence under this subsection if the person commits an offence under subsection (1) in circumstances of aggravation. A person convicted of an offence under this subsection is liable to imprisonment for 20 years."
>
> [38] The appellant and the complainant, his former partner, were co-tenants of an apartment in Queanbeyan subject to a residential tenancy agreement under the *Residential Tenancies Act 2010* (NSW) ("the RT Act"). They separated and the appellant

moved out. While still a co-tenant at law, the appellant attended the apartment and demanded to be let in. The complainant refused him access. The appellant kicked in the door, damaging the doorframe, and intimidated and assaulted the complainant. Having been acquitted of the offence under s 112(2), the appellant eventually pleaded guilty to common assault, intimidation and destruction of property.

[39] The question raised by this appeal is: for the purposes of s 112 of the *Crimes Act*, did the appellant commit a "break[] and enter[]"? The answer is "no", and the appeal should be allowed.

[40] The case is to be decided by an analysis of the common law and legislative history, and their interactions with long-standing concepts in property law and the relevant residential tenancy law. The appeal presents four interrelated issues. The first and central issue is whether, for the purposes of s 112 of the *Crimes Act*, a person "who breaks and enters any dwelling-house" must be a trespasser, that is, whether the offence may only be committed by a person who enters a premises without lawful authority. The second, third and fourth issues are all, in effect, alternative contentions focused upon rights conferred and obligations imposed on a tenant under the RT Act.

[41] The second issue, related to the first, is whether such lawful authority to enter a premises is removed where the entry is made without the consent of the present occupant. The third and fourth issues concern whether certain provisions of the RT Act somehow condition a tenant's lawful authority to enter a premises. The third issue, raised by the Crown in oral argument, is whether entry into a residential premises under a "right of occupation" granted under a residential tenancy agreement is conditional upon the tenant's purpose being to use the premises as a residence. That issue was framed as whether, where a tenant's purpose of entry is other than to use the premises as a residence – such as a purpose of assaulting an occupant inside the premises – the tenant no longer has any legal entitlement to be on those premises. The fourth issue, raised by the Crown's notice of contention, is whether a tenant's right to enter a premises is qualified by the operation of s 51(1)(d) of the RT Act, which prohibits a tenant from "intentionally or negligently caus[ing] or permit[ting] any damage to the residential premises".

[42] For the reasons given below, the composite elements of "breaks and enters" in s 112(1)(a) require a trespass, that is, entry to premises of another without lawful authority. The appellant's "right of occupation", granted under his residential tenancy agreement, was not in the nature of a mere permission to occupy that might be qualified in the ways contended for by the Crown. The appellant had a right of exclusive possession which would not have been lost even if it had been found that he ceased to occupy the premises prior to the expiry or termination of the residential tenancy agreement. Consistent with that right, the appellant had lawful authority for entry into the Queanbeyan apartment, including by force of the kind that would constitute a "break" in the absence of such authority, so that his forcible entry was no trespass. Having that authority, the appellant did not require the complainant's consent to enter the residential premises. The appellant's liberty to enter the premises was also not conditional upon his having a purpose to use the premises as a residence, nor was it removed when he entered the apartment by force, in contravention of s 51(1)(d) of the RT Act. Accordingly, the appeal should be allowed.

[footnotes omitted].

OFFENCES – Participate in a criminal group

Mohana v R [2023] NSWCCA 61 – 22 March 2023

Bilal Mohana, the applicant, was convicted on supplying a prohibited drug and dealing with proceeds of crime after a judge alone trial. A further offence of participating in a criminal grouping was placed on a s166 certificate, which the applicant also plead not guilty to. The trial judge, by consent of the parties, relied on the evidence in the trial and found the applicant guilty of this offence too.

The applicant appeal against his conviction on all counts, one of which is that the verdict on the s166 matter was unreasonable. Simpson AJA, with Davies and Wilson JJ agreeing, dismissed the appeal. Her Honour noted:

> [101] It is of some importance that the trial judge limited the "criminal group" to three individuals – the applicant, Mousselmani and Maroun.
>
> [102] The submission made on behalf of the applicant may be stated succinctly. It was:
>
> > (i) that proof of the existence of a "criminal group" required proof that members of the group (three or more individuals) have a "shared objective" (citing *Czako v R* [2015] NSWCCA 202);
> >
> > (ii) that the Crown failed to prove that the three identified participants had such a "shared objective".
>
> [103] The first proposition is correct. In *Czako* at [44], McCallum J (as her Honour then was) said:
>
> > "In order to establish the first element, the Crown had to prove beyond reasonable doubt the existence of a group of three or more people who had the relevant shared objective."
>
> That proposition arises in any event from the clear terms of the chapeau to s 93S(1).
>
> [104] The applicant's argument in relation to the second proposition was that, on the evidence, the objectives of the three alleged participants did not coincide: that was because Maroun's objective was to obtain material benefits from selling prohibited drugs to the applicant and/or Mousselmani; the applicant's and Mousselmani's objective was to obtain material benefits from selling prohibited drugs to others. Thus, the objectives of the participants were divergent, not shared.
>
> [105] The argument prompted an intervention by the court, which focused attention on the words "a serious indictable offence" in subs (1)(a) of s 93S, with emphasis on the indefinite article. The suggestion was that subs (1)(a) required the identification of conduct constituting a single serious indictable offence from which all participants sought to obtain material benefits. In one sense that was a more precise formulation of the applicant's original submissions.
>
> [106] Both parties assisted with supplementary written submissions. Having considered the submissions, I am now satisfied that ground 4 should be rejected.
>
> [107] It is, I think, correct that s 93S(1)(a) requires identification of conduct that constitutes a [single] serious indictable offence. Identification of a series of disparate, even if connected, offences will not be sufficient.

> [108] At one point, it appeared to me that that requirement could not be met in this case, because the indictable offence constituted by the conduct of Maroun in selling prohibited drugs to the applicant and Mousselmani was not the same indictable offence constituted by the conduct of the applicant and Mousselmani in on-selling to others the drugs they had received from Maroun. However, that is to give too narrow an interpretation to s 93S(1)(a). In practical terms, only one individual offence is necessary to be established. That is the supply, by Maroun, of drugs to the applicant and Mousselmani. There is no doubt, and no issue, that Maroun sought to obtain (immediate) material benefits from that supply. But so also did the applicant and Mousselmani. The material benefits obtained by them were (or would be) directly derived from the on-sale. But the first step on the way – providing the applicant and Mousselmani with the means to on-sell – was the conduct of Maroun in selling the drug to them. Thus, each of the three participants shared the objective of obtaining material benefits from the conduct of Maroun in selling the drugs to the applicant and Mousselmani.

> [109] No proposition was advanced to the effect that, if the evidence established that a "criminal group" existed, the evidence failed to establish participation by the applicant. The evidence clearly did establish that. I would therefore reject ground 4 of the proposed appeal. I am satisfied that the evidence was sufficient in nature and quality to eliminate any reasonable doubt that the applicant was guilty of this offence.

WITHDRAWAL OF GUILTY PLEA – The Test

White v R [2022] NSWCCA 241 – 18 November 2022

Scott White, the applicant, was charged with the murder of Scott Johnson between 7 and 11 December 1988 at Manly. The matter was listed for trial on 2 May 2022 with a voir dire to be held on 10 January 2022. On this day, he was arraigned and entered a plea of guilty to the charge, despite having maintained his instructions to plead not guilty for 2 years, up until a conference that was held with his legal representatives shortly before the arraignment. The primary judge adjourned the matter shortly to allow a conference between the applicant and his legal team to take place. During this conference, the applicant signed a statement indicating that he had been confused and was worried about his former wife coming after him and that he wanted to plead not guilty and proceed with the trial.

Upon resumption, an application was made for the arraignment to be repeated and if not, then for the Court to hear an application to vacate the plea of guilty. It was not contended that the plea was made in error and at that point, no refence was made to the applicant's signed statement. On this basis, the primary judge refused to re-arraign the applicant and adjourned the matter to the following day for hearing of the application. Following the two-day hearing, the Judge refused granting leave to withdraw the plea as her Honour was not persuaded that not doing so would constitute a miscarriage of justice. He was then sentenced on 3 May 2022.

The applicant appealed against his conviction relying on two grounds; a miscarriage of justice occurred in respect of his conviction and that the primary judge had erred in refusing to grant leave to withdraw the guilty plea. In essence, the applicant contended that "*her Honour applied the wrong legal test, namely the "miscarriage of justice" test, and that the question whether leave to withdraw a plea should be granted before conviction should simply be determined by reference to what the interests of justice require*" ([20]). The Court, per Bell CJ, Button and N Adams JJ, allowed the appeal.

The Court, at [16], referred to *Tomlinson v R* [2022] NSWCCA 16, per N Adams J, noting generally about conviction appeals:

> [121] In addition to allowing a conviction appeal if the court is of opinion that the verdict of the jury is unreasonable ('the first limb'), or that there has been a wrong decision of any question of law ('the second limb'), the court may also allow an appeal against conviction if of the opinion 'that on any other ground whatsoever there was a miscarriage of justice' ('the third limb'). Section 6(1) goes on to provide that the court may, even if it is of opinion that 'the point or points raised by the appeal' might be decided in favour of the appellant, dismiss the appeal if it considers that 'no substantial miscarriage of justice' has actually occurred. This is commonly referred to as 'the proviso'.

The Court noted, at [21], "*As was stated by Gageler J in Hofer, "[w]hat is essential to the finding of miscarriage of justice is that the irregularity had the meaningful potential or tendency to have affected the result of the trial." Although the present appeal does not concern an irregularity in the course of a trial, as did Hofer, Gageler J's formulation is equally apposite in the case of an appeal against conviction after the entry of a guilty plea*".

The Court further noted, at [23], that "*One important point of context that was stressed throughout the argument on appeal was the need to differentiate between, on the one hand, an application for leave to withdraw a plea of guilty prior to conviction (**the first scenario**) and, on the other hand, an appeal from conviction notwithstanding a plea of guilty on the basis that, at that [appellate] stage, the Court should go behind the plea and, if necessary, permit it to be withdrawn for some good reason (**the second scenario**)*".

After careful considerations of the submissions and relevant authorities, the Court stated the following in relation to the test:

> [58] The proposition that the Court of Criminal Appeal may quash a conviction entered upon a plea of guilty only if it is demonstrated that a miscarriage of justice will occur if the plea is not permitted to be withdrawn is unimpeachable in the context of what we have described as a second scenario case. That is because, in such a scenario, the Court at first instance has simply accepted the plea and proceeded to convict and sentence the appellant; it has not been called upon to make any decision on a question of law that may be "wrong", so as to attract what has been described as the "second limb" of s 6(1) of the *Criminal Appeal Act*. Only the third limb of that section ("miscarriage of justice") is available to an appellant in such circumstances and so it is entirely apposite to speak of the need to establish a miscarriage of justice in the second scenario, as that is the criterion that must be satisfied if an appeal is to succeed following conviction upon a plea.
>
> [59] But it does not follow that the language of miscarriage is apposite in what we have described as the first scenario cases, namely where leave has been sought to withdraw a plea prior to entry of conviction (and sentence). That is so both as a matter of authority and as a matter of principle. Unlike in second scenario cases, the "miscarriage of justice" test has no "statutory root" when applied in the context of a first scenario case.
>
> [60] We are comfortably satisfied from our review of the authorities that, although there has been a conflation of tests in some cases and some summaries of authority, the proper test to be applied where an accused seeks leave to withdraw his or her plea of guilty *prior to conviction* (a first scenario case) is whether the interests of justice require that course to be taken.
>
> [61] The judgments of at least Toohey J and Gaudron and Gummow JJ in *Maxwell* support this conclusion and, even if strictly *dicta*, are "seriously considered" in the sense referred

to in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*. It follows that the decisions in *Boag*, *Wong* and *Garcia-Godos* must be regarded as wrongly decided and should not be followed in a case where an application is made for leave to withdraw a plea of guilty before conviction.

[62] A sensible distinction is to be drawn between allowing a plea to be withdrawn *before conviction* and *going behind* a guilty plea that has led to a conviction on appeal. The distinction between the two scenarios is brought home by consideration of the concept of finality, which is frequently mentioned in cases involving applications to withdraw a plea, as it was in the present case. Where a conviction has been entered and sentence passed, any attempt on appeal to disturb that outcome will necessarily impact on the finality of the verdict and sentence. On the other hand, where a conviction has not yet been entered even though the accused has pleaded guilty, nothing is final because it remains open for the Crown or the Court not to accept the guilty plea and, in the case of the Crown, to withdraw its acceptance at any time until the formal recording of a conviction and sentence. That was what *Maxwell* was all about.

[63] Indeed, the distinction between the two scenarios goes to jurisdiction. *Hura* confirmed, for example, that, once the District Court of New South Wales has accepted a plea of guilty (entered mid-trial) and discharged the jury, the plea may not be withdrawn thereafter. In *R v Chiron*, it was also held that there was no jurisdiction to permit withdrawal of a guilty plea once a jury had returned a verdict and been discharged. In these cases, an accused seeking to go behind his or her plea of guilty could only do so on appeal against conviction, in which to succeed a miscarriage of justice would need to be established. That is why in *Hura*, Spigelman CJ dealt with the matter under the heading "[m]iscarriage of justice".

[64] We would respectfully reject the Director's fallback submission that there is no real or material difference between the interests of justice test and the "miscarriage of justice" test. A positive conclusion on the balance of probabilities that there *would* be a miscarriage of justice if a plea was not permitted to be withdrawn is, no doubt, the paradigm case where it will be in the interests of justice to permit withdrawal of a plea. But equally, it may also be in the interests of justice to permit a plea to be withdrawn if there is a *risk* of a miscarriage of justice, provided that the risk is a real and not fanciful one.

[65] The interests of justice test is broader and may focus on matters going beyond the integrity of the plea, although that will very often be the focal point of the inquiry. A non-exhaustive list of factors affecting the interests of justice will include:

- the circumstances in which the plea was given;
- the nature and formality of the plea, involving as it does the admission of all the formal elements of the offence;
- the importance of the role of trial by jury in the criminal justice system;
- the time between the entry of the plea and the application for its withdrawal;
- any prejudice to the Crown that might arise from the withdrawal of the plea;
- the complexity of the elements of the charged offence;
- whether all of the relevant facts upon which the Crown intended to rely were fully known to the accused;
- the nature and extent of legal advice received by the accused before entering the plea;
- the seriousness of the alleged offending and thus the likely consequences in terms of penalty;
- the subjective circumstances of the accused;

- any intellectual or cognitive impairment suffered by the accused, notwithstanding their fitness to plead;
- any reason to suppose that “the accused [was] not thoroughly aware of what he [or she was] doing”;
- any extraneous factors that bore upon the making of the plea at the time it was made, including inducement by threats, fraud or other impropriety;
- whether the accused has been persuaded to enter a plea by reason of imprudent and inappropriate advice tendered by his or her legal representatives;
- any explanation that has been proffered by the accused for the application to withdraw their guilty plea;
- any consequences to victims, witnesses or third parties that might arise from the withdrawal of the plea; and
- whether, on the material before the Court, there is a real question about the accused’s guilt to the charge in respect of which the plea has been entered.

[66] In relation to this last matter, we reject the submission advanced by the Crown that consideration of whether there is a “real question about the guilt of the accused” should be a discrete element or stage of the inquiry. The preferable approach, in our opinion, is that it is a factor to be weighed, where relevant, in all the circumstances of the case.

[67] Whether or not an accused goes into evidence to explain the reasons for his or her application to withdraw a plea may be relevant, but it is not necessarily determinative. One clear example where it would not be necessary for the accused to do so is where, on the facts, it can be demonstrated that the offence to which the accused pleaded guilty could not legally be made out even with the benefit of the admission of all elements inherent in the plea itself. Another example may be where there is other evidence which bears upon the accused’s reasons for the attempt to withdraw the plea, such as the Applicant’s Signed Statement in the present case. That statement was admitted into evidence without objection as an annexure to Ms Sutherland’s Affidavit. Although it was of a hearsay nature and could have been objected to on that basis, once admitted it became evidence before the primary judge of the Applicant’s reasons for seeking leave to withdraw his plea, albeit evidence that was not able to be tested by cross-examination of the Applicant.

[68] The onus of persuading a judge to permit the withdrawal of a plea of guilty is on the accused. Although there are statements to the effect that courts should approach attempts at trial or on appeal (after conviction and sentence) to withdraw a plea of guilty “with caution bordering on circumspection”, it is important that the undoubted discretion which exists in what we have described as a first scenario case should not be fettered. In this context, we are in agreement with the observations of White J and Bollen J in *Kitchen* that the language used by Lord Upjohn in *Recorder of Manchester*, namely that the discretion should be exercised only in “clear cases and very sparingly”, is neither necessary nor desirable. It is apt to fetter the exercise of the discretion. It is notable that none of the other Law Lords in *Recorder of Manchester* proffered such a view. So too, in *Webb and Hay*, Debelle J said that “[i]t does not seem that the discretion should be exercised only in clear cases and very sparingly but that is not to say the discretion should be exercised liberally”.

[69] For similar reasons, we would reject the argument advanced in the Director’s Supplementary Submissions that an accused seeking leave to withdraw a guilty plea bears a “substantial” or “heavy onus” of proof. While the onus of proof is certainly borne by the accused in an application for leave to withdraw a guilty plea, there is no principled basis for this Court to treat that onus as any “heavier” than in other circumstances where a party seeks to persuade a court to exercise a discretion in the interests of justice.

[70] Each case will necessarily turn on its own facts but examples of cases where the interests of justice will warrant the withdrawal of a plea of guilty include those listed by Spigelman CJ in *Hura* and by Payne JA in *Layt* (also being cases where a miscarriage of justice would occur). These include cases where:

- the nature of the charge to which the plea has been entered is not appreciated;
- the plea is not "a free and voluntary confession";
- the "plea [is] not really attributable to a genuine consciousness of guilt";
- there has been a "mistake or other circumstances affecting the integrity of the plea as an admission of guilt";
- the plea has been "induced by threats or other impropriety" and the applicant would not otherwise have pleaded guilty;
- the plea is not unequivocal or is made in circumstances suggesting it is not a true admission of guilt; and
- "the person who entered the plea was not in possession of all of the facts and did not entertain a genuine consciousness of guilt".

[71] It should also be noted that where a plea of guilty is entered during committal in the Local Court and the accused is then committed to the District Court or Supreme Court for sentence (which is, of course, not this case), s 103(1) of the *Criminal Procedure Act* appears to contemplate that, for offences other than those attracting life imprisonment, an accused may withdraw the plea without leave of the Court and the judge *must* direct that he or she be put on trial for the offence. In cases where the offence is punishable by life imprisonment, the judge has a general discretion to make an order remitting the matter back to the Local Court, where the committal proceedings will continue as if the accused had not pleaded guilty. The absence of any statutory criteria for the exercise of this discretion is consistent with it being exercisable judicially, where the interests of justice so require.

[footnotes omitted]

The Court concluded, at [72], that "*the wrong legal test was applied to the application for leave to withdraw the Applicant's plea of guilty*", therefore, as the Crown accepted, given the conviction was based on a plea of guilty, the withdrawal of which was refused by applying the wrong test, it amounted to miscarriage of justice.

In relation to the proviso, the Court, at [73], referred to *Filippou v The Queen* [2015] HCA 29, per French CJ, Bell, Keane and Nettle JJ:

[15] By 'substantial miscarriage of justice' what is meant is that *the possibility cannot be excluded beyond reasonable doubt that the appellant has been denied a chance of acquittal which was fairly open to him or her or that there was some other departure from a trial according to law that warrants that description*. Consequently, if the Court of Criminal Appeal is persuaded that the first limb applies, it will follow that it has concluded that there has been a substantial miscarriage of justice. In contrast, where the second limb applies, the circumstances in some cases may be such that, despite the judge making 'the wrong decision of [a] question of law', the Court of Criminal Appeal is persuaded that the error could not have deprived the appellant of a chance of acquittal that was fairly open to him or her. In that case the proviso will operate. Where the third limb is engaged, if the Court of Criminal Appeal has concluded that the appellant has not received a fair trial it will follow that it has concluded that there has been a substantial miscarriage of justice. But where, despite some other identified irregularity, the Court of Criminal Appeal is satisfied that the appellant has received a fair trial according to law and

> not otherwise been deprived of a chance of acquittal that was fairly open to him or her, once again the proviso will operate. (emphasis added; footnotes omitted)

In allowing the appeal, the Court concluded, at [74]:

> In the present case we are unable to conclude that no substantial miscarriage of justice actually occurred because, although the matter might be thought to be finely balanced, we are not persuaded that the result would have been the same had the interests of justice test been applied to the Applicant's application for leave to withdraw his plea of guilty. In other words, there was a real possibility that, had this test been applied on the application, it would have been granted. Plainly enough, if this had occurred, the Applicant could not have been convicted without going to trial. …

WITHDRAWAL OF GUILTY PLEA – Whether *White* concerning the test relating to withdrawing a plea of guilty is "plainly wrong"

Garcia-Godos v R; *MH v R* [2023] NSWCCA 145 – 19 July 2023

Luis Garcia-Godos and MH, the applicants, entered pleas of guilty to the charges they were facing then sought to withdraw these pleas after being convicted. This application was refused and they were sentenced in the District Court. The applicants appealed after the decision in *White* was handed down, contending that the wrong test was applied.

The Court, per Davies, Weinstein and Sweeney JJ, dismissed the appeal. The Court considered when it was appropriate to depart from its own previous decision and referred to a number of authorities, then noted:

> [21] Accordingly, we should only depart from *White* if we are of the view that it is plainly wrong and, having identified the error, we find that there are compelling reasons to depart from it. The fact that reasonable minds may differ on the issue is not sufficient. We would need to have a strong conviction that the judgment was erroneous.

The Court then explored the decision and reasoning in *White* and noted:

> [56] The principal basis on which the decision in White is founded is the division the Court made between what it called first scenario cases (pre-conviction applications) and second scenario cases (post-conviction appeals). The division was based on the timing of the application, and its relationship with the principle of finality in the criminal process. The Court thereafter examined a large number of cases involving applications to withdraw pleas, and categorised those cases as falling either within the first scenario or the second scenario.
>
> [57] A second basis for the division came about because of the requirement in post-conviction appeals for applicants to establish a miscarriage of justice to bring them within s 6(1) of the CAA. The Court then concluded that in relation to applications made prior to conviction and sentence, the "miscarriage of justice" test had no "statutory root", taking the phrase from *Parente v R* (2017) 96 NSWLR 633; [2017] NSWCCA 284 at [101] in rather different circumstances.
>
> [58] It does not appear to us, on an analysis of the cases referred to in *White*, that the division between first scenario and second scenario cases had ever been made prior to the decision in *White*. That, in itself, brought about the difficulty of being able to classify

prior cases in one or other group. That bifurcation was made more difficult because a number of the cases examined used the expressions “miscarriage of justice” and “interests of justice” together or interchangeably.

The Court then went on to further explore the authorities referred to in *White* and held:

> [72] Even this relatively brief analysis of some, but not all, of the relevant cases on withdrawal of pleas indicates that no firm conclusion can be reached trhat *[sic]* the Court in *White* was incorrect in making the distinction between the two categories of cases. The cases are dependent on obiter dicta remarks in two High Court cases where the present issue was somewhat removed from what the High Court was considering. *Maxwell* and cases in this Court and other intermediate appellate courts do not always speak clearly in distinguishing between “interests of justice” and “miscarriage of justice”, or even in having regard to the circumstances in which the applications to withdraw have been made. The Court in White acknowledged at [60] that a number of the cases had conflated the tests. For those reasons, we cannot say that the Court in White was plainly wrong in making the distinction it did between the two categories of cases.
>
> [73] In relation to the need to demonstrate a “miscarriage of justice” in second scenario cases by reason of s 6(1) of the CAA, the Court concluded that this test was not apposite for first scenario cases as a matter of principle because it had no “statutory root”. We doubt that a statutory root must be found to apply the “miscarriage of justice” test, because the term is employed far more widely than in conviction appeals in accordance with s 6(1) of the CAA. For example, the term is frequently used in sentence appeals where it is sufficient to show error, and there is no necessity to demonstrate a “miscarriage of justice”: *Betts v The Queen* (2016) 258 CLR 420; [2016] HCA 25 at [2]; *Barnes v R* [2022] NSWCCA 140 at [25]. Further, as the Commonwealth Director pointed out, the miscarriage of justice test is employed without any statutory basis in appeals from magistrates to the District Court under the CARA.
>
> [74] The term is also used in civil proceedings in certain circumstances without any statutory basis; for example, in relation to staying civil proceedings pending determination of criminal proceedings: *McMahon v Gould* (1982) 7 ACLR 202 at 206-207; *Niven v SDS* [2006] NSWCA 338 at [26]; and in determining whether or not negligence has been established: *Tcaciuc v Broken Hill Pty Co Ltd* (1961) 62 SR (NSW) 687; *Hobana Pty Limited & Anor v Richard Gremmo* [2006] NSWCA 261 at [18].
>
> [75] In the light of the more widespread use of “miscarriage of justice” than its application by reason of s 6(1) of the CAA, we doubt that the Court in White was suggesting that the term was not relevant except where it had a statutory basis. The matter is certainly not clear from what the Court said at [59]. This uncertainty means that we cannot conclude that the Court in *White* was plainly wrong in this regard.
>
> [76] Our ultimate conclusion in both of these applications is not based on any view that the two tests are in fact the same, because, as we have said, we cannot conclude that the decision in *White* was plainly wrong. Our conclusion is based on accepting the factors contained in *White* at [65] and applying them to the facts involved in the two matters.

PRACTICE AND PROCEDURE – Consideration of the obligations on the Crown to investigate matters raised by the accused and call witnesses at trial

HO v R [2023] NSWCCA 245 – 6 October 2023

HO, the applicant, was charged with multiple counts of sexual and physical assaults. After a jury trial, she was found guilty of a number of offences. The applicant appealed against his conviction on three grounds, one of which is that the trial miscarried where the allegations had not been properly investigated.

Wilson J, with whom Beech-Jones CJ at CL (as his Honour then was) and R A Hulme AJ agreed, dismissed the appeal. Her Honour noted:

> [84] In refusing the application for a temporary stay, the trial judge referred to the decision of the High Court in *Penney v The Queen* [1998] HCA 51; 72 ALJR 1316. In *Penney*, the appellant challenged his conviction for the attempted murder of his wife, an offence carried out by the ignition of a petrol-soaked rag pushed into the petrol tank of a car the intended victim was driving. The competence and adequacy of the police investigation was an issue at trial, as investigations that could have produced important evidence had not been carried out. For example, the match used to ignite the petrol had not been retained for forensic examination, and nor had the clothes or person of the appellant, who had been arrested very shortly after the fire, been examined. On appeal to the South Australian Court of Criminal Appeal, Mr Penney contended that the police investigation into the causes of the fire and his responsibility for it had been attended by so many absences and failures as to vitiate the fairness of his trial. The argument before the High Court was that the trial process, which began at the inception of the police investigation, had been so defective as to infect the trial process such that he did not receive a fair trial. The appellant contended that, because of the inadequate investigation, the verdict was unsafe and unsatisfactory, or there had been a miscarriage of justice entitling him to an acquittal or a retrial. Those contentions were dismissed by the High Court, with Callinan J stating, at 1319, with the agreement of the other members of the Court:
>
> > "The appellant's submissions on these contentions fail at the threshold. They fail because even though a better investigation may, and probably should have, been conducted, there is no general proposition of Australian law that a complete and unexceptionable investigation of an alleged crime is a necessary element of the trial process, or indeed of a fair trial."
>
> [85] What the law protects is the right of an accused person to a fair trial; whether a trial has been fair will depend upon the circumstances of the individual proceedings. The conclusion of the trial judge prior to the commencement of the trial that there would be no unfairness to the applicant is borne out by the record of trial.
>
> [86] The applicant, unlike Mr Penney, was not deprived of any relevant or material evidence because of the way in which the police investigated the allegation made by Ms Z, or because of the way the Crown conducted its case at trial. The applicant had access to all the information and evidence that he claimed to be of relevance, and he was, subject to compliance with the *Evidence Act*, able to raise it in cross-examination with appropriate witnesses, or adduce the evidence in his own case. It would appear that the only information he did not have were statements of persons whom he had nominated as having relevant evidence, although without ever outlining the nature of the evidence these persons could or might be able to give. Oral evidence called by the Crown before the trial judge was to the effect that all persons the applicant had referred to in his application for a stay had been the subject of police inquiries. Statements had been obtained from some, such as Vesna Hunt and Ban Saleh (and the Crown called those persons in its case).

Others had not been identified, such as “Sawsan – dentist” and “Sabah” or had been located but refused to speak to police, such as Boshra Noshad.

…

[88] The obligation of the Crown in bringing an accused person to trial does not extend to a duty to investigate an accused person’s case on his or her behalf, or to present that case at trial. The Crown has an obligation of fairness within the context of an adversarial system of criminal justice, but that does not mean that it is bound to pursue every matter said by an accused to be relevant to the subject of the trial, or to secure the attendance of every person nominated by the accused as a potential witness. As the High Court said in *Richardson v The Queen* (1974) 131 CLR 116; [1974] HCA 19 at 120:

> “It is […] a misconception to speak of the prosecutor as owing a duty to the accused to call all witnesses who will testify as to the events giving rise to the offence charged.”

[89] The obligations on the Crown with respect to leading evidence and calling witnesses are well established, from decisions including *Richardson*; *Whitehorn v The Queen* 152 CLR 657; [1983] HCA 38; and *The Queen v Apostilides* (1984) 154 CLR 563; [1984] HCA 38. In summary, the principles to be drawn from these and other authorities, noting the fundamental obligation of the Crown to treat an accused person fairly, are these:

> (a) It is for the Crown and not the court to decide which witnesses the Crown will call in its case: *Richardson* at 119; *Whitehorn* at 663.
>
> (b) That decision is to be made in conformity with the dictates of the obligation of fairness to the accused, and having regard to other material considerations, such as whether the evidence is necessary to the unfolding of the Crown case; whether the evidence is truthful and credible; and whether it is in the interests of justice to subject the evidence to cross-examination by the Crown: *Richardson* at 119.
>
> (c) The Crown is not bound to call a witness, even an eye-witness, whose evidence is judged to be unreliable, untrustworthy or otherwise incapable of belief: *Whitehorn* at 674.
>
> (d) Criminally involved witnesses can be regarded prima facie as unreliable, and there is no principle of law that requires the Crown to call such a person in its case: *Allchin v R*; *Skepevski v R* [2019] NSWCCA 278 at [127].
>
> (e) A judgment not to call a witness must be based on identifiable features, including the assessment made of the witness after a conference with that person where appropriate: *Whitehorn* at 664; *R v Kneebone* (1999) 47 NSWLR 450; [1999] NSWCCA 279 at [49] and [102].
>
> (f) Tactical considerations can play no part in the decision to call a witness: *Whitehorn* at 664.
>
> (g) Where the Crown decides not to call a witness who has been nominated by the service of the brief of evidence as a Crown witness, the decision must be communicated to the accused at a reasonable time and the witness made available at trial to the accused: *Whitehorn* at 664.
>
> (h) The reasons for the decision not to call the witness should be disclosed if sought: *Whitehorn* at 665.

(i) There is no authority for the proposition that the Crown has a duty to actively seek out material not in its possession so that the material might be made available to the accused: *Marwan v Director of Public Prosecutions* [2019] NSWCCA 161 at [45] to [50].

(j) Where a witness who might have been expected to be called by the Crown and to give evidence on a matter is not called, the jury may take the fact that there was no evidence from that witness into account when deciding whether the Crown has proved its case: *Mahmood v Western Australia* (2008) 232 CLR 397; [2008] HCA 1 at [27].

(k) A decision of the prosecutor not to call a particular witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice: *Apostilides* at 575.

[90] Nothing in those principles suggests that the Crown has any obligation to investigate an accused's case on his or her behalf, or to take over the burden of presenting that case to the jury. It did not have that obligation or that burden with respect to the applicant at his trial. As the trial judge surmised in dealing with the application for a temporary stay, there was no basis to conclude that the applicant's trial would be anything other than fair.

COSTS – Costs certificates can be granted even if accused was legally aided

Rodden v R [2023] NSWCCA 202 – 18 August 2023

Simon Rodden, the applicant, was acquitted of murder by a juy in 2022. He was legally aided, which obliged him to pay $75 for his defence. After his acquittal, he brought an application for a costs certificate pursuant to s2 of the *Costs Act*, which was declined by the primary judge. The applicant appealed this decision.

The Court, per Bell CJ, Leeming JA and Beech-Jones JA, dismissed the appeal on the basis that there was no error on the primary judge's finding on the reasonableness of instituting the proceedings; however, held:

[108] To recapitulate, his Honour, proceeding on the basis that the applicant was fully funded by legal aid and therefore did not, could not and would never have any liability in respect of the costs that had been expended on his defence, formed the view that the statutory officer referred to in s 4 of the Costs Act could never exercise his or her discretion to award costs in favour of the applicant. On that basis, his Honour saw no utility in his granting a certificate pursuant to s 2 of the Costs Act even if he were satisfied of both matters referred to in s 3(1) of that Act.

[109] In reaching this conclusion – which it may be noted was not one contended for by the Crown before Fagan J – his Honour expressed himself in strong terms about what may be described as policy questions, observing, for example, that:

(1) "litigation of the issues under s 3 upon which the grant or refusal of a certificate depends, concerning whether prosecution of the charge was reasonable, appears to be a misallocation of the public resources of the Legal Aid Commission, the Director of Public Prosecutions and the Court": at [6];

(2) An application for a costs certificate by an applicant who has been fully funded by Legal Aid represents "a massive waste of public expenditure upon a form of proceeding

that was never envisaged when the Costs in Criminal Cases Act was passed": at [19]; and

(3) "all that can be achieved by these applications is the movement of money between public accounts, which could be done by executive direction rather than by involving statutory bodies in litigation against each other": at [19].

[110] What his Honour had to say about the construction of the Costs Act and the LAC Act was unnecessary and, in our respectful opinion, wrong for the reasons explained below.

[111] It was unnecessary because, on an application for a certificate pursuant to s 2 of the Costs Act, the starting point should be consideration of the two matters set out in s 3(1). Not only does this follow from the structure of the Costs Act, it is well established by authority: see, for example, *Gwozdecky* at 165; *Johnston* and *Mordaunt*. In the present case, his Honour was not satisfied that the prosecution of the applicant was unreasonable within s 3(1)(a) of the Costs Act, applying the objective analysis explained in decisions such as *Manley* and *Johnston*, and therefore should never have reached the question of whether to exercise the "residual discretion" which has been held to be encompassed in the word "may" in s 2 of the Costs Act.

[112] It would only have been if his Honour had reached the conclusion that the initiation of the prosecution was not reasonable within the meaning of s 3(1)(a) of the Costs Act that he would have needed to consider whether, for some reason, he should exercise his discretion against the grant of the certificate sought.

[113] Rather, his Honour concluded that the exercise was one of supererogation because, for the reasons he gave, he would never, in the circumstances of a fully funded legal aid applicant, exercise the discretion under s 2 of the Costs Act to grant a certificate.

…

[116] None of the parties addressed the question of construction raised by McHugh J as to the meaning of the word "may" in s 2 of the Costs Act and, in the absence of argument and in light of the view we have come to in relation to Fagan J's construction of the Costs Act more generally, it is not necessary for us to do so. It suffices to observe that, if the word "may" in s 2, on its proper construction and in accordance with the principles in *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214, in fact means "must", none of the primary judge's analysis would be relevant as the sole exercise for the Court or a judge or magistrate called upon to grant a certificate would be the formation of the requisite opinion pursuant to s 3 of the Costs Act.

[117] On the assumption, however, that s 2 does in fact confer a residual discretion, in the event of judicial satisfaction as to the matters in s 3 (1), a certificate should ordinarily be granted. In exercising the residual discretion, the beneficial nature of the Costs Act should be fully borne in mind. That that is the character of the legislation has been noted in many cases including *Nadilo* at 743 (see [37] above); *Allerton* at 559-560; *Mordaunt* at [36(a)]. In the ordinary course, it is not the function of judges considering whether to grant a certificate under s 2 to consider the matters raised by section 4 including the quantification of costs and the extent to which the applicant for the certificate is obliged to pay costs or has been or will be reimbursed for the costs. Those are matters for the Director-General.

…

[119] Was his Honour's analysis nevertheless justified as a matter of statutory construction? We respectfully think not.

[120] The primary judge's starting point was s 4(1) of the Costs Act. As noted at [51] above, his Honour construed the expression "costs incurred in the proceedings" in s 4(1) as "costs incurred in the proceedings *by the person who has been acquitted*".

[121] There is no obvious reason why the expression "costs incurred in the proceedings" should be so confined and not extend to or include "costs incurred in the proceedings by *or on behalf of* the person who has been acquitted". After all, it is not uncommon for a litigant to have his or her costs paid for or undertaken to be paid for on his or her behalf, whether by an employer, trade union, insurer, family member or supporter: cf. *Wentworth v Rogers* (2006) 66 NSWLR 474; [2006] NSWCA 145 at [104]. That will not ordinarily result in the denial of an award of costs. Indeed, in many cases, the detail of a party's funding arrangements will be entirely unknown to the Court and the other side.

[122] Perhaps most fundamentally, the text of s 4(1) does not contain the limitation the primary judge introduced into it. Confining s 4(1) in a way which limits the reach of the Act's application is contrary to the broad way in which beneficial legislation, including the Costs Act itself, should be interpreted: *Allerton* at 559F.

…

[125] In short, his Honour wrongly assumed that, because the applicant had been "fully funded" by the Commission, the applicant could never be out of pocket, or made legally liable to make a payment to the Commission, in respect of the costs that had been incurred in furtherance of his defence. This flawed assumption carried through to his Honour's statement that "it does not appear to be open to the Director-General to form an opinion that "the making of a payment to the applicant is justified" where the applicant, Mr Rodden, has himself incurred no costs." A powerful discretionary reason for the Director-General to exercise his discretion favourably would be if the Commission had exercised its powers to require the applicant to make a contribution up until the whole of the amount of costs incurred in his defence. It was premature of the primary judge to speculate as to what was open to the Director-General. That would all depend upon the circumstances at a time which necessarily post-dated the grant of a certificate pursuant to s 2 of the Costs Act.

…

[132] To the extent that his Honour sought to support his analysis by recourse to arguments based in public policy, including those highlighted at [109] above, again we disagree with his Honour's viewpoint. Even if it were ever appropriate for a judge to express the view that a statutory scheme "appears to be a misallocation of the public resources of the Legal Aid Commission, the Director of Public Prosecutions and the Court" and to entail "a massive waste of public expenditure", the role of the Court in forming an opinion as to the matters referred to in s 3 of the Costs Act makes eminent common sense. The existence of a judicial opinion as to those matters supplies the gateway to an award of costs. That the ultimate decision as to whether a costs award is made is vested in the Director-General was and is a matter for the legislature.

[133] Nor, with respect, is the view that what is entailed in a Costs Act exercise is simply "the movement of money between public accounts" either accurate or reflective of the fact that the Commission is constituted a corporation under s 6 of the LAC Act with a Board and Chief Executive Officer (ss 14-17), there is a separate Legal Aid Fund (s 62) with

attendant statutory obligations in relation to payment into and out of that Fund (ss 63, 64) and that, by s 67 of the LAC Act, the Commission is required, on or before 31 May in each year, to prepare estimates of its income and expenditure for the following financial year.

[134] Further, given the salutary effect of an adverse costs order referred to by McHugh J in *Oshlack*, the making of an award of costs following a successful application pursuant to the Costs Act achieves rather more than simply a movement of moneys or “churning of funds between public accounts”, as his Honour described it.