A Selection of Recent Decisions from the Appellate Courts

Reasonable Cause CPD
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Apprehended Violence Orders

i. Commissioner of NSW Police v Murphy [2024] NSWCA 311

Murphy consented to an AVO without admissions with respect to his son for a period of six months. The granting of the order brought into play the provisions of the Firearms Act 1996 (NSW) regarding the suspension of Murphy's firearms licence.

After five months, Murphy applied for the AVO to be revoked. The Magistrate was unable to deal with the matter on the day, and therefore extended the AV0, on an interim basis, (an "extension order"). At the later hearing date, the Magistrate revoked the order.

A substantial purpose of the application was to disengage the provisions of the *Firearms Act 1996 (NSW)* regarding the suspension of the applicant's firearms licence; that is, the applicant was quite explicit in stating that one of his purposes was to get his firearms licence back once the order was revoked.

McHugh JA stated:

> *[104] …an order purporting to extend an ADVO that is not made for a substantial purpose of protecting people from domestic violence, intimidation (including harassment) and stalking is not made for a proper purpose.*
>
> *[105] Consistently with s 78, the court may exercise the s 73 power to extend an ADVO by consent and without admissions. But the court may do so only for the substantial purpose of ensuring the safety and protection of a protected person and, by ss 17(3) and 79A(2), only for a period and only in such respects as are necessary to achieve that object.*

Later, McHugh JA stated at [117]:

> *"… the purpose of revoking an ADVO in order to disengage the prohibition in s 11(5)(c) of the Firearms Act is a purpose that would defeat Parliament's intention and the operation of its legislative scheme. Such a purpose is alien to the purposes for which Parliament conferred the power to revoke in s 73."*

Bail

ii. Lee v DPP(Cth) [2024] NSWCCA 202

This decision criticises the CDPP for continuing to criticise electronic monitoring as a condition of bail.

Dhanji J:

> *64. The applicant is willing to subject himself to electronic monitoring. Evidence was tendered directed to the efficacy of such monitoring in preventing persons from escaping overseas. The Crown relied on the affidavit of Federal Agent Luke Wilson in*

this regard. Without descending to the detail of this evidence, it must be accepted that electronic monitoring is not foolproof: see Flower v R [2020] NSWSC 64. I would, nonetheless, accept that such monitoring provides a significant obstacle to any attempt to escape trial.

65. *On the application, the prosecution filed written submissions in which reliance was placed on the observations of Fagan J in R v Bail Applicant M [2020] NSWSC 1685 where his Honour cast doubt as to the suitability of a condition for electronic monitoring as a result of the obligations it would place on the Australian Federal Police. In Commonwealth Director of Public Prosecutions v Saadieh [2021] NSWCCA 232 at Beech-Jones CJ at CL, at [8] rejected such an approach. Bathurst CJ explicitly agreed with Beech-Jones CJ at CL's observations. In R v Okusitino; R v Lavulo; R v Iongi [2024] NSWSC 143 reliance was also placed on the decision in R v Bail Applicant M. I said (at [89]-[90]):*

> *"89 … Despite the Commonwealth Director being a party to [the decision in Saadieh], no reference was made to it in the written submissions of counsel for the Director. Indeed, reference was made to a decision of a single judge of this Court, inconsistent with, and predating, the decision in Saadieh.*
>
> *90 … It is not open to the Director to ignore statements of the Court of Criminal Appeal on the basis that it is not convenient to the Director's case. I would expect serious consideration would be given to the tendering of any such statements in the future, insofar as they deal with the issue of the imposition electronic monitoring poses to the AFP. …"*

66. *It is extraordinary that reliance should continue to be placed on the decision of a single judge of the Supreme Court, ignoring a contrary decision of this Court. When my observations in R v Okusitino; R v Lavulo; R v Iongi were pointed out at the hearing, senior counsel for the Director made plain that no reliance was placed on R v Bail Applicant M. Further, subsequent to the hearing, communication was received by the Court from the Director disavowing reliance on both the decision, and a paragraph in Federal Agent Wilson's affidavit which might be thought to transgress what was said in Saadieh.*

67. *It should be stressed that the affidavit of Federal Agent Wilson was not in the same form as that tendered before me in R v Okusitino; R v Lavulo; R v Iongi. I would accept that Federal Agent Wilson modified his affidavit to address the concerns raised in R v Okusitino; R v Lavulo; R v Iongi.*

68. *It should also be stressed that there is no basis to conclude that senior counsel appearing on the application prepared the submissions filed on behalf of the Director. Indeed, in conformity with what appears to be a relatively common practice of the Commonwealth Director's office, there was no indication of the individual responsible for the submissions. It is unclear as to why this should occur. It is contrary to the Practice Note No. SC CCA 1 Court of Criminal Appeal – General which provides:*

> *"**Filing and Format of Written Submissions***
>
> *16. All written submissions shall:*
>
> *…*
>
> *(f) be signed by the legal representative(s) who prepared or settled the submissions and include the name and email address of the signatory."*

69. The existence of the requirement promotes accountability, with the potential to avoid a situation such as that which has arisen here.

iii. R v BH [2024] NSWSC 1577

This matter involved a young person seeking bail in the Supreme Court in circumstances where he had been charged with certain offences and had previous offences such that the operation of *Bail Act 2013 (NSW) s.22C* was enlivened. In order to grant bail, the section requires that the Court has "…a high degree of confidence the young person will not commit a serious indictable offence while on bail subject to any proposed bail conditions."

The section is set out below:

22C Temporary limitation on bail for certain young persons in relation to certain serious offences

(1) A bail authority must not grant bail to a relevant young person for a relevant offence alleged to have been committed while the young person is on bail for another relevant offence unless the bail authority has ***a high degree of confidence*** the young person will not commit a serious indictable offence while on bail subject to any proposed bail conditions.
(2) A decision under subsection (1) may be made only after—
(a) an assessment of bail concerns is made under Division 2, and
(b) consideration of whether any bail conditions could reasonably be imposed to address any bail concerns or risk the relevant young person will commit a further serious indictable offence.
(3) To avoid doubt, the requirement under this section to establish that bail should be refused for the relevant young person remains with the prosecution.
(4) This section applies despite anything to the contrary in this Act.
(5) This section expires 12 months after this section commences.
(6) In this section—

motor theft offence means an offence under the following sections of the *Crimes Act 1900*—

(a) section 154A,
(b) section 154C,
(c) section 154F.

relevant offence means—

(a) a motor theft offence, or
(b) a serious breaking and entering offence, or
(c) an offence under the *Crimes Act 1900*, section 154K, if the underlying offence is a motor theft offence or serious breaking and entering offence.

relevant young person, for a relevant offence, means an individual who is, at the time the relevant offence is alleged to have been committed—

(a) 14 years of age or more, and
(b) less than 18 years of age.

serious breaking and entering offence means an offence under the *Crimes Act 1900*, Part 4, Division 4 that is punishable by imprisonment for a term of 14 years or more.

serious indictable offence has the same meaning as in the *Crimes Act 1900*, section 4(1).

Yehia J noted the troubling aspects of the legislation, including the absence of any guidance, as to what constitutes "a high degree of confidence", and the inconsistency between the bail legislation and section 6 of the *Children (Criminal Proceedings) Act 1987 (NSW).*

Her Honour stated at [12]-[19]:

12. *In the decision of R v RB [2024] NSWSC 471, Lonergan J observed at [6] that "the test – 'a high degree of confidence' is a test unknown to the criminal law." There is no guidance as to what the phrase "high degree of confidence" means, or the matters that may inform that assessment. In the Legislative Assembly's Second Reading Debate on 19 March 2024, in respect of the insertion of s 22C into the Bail Act, the Attorney-General referred to the test as "the Government's bespoke test of 'a high degree of confidence'" which is "intended to set an appropriately higher bar" for a young person's release when they are charged with repeated serious breaking and entering and motor vehicle offences, including while on bail.*[4]
13. *"High degree of confidence" is different from the test contained in legislation such as the Crimes (High Risk Offenders) Act 2006 (NSW) ("CHRO Act"), which requires the Court to be "be satisfied to a high degree of probability that the offender poses an unacceptable risk of committing another serious offence if not kept under supervision under the order": s 5B of the CHRO Act. The "high degree of confidence" required under s 22C may require some probabilistic assessment. It may also import some value assessment based on the evidence. However, "probability" and "confidence" are not completely synonymous.*
14. *Section 22C involves an evaluative judgment requiring the Court to reach a state of satisfaction regarded as a "high bar" but not a state of certainty. The Court does not need to be certain that the young person will not commit a further relevant offence. However, the test is a more onerous one than the "show cause" requirement which applies to adults under s 16A of the Bail Act. Furthermore, considerations such as delay appear to have no bearing on the assessment required under s 22C.*
15. *In R v TW [2024] NSWSC 1504 Rothman J identified the possible issues posed by the wording of s 22C, including but not limited to,*
    the possible inconsistency with notions of equal justice. His Honour observed at [11]:
    > *"Obviously, there are circumstances that require an arbitrary delineation. Thus, juveniles, those under 18, are for most criminal offences treated under a different regime than adults. But the arbitrary differentiation now applicable under this bail provision treats those, on average, less mature and less capable of executive functioning (through no conduct on their account except their date of birth) as requiring stricter measures than adults." (Emphasis added.)*
16. *I respectfully agree with and adopt his Honour's observation.*
17. *It is both curious and troubling that a stricter and higher test applies to children (as opposed to adults), who seek release to bail. On its face, it is inconsistent with the principles set out in s 6 of the Children (Criminal Proceedings) Act 1987 (NSW) ("CCPA"). Section 6 provides:*

6 Principles relating to exercise of functions under Act

A person or body that has functions under this Act is to exercise those functions having regard to the following principles—

(a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,

(b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,

(c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,

(d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,

(e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind,

(f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,

(g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions,

(h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

18. *By operation of s 4 of the CCPA, s 6 applies to any court that exercises criminal jurisdiction and in any criminal proceedings before any such court, notwithstanding any law or practice to the contrary. Section 5(1)(b) of the Bail Act provides that proceedings for an offence means criminal proceedings against a person for an offence (whether summary or indictable), and include proceedings relating to bail*.
19. *The desirability, wherever possible, to allow a child to reside in their own home, engage in education and employment, and reintegrate into the community, are relevant considerations. Furthermore, a child's state of dependency and immaturity requires guidance and assistance. A structured community supervision and treatment plan will often instil a high degree of confidence that a young person will not commit a serious indictable offence while subject to bail conditions. Of course, each case must depend upon its own facts.*

iv. *Bugmy v DPP(NSW)* [2024] NSWCA 70

B was charged with resist police in the execution of duty. B argued that the police officer had acted unlawfully in arresting her for a breach of bail.

In dealing with a breach of bail or an apprehension that a breach of bail is about to be committed a police officer has a discretion as to what action to take in accordance with s.77(3) which reads as follows:

(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.

In the Court of Appeal it was held that in order for the power of arrest to be lawfully, exercised pursuant to subsection (1), it was necessary for the officer to comply with the terms of subsection (3). The arresting officer had not considered the matters outlined in subsection (3), and therefore was not acting in the execution of duty when he arrested Ms Bugmy.

v. *NSW v McLaughlin* [2024] NSWCA 137

The respondent was arrested for common assault and choking early on a Saturday morning and held in police custody. At 12:30pm that day, he was charged and a court attendance notice (CAN) was created but not filed with the Local Court. At around 1pm, the respondent was refused bail by police and, at about 5pm, he was transferred to a Corrective Services (CS) facility. At 10:35am the following day, the CAN was filed with the Local Court and a magistrate granted the respondent bail.

The respondent commenced proceedings in the District Court against the State for false imprisonment from 1pm on the Saturday to 10:35am on the Sunday, and the primary judge found the State liable and awarded damages to the respondent in the sum of $10,000. The primary judge found the police had not discharged their duties under s 46(1) of the *Bail Act 2013*, which relevantly requires police officers to ensure an accused person charged with an offence who is refused police bail is brought before a court as soon as reasonably practicable.

Bugmy Bar Book

vi. *Baines v R* [2023]NSWCCA 302

B was an aboriginal offender who stood for sentence. He was a member of the "stolen generation". He grew up in a large and significantly disadvantaged family, where alcohol and domestic violence were rife. Evidence from a psychologist was led to demonstrate significant disadvantage in B's upbringing. The sentencing judge declined to have regard to the contents of the "Bugmy Bar Book".

Simpson AJA held:

85. That the Bugmy Bar Book is a useful compilation of material relevant to an understanding of social disadvantage and deprivation does not necessarily make

it a useful tool for sentencing purposes. Alone, it says nothing about any individual offender (whether Aboriginal or non-Aboriginal).

86. The task of a sentencing judge, in every case, is to sentence a specific offender, for a specific offence, taking into account (inter alia) the specific personal circumstances of the offender. General propositions drawn from research of the kind collated and analysed in the Bugmy Bar Book do not and cannot substitute for specific evidence with respect to those issues.

Driving – Dangerous Driving Cause Death

vii. *Omigie v R* [2024] NSWCCA 205

The appellant was charged with one count pursuant to s.52A(1)(c) of the *Crimes Act 1900 (NSW)* of driving in a manner dangerous ***"...whereby the vehicle was involved in an impact***, …" with another person together with other related charges.

The facts of the matter were that the appellant came to a complete stop on a busy motorway with the speed limit of 80 km/h at a time when the traffic was free-flowing but increasing and in darkness. There was subsequently a multiple vehicle collision which did not involve the appellant's own vehicle but did result in a truck impacting with another car resulting in the driver of the car being crushed to death.

Harrison CJ at CL at [97]:

> *Mr Omigie has submitted that even if the jury were satisfied that his vehicle was involved in an impact pursuant to s 52A(6), the verdict was unreasonable because it was not reasonably open to the jury to be satisfied beyond reasonable doubt that he was driving in a manner dangerous to other persons at the relevant time. I am unable to accept that submission. Mr Omigie's conduct as a driver was a matter that the jury was required to assess according to an objective standard applying to all users of public roads: R v Saunders [2002] NSWCCA 362; (2002) A Crim R 104 at [17]. That was a quintessential jury question involving matters of degree and judgment and the application of community standards: Reyne (a pseudonym) v R [2022] NSWCCA 201; (2022) 302 A Crim R 297 at [106]-[107]. Mr Omigie does not suggest that the jury were not properly instructed on the elements of the offence. Accordingly, the question is whether it was open to the jury to reach the conclusion that Mr Omigie's conduct was dangerous. As already noted, Mr Omigie came to a complete stop on a busy motorway with a speed limit of 80 km per hour, at a time when traffic was free-flowing but increasing, and in darkness. Mr Omigie clearly subjected others on the road to a level of risk greater than that ordinarily associated with driving a motor vehicle. It was well open to the jury in those circumstances to be satisfied beyond reasonable doubt that in driving in that manner, Mr Omigie seriously breached the proper standards of management and control of his vehicle in a way that resulted in a real danger to other persons on the road.*

Driving – Drug Driving - An Absolute Liability Offence

viii. R v Narouz [2024] NSWCCA 14

N was convicted in the Local Court of driving whilst there was present within his oral fluid a prescribed illicit drug (cocaine). In the Local Court N raised the defence of honest and reasonable mistake of fact, arguing that he had taken a sip from a bottle of energy drink that had been left on the floor of the car he had borrowed from a friend, and that this may explain the presence of cocaine in his oral fluid. The magistrate found that the defence was available, The magistrate found that the defence was available, however, disbelieved N and found the offence proven. On appeal to the District Court the Judge held that the offence was one of absolute liability. The Judge was asked to state a case to the NSWCCA.

Chen J (Bell CJ and Harrison CJ at CL concurring) held that the offence was one of absolute liability.

Drugs – Supply

ix. Salameh v R [2024] NSWCCA 239

The applicant was convicted of deemed supply of large commercial quantity and deemed supply commercial quantity of fentanyl. On sentence the applicant asserted that he thought the drug was cocaine and not fentanyl.

Thus, question arose on appeal as to the requisite mens rea regarding the particularised drug and for the for deemed commercial quantity and deemed large commercial quantity.

This is a decision of a 5 Judge bench of the NSWCCA.

Bell CJ at [13]-[14]:

> *[13] As to the purpose of s 25(2), it is clearly to deter the commercial supply of prohibited drugs. We cannot accept that Parliament intended a supplier of a commercial quantity of a prohibited drug could escape liability for that commercial supply if they incorrectly believed that the prohibited drug being supplied was another prohibited drug the commercial quantity of which was larger than the commercial quantity of the actual drug supplied. That conclusion about statutory purpose is underlined by ss 25(3), 29 and 33 of the DMTA to which we have referred.*
>
> *[14] For these reasons we conclude that as a matter of construction, in s 25(2) both usages of "prohibited drug" refer to the actual prohibited drug the accused has supplied or has knowingly taken part in the supply of and not to a prohibited drug that an accused mistakenly believed was involved.*

Basten AJA at {126]:

"….the mental element of an offence under s 25(2) requires that the accused knows or believes that the substance in his or her possession is a prohibited drug and also knows, in the accepted sense, that the quantity of drug in fact in his possession is of the order of the quantity which the law identifies as a commercial quantity (or a large commercial quantity) of the prohibited drug the subject of the charge: the accused need have no knowledge or belief as to the actual drug, nor as to the legal significance of the quantity. This is consistent with the accepted view that the quantity prescribed under s 29, necessary to engage s 25(1), is not the subject of a mental element."

Escape Police Custody (Common Law)

x. *Elali v R* [2025] NSWCCA 9

The offender pleaded guilty to one count of entering a building with intent to commit an indictable offence. The indictable offence was the common law offence of escaping lawful custody.

The agreed facts were that the offender was in police custody at Mount Druitt hospital. The offender was being escorted by police from the hospital to be taken to another custodial facility. The offender broke free and ran. He was pursued on foot by police. The offender ran into a residential premises and asked the occupants to hide him. Police had lost sight of the offender but called for urgent assistance and set up a perimeter. Police later, located the offender with the assistance of one of the occupants of the private residence.

Notwithstanding a plea of guilty in the District Court, the offender appealed against his conviction on the basis that on the given facts he could not in law be convicted of the offence as the offence of escape was completed prior to entering into the building.

Price AJA at (59]-[62]:

59. *In* Reid*, Lord Thomas of Cwmgiedd, the Lord Chief Justice of England and Wales, emphasised that the common law offence of escape from lawful custody was ultimately a question of fact. In that case, John Anslow was a prisoner and whilst being transported to court, a gang of three men attacked the prisoner transport van and facilitated Mr Anslow's escape. The applicant, Mr Reid, had provided Mr Anslow with a telephone number in a coded Christmas card and copies of Mr Anslow's passport were found at Reid's home. It was alleged that the copies were to be used to assist Mr Anslow obtain further documents. The applicant was charged with conspiracy to escape.*

60. *The Lord Chief Justice said at [13]:*

> *"… I do not accept that the common law offence of 'escape' ended after Anslow left the van and no one was in immediate pursuit. This is to impose an artificial limitation. Although the escapee will in due course become a fugitive, it is a question of fact as to when the circumstances that are intrinsically related to the escape end, and his position changes into 'life on the run'."*

61. *In my view, the approach taken by the Lord Chief Justice in* Reid *to the common law offence of escape is sensible. It is not constrained by the imposition of boundaries such as the lack of immediate pursuit, loss of control or being out of sight. It accords with common sense and does not overcomplicate this area of the law. However, there is a temporal limitation to the offence. Escape does not continue indefinitely as there will come a time that the escape has been completed such that the escapee becomes a fugitive from justice. The emphasis placed on a factual finding mirrors what was said in* Ryan and Walker *in the passage extracted at [44] above.*

62. *In the present case, as I have stated at [38] above, the applicant was in the process of escaping when he entered the premises. A jury, properly instructed, could not reasonably reach any other conclusion.*

Expert Evidence – Child Sexual Assault (Rita Shackel)

xi. BQ v R [2024] HCA 29

Associate Professor Shackel gave evidence at trial concerning how victims of child sexual assault as a class respond to and disclose victimisation.

14. *Associate Professor Shackel told the jury that there are no typical responses of a child to being sexually assaulted but instead responses will vary and depend on the individual characteristics of the child, the relationship between the child and the perpetrator and the broader family and social context. She explained that "it is not uncommon for children not to resist" and "it is not uncommon for children to acquiesce and to comply [with] directions and requests of a perpetrator". She also stated that there are various factors that inhibit victims from "tell[ing] anybody about what is happening to them and ... mak[ing] an official report".*
15. *Associate Professor Shackel also told the jury that one way of categorising the research was to differentiate between "intra-familial" and "extra-familial" cases of child sexual assault. She was asked by the Crown Prosecutor what the research had demonstrated with respect to the effect an "intra-familial situation [in which such abuse occurs] has on the way that children behave". Associate Professor Shackel responded by explaining that the familial context of sexual abuse gives rise to certain factors that inhibit the child from responding to or resisting the abuse. She observed that "the research shows us that in the context of intrafamilial child sexual assault, the abuse often takes place within the home" and "in the course of everyday activities: bathing, putting children to sleep, watching TV, playing with children". She noted that for children in such contexts, there was a blurring of "normal interaction and appropriate interaction" with "touching".*

The HCA held that the evidence of Associate Professor Shackel was admissible both as credibility evident, and as expert opinion evidence.

Sentencing – Procedural Fairness

xii. Smith v R [2024] NSWCCA 59

S stood for sentence with respect to offences of dishonesty. The defence tendered a report from Dr Gerald Chew which concluded that the offender had cognitive impairments, and that there was a causal link to his offending behaviour.

The report was admitted into evidence without objection, and the DPP did not require Dr Chew for cross-examination.

The sentencing Judge, in a reserved judgement, noted the inconsistencies between two sentencing assessment reports and Dr Chew's report. She rejected Dr Chew's opinion regarding causal connection and thus found that there was no basis for a reduction in the offender's moral culpability.

The NSWCCA held that this constituted a lack of procedural fairness in sentencing proceedings.

Basten AJA held:

> *48. In circumstances where there had been no objection to the tender of Dr Chew's report, and the prosecutor had not sought to cross-examine Dr Chew, but had indicated on two occasions that he did not wish to be heard with respect to the subjective material favouring the applicant, it should be inferred that there was no dispute as to Dr Chew's opinions and, in particular, the opinion as to the causal link between his psychiatric and cognitive impairments and the offending.*
> *49. In those circumstances, if the sentencing judge were proposing to take a different view, she was bound to advise the parties of that possibility. It was by no means clear that Dr Chew would have accepted that his opinion would have been different had he known of the applicant's continued use of drugs whilst in custody. Indeed, the judge did not explain why she thought that fact cast doubt on the psychiatrist's conclusions. The applicant should have had an opportunity to allow that matter to be put to Dr Chew, and to address the judge as to why she should not adopt the view she did.*
> *50. The judge's reasons demonstrate that the supposed absence of a causal link affected her conclusion as to the moral culpability of the applicant and the weight to be given to general deterrence, and therefore the sentence imposed. Accordingly, the appeal should be upheld and the sentence imposed in the District Court set aside. It is then necessary for the Court to resentence the applicant.*

Sentencing – Commonwealth Offences – Availability of Aggregate Sentences

xiii. McGregor v R [2024] NSWCCA 200

This decision is a 5 Judge bench of the NSWCCA.

The applicant was sentenced with respect to a number of federal offences involving child sexual abuse.

Error was established regarding other issues. On re-sentence the Crown contended that aggregate sentences could not be imposed for Commonwealth matters. This was contrary to the position taken by the Crown in *DPP(Cth) v Beattie (2017) NSWCCA 301; 270 A Crim R 556.*

The NSWCCA rejected this argument at [92], [103].

Sentencing – Commonwealth Offences – Imposition of ICO's

xiv. Vamadevan v The King [2024] NSWCCA 223

This decision is a 5 Judge bench of the NSWCCA.

The applicant was sentenced for a number of Commonwealth offences. The Crown conceded error on appeal. On re-sentence a question arose as to whether in imposing an ICO with respect to Commonwealth offences the Court was obliged to consider s.66 of the *C (SP) Act (NSW).*

The Court held in a joint judgment That they were not required to consider s.66 of the *C (SP) Act (NSW)* and to do so would amount to error. The previous decisions of *Chan v R [2023] NSWCCA 206*, which was followed in *AM v R [2024] NSWCCA 26* and *Khanat v R [2024] NSWCCA 41* where held to have been decided in error and should be regarded as overruled.

The Court (Bell CJ, Payne JA, N Adams J, ChenJ, Rigg J) stated:

> 56. *It follows from the foregoing analysis that, in resentencing, the NSW intensive correction orders regime is available to be applied to a federal offender, as the court is "empowered… in corresponding cases" within the meaning of s 20AB(1) of the Crimes Act to make an order in the present case but that s 66 of the NSW Sentencing Act does not (as a matter of construction of s 20AB of the Crimes Act) apply in considering whether or not to impose an intensive correction order upon a federal offender.*
>
> 57. *Accordingly, the steps to be undertaken by a sentencing court before an intensive correction order can be imposed on a federal offender under s 20AB(1) of the Crimes Act are as follows:*
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> *(1) First, the sentencing court must be satisfied "after having considered all other available sentences" that "no other sentence is appropriate in all the circumstances of the case" other than a sentence of imprisonment: s 17A(1).*
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> *(2) Secondly, the sentencing judge must "impose a sentence … that is of a severity appropriate in all the circumstances of the offence": s 16A(1).*
>
> *(3) Thirdly, if none of the disentitling provisions contained in the NSW Sentencing Act (including the identified provisions of the Crimes Act and the Criminal Code summarised above at [11]) apply, then the sentencing court may consider*

whether or not to impose an intensive correction order. In doing so, the sentencing judge is obliged to consider the matters in s 16A of the Crimes Act and not s 66 of the NSW Sentencing Act. The sentencing court must, "in addition to any other matters", take into account such of the matters in s 16A(2) "as are relevant and known to the court".

58. *It may be accepted, as the respondent submitted, that a consequence of that conclusion is that federal offenders in NSW the potential subject of an intensive correction order are, in relation to the application of s 66 of the NSW Sentencing Act, treated differently from NSW offenders. NSW offenders will be subject to s 66 NSW Sentencing Act considerations, whereas federal offenders in NSW will not. However, applying s 66 of the NSW Sentencing Act to the sentencing of federal offenders distorts equality of treatment among federal offenders in a potentially significant way; a federal offender sentenced in NSW would be sentenced in accordance with "paramount" considerations that are not applicable if they were sentenced in other states. Those "paramount" considerations are inconsistent with the considerations Part IB requires be taken into account for all other federal offenders.*

59. *The making of an intensive correction order without considering the matters identified in s 66 of the NSW Sentencing Act (s 3A and the "paramount" consideration of community safety) is the inevitable consequence of the scheme of federal sentencing where the Commonwealth Parliament has provided an extensive scheme for sentencing federal offenders in Part IB of the Crimes Act. An intensive correction order for federal offenders is not imposed under the NSW Sentencing Act but under s 20AB(1) of the Crimes Act. An intensive correction order is made available to federal offenders in terms that direct that s 16A identifies the factors to be considered by a court and the manner in which those factors are to be taken into account. An intensive correction order under s 20AB, if made, is still recognisable as an intensive correction order insofar as the same conditions as to the existence of power to make an order must be met and insofar as the content of the disposition (that is, what it can require the offender to do) takes its colour from the NSW Sentencing Act. The exercise of the discretion whether or not to make an intensive correction order, however, is governed by s 16A of the Crimes Act and not s 66 of the NSW Sentencing Act.*

60. *We acknowledge that three earlier cases in this Court have reached a different conclusion, albeit that the argument developed by the CDPP here was not advanced in any of those cases. Strictly speaking, as the argument we have accepted was not put in any of those cases we need be satisfied, as we are, merely that those cases are wrong. In McGregor, this Court held that it was entitled to overturn one of its own decisions without needing to find that it was "plainly wrong", since the point in question was not part of the ratio of the previous case: at [55]-[56]. We respectfully agree and the same conclusion should be drawn here.*

61. *The principal decision is Chan v R [2023] NSWCCA 206, which was followed in AM v R [2024] NSWCCA 26 and Khanat v R [2024] NSWCCA 41. Those subsequent cases do*

not provide any additional reasons to Chan. Chan was not the outcome of a series of cases in which relevant principles were worked through. For the reasons that follow, Chan, AM and Khanat should be overruled.

Sentencing – Errors in Information Provided to Court

xv. *WP v R* [2024] NSWCCA 77

The offender pleaded guilty to a number of child sexual offences. He appealed the sentence on the grounds that the sentencing Judge had been provided with incorrect information about a number of the matters for which he stood to be sentenced.

The incorrect information included the following matters:

- An incorrect maximum penalty for one offence
- Incorrect standard non-parole periods for 5 offences
- An indicative sentence for one offence that exceeded the maximum penalty available for that offence.
- An incorrect statement as to the utilitarian value of the plea of guilty given its timing.

The error arose in the Crown's sentencing summary document and no issue was taken by the defence to that document.

Wilson J held:

[113] Before leaving the grounds however, I would urge those appearing before sentencing courts to exercise care in the information provided to the court. Particularly where child sexual assault offences are concerned there have been many legislative changes over the years, either wholesale to repeal or replace specific offences, or partial to amend maximum penalties or SNPPs. The date upon which an offence occurred will ordinarily dictate the correct offence and the relevant penalty. It is important to be astute to the frequency with which the legislation in this area has changed, and sensible to carefully check the relevant information before placing it before a court. Whilst there are useful summary guides to legislative change, the most reliable way of ascertaining the correct information is to go to the version of the relevant Act that was in force as at the date of the offence and check each provision individually. The process is time-consuming, but it will help to avoid the necessity for applications such as this. Sentencing judges are entitled to expect and rely upon assistance from the parties as to matters that should not be controversial, including information as to penalties and the applicability or otherwise of the statutory discount regime. That imposes an obligation of accuracy upon the legal representatives which lawyers appearing before the courts should always bear in mind.

Sentencing – Juvenile Criminal Record

xvi. *Dennis v R* [2024] NSWCCA 137

The applicant was sentenced with respect to one count of aggravated sexual assault with a further count of intimidation taken into account on a Form One. On sentence the applicant's juvenile criminal history was tendered with no objection. The tendering of the record was held to be in error in the circumstances.

Garling J at [62]:

> 62. *The provisions of s 15 of the CCP Act do not permit any derogation from the prohibition on admissibility of a person's past juvenile criminal offending history where the facts and circumstances demonstrate that the pre-conditions set out in (a) and (b) of s 15(1) are fulfilled. That is so, even if the contents of the juvenile history are to be used by the applicant in an attempt to mitigate any sentence which is to be imposed.*
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> 63. *It was an error in the sentence proceedings for the Judge to have admitted the applicant's criminal history records.*
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> 64. *It seems that his Honour's error followed upon the failure of counsel either for the Crown or the applicant, to draw his Honour's attention to the provisions of the CCP Act. These proceedings ought stand as a salutary reminder of the obligations of counsel appearing in matters to ensure that their clients are not in breach of applicable legislation and that any relevant legislation is drawn to the attention of the sentencing Judge.*

Sentencing – Quasi-Custodial Bail

xvii. *Butler v R* [2024] NSWCCA 133

The respondent was arrested and charged with Commonwealth drug offences. He spent one night in custody, and was then bailed to report to police daily, to observe a 12 hour curfew, with some exceptions, and surety was required in the sum of $1 million. Later, but bail was varied to require reporting five days per week and a nine-hour curfew subject to exceptions.

The sentencing judge at first instance took into account the initial bail conditions as amounting to quasi-custodial bail warranting the backdating of the custodial sentence. This was held to be in error.

Campbell J stated:

> *44. For the reasons that follow, I have concluded that it was not open to the sentencing judge to conclude that even the stricter conditions of bail between the 31 March 2021 and 11 October 2022 amounted to quasi-custody justifying backdating the commencement of the sentence imposed by six months. In coming to this conclusion, I fully appreciate, as the Crown submissions acknowledged, that the question is one of fact in which questions of degree in all the circumstances necessarily arise. For this reason, it is not possible to express a bright line legal test applicable in every case. But this does not mean that the question is entirely at large or that the wide discretion the law reposes in a sentencing judge is entirely unbounded, and therefore unreviewable by the Court of Criminal Appeal.*
>
> *45. I am of the view that the test as formulated by Price J in Quinlin (see [34] above) is as specific as the nature of the sentencing task and the wide discretion applicable to it will permit. To repeat, the question is whether the conditions of bail "are so harsh or restrictive that they may require a conclusion that at least some part of the period on bail should be treated as the notional equivalent of custody, conveniently referred to as 'quasi-custody'": see also Frlanov v R [2018] NSWCCA 267 at [24], RA Hulme J (Macfarlan JA and Rothman J agreeing); and R v Webb [2004] NSWCCA 330; 149 A Crim R 167 at [18], Grove J (Simpson and Shaw JJ agreeing).*
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> *46. Price J pointed out in Quinlin (at [89]) that two questions arise: first whether the bail conditions in fact amount to quasi-custody; and secondly, whether and to what extent an allowance should be made by backdating the sentence. As I have already indicated, his Honour said these are discretionary decisions reviewable only on a House v The King basis (Quinlin at [89]). As Garling J pointed out in La v R [2021] NSWCCA 136 (at [56]-[58]) (Basten JA and Price J agreeing), all grants of conditional bail pursuant to s 20 Bail Act will involve, or are highly likely to involve, restrictions on the person's liberty. His Honour observed that a grant of conditional bail involving some restriction on a person's liberty does not thereby, without more, constitute quasi-custody of a kind which makes it relevant to the imposition of a sentence. I think it useful to set out in full the relevant passage from his Honour's judgment (at [56]-[59]):*

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

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

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

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

Other references to authority could be readily multiplied but the foregoing adequately captures the applicable principles.

Sentencing – Rehabilitation - Prospects of Rehabilitation

xviii. *Brown v R* [2023] NSWCCA 330

B. stood for sentence with respect to a number of child sex offences. A psychiatric report was tendered indicating that the offender's risk of reoffending was average to below average. This was based upon a risk assessment administered by the psychiatrist (Static 99 R). The sentencing judge at first instance did not accept this conclusion.

On appeal it was held that the sentencing Judge was not bound to accept the opinion of the forensic psychiatrist as this opinion was not determinative. Cavanagh held:

34. *….Firstly, the opinion of an expert such as Dr Furst is only one aspect of the evidence which her Honour was required to consider. It needed to be weighed with all of the other evidence: Stoeski v R [2014] NSWCCA 161 at [38] per Adamson J.*
35. *Further, her Honour was not bound to accept the opinion by the psychiatrist as to prospects of rehabilitation. An expert psychiatrist performs a different function from that of a sentencing judge in the sentencing process. The expert psychiatrist has regard to any testing which the applicant might have undergone as well as the findings on clinical examination and analysis of the information provided by the offender. The expert psychiatrist offers an opinion based on the tools available to that psychiatrist. The sentencing judge forms a view as to the facts. An offender's prospects of rehabilitation is a question of fact.*

36. *Plainly, her Honour took a different view to that of Dr Furst as to the significance of the applicant's comments about his interest in young boys and his comments about the experience after the offending. Her Honour was required to form her own view as to the significance of the various factors which led to the finding of fact about the applicant's prospects of rehabilitation. Her Honour may have placed more weight on the factors which she identified than Dr Furst did. She was not bound to adopt Dr Furst's opinion.*
37. *When there is a challenge to a finding of fact, such as a finding as to the prospects of rehabilitation, the question is whether the finding was open on the material before the sentencing judge: see DS v R; DM v R (2022) 109 NSWLR 82; [2022] NSWCCA 156 at [131]; Azzopardi v R [2019] NSWCCA 306 at [36]-[39].*
38. *In my view, the applicant has not established that the finding was not open to her Honour. Her Honour explained why she disagreed with the opinion of Dr Furst and identified the features of the applicant's post-offence conduct which were of concern. I reject the submission that her Honour failed to adequately explain why her opinion differed from that of Dr Furst. It is apparent on the face of the remarks on sentence. The applicant has not established ground 2.*

Sentencing - Significant Issues Must Be Addressed in Judgment

xix. *Whipp v R* [2024] NSWCCA 79

The offender pleaded guilty to one count of robbery whilst armed with an offensive weapon. The offender tended a report on sentence indicating that he had complex post-traumatic stress disorder as well as a substance use disorder and likely intellectual disability. The author of the report attributed the complex PTSD to the offender being a victim of grave misconduct whilst he was an inmate in a juvenile detention centre. The report indicated that the offender would find custody more onerous as he experienced trauma related flashbacks sometimes triggered by interactions with other inmates and correctional staff. Significant oral submissions were made in the sentencing proceedings to the effect that the offender would find custody more onerous. The sentencing judge did not address this issue in her remarks on sentence. On appeal, this was held to be in error.

58. *…., I do not believe that sentencing has devolved to the point where a sentencing judge is required to deal ritualistically, by way of a "tick a box" process or rote recitation, with every single written and oral submission – without discrimination as to its significance or triviality – made on behalf of an offender or the Crown, for fear of an appeal by one party or the other. That would be a victory of form over substance. It would also be an intellectual debasement of what should be a process of considered reflection. It would also impose an intolerable, unworkable burden on sentencing judges. That would be especially so in the District Court, bearing in mind its combination of extreme busyness with error-based appeals from that court in criminal matters.*
59. *Even so, in my respectful opinion, it was incumbent upon the sentencing judge to engage explicitly with this submission. As I have shown, it was a significant proportion of the oral submissions on behalf the applicant as a whole. It was also, I think, an important point: that a man who had been psychologically and indeed physically damaged in a particular setting was to be punished by being placed yet again in*

the very setting from which the damage arose. I respectfully think that it was insufficient simply to state the effect on periods of incarceration of the applicant in the past, and then to state that all such factors had been taken into account as a matter of instinctive synthesis. I think it was incumbent upon the sentencing judge – perhaps only very briefly – to refer to the matter, and to either accept it as playing some mitigatory role regarding the sentence to be served in the future, or to explain why it had been rejected.

Sentencing - Supply Prohibited Drug

xx. *Robertson v R* [2024] NSWCCA 22

R was charged with supplying a commercial quantity of prohibited drug. There was evidence that he was supplying the drug for the purposes of paying of a drug debt as well as to feed his own addiction. The NSWCCA held that this aspect of the matter was neither aggravating, nor mitigating.

Ierace J held:

> *90. Engaging in a drug offence, such as supply or importation, in order to repay a drug debt or to finance a drug addiction is not mitigatory of the offence's objective seriousness. However, doing so for financial reward, either exclusively or beyond what is required to repay a drug debt, may increase the objective gravity of the offending: De La Rosa at [261]. See also Quayle v R [2010] NSWCCA 16 per R A Hulme J (Grove and Simpson JJ agreeing) at [53].*
>
> *91. To the extent that engaging in such offending behaviour to repay a drug debt or finance a drug addiction may be construed as a form of seeking financial gain, as the sentencing judge did, it is the purpose of that financial gain that determines its relevance in the sentencing exercise. In Hejazi v R [2009] NSWCCA 282, Basten JA (Howie and Hislop JJ agreeing) said, at [12], referring to Cicciarello at [17]:*
>
> > *"This statement must be read in its context. It does not purport to say that an offence committed for financial gain may not involve an element of aggravation, as indeed s 21A of the Sentencing Procedure Act states. What it does assert is that selling to feed a drug addiction is a factor which does not increase the moral culpability of the offence in the way that it might be increased if financial gain were not otherwise so excused. Nor does it suggest that the fact that the purpose of the offence was to obtain funds to feed a drug habit in any way diminishes the objective seriousness of the offence."*
>
> *92. In the passage extracted at [64] above, the sentencing judge was cognisant of the potential relevance "on some of the authorities" of motive in fixing the objective seriousness of the offence. His Honour identified the applicant's motive as "to accrue … a financial benefit, namely … paying off a drug debt". His Honour did not, in terms, identify it as an aggravating factor, but in view of the sentencing judge's finding that, absent his involvement with the UCO, the applicant was "selling comparatively small amounts involving 1 gram at a time and at the most 3 grams*

to support his habit", it is not apparent how else the offence could attract a finding of mid-range seriousness.

93. *I am satisfied by the manner and context of the reference to "financial gain" that his Honour treated it as the applicant's primary motive and a significant factor in fixing the objective seriousness of the offence, whereas the reasons for the financial gain, to pay off a drug debt to those who had carried out the home invasion and to skim drugs for his addiction, was of little consequence in that exercise. In my view, his Honour fell into error in placing little or no weight on the applicant's motive for engaging in the offence in determining its objective seriousness.*

Silence in Court

xxi. *Day v R (No.2)* [2023] NSWCCA 312

Counsel for the accused opened to the jury implying that the accused would give evidence. During the course of cross-examination of the key Crown witness documents were shown and defence counsel gave an undertaking that those documents would be proved and put into evidence through either an accountant, or through the accused giving evidence.

Ultimately the accused did not give evidence. Counsel for the Crown made a number of comments during the closing address to the effect that there was no evidence to support a number of propositions that had been put in cross-examination, as well as no evidence to support other propositions that had been advanced on behalf of the accused.

The NSWCCA held that the address of the Crown Prosecutor led to a miscarriage of justice in that it constituted a breach of section 20 (2) of the *Evidence Act 199 (NSW)* which reads:

> *(2) The judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence. However, unless the comment is made by another defendant in the proceeding, the comment must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned.*

Simpson AJA held at [85];

> *Two themes permeated the address of the prosecutor. One was the perfectly correct and legitimate proposition that the questions put to the complainant in cross-examination did not constitute evidence, and that it was only the answers of the complainant, invariably denying the proposition, that constituted evidence. No criticism can be made of the prosecutor in relation to those submissions. The second theme, however, went beyond what was legitimate and drew the jury's attention to the fact that the applicant did not give evidence. These remarks were, in many cases, made in a context in which the only person who could have given that evidence (or, at least, the obvious*

person to give that evidence) was the applicant. ….This was a clear departure from the prohibition in s 20 of the Evidence Act

Stay of Proceedings – Permanent Stay

xxii. Willmot v State of Queensland [2024] HCA 42

W brought a civil action alleging child sexual abuse and serious physical abuse alleged to have arisen more than 50 years ago. Relevant legislation in Queensland had abolished any statute of limitations.

The state of Queensland sought a permanent state of proceedings.

Gaegler CJ, Gordon, Jagot, and Beech-Jones JJ:

15. *The principles relating to a permanent stay of proceedings were conveniently summarised by Bell P in Moubarak by his tutor Coorey v Holt as follows:*[16]

> *"(1) the onus of proving that a permanent stay of proceedings should be granted lies squarely on a defendant ...*
>
> *(2) a permanent stay should only be ordered in exceptional circumstances ...*
>
> *(3) a permanent stay should be granted when the interests of the administration of justice so demand ...*
>
> *(4) the categories of cases in which a permanent stay may be ordered are not closed ...*
>
> *(5) one category of case where a permanent stay may be ordered is where the proceedings or their continuance would be vexatious or oppressive ...*
>
> *(6) the continuation of proceedings may be oppressive if that is their objective effect ...*
>
> *(7) proceedings may be oppressive where their effect is 'seriously and unfairly burdensome, prejudicial or damaging' ...*
>
> *(8) proceedings may be stayed on a permanent basis where their continuation would be manifestly unfair to a party ... , and*
>
> *(9) proceedings may be stayed on a permanent basis where their continuation would bring the administration of justice into disrepute amongst right-thinking people ..."*

16. *The relevant inquiry is whether any prospective trial will be unfair or so unfairly and unjustifiably oppressive as to constitute an abuse of process.*[17] *If a fair trial can be*

held and will not be so unfairly and unjustifiably oppressive as to constitute an abuse of process, a court ordinarily has a duty to hear and decide the case.[18] If the trial will be necessarily unfair, a stay must be ordered.[19]

17. *The extreme step of granting a permanent stay demands recognition that the question of whether a trial will necessarily be unfair or so unfairly and unjustifiably oppressive as to constitute an abuse of process admits of only one correct answer.[20] The evaluative inquiry in each case is unique and highly fact-sensitive.[21] The correct answer in each case turns on its own facts and requires separate consideration of each claim – its nature, content, and the available evidence.[22]*

Later at [25]:

25. *Of course, the application of the concept of a fair trial will vary from case to case. As Gaudron J said in Dietrich v The Queen, what is fair "very often depends on the circumstances of the particular case" and "notions of fairness are inevitably bound up with prevailing social values".[46] The "inquiry as to what is fair must be particular and individual".[47] Or, as Gleeson CJ said in Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam, "[f]airness is not an abstract concept. It is essentially practical ... the concern of the law is to avoid practical injustice."[48]*

Stay of Proceedings – Temporary Stay

xxiii. *R v Abu-Mahmoud* [2024] NSWCCA 21

AM was charged with doing an act intending to pervert the course of justice. Specifically he was accused of paying CC to swear and affidavit to the effect that AM was not responsible at all for a murder.

CC's solicitor at the relevant time sought and was granted an immunity from prosecution. The solicitor had made a statement to the police annexing potentially privileged documents. CC wished to claim privilege over those documents. There were delays in dealing with the claim for privilege. In the end the trial judge ruled that no privilege attached to the documents. AM then sought a temporary study of proceedings pending payment of the costs thrown away due to the delay in dealing with the privilege issue on the basis that the Crown was responsible for the delay. The trial Judge granted a temporary stay, finding that the Crown did bear responsibility for the delay.

_____.

Mark Dennis SC
Forbes Chambers